

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/13**
Date: **14 August 2015**

THE APPEALS CHAMBER

Before: Judge Christine Van Den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Silvia Fernández de Gurmendi
Judge Howard Morrison
Judge Piotr Hofmański

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

Public

Prosecution's Further Submissions concerning Admissibility

Source: Office of the Prosecutor

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Introduction

1. The Office of the Prosecutor has appealed the Pre-Trial Chamber's decision of 16 July 2015 under article 82(1)(a) of the Rome Statute,¹ allowing direct appeals of decisions with respect to jurisdiction or admissibility. In the Decision, the Pre-Trial Chamber, by majority, requested the Prosecutor to reconsider her determination that she could not initiate an investigation because it disagreed with her conclusion that any potential case(s) arising from that situation would be inadmissible.²

2. Following the request by the Government of the Union of the Comoros³ and participating victims⁴ to dismiss the Prosecution's appeal, the Appeals Chamber has invited further submissions from the Parties and participants on the admissibility of this appeal.⁵

3. With the benefit of these submissions, the Appeals Chamber should proceed to order the Parties and participants to file their submissions on the merits of the Prosecution's appeal. To assist the expeditious hearing of this appeal, the Appeals Chamber may consider reserving its reasoned opinion on admissibility until such time as it decides on the merits of the appeal.

Submissions

4. A decision is appealable under article 82(1)(a) if it is based on a ruling of jurisdiction or admissibility. The law and practice of this Court establish that this should be determined on the basis of the substance of the decision itself. Provided

¹ See ICC-01/13-35 ("Notice of Appeal"); ICC-01/13-34 ("Decision").

² Decision, para.49. See further paras.24, 26, 30, 45, 47-48.

³ See ICC-01/13-39 ("Comoros Admissibility Submissions").

⁴ See ICC-01/13-41. The Prosecution notes that, whereas the Comoros has already developed its arguments opposing the admissibility of the appeal, the Office of Public Counsel for Victims ("OPCV") has not yet done so but only stated their intention to make such arguments: see paras.12, 17-18. Accordingly, the Prosecution here addresses only arguments presented by the Comoros, but not OPCV.

⁵ See ICC-01/13-42.

that this requirement is satisfied, the procedural context of the decision is immaterial.

5. This appeal is admissible because the Decision meets the necessary criteria. It is based on a clear and unequivocal ruling on admissibility, concluding that any potential case arising from this situation is sufficiently grave to be heard before this Court.

6. Supporting the Prosecution's Notice of Appeal, these submissions first address the law governing the admissibility of appeals under article 82(1)(a) (which applies to any decision based on a ruling of jurisdiction or admissibility), then the Comoros' inaccurate contention that only a "final" or "conclusive" decision may be appealed, and then highlight those aspects of the Decision which demonstrate that it was based on a ruling on admissibility.

Article 82(1)(a) requires an examination of substance, not form

7. Article 82(1)(a) permits an appeal of a "decision with respect to [...] admissibility". The Appeals Chamber has consistently interpreted this requirement to mean that the decision must be "based on a ruling of [...] admissibility".⁶ In essence, this means that the Appeals Chamber must consider the substance of a decision, rather than its form or procedural context, to determine whether it falls under article 82(1)(a).

8. In its *Kenya* decision, the Appeals Chamber articulated three further criteria relevant to assessing this requirement:

⁶ ICC-01/04-169-US-Exp OA (made public by ICC-01/04-538-PUB-Exp) ("*DRC* Appeal Decision"), para.18; ICC-01/09-78 OA ("*Kenya* Appeal Decision"), para.15; ICC-01/11-01/11-74 OA ("*First Libya* Appeal Decision"), para.10; ICC-01/11-01/11-126 OA ("*Second Libya* Appeal Decision"), paras.13-14; ICC-01/04-01/07-3424 OA14 ("*Katanga* Appeal Decision"), para.33.

