

**Cour
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

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

Public

**Prosecution Response to Request for Leave to Appeal the “Decision on the
‘Application for Judicial Review by the Government of the Union of the
Comoros’” of 16 September 2020**

Source: Office of the Prosecutor

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

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Introduction

1. In 2014, the Prosecutor first determined that, in her view, this situation does not disclose a potential case of sufficient gravity so as to be admissible before the Court. Consequently, there was no reasonable basis to open an investigation of the situation referred to the Court by the Government of the Union of the Comoros.¹
2. Since then, at the instance of the Comoros and pursuant to requests made by the majority of the Pre-Trial Chamber in 2015² and 2018³—and with the benefit of the Appeals Chamber’s judgment in 2019, also by majority⁴—the Prosecutor has reconsidered that determination twice.⁵ She has at all times acted promptly and in good faith, and sought to discharge her independent responsibilities transparently, objectively and fairly, within the framework of the applicable law and relevant judicial guidance.
3. In its most recent decision, the Pre-Trial Chamber criticised the reasoning in the Prosecutor’s most recent reconsideration,⁶ and expressed doubt about the correctness of aspects of the 2019 Appeal Judgment.⁷ Nevertheless, it unanimously declined to request the Prosecutor—for a third time—to reconsider her original 2014 determination.⁸ The Comoros has now sought leave to appeal this decision.⁹
4. The Prosecution concurs with the Pre-Trial Chamber’s exercise of discretion to bring these proceedings to an end, and respectfully submits that leave to appeal the Decision should be denied.

¹ [ICC-01/13-6-AnxA](#) (“Article 53(1) Report”).

² [ICC-01/13-34](#) (“2015 Request”).

³ [ICC-01/13-68](#) (“2018 Request”).

⁴ [ICC-01/13-98 OAZ](#) (“2019 Appeal Judgment”). *See also* [ICC-01/13-51 OA](#) (“2015 Appeal Admissibility Decision”).

⁵ *See* [ICC-01/13-57-Anx1](#) (“First Reconsideration”); [ICC-01/13-99-Anx1](#) (“Second Reconsideration”).

⁶ *See e.g.* [ICC-01/13-111](#) (“Decision”), paras. 45, 71, 83, 94-104, 106.

⁷ [Decision](#), paras. 107-108, 110.

⁸ [Decision](#), paras. 106, 111-112.

⁹ [ICC-01/13-112](#) (“Request”).

Submissions

5. The Prosecution submits that the Request does not satisfy the requirements of article 82(1)(d) of the Statute, and consequently the Pre-Trial Chamber should not grant leave to appeal the Decision. Nothing in the issues proposed for certification by the Comoros goes to the core of the Decision, which is the Pre-Trial Chamber's exercise of discretion to conclude that a further reconsideration by the Prosecutor would not be appropriate, in the unique circumstances of these proceedings. While the Pre-Trial Chamber expressed reservations with aspects of the 2019 Appeal Judgment, it accepted that it was binding in its application to this situation and provided the legal framework for the Prosecutor in her most recent reconsideration decision.

6. Since it considers that the outcome is correct, the Prosecution expresses no further view at this time on discrete aspects of the reasoning in the Decision. However, should any issue be certified for appeal, the Prosecution recalls that it may raise in any ensuing appeal proceedings any argument material to the Appeals Chamber's determination of whether the Pre-Trial Chamber erred, and whether any such error materially affected the Decision.

The proposed issues do not meet the requirements for certification

7. The Comoros has proposed two issues for certification by the Pre-Trial Chamber. The first proposed issue is:

Whether the Pre-Trial Chamber was in error for deciding not to ask the Prosecution to reconsider its decision, upon finding that the Prosecution has failed to genuinely reconsider its decision not to investigate in accordance with the Pre-Trial Chamber's decision of 16 July 2015.¹⁰

8. The second proposed issue is:

¹⁰ [Request](#), para. 10.

Whether the Appeals Chamber’s Judgment of 2 September 2019 prevents the Pre-Trial Chamber from exercising its power to direct the Prosecution to reconsider its decision in respect of all identified errors, and should guidance be provided by the Appeals Chamber in this regard.¹¹

9. In the respectful submission of the Prosecution, neither of these proposed issues meets the requirements of article 82(1)(d) of the Statute, which is a necessary precondition for grant of leave to appeal. As both the Pre-Trial Chamber and the Comoros have previously stressed, interlocutory appeals under article 82(1)(d) may only be granted restrictively, since they constitute a limited exception to the general finality of a judicial determination which is justified “to prevent the impact of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”¹²

In particular:

- Neither of the proposed issues is an ‘appealable’ issue. The first issue merely disagrees with the Decision, while certification of the second issue would infringe the principle of *res judicata*.
- Immediate resolution of the proposed issues by the Appeals Chamber would not materially advance the proceedings, but would instead undercut the legal basis on which the Prosecution has already relied.

