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Date: **26 November 2018**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Peter 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 Document**

**Response on behalf of the Government of the Comoros to the Prosecution's "Request for Leave to Appeal the 'Decision on the Application for Judicial Review by the Government of the Union of the Comoros'"**

**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:**

**The Office of the Prosecutor**  
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**  
Mr. Rodney Dixon QC  
Ms. Paolina Massidda

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**  
Ms. Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**  
Mr. Rodney Dixon QC

**Amicus Curiae**

## **REGISTRY**

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Mr. Peter Lewis

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**Detention Section**

**Victims Participation and Reparations  
Section**

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## **Introduction**

1. The Government of the Union of the Comoros files this Response to the Prosecution’s Request of 21 November 2018 pursuant to Article 82(1)(d) for Leave to Appeal<sup>1</sup> against the Pre-Trial Chamber’s “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros.’”<sup>2</sup>
2. This Response is filed pursuant to Regulation 65(3) and Regulation 33 of the Regulations of the Court.
3. The Government of the Comoros submits that the request for leave to appeal should be rejected on the basis that the Prosecution has not satisfied the specific and restrictive requirements of Article 82(1)(d) to justify the Chamber granting leave to appeal its Decision of 15 November 2018.

## **The stringent requirements of Article 82(1)(d) have not been satisfied**

4. The Appeals Chamber has made clear that the test for granting leave to appeal under “article 82 (1) (d) of the Statute has two components” whereby the “first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber.”<sup>3</sup> The applicant is required to establish that the decision complained of involves an issue that “*would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*” and that an immediate resolution of such issue by the Appeals Chamber may “*materially advance the proceedings*”.<sup>4</sup>

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<sup>1</sup> Request for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, ICC-01/13-69, 21 November 2018 [*hereinafter* OTP Leave to Appeal].

<sup>2</sup> Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, ICC-01/13-68, 15 November 2018 [*hereinafter* PTC Decision of 15 November].

<sup>3</sup> *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 8.

<sup>4</sup> Rome Statute, Article 82(1)(d). See also, *Prosecutor v. Kony*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 20, 21.

5. The Prosecution has identified three proposed issues for appeal which are all integrally related in that each, again, challenges the “distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor”<sup>5</sup>, the “supervisory role of the Pre-Trial Chambers over the Prosecutor’s actions”<sup>6</sup> and the obligation of the Prosecutor to comply with orders of the Chamber and not to disregard those with which she does not agree.<sup>7</sup>
6. Indeed, the Prosecutor specifically seeks to appeal whether she “is obligated 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” when she does not accept the Chamber’s conclusions (the third proposed appeal issue).<sup>8</sup> Moreover, the Prosecutor’s first and second proposed appeal issues are almost identical with the third issue - the first questions whether the Pre-Trial Chamber has the supervisory power to “entertain” and review the Prosecution’s decisions once she has decided they are final<sup>9</sup>, and the second whether the Chamber has the power to “set aside the conclusion and reasons of the Prosecutor.”<sup>10</sup>
7. The issues raised by the Prosecution in its request demonstrate that the Prosecution still refuses to accept the distribution of powers between the Pre-Trial Chamber and the Prosecution - an issue that was litigated at length in the submissions of the parties before the Chamber and clearly addressed in great detail in the PTC’s decision.<sup>11</sup>
8. None of these proposed issues satisfy the strict test for granting leave to appeal under Article 82(1)(d) for all of the reasons set out below.

**A. The first component of Article 82(1)(d) has not been met**

9. Under the first component of Article 82(1)(d), the Prosecution must identify an appealable issue, and then demonstrate how consideration of this issue by the Appeals Chamber would

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<sup>5</sup> PTC Decision of 15 November, para. 86.

<sup>6</sup> PTC Decision of 15 November, para. 98.

<sup>7</sup> PTC Decision of 15 November, paras. 96-109.

<sup>8</sup> OTP Leave to Appeal, para. 13.

<sup>9</sup> OTP Leave to Appeal, para. 9.

<sup>10</sup> OTP Leave to Appeal, para. 11.

<sup>11</sup> PTC Decision of 15 November, paras. 81-87, 96-109.

“‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.<sup>12</sup>

10. Importantly, it has been consistently emphasised in the ICC’s case law that interlocutory appeals under Article 82(1)(d) “*were meant to be admissible only under the limited and very specific circumstances*” stipulated in the Statute.<sup>13</sup> It has been held that the Statute restricts interlocutory appeals “*to a few, strictly defined, exceptions*”.<sup>14</sup> The existence of the requirements set forth in Article 82(1)(d) “is the sole factor of relevance in determining whether leave should be granted or not ... the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted.”<sup>15</sup>

***(1) The Prosecution has failed to identify any appealable issues***

11. When considering whether an appealable issue has been identified by the Prosecution, the jurisprudence of the Court sets out that “[h]ypothetical concerns, abstract legal questions or questions over which there is mere disagreement or conflicting opinion may not constitute issues” which are appealable under Article 82(1)(d).<sup>16</sup> Leave to appeal has routinely be rejected when a party, “*in reiterating the different factors in support of its own position, is merely contesting the Chamber's conclusion ... an argument which amounts only to a disagreement with the Chamber's view.*”<sup>17</sup>

<sup>12</sup> *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, paras. 9, 10 citing Rome Statute, Article 82(1)(d).

<sup>13</sup> *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 16.; See also, *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

<sup>14</sup> *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 19.; *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

<sup>15</sup> *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 22.

<sup>16</sup> *Prosecutor v. Saif Gaddafi et al.*, Decision on the "Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-490, 11 December 2013, para. 5.

<sup>17</sup> *Prosecutor v. Saif Gaddafi et al.*, Decision on the "Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-490, 11 December 2013, para. 31 (emphasis added).

12. Hence, the Appeals Chamber has clearly found that just because a party disagrees with the conclusion of a Chamber, this does not constitute an appealable issue:

*“There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject.”<sup>18</sup>*

13. In the present case, the Prosecution’s proposed appealable issues amount to nothing more than the Prosecution, yet again, disagreeing with the findings of the Chamber. The Prosecution is merely trying to relitigate the same questions already considered and clearly determined by the Pre-Trial Chamber. It is evident that the OTP’s proposed issues and arguments are in reality disagreements with the Pre-Trial Chamber’s decision.

14. The issues raised by the Prosecution are not issues arising out of the decision, but are instead the exact issues considered and determined by the Pre-Trial Chamber in its decision. This is demonstrated by the fact that the Pre-Trial Chamber clearly stated in its analysis that *“the primary question arising from the 29 November 2017 Decision is whether the Prosecutor is under an obligation to abide by the 16 July 2015 Decision or whether she is free to disregard it and adopt another basis for her reconsideration in the exercise of her discretion.”* Yet, the Prosecution seeks to raise this very same question and directly related questions again, on the basis that it disagrees with the Chamber’s unambiguous decision on these issues and in order to circumvent and challenge the Chamber’s Order again.

15. It is wrong for the Prosecution to suggest that there are “contrasting opinions of the Pre-Trial Chamber in the Decision” in order to argue for appellate review when in fact the Chamber was absolutely clear and unified on the “the supervisory role of the Pre-Trial Chambers over the Prosecutor’s actions.”<sup>19</sup> There was no divergence between the judges that “judicial decisions should be, as a matter of principle, complied with”<sup>20</sup> and the Prosecutor does not have the power to decide for herself whether she “is obliged to accept

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<sup>18</sup> *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 9.

<sup>19</sup> PTC Decision of 15 November, para. 98.

<sup>20</sup> See, Partly Dissenting Opinion of Judge Péter Kovács, ICC-01/13-68-Anx, 15 November 2018, para. 3. See also, PTC Decision of 15 November, paras. 96-109.

particular conclusions” set out in the Chamber’s decision or to disregard the Chamber’s order by “draw[ing] her own conclusions.”<sup>21</sup>

16. The Government of the Comoros therefore submits that the Pre-Trial Chamber should find that the Prosecution has not raised any *appealable issue* arising from the Decision of 15 November in accordance with Article 82(1)(d), and should thus dismiss the Prosecution’s request.

***(2) The proposed issues in any event do not significantly affect the outcome of a trial or the fair and expeditious conduct of proceedings***

17. The Appeals Chamber has also clarified that even if an issue is identified, “[n]ot every issue may constitute the subject of an appeal.”<sup>22</sup> To constitute an appealable issue, the issue must “significantly affect ... in a material way, either a) “the fair and expeditious conduct of the proceedings” or b) “the outcome of the trial.”<sup>23</sup>

18. The ICC’s case law emphasises that what the “*party seeking leave needs to demonstrate is that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings. Failing such demonstration, leave to appeal cannot be granted*”.<sup>24</sup>

19. In the present case the proposed appealable issues cannot be said to significantly affect the “outcome of the trial” as there are no such proceedings before the Court. Acknowledging this,<sup>25</sup> the Prosecution instead asks the Chamber to “consider the impact of the proposed issues, *mutatis mutandis*, on the outcome of the preliminary examination in this situation.”<sup>26</sup> But to do so would ignore the plain and literal wording of Article 82(1)(d),

<sup>21</sup> Prosecution’s third proposed issue of appeal, at para. 13. OTP Leave to Appeal, para. 13.

