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No.: ICC-01/13
Date: **21 January 2019**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

**SITUATION ON REGISTERED VESSELS OF THE UNION OF THE
COMOROS, THE HELLENIC REPUBLIC OF GREECE, AND THE KINGDOM OF
CAMBODIA**

Public

**Prosecution's omnibus request for extension of pages, extension of time, and
suspensive effect**

Source: Office of the Prosecutor

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Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for the Defence

Legal Representatives of the Victims

Mr Rodney Dixon

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Mr Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. On 18 January 2019, Pre-Trial Chamber I granted¹ the Prosecution leave to appeal the Pre-Trial Chamber's Decision on the "Application for Judicial Review by the Government of the Union of the Comoros".²

2. Given the foundational importance of the issues arising from this decision, and to promote the fair and expeditious conduct of this appeal, the Prosecution seeks: (i) an extension of the page limit for its Appeal Brief by a further 30 pages, to a maximum of 50 pages; (ii) an extension of time of a further 10 days so that the Prosecution may file its Appeal Brief by Monday 11 February 2019 (instead of Thursday 31 January 2019), with the understanding that the Comoros and the victims may likewise file their responses up to 20 days thereafter (on Monday 4 March 2019); and (iii) an order pursuant to article 82(3) of the Rome Statute suspending the effect of the Decision.

Submissions

3. This omnibus request relating to the conduct of the forthcoming appeal is brought to the Appeals Chamber within one working day of the Pre-Trial Chamber's decision granting leave to appeal. Nonetheless, since the applicable time limit for the Prosecution to file its Appeal Brief (unless varied) is already less than the time for any responses to this motion,³ the Prosecution requests the Appeals Chamber to expedite the schedule for receiving submissions on this motion from the other Parties and participants.

A. Request for an extension of pages

4. Exceptional circumstances justify extending the page limit for the Prosecution's Appeal Brief by a further 30 pages, to a maximum of 50 pages.⁴ While this appeal has

¹ [ICC-01/13-73](#) ("Certification Decision").

² [ICC-01/13-68](#) ("Decision").

³ See [Regulations of the Court](#), reg. 34(b).

⁴ See [Regulations of the Court](#), reg. 37(2).

been brought under article 82(1)(d), it is exceptional both in its nature and scope, and its outcome is likely to affect not only this situation but the operations of this Court as a whole. In these circumstances, the necessary arguments cannot be meaningfully canvassed within the usual allotment of 20 pages.⁵ The hearing of this appeal will, moreover, be significantly facilitated by sufficiently comprehensive and clear submissions from all parties and participants.

5. Specifically, this appeal concerns the scope of the Pre-Trial Chamber's powers once the Prosecutor has made, in her respectful view, a "final decision" under rule 108(3) not to open an investigation, and the nature of the obligation imposed on the Prosecutor once the Pre-Trial Chamber has made a "request" under article 53(3)(a) of the Statute.⁶ These two issues are of foundational importance to the work of the Court.

6. Indeed, the Pre-Trial Chamber was unanimous in agreeing that this appeal will "clarify the applicable statutory regime for the present case but also for any future cases", and may go to the core of the balance of competences between the Pre-Trial Chamber and the Prosecutor.⁷ Notably, there has emerged not only a respectful divergence of opinion between Pre-Trial Chamber I and the Prosecutor on these matters,⁸ but also between the Judges of Pre-Trial Chamber I itself.⁹ Likewise, while the Appeals Chamber has previously had occasion to express itself on a related matter,¹⁰ again by majority, the meaning of aspects of that previous ruling may also be in issue.¹¹

7. In this context, the 20 pages prescribed in regulation 37(1) are inadequate. A proper examination of the issues identified for appeal in this case, and the associated

⁵ See [Regulations of the Court](#), reg. 37(1).

⁶ See [Certification Decision](#), paras. 39, 46, Disposition.

⁷ [Certification Decision](#), paras. 43, 48.

⁸ [Certification Decision](#), paras. 43, 47.

⁹ Judge Kovács, for example, not only wrote a dissenting opinion on the Decision ([ICC-01/13-68-Anx](#)), but also in Pre-Trial Chamber I's initial request for review under article 53(3)(a) ([ICC-01/13-34-Anx-Corr](#)).

¹⁰ [ICC-01/13-51 OA](#); [ICC-01/13-51-Anx OA](#).

¹¹ See [Certification Decision](#), para. 43.

grounds of appeal, will require detailed analysis of the Rome Statute and the Rules of Procedure and Evidence, as well as previous jurisprudence of the Court, and also entail specific examination of how the Pre-Trial Chamber applied the law and procedure to its review of the 144-page final decision of the Prosecution pursuant to rule 108(3).¹² As the Appeals Chamber has previously recognised, all those concerned in this appeal will benefit from having an appeal brief which is “comprehensive and accurate to the greatest extent possible”.¹³ Yet this consideration applies all the more strongly in the present case given the subject-matter of this appeal, which has the potential to affect the circumstances in which investigations are opened at the Court, a core aspect of its mandate under the Rome Statute.

8. The exceptional circumstances of this appeal therefore warrant an extension of the page limit of the Appeal Brief to 50 pages. For similar reasons, the Prosecution does not oppose a corresponding extension of the page limit being granted to the Comoros for its Response Brief.