- “the operative part of the decision itself must pertain directly to a question on [...] admissibility” (first *Kenya* criterion);⁷
- “an indirect or tangential link” between the decision and a question of admissibility will not suffice (second *Kenya* criterion);⁸ and
- “[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)” (third *Kenya* criterion).⁹

9. Reading these criteria together, in the context of the Appeals Chamber’s previous jurisprudence, some additional considerations follow.

- The first *Kenya* criterion, referring to the “operative part”, should not be understood formalistically to mean that the decision must make express reference to admissibility in its disposition. (Although indeed the presence of such a reference might be persuasive.) Such a view would not only be inconsistent with the third *Kenya* criterion (which distinguishes the nature of the decision from its effect—and the disposition of a decision is often closely concerned with its effect), but would also narrow the broader formulation in the *DRC* Appeal Decision (“based on a ruling of [...] admissibility”) which the Appeals Chamber has continued to approve. Rather, the “operative part” of a decision should be understood to mean the essence or gravamen of the reasoning contained in that decision. This is the only understanding consistent with the Appeals Chamber’s other relevant observations.

⁷ *Kenya* Appeal Decision, para.15. See also *First Libya* Appeal Decision, para.10; *Katanga* Appeal Decision, para.33.

⁸ *Kenya* Appeal Decision, para.15. See also *First Libya* Appeal Decision, para.10; *Second Libya* Appeal Decision, para.13; *Katanga* Appeal Decision, para.33.

⁹ *Kenya* Appeal Decision, para.17. See also *First Libya* Appeal Decision, para.10.

- The second *Kenya* criterion largely speaks for itself. Decisions which were found to be insufficiently linked to a question of admissibility include those relating to State cooperation,¹⁰ intervention as *amicus curiae*,¹¹ and the detention of witnesses.¹²
- The third *Kenya* criterion, consistent with the Appeals Chamber’s bedrock requirement that the decision is “based on a ruling of admissibility”, emphasises that the procedural consequences of the decision are not the determining factor. Accordingly, a decision is not appealable under article 82(1)(a) simply because it may impact a matter of admissibility at a future stage (consistent with the second *Kenya* criterion), nor does a decision fail to be appealable under article 82(1)(a) if it is based on a ruling of admissibility but also has a more discrete procedural consequence.¹³

10. Applying this approach, appeals under article 82(1)(a) are not limited, formalistically, to decisions taken solely under articles 18 or 19.¹⁴ Although the *Kenya* Appeals Chamber referred to those provisions—which specifically refer to article 82—in order to confirm its interpretation of the terms of article 82(1)(a), it concluded only that they confirmed its understanding that the decision must be based on a

¹⁰ *Kenya* Appeal Decision, paras.18-20 (“the Pre-Trial Chamber found that the Request for Assistance was not linked to the admissibility of pending cases and proceeded to rule on these distinct issues in a separate decision”); Second *Libya* Appeal Decision, paras.14-15 (“The Impugned Decision concerned a request for the postponement of surrender under article 95 [...] and made no determination concerning the admissibility of the case. [...] The Pre-Trial Chamber dealt exclusively with the question of whether admissibility proceedings had begun. It did not make a finding on whether the case against Mr Gaddafi was admissible”).

¹¹ First *Libya* Appeal Decision, para.11 (“The Pre-Trial Chamber did not even consider, let alone issue a ruling on, the admissibility of the case against Mr Gaddafi [...] It was simply a decision on whether [the applicant] may submit observations under rule 103”).

¹² *Katanga* Appeal Decision, paras.9, 32, 34 (reasoning that the decision was not a decision relating jurisdiction in the sense of the Court’s material, personal, temporal, or geographic jurisdiction, as opposed to the Court’s competence to resolve a particular matter).

¹³ See below e.g. para.11 (discussing the *DRC* Appeal Decision which recognised a decision under article 58, on its facts, as based on a ruling on admissibility).

