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**No. ICC-01/13 OA
Date: 6 November 2015**

THE APPEALS CHAMBER

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

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

Public document

**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"**

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

Requesting *Amicus Curiae* Organisation
European Centre for Law & Justice

Legal Representatives of victims
Mr Geoffrey Nice
Mr Rodney Dixon

The Office of Public Counsel for victims
Ms Paolina Massidda
Mr Enrique Carnero Rojo

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” dated 16 July 2015 (ICC-01/13-34),

Noting the “Directions on the conduct of proceedings” dated 6 August 2015 (ICC-01/13-42) in which the Appeals Chamber, *inter alia*, considered “that, before addressing the merits of [the] appeal, it [was] necessary to examine whether the Prosecutor’s appeal [was] admissible” and accordingly “suspend[ed] the running of the applicable time limits for the filing of the document in support of appeal and related submissions pending a decision on the admissibility of the appeal”,

After deliberation,

Renders by majority, Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert dissenting, the following

DECISION

1. The Prosecutor’s appeal is dismissed as inadmissible.
2. The Prosecutor’s request for an extension of pages and the request to submit *amicus curiae* observations are dismissed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

1. The Union of the Comoros submitted a referral “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip” to the Prosecutor on 14 May 2013.¹ In a report dated 6 November 2014, the Prosecutor set

¹ Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, attached to letter from the Prosecutor to the President of the Court dated 14 May 2013, and filed as Annex 1 to “Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I”, 5 July 2013, [ICC-01/13-1-Anx1](#), p. 3.

out her reasons for her conclusion that there was no reasonable basis to proceed with an investigation into this situation² (hereinafter: “Prosecutor’s Decision not to Initiate an Investigation”).

2. On 29 January 2015, the Union of the Comoros filed an application before Pre-Trial Chamber I for review of this decision, pursuant to article 53 (3) (a) of the Statute,³ to which the Prosecutor filed a response on 30 March 2015.⁴ Submissions were also received from two groups of victims⁵ and responses thereto from the Prosecutor⁶ and the Union of the Comoros.⁷

3. On 16 July 2015, Pre-Trial Chamber I, by majority (hereinafter: “Pre-Trial Chamber”), Judge Kovács dissenting,⁸ rendered the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”⁹ (hereinafter: “Impugned Decision”), requesting “the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros”.¹⁰

B. Proceedings before the Appeals Chamber

4. On 27 July 2015, the Prosecutor filed the “Notice of Appeal of ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to

² See “Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report”, filed as Annex A to “Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute”, dated 6 November 2014 and registered on 4 February 2015, [ICC-01/13-6-AnxA](#).

³ “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation”, ICC-01/13-3-Conf; a public redacted version was filed on the same day ([ICC-01/13-3-Red](#)).

⁴ “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute”, ICC-01/13-14-Conf; a public redacted version was filed on the same day ([ICC-01/13-14-Red](#)) (hereinafter: “Prosecutor’s Submissions of 30 March 2015”).

⁵ “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, 22 June 2015, ICC-01/13-27-Conf; a public redacted version was registered on 23 June 2015 ([ICC-01/13-27-Red](#)). “Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015”, 22 June 2015, ICC-01/13-28-Conf; a public redacted version was registered on 30 June 2015 ([ICC-01/13-28-Red](#)).

⁶ “Prosecution’s Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)”, 14 July 2015, ICC-01/13-29-Conf; a public redacted version was registered on the same day ([ICC-01/13-29-Red](#)).

⁷ “Response by the Government of the Comoros to Victim Observations filed on 22 June 2015”, 14 July 2015, [ICC-01/13-30](#).

⁸ “Partly Dissenting Opinion of Judge Péter Kovács”: Corrigendum of Annex to the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, 16 July 2015, [ICC-01/13-34-Anx-Corr](#).

⁹ [ICC-01/13-34](#).

¹⁰ [Impugned Decision](#), p. 26.

initiate an investigation’ (ICC-01/13-34)”¹¹ (hereinafter: “Notice of Appeal”), including therein, *inter alia*, submissions as to the admissibility of the appeal and an application for suspensive effect.

5. On 3 August 2015, the Union of the Comoros filed the “Application by the Government of the Comoros to dismiss *in limine* the Prosecution ‘Notice of Appeal of “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)””¹² (hereinafter: “Application to Dismiss by the Union of the Comoros”). On 4 August 2015, the Prosecutor filed the “Prosecution’s Urgent Response to the Government of the Union of the Comoros’ Application to Dismiss the Appeal *In Limine*, and Request for Extension of Pages under Regulation 37 of the Regulations of the Court”¹³ (hereinafter: “Prosecutor’s Response to Application to Dismiss by the Union of the Comoros” and “Prosecutor’s Request for Extension of Pages”, respectively).