B. Request for an extension of time

9. There is good cause to extend the time limit for the Prosecution’s Appeal Brief by 10 days, so that it is due on Monday 11 February 2019 (instead of Thursday 31 January 2019).¹⁴

10. Should the Appeals Chamber agree that the exceptional circumstances of this appeal justify the extension of pages requested above then, logically, there is also good cause for a corresponding extension of time in which to draft those additional submissions. Although the Prosecution began its preparations while awaiting the Pre-Trial Chamber’s determination under article 82(1)(d), the extent of these preparations was necessarily limited until the scope of the appeal was confirmed in the Certification Decision. Likewise, the Prosecution cannot be certain of the precise

¹² [ICC-01/13-57-Anx1](#) (“Prosecutor’s Final Decision”).

¹³ [ICC-01/04-02/06-2303](#), para. 10.

¹⁴ See [Regulations of the Court](#), reg. 35(2).

manner in which its Appeal Brief will be drafted until the present motion is determined by the Appeals Chamber.

11. The Prosecution does not oppose the grant of a corresponding extension to the Comoros for its Response Brief, and for any response which may be filed by the participating victims—who are also in part represented by counsel for the Comoros, Mr Dixon, as well as by OPCV—so that these documents are all due 20 days after the filing of the Prosecution’s Appeal Brief, on Monday 4 March 2019.¹⁵

C. Request for suspensive effect

12. The Decision purported to set a deadline of 15 May 2019 for the Prosecutor to reconsider her original determination under article 53(1) of the Statute,¹⁶ a time period which began running on 15 November 2018—in other words, starting a clock which would count down for six months. Without prejudice to its views on the legality of this order, the Prosecution respectfully submits that the Appeals Chamber should exercise its power under article 82(3) of the Statute and rule 156(5) to suspend the effect of the Decision—and so ‘stop the clock’—until this appeal is determined.

13. While the grant of suspensive effect is a discretionary matter, it is justified in this case to preserve the object of the Prosecution’s appeal¹⁷—which will contend that, but for the errors in the Decision, no further request for reconsideration could properly have been made.¹⁸ In particular, the Prosecution has already invested considerable time and scarce resources not only into conducting the original

¹⁵ See [Regulations of the Court](#), regs. 24(4), 65(5). See further [ICC-02/11-01/15-172 OA6](#), para. 20 (“The Appeals Chamber notes that regulation 24(2) of the Regulations of the Court provides for victims or their legal representatives to file a response to any document when they are permitted to participate. In this respect, regulation 24(4) of the Regulations of the Court provides that ‘[a] response referred to in sub-regulation 1-3 may not be filed to any document which is itself a response or reply.’”). This is also consistent with the previous practice of the Appeals Chamber in this case: [ICC-01/13-42 OA](#), paras. 3-4.

¹⁶ [Decision](#), para. 121, and Disposition.

¹⁷ See [ICC-01/13-43 OA](#), para. 7 (granting suspensive effect for the purpose of the previous appellate proceedings in this situation).

¹⁸ See e.g. [Certification Decision](#), paras. 39, 45-46, 52 (certifying for appeal two issues which, if resolved according to the view of the Prosecution, would require reversal of the Decision).

preliminary examination of this situation,¹⁹ but also the reconsideration previously requested by the majority of the Pre-Trial Chamber.²⁰ Whether it may lawfully be required to do so for a third time goes to the heart of the issues in this appeal. The Prosecution should not be required to expend the necessary resources, again, until this question is properly resolved.

14. The Prosecution is mindful that the Pre-Trial Chamber did not find it necessary to stay its Decision,²¹ yet expressly recognised that the Prosecution may nonetheless seek suspensive effect from the Appeals Chamber, as it does in this request.²² The Prosecution's need is urgent because, with every passing day, the time diminishes for the Prosecution to conduct any further reconsideration, if the Decision is upheld. What was a six month deadline when the Prosecution promptly sought leave to appeal, and a stay, is already now a four month deadline.²³ Even if this appeal is resolved within that period, the amount of time left for the Prosecution to conduct any reconsideration will be negligible.

15. Nor is the Prosecution able to commence any reconsideration during the appeal proceedings, even if this were appropriate, because the standard which should be applied constitutes one of the key issues certified by the Pre-Trial Chamber for appeal.²⁴ In other words, the appeal not only addresses the question whether the Prosecution may be *required* to conduct a further reconsideration but also, fundamentally, *how* such a reconsideration should take place. The Prosecution cannot meaningfully proceed until this question is determined by the Appeals Chamber.

¹⁹ See [Decision](#), paras. 1-2.

²⁰ See [Decision](#), paras. 14-15, 28-37. See e.g. [Prosecutor's Final Decision](#).

²¹ [Certification Decision](#), para. 54.

²² [Certification Decision](#), para. 55.

²³ See [Certification Decision](#), para. 17 (noting that the Prosecution sought leave to appeal, and a stay, on 21 November 2018).

²⁴ [Certification Decision](#), paras. 46, 52 (certifying for appeal “[w]hether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber’s request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues”).

Relief Sought

16. For the reasons set out above, the Prosecution requests the Appeals Chamber to:

- i. expedite the schedule for receiving submissions from the other Parties and participants with regard to this motion; and,

having received those submissions,

- ii. extend the pages for the Prosecution's Appeal Brief to a maximum of 50 pages;
- iii. extend the time limit for the Prosecution's Appeal Brief until Monday 11 February 2019 (being 20 days from the issue of the Certification Decision), with the understanding that the Comoros's Response Brief and any observations from the participating victims may be filed up to 20 days thereafter (Monday 4 March 2019); and
- iv. suspend the effect of the Decision until the Prosecution's appeal has been determined.



Fatou Bensouda, Prosecutor

Dated this 21st day of January 2019

At The Hague, The Netherlands