<sup>22</sup> *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

<sup>23</sup> *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

<sup>24</sup> *Prosecutor v. Kony*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21.

<sup>25</sup> OTP Leave to Appeal, paras. 18-19.

<sup>26</sup> OTP Leave to Appeal, paras. 18-19.

and subvert the clear intention of the provision in the Statute. Indeed, case law on Article 82(1)(d) states that the “*mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal*”.<sup>27</sup> The Government of the Comoros therefore submits that the Prosecution’s assertions that the proposed issues would significantly affect the outcome of the “preliminary examination” must be rejected.

20. The Prosecution also maintains that the proposed issues significantly affect the fair and expeditious conduct of the proceedings. In so arguing, the Prosecution submits that the issues raised are about striking a balance - both a “balance between opportunities for review and reasonable finality”<sup>28</sup> and a “balance between duration and effectiveness of proceedings”<sup>29</sup> - and about the “proper allocation of resources” during this stage of the proceedings.<sup>30</sup> The Prosecution suggests that raising these issues is for the benefit of “the procedural guarantees which the Court provides to States, and indirectly to the participating victims.”<sup>31</sup>
21. The Comoros emphasises that nothing in the Prosecution’s arguments requires the Appeals Chamber to spend even further time and resources to prolong the proceedings in any way, and yet again to delay the Prosecution’s reconsideration of its decision not to investigate this case. The Prosecutor is attempting to argue that not allowing her appeal would be unfair to the State concerned and the Victims because her reconsideration would protract the proceedings further, and not give the Victims finality. The Prosecutor completely ignores that the Comoros and the Victims have been urging the OTP for a considerable time to reconsider her decision in light of the errors identified by the Chamber so that this case can move forward without delay. The Chamber has now ordered the OTP to do so in 6 months, and there is no reason to appeal this Order.
22. The Pre-Trial Chamber’s decision of 15 November is very clear that there is “no indication in the Statute that the oversight role of the Pre-Trial Chamber over the parties to the

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<sup>27</sup> *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21.

<sup>28</sup> OTP Leave to Appeal, para. 16.

<sup>29</sup> OTP Leave to Appeal, para. 17.

<sup>30</sup> OTP Leave to Appeal, para. 16.

<sup>31</sup> OTP Leave to Appeal, para. 16.

proceedings, including the Prosecutor, is in any way reduced at the early stages of the proceedings”, meaning “the Prosecutor must exercise her discretionary powers in keeping with the decisions issued by the Pre-Trial Chamber in the exercise of its statutorily assigned oversight role.”<sup>32</sup> As a matter of law, there is no doubt that the Prosecution must now reconsider her decision in accordance with the Pre-Trial Chamber’s decision of 16 July 2015.

23. The question of “finality” and “resources”, as asserted by the OTP, cannot be a reason to end the proceedings (i.e. to close the preliminary examination) when there are errors identified by the Chamber that the Prosecution must address and properly apply its mind to. There should be no appeal permitted when the purpose of that appeal is, at heart, to circumvent the Chamber’s Order to consider and address these errors.
  
24. The Prosecution has not demonstrated that the proposed issues *significantly* affect the fair and expeditious conduct of the proceedings. The Prosecution’s arguments ultimately come back to the Prosecution still resisting the Chamber’s clear decision on the “distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor”<sup>33</sup>, and whether the Prosecution must comply with the Chamber’s Orders.
  
25. The Prosecution’s suggestion that granting leave to appeal would conserve the resources of the Court and save time is misguided. It would only do the exact opposite and delay the Prosecution’s reconsideration of her decision even longer for the Victims who have been seeking justice before the Court since 2013. Noting this delay, and that “it took more than two years” to issue its reconsideration decision<sup>34</sup>, the Pre-Trial Chamber appropriately “set a deadline of 6 months for the Prosecutor” to comply with the Chamber’s Order on reconsideration.<sup>35</sup> The Government of the Comoros submits that the Prosecution must proceed immediately with the reconsideration of its decision in accordance with the Chamber’s decision of 16 July 2015 in order to preserve the resources of the Court, to save time, and in fairness to the rights of the Victims.

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<sup>32</sup> PTC Decision of 15 November, para. 99.

<sup>33</sup> PTC Decision of 15 November, para. 86.

<sup>34</sup> PTC Decision of 15 November, para. 119.

<sup>35</sup> PTC Decision of 15 November, para. 121.