¹⁴ *Contra* Comoros Admissibility Submissions, para.20.

ruling of admissibility.¹⁵ It did *not* determine, as the Comoros suggests, that the only relevant rulings of admissibility that may be appealed directly under article 82(1)(a) are those arising under articles 18 and 19. This would read the Statute out of context, contrary to article 31 of the Vienna Convention,¹⁶ ignoring potential rulings of jurisdiction or admissibility which might arise in decisions under other provisions of the Statute such as articles 15 and, in the Prosecution’s contention, 53.¹⁷ It would also contradict the Appeals Chamber’s approach in the *DRC* situation, which agreed that a decision is appealable under article 82(1)(a) if it purports to rule on admissibility, irrespective of the statutory basis on which it does so.

11. Thus, in the *DRC* situation, the Appeals Chamber confirmed that the Pre-Trial Chamber erred in making “an initial determination of the admissibility of the case” when seised of an application under article 58.¹⁸ Nevertheless, because its analysis was in fact “based on a ruling of the admissibility of the case”—even though it should not have been—the Appeals Chamber considered the appeal admissible under article 82(1)(a).¹⁹ This approach is further consistent with the distinction which should be made between the Appeals Chamber’s analysis of a decision for the purpose of admissibility (looking at what the decision *is*) and for the purpose of determining an appeal on the merits (looking at what the decision *ought to be*).

12. The drafters of the Statute and the Rules likewise declined to provide the Court with additional guidance for the interpretation of article 82(1)(a), neither expressly

¹⁵ *Kenya* Appeal Decision, para.16 (“In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19(6) and 82(1)(a) [...] indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case”). The Prosecution does not understand the addition of the adverb “specifically” to be intended to narrow the formulation from the *DRC* Appeal Decision (“based on a ruling”), cited with approval in the previous paragraph.

¹⁶ See e.g. ICC-01/09-01/11-1598 OA7 OA8, para.105 (the Statute should be interpreted according to the principles in the Vienna Convention).

¹⁷ See Staker, ‘Article 82: appeal against other decisions’, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd Ed. (München/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, 2008) (“Staker”), p.1477, mn.7. See further below paras.21-22.

¹⁸ *DRC* Appeal Decision, para.41.

¹⁹ *DRC* Appeal Decision, para.18. See also para.40 (describing the admissibility determination as “an integral part of [the] decision”).

limiting its scope to decisions under articles 18 and 19 nor expressly listing other provisions which may fall within it. Thus, as the Prosecution observed in its Notice of Appeal, during the negotiations on the Rules, national delegations debated whether to include a rule expressly stating that rulings of jurisdiction or admissibility made in the context of article 53(3) proceedings were appealable. Ultimately, they decided not to do so, leaving the matter for this Court to decide on the facts and by interpreting the Statute in the ordinary fashion. There was no consensus, however, that such rulings would necessarily *not* be appealable.²⁰

A decision appealed under article 82(1)(a) need not be “final” or “conclusive”, provided it is based on a ruling on admissibility

13. At the heart of the Comoros’ challenge to the admissibility of this appeal is the claim that “a party can only appeal directly to the Appeals Chamber” under article 82(1)(a) “when the decision constitutes a final determination [...] of whether the case is actually admissible or not.”²¹ The Comoros’ view in this respect is unequivocal: “[t]he Appeals Chamber has consistently found that only final decisions on the admissibility of a case—*i.e.*, decisions which make a conclusive determination that a case is either admissible or inadmissible, nothing less—are subject to appeal under [a]rticle 82(1)(a).”²²

14. The Comoros’ understanding of the law is incorrect. Provided that a decision is a decision with respect to jurisdiction or admissibility—in the sense that it is based

²⁰ See Friman, ‘Investigation and Prosecution’ in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey, Transnational: 2001) (“Lee”), pp.534-535; Brady, ‘Appeal’ in Lee, pp.578-579.

²¹ Comoros Admissibility Submissions, para.3.

