

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/13 OA 2**

Date: **24 January 2019**

THE APPEALS CHAMBER

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

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

Public Document

**Response on behalf of the Government of the Union of the Comoros to the
“Prosecution’s omnibus request for extension of pages, extension of time, and
suspensive effect”**

Source: **Rodney Dixon QC, and Stoke White Ltd (London), on behalf of the
Government of the Union of the Comoros**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Government of the Union of the Comoros files this response to the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect.”¹
2. This Response is filed pursuant to the Appeals Chamber’s Order of 22 January 2019 which granted the Government and all other parties until 24 January 2019 to file a response to the Prosecution’s Request.²
3. The Government of the Comoros strongly opposes the Prosecution’s request that the Appeals Chamber grant suspensive effect over the Pre-Trial Chamber’s 15 November 2018 Decision, which ordered the Prosecution to reconsider, for a second time, its decision not to investigate the crimes committed during the May 2010 attack on the Gaza Freedom Flotilla by 15 May 2019.³ The Comoros submits that granting a suspension of this deadline would only result in even further delays in this case. The Comoros urges that the Prosecution should not be permitted to procrastinate any further in genuinely and diligently reconsidering its decision in accordance with the specific errors identified by the Pre-Trial Chamber in its Reconsideration Decision of 15 November 2018 and its Reconsideration Decision of 16 July 2015.⁴
4. No position is taken by the Comoros on the Prosecution’s other requests for extensions of the page limit and time to file its Appeal Brief. It is vital that the OTP is strictly kept to the deadline of 15 May 2019 to address the errors identified by the Pre-Trial Chamber. It bears emphasis that the Prosecutor has taken the view that the OTP does not need to rectify these errors if the OTP does not agree with the Chamber’s reasoning; a position which was roundly rejected and corrected by the Chamber in its Decision of 15 November 2018. In order to give full effect to this finding, the Chamber at the same time clearly fixed 15 May 2019 as the deadline for the OTP to comply with the Chamber’s Order. The OTP, like all

¹ Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect, ICC-01/13-74, 21 January 2019 [*hereinafter* OTP Request].

² Order on the filing of responses to the request of the Prosecutor for extension of pages, extension of time, and suspensive effect, ICC-01/13-76, 22 January 2019.

³ “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, ICC-01/13-68, 15 November 2018, para. 121 [*hereinafter* PTC Reconsideration Decision of November 2018].

⁴ “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, ICC-01/13-34, 16 July 2015 [*hereinafter* Reconsideration Decision of 16 July 2015].

other parties, is obliged to implement the Chamber's orders and directions. The Prosecutor is not free to refuse to follow the orders that emanate from the Chamber's judicial review of the OTP's decisions. It is thus imperative that the Appeals Chamber maintains the Pre-Trial Chamber's deadline as set while the present appeal is being heard.

II. Applicable Law

5. The Appeals Chamber's findings on requests for suspensive effect under Article 82(3) of the Statute and Rule 156(5) of the Rules of Procedure and Evidence, have established that:

*"... when deciding on requests for suspensive effect, [the Appeals Chamber] has considered whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant"', (ii) would lead to consequences that "would be very difficult to correct and may be irreversible", or (iii) "could potentially defeat the purpose of the appeal.""*⁵

6. The Appeals Chamber has further noted that "when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances."⁶

III. Submissions

7. The Comoros submits that the Prosecution has certainly not shown that addressing the errors identified by the Pre-Trial Chamber now while the appeal is underway would either create an irreversible situation, or lead to consequences that are difficult to correct or would defeat the purpose of the appeal, such that a suspension needs to be granted to guard against any one of these outcomes.

8. The Prosecution claims that granting a suspension would assist in preventing the expenditure of resources on reconsidering its decision again, as it has "already invested

⁵ Prosecutor v. Bemba, "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", ICC-01/05-01/08-817, 9 July 2010, para. 11.