26. The Government of the Comoros submits that the Prosecution has neither raised any appealable issues nor established that the Pre-Trial Chamber's decision involves issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the "trial". The Comoros states that leave to appeal should therefore be granted.

**B. The second component of Article 82(1)(d) has also not been satisfied**

27. As noted above, the Appeals Chamber has found that *both* components required under Article 82(1)(d) must be satisfied for leave to be granted, and that "failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met."<sup>36</sup>

28. On this basis, the Government of the Comoros submits that the Chamber should dismiss the Prosecution's request without further considering whether the second component has been met. However, in any event, the Comoros submits that the Prosecution has also failed to satisfy the second component of the test; namely that "*in the opinion of the Pre-Trial Chamber ... an immediate resolution by the Appeals Chamber may materially advance the proceedings.*"<sup>37</sup>

29. The Prosecution asserts that "[i]f the important legal issues arising from the Decision are not certified now" and considered by the Appeals Chamber, "there is no prospect that they will ever receive timely appellate attention and clarification."<sup>38</sup> The Prosecution goes on to claim that leave should be granted because "the Prosecution may have misunderstood the nature of its obligations and any aspects of the Pre-Trial Chamber's decision."<sup>39</sup>

30. Again, there is nothing for the Prosecution to "misunderstand" in the Pre-Trial Chamber's decision, nor anything unclear in its directions to the OTP. Furthermore, the Prosecution's assertions that there are "differences in interpreting the Appeals Chamber's prior ruling on the situation" is merely another attempt to reargue the same issue on appeal that has already

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<sup>36</sup> *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21.

<sup>37</sup> Rome Statute, Article 82(1)(d).

<sup>38</sup> OTP Leave to Appeal, para. 20.

<sup>39</sup> OTP Leave to Appeal, para. 21.

been litigated and decided by the Chamber. The OTP again challenges the Appeals Chamber's decision which dismissed the Prosecution appeal under Article 82(1)(a) as being inadmissible.<sup>40</sup> The Appeals Chamber "underline[d] that it [took] no view on the merits of the grounds of appeal raised by the Prosecutor for the purpose of determining [the] question" of admissibility.<sup>41</sup>

31. As stated above, the Pre-Trial Chamber's decision is abundantly clear on the "the supervisory role of the Pre-Trial Chambers over the Prosecutor's actions"<sup>42</sup> and that "judicial decisions should be, as a matter of principle, complied with"<sup>43</sup> by the Prosecution. It is disingenuous for the Prosecution to try to assert that an appeal is needed to better understand the Pre-Trial Chamber's Order, when the OTP is really seeking to re-litigate the same issue.
32. The Government of the Comoros submits that granting the Prosecution's application for leave to appeal would not *materially* advance the proceedings. It would only further delay the proceedings. The Prosecution's request should therefore be rejected.

### **C. The request for a provisional stay should be dismissed**

33. The Prosecution asks that the "Pre-Trial Chamber provisionally stays the effects of the Decision pending its deliberations, so that the deadline does not begin to run."<sup>44</sup>
34. The Pre-Trial Chamber recognised the extraordinary delays in the Prosecution's previous reconsideration of its decision, as well as its attempts to ignore the Order of the Pre-Trial Chamber.<sup>45</sup> The Prosecution is again attempting to further delay its reconsideration. The Victims have waited over three years for the Prosecution to reconsider her decision in accordance with the Chamber's earlier decision, and should not have to wait any longer while the Prosecution tries to further circumvent its obligations.

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<sup>40</sup> OTP Leave to Appeal, para. 4.

<sup>41</sup> Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", ICC-01/13-51, 6 November 2016, para. 37.

<sup>42</sup> PTC Decision of 15 November, para. 98.

<sup>43</sup> See, Partly Dissenting Opinion of Judge Péter Kovács, ICC-01/13-68-Anx, 15 November 2018, para. 3. See also, PTC Decision of 15 November, paras. 96-109.

<sup>44</sup> OTP Leave to Appeal, para. 22.

<sup>45</sup> PTC Decision of 15 November, para. 119.

35. The Government therefore submits that a provisional stay should not be granted. The Prosecution must begin reconsidering its decision immediately and without further delay.

**Conclusion**

36. For the reasons set out above, the Government of the Comoros submits that the Prosecution has not satisfied the stringent requirements under Article 82(1)(d) for granting leave to appeal, and leave to appeal should thus be refused.

37. The Comoros also submits that the Prosecution should be directed to immediately begin reconsidering its decision in accordance with the Pre-Trial Chamber's decision of 16 July 2015, with no further delays.



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**Rodney Dixon QC**

**Counsel on behalf of the Government of the Union of the Comoros**

Dated 26 November 2018

London