²² Comoros Admissibility Submissions, para.11. See also paras.13 (contending that the Prosecution has “attempt[ed] to argue that the [Decision] makes a final or conclusive decision on admissibility”), 16 (the Decision does not “in any way amount to a final decision on whether potential cases are admissible”), 17 (contending that the Prosecution has not shown that the Pre-Trial Chamber made “a conclusive determination on the admissibility of potential cases” in the Decision), 20 (asserting that the Prosecution has provided no authority showing that the Decision “need not make a conclusive determination under [a]rticles 18 or 19”).

on a ruling of jurisdiction or admissibility²³—there is no requirement for that decision to be “final” or “conclusive”:

- The Comoros shows nothing in the *Kenya* Appeal Decision supporting any requirement of finality.²⁴
- The Comoros is incorrect to assert that, “[i]n the *Libya* [s]ituation, the Appeals Chamber similarly reaffirmed the need for a conclusive and final decision on admissibility.”²⁵ To the contrary, neither the passage quoted nor any other passage in the Second *Libya* Appeal Decision supports that proposition.
- The Comoros is likewise incorrect to assert that the “‘impact’ [of] a decision on the question of admissibility [...] is not sufficient to permit an appeal under [a]rticle 82(1)(a) [...] without it being itself a conclusive decision made on the admissibility of the case.”²⁶ Again, nothing in the First *Libya* Appeal Decision supports that proposition.²⁷

15. Indeed, the only authority cited by the Comoros in support of its claim of a requirement of “finality” is a blog post briefly analysing the Decision and seeking to paraphrase (in a sentence) the jurisprudence under article 82(1)(a).²⁸ Although this

²³ See above paras.7-9.

²⁴ Comoros Admissibility Submissions, para.11 (quoting *Kenya* Appeal Decision, para.15 (“a decision of a Pre-Trial or Trial Chamber may constitute a ‘decision with respect to [...] admissibility’ only to the extent that it consisted of or ‘was based on’ a ruling that a case was admissible or inadmissible”).

²⁵ Comoros Admissibility Submissions, para.11 (quoting Second *Libya* Appeal Decision, para.15: “[The Pre-Trial Chamber] did not make a finding on whether the case against Mr Gaddafi was admissible. As reflected in the Appeals Chamber’s jurisprudence cited above, such a finding is required [...]”).

²⁶ Comoros Admissibility Submissions, para.12 (citing First *Libya* Appeal Decision, para.11).

²⁷ See First *Libya* Appeal Decision, para.11 (“The Pre-Trial Chamber did not even consider, let alone issue a ruling on, the admissibility of the case against Mr Gaddafi. As such, it cannot be considered a ‘decision with respect to [...] admissibility’. [...] As the Appeals Chamber has found twice before, a decision of such a nature is not and cannot be considered to be a decision with respect to [...] admissibility”).

²⁸ See Comoros Admissibility Submissions, para.11, fn.11 (supporting the claim that “nothing less” than a “final” or “conclusive” decision may be appealed under article 82(1)(a) on the basis of “the case law referred to [...] and highlighted in academic writing”, citing only ‘The ICC Prosecutor Should Reject Judges’ Decision in *Mavi Marmara*,’ *Just Security*, 20 July 2015, available at <https://www.justsecurity.org/24778/icc-prosecutor->

blog post does refer to a “final decision”, the observation should be treated with caution. First, as already demonstrated, the observation is inconsistent with the Appeals Chamber’s jurisprudence. Second, the authority of the source as legal authority is very limited by its nature: to a much greater extent than other forms of writing, blogs are generally written with a view to brevity, topicality, and simplicity. Apparent inconsistencies, ambiguities, or incongruities in the law described in this context do not merit close scrutiny. Indeed, given the inconsistency between the blog post and the authorities of this Court, and the unique purpose of the publication (including its presumed intention to report the existing state of the law at this Court, not to advocate a new interpretation), it is likely that any inconsistency is no more than a “slip of the tongue”.

16. The notion that a decision must be “final” in order to be appealable under article 82(1)(a) is further manifestly incorrect because it is inconsistent with the ambulatory nature of admissibility decisions, the requirement for an appealable decisions to be based on a “ruling” on admissibility, and the nature of appeals under article 82 of the Statute.