6. On 5 August 2015, the victims represented by Ms Paolina Massidda from the Office of Public Counsel for victims (hereinafter: “OPCV”), filed the “Victims’ request for directions on the conduct of the proceedings following the ‘Notice of Appeal of “Decision on the request of the Union of the Comoros to review the Prosecution [*sic*] not to initiate an investigation” (ICC-01/13-34)””.¹⁴

7. On 6 August 2015, the Appeals Chamber decided that it was necessary to examine whether the Prosecutor’s appeal was admissible before addressing the merits of the appeal and issued directions, *inter alia*, fixing deadlines for the filing of additional submissions on the admissibility of the appeal by the Prosecutor, the Union of the Comoros and victims.¹⁵ On the same day, the Appeals Chamber suspended the effect of the Impugned Decision.¹⁶ On 14 August 2015, the Appeals Chamber decided to postpone a decision on a request filed pursuant to rule 103 of the Rules of

¹¹ [ICC-01/13-35](#) (OA).

¹² [ICC-01/13-39](#) (OA).

¹³ [ICC-01/13-40](#) (OA).

¹⁴ [ICC-01/13-41](#) (OA).

¹⁵ “Directions on the conduct of proceedings”, [ICC-01/13-42](#) (OA).

¹⁶ “Decision on suspensive effect”, [ICC-01/13-43](#) (OA) (hereinafter: “Decision on Suspensive Effect”).

Procedure and Evidence to submit *amicus curiae* observations,¹⁷ pending a determination on the admissibility of the appeal.¹⁸

8. On 14 August 2015, the Prosecutor filed the “Prosecution’s Further Submissions concerning Admissibility”¹⁹ (hereinafter: “Prosecutor’s Further Submissions”).

9. On 19 August 2015, the OPCV filed the “Victims’ observations on the admissibility of the Prosecution ‘Notice of Appeal of “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)”²⁰ (hereinafter: “First Group of Victims’ Observations on the Admissibility of the Appeal”).

10. On the same date, the Union of the Comoros filed the “Response of the Government of the Comoros to the ‘Prosecution’s Further Submissions concerning Admissibility’”²¹ (hereinafter: “Comoros’ Response to the Prosecutor’s Further Submissions”) and the victims represented by Mr Geoffrey Nice and Mr Rodney Dixon filed the “Observations of the Victims on the admissibility of the Prosecution’s ‘Notice of Appeal of “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)”²² (hereinafter: “Second Group of Victims’ Observations on the Admissibility of the Appeal”).

II. PRELIMINARY ISSUE: COMMENTS MADE BY COUNSEL

11. On 30 July 2015, the Prosecutor filed the “Prosecution’s request to instruct Parties and participants to refrain from commenting on the merits of this case in the media and comply with the Code of Professional Conduct for counsel”,²³ in which she stated her objections to particular comments reportedly made to a media outlet by

¹⁷ “Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”, dated 7 August 2015 and registered on 13 August 2015, [ICC-01/13-44](#) (OA) (hereinafter: “Request to submit *Amicus Curiae* Observations”); “*Amicus Curiae* Observations of the European Centre for Law & Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence”, dated 7 August 2015 and registered on 13 August 2015, [ICC-01/13-45](#) (OA).

¹⁸ “Decision in relation to request for leave to submit rule 103 observations”, [ICC-01/13-46](#) (OA).

¹⁹ [ICC-01/13-47](#) (OA).

²⁰ [ICC-01/13-48](#) (OA).

²¹ [ICC-01/13-49](#) (OA).

²² [ICC-01/13-50](#) (OA).

²³ [ICC-01/13-36](#) (OA) (hereinafter: “Prosecutor’s Request Regarding Commenting on Case”).

counsel, Mr Geoffrey Nice, who represents both the Union of the Comoros and victims. She asked that the Appeals Chamber “instruct Parties and participants to refrain from commenting on the merits of the case outside the courtroom and abide by the expected standards of professional conduct required by the Code of Professional Conduct for counsel”.²⁴

12. A response to this request was filed by counsel representing the Union of the Comoros, stating, *inter alia*, that it was “accepted that the words quoted should not have been published”, “regret[ting] that they were so published and apologi[sing] in full for the publication happening”.²⁵

13. The Appeals Chamber takes note of counsel’s apology and in such circumstances finds it unnecessary to address this matter further.