10. While the Comoros maintains that the proposed issues would “significantly affect[] the fair and expeditious conduct of the proceedings”,¹³ the Prosecution also notes that it does not develop *both* limbs of this conjunctive requirement,¹⁴ focusing only on the effectiveness (in its view) of article 53(3)(a) and the rights of those concerned.¹⁵ For failing to satisfy the requirements of article 82(1)(d), the Request

¹¹ [Request](#), para. 22.

¹² [ICC-01/13-73](#) (“Certification Decision”), para. 22. *See also* [ICC-01/13-71](#) (“Comoros ALA Response”), para. 10.

¹³ [Request](#), para. 15 (first issue), 26 (second issue). *See also* paras. 16, 18-20.

¹⁴ [Statute](#), art. 82(1)(d) (referring to the “fair *and* expeditious conduct of the proceedings”, emphasis added).

¹⁵ [Request](#), paras. 18-20.

should fail. The Comoros does not even attempt to proceed on the alternate statutory basis that the proposed issues would significantly affect the “outcome of the trial”.

Neither of the proposed issues is an ‘appealable’ issue

11. The Pre-Trial Chamber has previously underscored that, “pursuant to article 82(1)(d) of the Statute, it is for the chamber whose decision is impugned to determine—at its discretion—which issues are appealable and which are not.”¹⁶ An appealable issue is:

an ‘identifiable subject or topic requiring a decision for its resolution [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one’. It has been consistently held that a mere disagreement or a conflict of opinion does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.¹⁷

12. Neither of the proposed issues satisfies these requirements. The first issue is no more than a disagreement with the Decision, and the second issue is already *res judicata* in this situation. Such an issue requires no decision for its resolution; to the contrary, it has *already* been decided. As such, it cannot be the subject of a further appeal under article 82(1)(d).

The first proposed issue is no more than a disagreement with the Decision

13. The Pre-Trial Chamber has previously declined to certify issues which constituted a mere disagreement with its decision, and should apply the same approach to the current Request.¹⁸ Article 82(1)(d) is not a means by which a Party

¹⁶ [Certification Decision](#), para. 23.

¹⁷ [Certification Decision](#), para. 33. *See also* [Comoros ALA Response](#), para. 11.

¹⁸ [Certification Decision](#), para. 35 (“the Prosecutor’s proposed issue constitutes a disagreement with the Chamber’s analysis contained in the 15 November 2018 Decision. This is clearly evidenced by the Prosecutor’s contention that her decision not to initiate an investigation under rule 108(3) [...] is final, when the Chamber has unequivocally concluded that the [...] Decision is not final”).

may simply seek a different decision on precisely the same question considered at first instance.¹⁹

14. In the Decision, the Pre-Trial Chamber “decide[d] not to request the Prosecutor to reconsider her decision”,²⁰ notwithstanding its view that the Prosecutor had erred in a material way.²¹ Yet, in the Request, the Comoros simply asserts (with reference to the practice of the Pre-Trial Chamber in its previous composition) that “[...] the Chamber *must* request the Prosecutor to reconsider her decision [...]”.²² The Comoros presents no reasoned basis for contradicting the Pre-Trial Chamber’s conclusion, which is itself based on an exercise of statutory discretion. This is evident from the plain words of article 53(3)(a), providing that the “the Pre-Trial Chamber may review a decision of the Prosecutor [...] and *may* request the Prosecutor to reconsider that decision”.²³

15. Since the first proposed issue is not ‘appealable’, it should be dismissed without further analysis by the Pre-Trial Chamber.²⁴

The second proposed issue is already *res judicata*

16. Likewise, the second issue is not an ‘appealable’ issue because it does not require a further decision from the Appeals Chamber for its resolution. To the contrary, this issue has already been decided by the Appeals Chamber, in its 2019 Appeal Judgment, precisely for the purpose of these proceedings. It is not the function of article 82(1)(d) to allow the Parties to re-litigate issues on which the Appeals Chamber has already ruled for their benefit. Yet this seems to be the relief

¹⁹ Cf. [Comoros ALA Response](#), para. 14.