17. First, any requirement for a decision appealable under article 82(1)(a) to be “final” is inconsistent with the equal application of article 82(1)(a) to matters of complementarity as well as gravity. As the Appeals Chamber has recognised, State activities relevant to a complementarity analysis “may change over time”.²⁹ For this reason, the Statute provides further procedural avenues for Parties and participants

[reject-judges-decision-mavi-marmara/](#) (accessed 10 August 2015) (“But to [e]nsure that the decision does not have a far-reaching impact, the Prosecutor should seek an appeal or should consider and reject the decision. An appeal might be difficult because the Appeals Chamber has consistently considered article 82(a) [sic], the provision that allows appeals of admissibility decisions, to require a final decision on the admissibility of a case before there can be an appeal, and that has not occurred here”).

²⁹ ICC-01/04-01/07-1497 OA8, para.56.

to review admissibility rulings.³⁰ Necessarily, this does not prevent their appeal in the interim.

18. Second, as stated above, the Prosecution agrees that a “decision with respect to [...] admissibility” must be based on a “ruling” on admissibility.³¹ But a “ruling” is no more than “[a]n authoritative decision or pronouncement, [especially] one made by a judge”.³² The requirement for the impugned decision to contain a “ruling” is not a requirement of finality but of the authority or significance of the determination, emanating from its nature, content and relevance. Indeed, a judicial ruling is no less authoritative because it may be appealed, or because the ruling’s recipient may decide the future procedural measures to be taken in light of that ruling. Even if the recipient contests the ruling—or acts contrary to that ruling, within the framework of the law—their action will be evaluated in the forensic context of that ruling. It is this broad significance, in the context of the fundamental issues of jurisdiction and admissibility, which justifies direct appellate review. Conversely, a peripheral, irrelevant, or tangential observation concerning jurisdiction or admissibility is not a ruling, and would not justify such review.³³

19. This interpretation of the term “ruling” is consistent with the legal framework of the Statute, and the practice of this Court.

20. It is uncontested that article 82(1)(a) applies to decisions taken under article 18.³⁴ Yet article 18 decisions (“[p]reliminary rulings regarding admissibility”) are neither final nor conclusive. Thus, if the Pre-Trial Chamber decides that the Prosecution must defer to national proceedings under article 18(2) (in the sense of not authorising

³⁰ See further e.g. below para.20.

³¹ See above paras.7-9. Although the Prosecution’s position in this respect is also presented in its Notice of Appeal, it has never “attempt[ed] to argue that the [Decision] makes a final or conclusive decision on admissibility”: *contra* Comoros Admissibility Submissions, para.13.

³² *OED Online*, Oxford University Press, June 2015, available at <http://www.oed.com> (accessed 10 August 2015), “ruling, n.”, 2.

³³ See above fns.10-12, and accompanying text.

³⁴ See above para.9.

an investigation at that time), the Prosecution may appeal that decision under articles 18(4) and 82(1)(a) even though the *Prosecutor* has discretion to review that deferral under article 18(3) “at any time when there has been a significant change of circumstances”.³⁵ Likewise, the relevant State may appeal the Pre-Trial Chamber’s decision even though article 18(7) confirms that the Pre-Trial Chamber’s preliminary ruling is not conclusive—the State retains the ability to challenge admissibility at a later stage, under article 19, if it can show “additional significant facts or significant change of circumstances.”

21. Similarly, article 15(4) and rule 48 contemplate the Pre-Trial Chamber ruling on the admissibility of any potential case(s) arising from a situation as part of its determination whether to authorise an investigation. Such a ruling may be appealable by the Prosecutor under article 82(1)(a).³⁶ A negative decision under article 15(4) is not “final”, in the sense that the Prosecution retains discretion to re-apply under article 15(5) based on “new facts or evidence”. Nevertheless, since such a ruling necessarily affects the legal context of any future application³⁷ (as well as requiring the additional procedural burden of making a further application), the right of appeal is justified. The *DRC Appeal Decision* reflects a similar approach, allowing an appeal against the Pre-Trial Chamber’s ruling on admissibility in the context of an application under article 58, even though the Prosecutor retained discretion to re-apply for a new warrant presenting new facts or evidence.

