



Original: English

**No. ICC-01/13 OA2
Date: 31 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 AND THE KINGDOM OF
CAMBODIA**

Public

Decision on the Prosecutor's request for suspensive effect

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Legal Representatives of Victims

Mr Rodney Dixon

The Office of Public Counsel for Victims

Ms Paolina Massidda

States Representatives

Mr Rodney Dixon

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ of 15 November 2018 (ICC-01/13-68),

Having before it the ‘Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect’ of 21 January 2019 (ICC-01/13-74),

Renders the following

DECISION

The request of the Prosecutor for suspensive effect with respect to the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 15 November 2018, Pre-Trial Chamber I (‘Pre-Trial Chamber’) issued the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ (‘Impugned Decision’).¹
2. On 18 January 2019, the Pre-Trial Chamber granted the Prosecutor’s request for leave to appeal the Impugned Decision.²
3. On 21 January 2019, the Prosecutor filed the ‘Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect’ (‘Prosecutor’s Request’), in which she requests the Appeals Chamber to (i) extend the page limit for the Prosecutor’s appeal brief to a maximum of 50 pages; (ii) extend the time limit for the

¹ Impugned Decision, [ICC-01/13-68](#).

² ‘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](#), p. 22.

Prosecutor's appeal brief until 11 February 2019; and (iii) suspend the effect of the Impugned Decision until the Prosecutor's appeal has been determined.³

4. On 22 January 2019, the Appeals Chamber issued the 'Order on the filing of responses to the request of the Prosecutor for extension of pages, extension of time, and suspensive effect', in which it ordered that responses to the Prosecutor's Request be filed by 16h00 on 24 January 2019.⁴

5. On 24 January 2019, the Union of the Comoros ('Comoros')⁵, the victims represented by Mr Rodney Dixon ('LRV'),⁶ and the victims represented by Ms Paolina Massidda ('OPCV')⁷ (together referred as 'Victims') filed their responses.

6. On 25 January 2019, the Appeals Chamber granted the Prosecutor's request for extension of page limit and for extension of time limit, while noting that a decision on the Prosecutor's request for suspensive effect would be issued separately.⁸

II. MERITS

7. The Prosecutor notes that the Impugned Decision set a deadline of 15 May 2019 for the Prosecutor to reconsider her original determination under article 53(1) of the Statute, a time period of six months which began running from the issuance of the Impugned Decision.⁹ The Prosecutor submits that '[w]ithout prejudice to its views on the legality' of such order, the Appeals Chamber should exercise its power under article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence to suspend the effect of the Impugned Decision until this appeal is determined.¹⁰ The Prosecutor argues, *inter alia*, that her office has already invested considerable time and resources not only into conducting the original preliminary examination of this situation, but also the reconsideration previously requested by the majority of the Pre-

³ [ICC-01/13-74](#), paras 2, 16.

⁴ [ICC-01/13-76](#) (OA2), p. 3.

⁵ '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"', [ICC-01/13-79](#) ('Comoros' Response').

⁶ 'Response of the Victims to the "Prosecution's omnibus request for extension of pages, extension of time, and suspensive effect"', [ICC-01/13-78](#) ('LRV's Response').

⁷ 'Victims' response to the Prosecution's Omnibus Request', [ICC-01/13-77](#) ('OPCV's Response').

⁸ 'Decision on the Prosecutor's request for extension of page limit and extension of time limit', [ICC-01/13-80](#) (OA2), p. 3, paras 6, 11, 15-16.

⁹ [Prosecutor's Request](#), para. 12.

¹⁰ [Prosecutor's Request](#), paras 2, 12, 16 (iv).

Trial Chamber.¹¹ The Prosecutor argues that ‘whether [she] may lawfully be required to do so for a third time goes to the heart of the issues in this appeal’, and that she should not be required to expend the necessary resources until this question is properly resolved.¹² In any event, the Prosecutor contends that she is unable to commence any reconsideration during the appeal proceedings because the standard which should be applied constitutes one of the key issues under appeal.¹³ The Prosecutor submits that granting suspensive effect in this case is justified to preserve the object of the appeal, ‘which will contend that, but for the errors in the [Impugned] Decision, no further request for reconsideration could properly have been made’.¹⁴