⁶ Prosecutor v. Bemba, "Decision on the Request of the Prosecutor for Suspensive Effect", ICC-01/05-01/08-499, 3 September 2009, para. 11; Prosecutor v. Thomas Lubanga Dyilo, "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", ICC-01/04-01/06-1444 (OA 12), 22 July 2008, para. 8.

considerable time and scarce resources not only into conducting the original preliminary examination of this situation, but also the reconsideration previously requested by the majority of the Pre-Trial Chamber.”⁷ This assertion is misguided and provides no basis at all to grant any suspension.

9. The Prosecution is not being ordered to completely ‘reinvent the wheel’ by 15 May 2019. Clearly, no investigative work has to be undertaken. The OTP already has completed a detailed review of all the materials and evidence submitted.⁸ The Prosecution need do no more than address the specific errors identified by the Pre-Trial Chamber without any more delay. As highlighted by the Pre-Trial Chamber, the OTP should have done this long ago, hence the need for a final deadline. In the submission of the Comoros, the OTP has instead embarked on an unnecessarily elongated analysis, that prematurely draw conclusions about the evidence, when no investigation had been undertaken, and ignored highly relevant evidence. The outcome was thus erroneous and wholly distorted towards finding the case inadmissible. Indeed, this is one of the key errors outlined by the Pre-Trial Chamber.

10. There is equally no merit in the Prosecution’s argument that even if the appeal is resolved within the six month time limit set by the Pre-Trial Chamber “the amount of time left for the Prosecution to conduct any reconsideration will be negligible.”⁹ The OTP should be getting on with addressed the errors identified by the Chamber once and for all right now. The appeal proceedings need not in any way affect this process. In this way, once the appeal is determined, even if just before 15 May, the OTP will be in a position to comply with any decision handed down. No further time will be lost.

11. Moreover, it should be taken into account that in its Reconsideration Decision of November 2018, the Chamber emphasised that the Prosecution is mandated to “respect the rights of [...] the referring entity, [in this case] a State Party”, by completing the preliminary examination “within a reasonable time from reception of a referral [...] regardless of its complexity.”¹⁰

⁷ OTP Request, para. 13.

⁸ “Prosecution’s Response to the Government of the Union of the Comoros’ ‘Application for Judicial Review’” (ICC-01/13-58) (Lack of Jurisdiction)”, ICC-01/13-61, 13 March 2018, para. 3.

⁹ OTP Request, para. 14.

¹⁰ PTC Reconsideration Decision of November 2018, para 120 quoting *Situation in the Central African Republic*, “Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic”, ICC-01/05-6, 30 November 2006, p. 4.

12. Considering that the Government of the Comoros referred the situation to the ICC in May 2013, over five years ago, the Government submits that any further delays cannot be countenanced. In the nearly 6 years that this matter has been before the Court, and after the Prosecution concluded that there is a “reasonable basis to believe that war crimes were committed on board” the Mavi Marmara within a year and half of receiving the Government’s referral¹¹, an actual investigation into the matter could potentially already have been completed so that the victims would have known whether the crimes committed against them could be prosecuted. The Comoros submits that Preliminary Examinations should not be misused to keep Situations open-ended, as it unfairly places the victims in a constant state of limbo, and frustrates the Prosecution’s mandate to respect the rights of both the referring State Party, and the victims.
13. The Government submits that the Prosecution is more than capable of reconsidering its decision within the six month deadline while the appeal is being heard. This is also demonstrated by the fact that the Prosecution states that it has already started the process of reconsideration “while awaiting the Pre-Trial Chamber’s determination under article 82(1)(d).”¹² The Prosecution has not shown that a suspension of the deadline is in any way necessary in the circumstances, as the Pre-Trial Chamber found when declining to grant a provisional stay of the Impugned Decision.¹³

Conclusion

14. Accordingly, the Government of the Union of the Comoros respectfully requests the Appeals Chamber to dismiss the Prosecution’s request for suspensive effect, and expeditiously to consider the Prosecution’s appeal.

¹¹ “Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute”, ICC-01/13-6-AnxA, 4 February 2015, para. 3.

¹² OTP Request, para. 10.

¹³ “Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’””, ICC-01/13-73, 18 January 2019, para. 54.



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Dated 24 January 2019

London