III. MERITS

A. Summary of Impugned Decision

14. The Impugned Decision reviewed the Prosecutor’s Decision not to Initiate an Investigation against two challenges raised by the Union of the Comoros to the Prosecutor’s interpretation and application of the gravity test under article 17 (1) (d) of the Statute: (i) “the failure to take into account facts that did not occur on the three vessels over which the Court may exercise territorial jurisdiction; and (ii) the failure to properly address the factors relevant to the determination of gravity under article 17(1)(d) of the Statute”.²⁶

15. In relation to the first, the Pre-Trial Chamber held that the Prosecutor’s position that, for the assessment of gravity, she could not consider facts occurring anywhere other than on the three vessels which were subject to the jurisdiction of the Court, “rests on an untenable understanding of jurisdiction”.²⁷ However, it found

²⁴ [Prosecutor’s Request Regarding Commenting on Case](#), para. 5.

²⁵ “Response to ‘Prosecution’s request to instruct Parties and participants to refrain from commenting on the merits of this case in the media and comply with the Code of Professional Conduct for counsel’”, dated 31 July 2015 and registered on 3 August 2015, [ICC-01/13-38](#) (OA), para. 2. Although the same counsel also represents a group of victims, this particular filing was made as “[c]ounsel on behalf of the Government of the Union of the Comoros”. *See* p. 4.

²⁶ [Impugned Decision](#), para. 11.

²⁷ [Impugned Decision](#), para. 17.

that this erroneous statement of principle did not affect the Prosecutor's assessment of gravity as such facts had, in fact, been taken into account by her.²⁸

16. In relation to the second ground of review raised by the Union of the Comoros, the Pre-Trial Chamber concluded that a combination of five failures or errors of the Prosecutor materially affected the validity of her conclusion that the potential cases arising out of the situation would not be of sufficient gravity to justify further action by the Court within the meaning of article 17 (1) (d) of the Statute.²⁹ (i) failure "to consider whether the persons likely to be the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes";³⁰ (ii) failure to take into account the "factor of scale" "as militating in favour of sufficient gravity, rather than the opposite";³¹ (iii) failure to recognise and to take "into account for the assessment of the nature of the crimes as part of the gravity test" "that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed";³² (iv) factual errors in "properly assessing the manner of commission of the identified crimes, in particular with respect to the question whether the identified crimes may have been 'systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians'",³³ and (v) error in the determination that "the impact of the identified crimes constituted an indicator of insufficient gravity of the potential case(s)".³⁴ On this basis, the Pre-Trial Chamber requested the Prosecutor to reconsider her decision not to initiate an investigation.³⁵

²⁸ [Impugned Decision](#), paras 18-19.

²⁹ [Impugned Decision](#), paras 20-49.

³⁰ [Impugned Decision](#), para. 23.

³¹ [Impugned Decision](#), para. 26.

³² [Impugned Decision](#), para. 30.

³³ [Impugned Decision](#), para. 49. *See* para. 44, referring to (i) an incorrect assessment of information regarding live fire being "used by the [Israeli Defence Forces] prior to the boarding of the *Mavi Marmara*"; (ii) unreasonable failure "to consider that the fact that the detained passengers suffered cruel and abusive treatment in Israel reasonably suggests that the identified crimes may not have occurred as individual excesses of [Israeli Defence Forces] soldiers"; (iii) unreasonable failure "to recognise the fact that the unnecessarily cruel treatment of passengers on the *Mavi Marmara*, the attempts of the perpetrators of the identified crimes to conceal the crimes, and the fact that the events did not unfold on other vessels in the flotilla in the same way [sic] as they did on the *Mavi Marmara*, are not incompatible with the hypothesis that the identified crimes were planned".

³⁴ [Impugned Decision](#), para. 47.

³⁵ [Impugned Decision](#), para. 50, p. 26.

B. Summary of Submissions of the Parties and Participants

1. Prosecutor's Submissions

17. In the Notice of Appeal, the Prosecutor submits that “[b]y its nature, the [Impugned] Decision constitutes a decision with respect to admissibility, which may be directly appealed under article 82(1)(a) of the Statute”.³⁶ She submits that “the essential premise and rationale underpinning the outcome of the [Impugned] Decision” is the Pre-Trial Chamber’s view “that any potential case or cases arising from this situation are admissible, in the sense that they are sufficiently grave to be heard before this Court”.³⁷ She highlights the Pre-Trial Chamber’s approach to procedural issues and the submissions of the parties as further illustrating the “centrality of the question of admissibility” to the Impugned Decision.³⁸ The Prosecutor argues that the Impugned Decision is analogous to a previous decision in the *DRC* situation, in relation to which the Appeals Chamber accepted an appeal under article 82 (1) (a) of the Statute against a decision that was in substance a ruling of inadmissibility, although it was in form a decision on an application for warrants of arrest.³⁹ She distinguishes this appeal from previous article 82 (1) (a) appeals found to be inadmissible by the Appeals Chamber and from previous findings by the Appeals Chamber in those cases.⁴⁰ The Prosecutor emphasises that she “does not assert a

³⁶ [Notice of Appeal](#), para. 2.