²⁰ [Decision](#), para. 111.

²¹ [Decision](#), paras. 102, 104.

²² [Request](#), para. 13 (emphasis supplied). See also para. 14 (“The Pre-Trial Chamber was therefore in error not to request the Prosecution to reconsider again its decision not to investigate”).

²³ [Statute](#), art. 53(3)(a) (emphasis added). See further [ICC-01/13-34-Anx-Corr](#), para. 3 (“The usage of the verb ‘may’ twice in the text of this provision makes it evident that, as a matter of principle, conducting a full-fledged review of the Prosecutor’s decision is neither a duty nor automatic. Rather it entails that the Pre-Trial Chamber enjoys a margin of discretion [...] The drafting history of the provision reveals that the drafters intended to leave some flexibility for the relevant body requested to carry out such review”).

²⁴ [Certification Decision](#), paras. 24, 36-37.

sought by the Comoros, when it asserts that the Appeals Chamber’s intervention is required “in order to address the guidance it gave in [the 2019 Appeal Judgment], and particularly the uncertainty it has caused”.²⁵

17. As summarised by the Pre-Trial Chamber in the Decision, correctly, the Appeals Chamber has already ruled in this situation that, under article 53(3)(a):

[T]he [Pre-Trial] Chamber may only direct the Prosecutor: (i) as to the interpretation of the applicable law; (ii), to consider certain available information; or (iii) to consider certain factors or information related thereto in the assessment of the gravity of the potential cases. The Chamber may not direct the Prosecutor as to: (i) how to apply the law to the available information; (ii) how she should analyse the available information and what factual findings to make; and (iii) what weight she should attach to the different factors relevant to the gravity assessment.²⁶

18. By asking whether the 2019 Appeal Judgment “prevents the Pre-Trial Chamber from exercising its power to direct the Prosecution to reconsider its decision in respect of all identified errors”, the second issue thus addresses precisely the same point which has already been settled by the Appeals Chamber for the purpose of this situation. The Appeals Chamber has already decided that the Pre-Trial Chamber may issue directions to the Prosecutor under article 53(3)(a) on matters of law, but not on matters of fact or in balancing the factors relevant to the assessment of gravity under article 17. The second proposed issue is merely an attempt by the Comoros to secure a different answer to this question.

19. The principle of *res judicata*—which is closely related to the principle of finality, already recognised by the Pre-Trial Chamber²⁷—promotes procedural fairness and

²⁵ [Request](#), para. 25. *See also* para. 27 (referring to the Comoros’ view of the desirability of “clarity” for the Pre-Trial Chamber).

²⁶ [Decision](#), para. 105. *See also* para. 23. *See further* [2019 Appeal Judgment](#), paras. 61, 76-82.

²⁷ [Certification Decision](#), para. 41 (fn. 74).

judicial economy by requiring that a final judgment on the merits is conclusive between the parties to those proceedings on all matters contained within it.

20. A judgment of the Appeals Chamber in an interlocutory appeal is a final judgment in this sense. If it were not so, this would defeat the object of interlocutory appeals, which exist to ensure that ongoing proceedings follow a course approved in advance by the Appeals Chamber. While the Appeals Chamber may on occasion depart from its prior reasoning—most often in proceedings between *different parties*, given the different circumstances—an ‘appealable’ issue cannot be founded solely on the hope that this will occur.

21. In the Decision, the Pre-Trial Chamber was careful to respect the finality of the 2019 Appeal Judgment. While it seemed to question the desirability of the distinctions drawn by the Appeals Chamber,²⁸ it nonetheless recognised that the Appeals Chamber has already set the parameters for the application of article 53(3)(a) in the facts of this situation, and that this determination is binding.²⁹ There was nothing unusual in this approach, since the 2019 Appeal Judgment was the foundation on which the Prosecutor carried out the Second Reconsideration. The Prosecution understands the Pre-Trial Chamber’s observations as judicial reflections on the 2019 Appeal Judgment, without prejudice to its obvious application in this situation. If the Pre-Trial Chamber had already reached the conclusion that these observations themselves identified an ‘appealable’ issue, it could simply have certified its own decision.³⁰ But it did not.

²⁸ See e.g. [Decision](#), paras. 107-108, 110-111.

²⁹ See e.g. [Decision](#), paras. 23, 105. See also *above* para. 17.