8. The Comoros, the LRV and the OPCV oppose the request for suspensive effect.¹⁵ The Comoros submit *inter alia* that granting a suspension would only result in even further delays in this case and that the Prosecutor has 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 of these outcomes.¹⁶ The Comoros further argue that the Prosecutor is more than capable of reconsidering her decision within the six-month time limit while the appeal is being heard.¹⁷ The LRV stresses the victims’ ‘deep frustration’ with the ‘unreasonable length of time’ it has taken to reach a ‘properly considered decision’, and submits that the Prosecutor can readily reconsider her decision while the appeal is being heard.¹⁸ The OPCV submits that the Prosecutor fails to demonstrate that the legal criteria justifying such a request are fulfilled in the circumstances, and that granting the request would not be in the interests of victims, or in the interests of justice in general.¹⁹

9. The Appeals Chamber notes that article 82(3) of the Statute provides that

¹¹ [Prosecutor’s Request](#), para. 13.

¹² [Prosecutor’s Request](#), para. 13.

¹³ [Prosecutor’s Request](#), para. 15.

¹⁴ [Prosecutor’s Request](#), para. 13.

¹⁵ [Comoros’ Response](#), para. 3; [LRV’s Response](#), paras 2-3; [OPCV’s Response](#), paras 3, 15.

¹⁶ [Comoros’ Response](#), para. 7.

¹⁷ [Comoros’ Response](#), paras 9-13.

¹⁸ [LRV’s Response](#), paras 3-11.

¹⁹ [OPCV’s Response](#), paras 3, 15-24 and p. 10.

[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

Rule 156(5) of the Rules provides that

[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

10. The Appeals Chamber recalls that its decision to order that an appeal have suspensive effect is discretionary and that, when examining a request for suspensive effect, it ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’.²⁰ The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, 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’.²¹ [Footnotes omitted.]

11. In the view of the Appeals Chamber, the Prosecutor has failed to show that ordering suspensive effect of the Impugned Decision is warranted. The Appeals Chamber notes the Prosecutor’s submissions, including that granting suspensive effect is justified in this case to ‘preserve the object’ of the appeal she intends to file against the Impugned Decision. In particular, the Prosecutor has not shown that conducting the requested reconsideration while the appeal is underway would create an irreversible situation, or lead to consequences that are difficult to correct or defeat the purpose of the appeal. Even if the Prosecutor were to carry out the reconsideration as

²⁰ ‘Decision on suspensive effect’, 6 August 2015, [ICC-01/13-43](#) (OA) (‘Decision on suspensive effect’), para. 7, referring to *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ‘Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014’, 22 October 2014, [ICC-01/05-01/13-718](#) (OA9), para. 5. *See also*, *Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Decision on the Request of the Prosecutor for Suspensive Effect’, 3 September 2009, [ICC-01/05-01/08-499](#) (OA12), para. 11.

²¹ *See e.g.*, [Decision on suspensive effect](#), para. 7, referring *inter alia* to *Prosecutor v. Jean-Pierre Bemba Gombo*, “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’”, 9 July 2010, [ICC-01/05-01/08-817](#) (OA 3) (‘Bemba Decision on suspensive effect’), para. 11.

requested by the Pre-Trial Chamber, this would neither lead to an irreversible situation that could not be corrected, were the Appeals Chamber eventually to grant the appeal, nor defeat the purpose of the appeal, since the Appeals Chamber is able to reverse, confirm or amend the Impugned Decision irrespective of whether the requested reconsideration is carried out or being conducted.²² In addition, if the Appeals Chamber eventually decides to grant the Prosecutor's appeal, any ongoing reconsideration could be discontinued at that time. Also, in the view of the Appeals Chamber, the Prosecutor's submissions that conducting such reconsideration would be resource-consuming are unconvincing. As such, and in the absence of any other compelling reason, the Appeals Chamber does not deem it necessary to order that the Prosecutor's appeal have suspensive effect.

12. For the above reasons, the request for suspensive effect is rejected.

Done in both English and French, the English version being authoritative.



Judge Solomy Balungi Bossa
Presiding Judge

Dated this 31st day of January 2019

At The Hague, The Netherlands

²² See also *Prosecutor v. Francis Kirimi Muthaura et al.*, 'Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect', 29 February 2012, [ICC-01/09-02/11-401](#) (OA4), paras 9-10, referring *inter alia* to [Bemba Decision on suspensive effect](#), para. 11.