³⁵ See also Statute, art.19(10).

³⁶ Staker, p.1477, mn.7 (“The decisions appealable under subparagraph (a) would be primarily those under Part 2 of the Statute (articles 5-21). Appeals are expressly provided for in article 18 para. 4 and 19 para. 6. Other decisions in that Part appealable under this provision may include those under article 15 para. 4 and article 20, and, for instance, decisions on whether a particular investigation or prosecution falls within the terms of a Security Council resolution under article 13 (b) or article 16”).

³⁷ By the notion of “legal context”, the Prosecution seeks to illustrate the phenomenon by which a ruling, notwithstanding any limit to its procedural consequences, nevertheless ‘sets the terms of the debate’ for future litigation on the same issue, as well as academic analysis and public discussion. The Appeals Chamber may have recognised the same phenomenon, to some extent, when it warned of the danger of “[a] degree of predetermination” as a result of certain rulings, which a Party may then find more difficult to overcome: see *DRC Appeal Decision*, paras.50-51.

22. To the extent that a ruling on admissibility under articles 15(4) or 58 is appealable, so must be a ruling on admissibility under article 53(3). Such a determination is again not “final”, in the sense that the Prosecutor retains discretion with regard to any request for reconsideration, but such a ruling necessarily affects the legal context of the Prosecutor’s decision.³⁸

23. Lastly, any requirement of “finality” under article 82(1)(a) would be misconceived because it overlooks the nature of appeals under article 82. The notion of “finality”, as construed by the Comoros, may convey the notion that it is the last opportunity to avert an irreversible situation, in the sense that an appealable decision would necessarily cause some kind of prejudice. Yet article 82(3), together with the Appeals Chamber’s jurisprudence on suspensive effect, makes clear that although decisions appealed under article 82 *may* cause such an irreversible situation or irreparable prejudice (thus warranting suspensive effect), it is not *required* that they do so.³⁹ Moreover, even when suspensive effect is granted (as in this case), it may be granted for reasons other than irreparable prejudice.⁴⁰

The Decision is a “decision with respect to [...] admissibility”

24. Applying the legal principles described above, the Decision is a decision with respect to admissibility—because it is based on a ruling on admissibility, notwithstanding its procedural stimulus or effect—and therefore may be appealed under article 82(1)(a).⁴¹

25. The Decision concluded that five factors “materially affect[ed] the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation [...]”

³⁸ See further above fn.37; below para.27.

³⁹ See e.g. ICC-01/05-01/08-817 OA3, para.11.

⁴⁰ See ICC-01/13-43, paras.7-8.

⁴¹ *Contra* Comoros Admissibility Submissions, para.9.

would not be of sufficient gravity to justify further action by the Court”.⁴² In other words, the Decision ruled invalid the Prosecutor’s determination that potential cases did not meet the gravity threshold and hence were inadmissible under article 17(1)(d). This was the sole basis for the Prosecutor’s original determination.

26. Moreover, the Decision went well beyond merely identifying errors (*arguendo*) in the Prosecution’s analysis but set out its own view of the merits, extensively and unequivocally. It did so with respect to each of the five factors which it considered to be relevant. Thus, it stated:

- “there appears to be no reason, in the present circumstances and in light of the parameters of the referral and scope of the Court’s jurisdiction, to consider that an investigation [...] could not lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes”;⁴³
- the scale of the identified crimes in this situation is “a compelling indicator of sufficient, and not of insufficient, gravity”;⁴⁴
- “there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed” and this should be taken “into account for the assessment of the nature of the crimes as part of the gravity test”;⁴⁵
- the conclusion that there was no reasonable basis to believe the identified crimes were systematic or resulted from a deliberate plan or policy is “unsustainable”;⁴⁶ and

⁴² Decision, para.49.