³⁰ See e.g. [ICC-02/11-01/15-744 OA8](#), para. 12; [ICC-02/11-01/15-369 OA7](#), para. 18 (fn. 26, quoting [ICC-01/04-168 OA3](#), para. 20: “By the plain terms of article 82(1)(d) of the Statute, a Pre-Trial Chamber or Trial Chamber may certify such a decision on its own accord”). The original quotation continues: “If it *fails to address the appealability of an issue* it may do so on the application of any party to the proceedings. It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it” (emphasis added).

Immediate resolution of the proposed issues by the Appeals Chamber would not materially advance the proceedings

22. Furthermore, and in any event, the Pre-Trial Chamber should decline to certify the proposed issues because their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

23. It is insufficient to assert that the proceedings may be materially advanced simply by determining if the Decision was erroneous, and “whether further steps should be taken to ensure compliance with the [Pre-Trial Chamber’s] decision of 16 July 2015.”³¹ Nor is it material if an appeal would generally provide “clarity to the Pre-Trial Chamber so that it is in a position effectively to exercise its power and duty to direct the Prosecution on reconsideration” under article 53(3)(a).³² This logic simply repeats the premise of the issues proposed for appeal, and fails to engage with the apposite question: whether appellate resolution of the proposed issues may *materially* advance *these* proceedings. In the Prosecution’s respectful submission, it would not.

24. The Request seems to acknowledge that, if anything, it is the second proposed issue which goes to the heart of the Comoros’ challenge to the Decision.³³ As the Prosecution has argued, the second issue—which invites the Appeals Chamber to revisit the meaning of the 2019 Appeal Judgment—cannot be considered an ‘appealable’ issue due to the principle of *res judicata*. But even if the Pre-Trial Chamber were to disagree in this respect, very similar concerns show that the Appeals Chamber’s intervention on the second issue cannot materially advance the proceedings.

25. As a matter of principle, chambers of the Court should not accept that their proceedings can be materially advanced by an interlocutory appeal which seeks only

³¹ *Contra Request*, para. 21.

³² *Contra Request*, para. 27.

³³ *See Request*, para. 22 (“the error made by the Pre-Trial Chamber arises from its findings about the implications of the [2019 Appeal Judgment]”).

to revisit an appeal judgment previously rendered in the very same proceedings, between the same Parties. The purpose of interlocutory appeal proceedings is to provide legal certainty, and to advance the proceedings by that means. A second appeal judgment in the same proceedings, on the same issue, between the same Parties, achieves just the opposite—it undermines those Parties’ ability to rely on the clear holdings of the Appeals Chamber, and removes all finality from the Court’s proceedings. The risk of perpetual litigation and re-litigation of every issue on which a Party feels sufficiently strongly, within the same proceedings, is inconsistent with the principle of judicial economy. In these circumstances, while each iteration may ‘continue’ the proceedings, it does not “advance” them “materially” since it does not further the fair and expeditious resolution of the matter before the Court. It is implicit in article 82(1)(d) that, once the Appeals Chamber has charted the course on a particular matter, that course is set.

26. In certifying for appeal issues arising from the 2018 Request, the Pre-Trial Chamber considered that the proceedings may be materially advanced if the Appeals Chamber were to “clarify the applicable statutory regime for the present case”, especially with regard to the “balance between the supervisory role of the Pre-Trial Chamber and the discretionary power of the Prosecutor during the early stages of the proceedings.”³⁴ That is the purpose which was duly served by the 2019 Appeal Judgment, which formed the legal framework by which the Prosecutor and the Pre-Trial Chamber have already acted.

27. That purpose of the 2019 Appeal Judgment would now be undermined by asking the Appeals Chamber the very same question, one year later. The fact that the 2019 Appeal Judgment was delivered by majority makes it no less binding, and the Pre-Trial Chamber quite rightly treated it as such.³⁵ It was unequivocal in its holding, and was delivered precisely so that it would be adequate and sufficient for the

³⁴ [Certification Decision](#), para. 43.

³⁵ *See above* para. 21.

Parties subsequently to rely upon it, as they did. None of the Parties can now turn back the clock, nor change the course set by the Appeals Chamber for the purpose of this situation, but must instead continue to work in good faith within that framework.

Conclusion

28. For the reasons above, the Pre-Trial Chamber is respectfully requested to refrain from certifying the proposed issues for appeal, and to bring the present litigation to an end. This will confirm that the preliminary examination in this situation is terminated, subject to the continuing discretion of the Prosecutor under article 53(4) of the Statute.



Fatou Bensouda, Prosecutor

Dated this 29th day of September 2020

At The Hague, The Netherlands