⁴³ Decision, para.24.

⁴⁴ Decision, para.26.

⁴⁵ Decision, para.30.

⁴⁶ Decision, para.45. *See also* paras.31, 36 (reasonable basis to believe there may have been such a plan, policy, or prior intention may indicate sufficient gravity).

- “the significant impact” of the identified crimes “is, as such, an indicator of sufficient gravity” and, in any event, the identified crimes “had an impact going beyond the suffering of the direct and indirect victims” since they “would have sent a clear and strong message to the people in Gaza (and beyond) that the blockade of Gaza was in full force”.⁴⁷

27. These statements, and the ultimate conclusion, plainly constituted a “ruling” on admissibility. Under the auspices of its judicial function—giving a natural authority to its statements, quite apart from their procedural effects—the majority of the Pre-Trial Chamber declared that potential case(s) arising from this situation are sufficiently grave to be heard by this Court and thus, in that respect, admissible. Although the Prosecutor retains discretion in deciding how further to proceed under rule 108 (although not *whether* to proceed under rule 108), she will exercise that discretion—and be seen to exercise that discretion, both by the public and the judiciary—in the context of this ruling. Furthermore, the manner in which the Prosecutor exercises her discretion will inevitably be informed by the ruling, and its reasoning.⁴⁸

28. The Comoros’ description of the Decision is partial,⁴⁹ and its conclusion that “[n]o decision” —or, properly, ruling—“has been made about [...] admissibility” is unpersuasive.⁵⁰ Although the Comoros correctly notes that the “issues” addressed by the majority of the Pre-Trial Chamber “might ‘affect’ and ‘impact’ admissibility”, it overlooks the emphatic and conclusory nature of the actual statements contained in the Decision.⁵¹ The propriety of such statements in article 53(3) proceedings is a

⁴⁷ Decision, paras.47-48.

⁴⁸ See e.g. Notice of Appeal, para.27.

⁴⁹ See Comoros Admissibility Submissions, para.16.

⁵⁰ *Contra* Comoros Admissibility Submissions, paras.13, 16-17.

⁵¹ See Comoros Admissibility Submissions, para.17.

question for the Appeals Chamber in considering the merits of this appeal.⁵² The language and tone of these statements makes clear that they are more than judicial “assist[ance]” or guidance,⁵³ but purport to be a declaration of the “correct” approach.

29. The Comoros’ further argument that the Decision cannot be based on a ruling on admissibility because “[t]he Prosecutor still has to make a decision on admissibility, and only thereafter could the Chamber ever be required to make a decision on admissibility” appears to be based on a misapprehension of the relevant sequence of events.⁵⁴ Manifestly, the Prosecutor in her article 53(1) determination concluded that any potential case(s) arising from the situation would be inadmissible for lack of gravity. The majority of the Pre-Trial Chamber has now ruled to the contrary. Although the Comoros may at least seek to dispute whether the Decision constitutes a “ruling” on admissibility, there can be no serious question that matters of admissibility are at stake.

Conclusion

30. For the reasons above, the Appeals Chamber should confirm the admissibility of the appeal and hear the Parties and participants on the three errors identified in the Notice of Appeal.

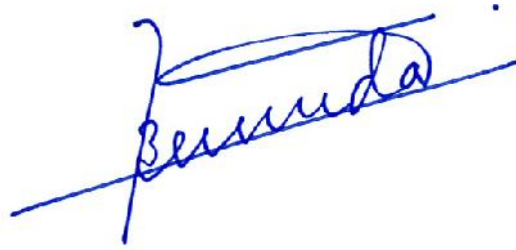
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⁵² Cf. Comoros Admissibility Submissions, para.18.

⁵³ *Contra* Comoros Admissibility Submissions, para.18.

⁵⁴ Comoros Admissibility Submissions, para.19.

⁵⁵ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para.32.



Fatou Bensouda, Prosecutor

Dated this 14th day of August 2015

At The Hague, The Netherlands