³⁷ [Notice of Appeal](#), para. 8, referring to [Impugned Decision](#), paras 24, 26, 30, 45, 47-49.

³⁸ [Notice of Appeal](#), para. 10, referring to “[Decision on Victims’ Participation](#)”, ICC-01/13-18, 24 April 2015, paras 7-10 and quoting from paras 9-10: “As the Prosecutor has taken her decision referring to ‘gravity under article 53(1)(b) in conjunction with article 17(1)(d) of the Statute, rule 107(5) of the Rules stipulates that rule 59 applies ‘[w]here an issue of jurisdiction or admissibility [...] is raised’ in the context of an article 53(3)(a) review process. [...] The Chamber is of the view that both rules 92(2), and 107(5) together with rule 59 of the Rules, foresee the participation of all victims who have communicated with the Court in relation to the situation in question. Considering that the ground, upon which the Prosecutor’s Decision rests, concerns ‘gravity’, an issue of admissibility within the meaning of rule 107(5) of the Rules, the Chamber considers rule 59 of the Rules to be *lex specialis* [...] This is without prejudice to any further determination of the Chamber on the merits”. Regarding the submissions of the parties, the Prosecutor refers to her own submissions in response to the observations of victims as an example: “Prosecution’s Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)”, 14 July 2015, [ICC-01/13-29-Red](#), para. 3, quoting: “The issue is whether the gravity of this situation makes the Court the proper forum”.

³⁹ [Notice of Appeal](#), paras 11-12, referring to *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, [ICC-01/04-169](#) (OA) (hereinafter: “*DRC Arrest Warrant Judgment*”), para. 18. See also [Prosecutor’s Further Submissions](#), paras 10-11.

⁴⁰ [Notice of Appeal](#), para. 13, referring to *Situation in the Republic of Kenya*, “Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence””, 10 August 2011, [ICC-](#)

general right of appeal of decisions under article 53(3)(a), but only that such decisions are not excluded from the scope of article 82(1)(a) where they are made with respect to jurisdiction or admissibility”.⁴¹

18. In the Prosecutor’s Further Submissions, the Prosecutor argues that “[a] decision is appealable under article 82(1)(a) if it is based on a ruling of jurisdiction or admissibility”⁴² and that “[t]he law and practice of this Court establish that this should be determined on the basis of the substance of the decision itself”.⁴³ She submits that “[p]rovided that this requirement is satisfied, the procedural context of the decision is immaterial”.⁴⁴ She submits that her appeal is admissible as the Impugned Decision “meets the necessary criteria”.⁴⁵ She submits that “[i]t 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”.⁴⁶ In the Prosecutor’s submission, the *Kenya* Appeal Decision should not be understood as requiring that a decision with respect to admissibility make “express reference to admissibility in its disposition” in order to be appealable, or as establishing that only rulings under articles 18 and 19 of the Statute may be appealable under article 82 (1) (a) of the Statute.⁴⁷ She argues that this would “contradict the Appeals Chamber’s approach in the *DRC* [Arrest Warrant Judgment], which agreed that a decision is appealable under article 82(1)(a) if it purports to rule on admissibility, irrespective of the statutory basis

[01/09-78](#) (OA) (hereinafter: “*Kenya* Appeal Decision”), paras 15, 18-20; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the ‘Appeal Against Decision on Application Under Rule 103’ of Ms Mishana Hosseinioun of 7 February 2012”, registered on 9 March 2012, [ICC-01/11-01/11-74](#) (OA) (hereinafter: “*Mishana Hosseinioun* Appeal Decision”), para.11; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on ‘Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” of 10 April 2012”, 25 April 2012, [ICC-01/11-01/11-126](#) (OA 2) (hereinafter: “*Libya* Appeal Decision”), paras 14-15; and *The Prosecutor v. Germain Katanga*, “Decision on the admissibility of the appeal against the ‘Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350’”, 20 January 2014, [ICC-01/04-01/07-3424](#) (OA 14) (hereinafter: “*Detained Witnesses* Appeal Decision”), paras 9, 32, 34.

⁴¹ [Notice of Appeal](#), para. 14.

⁴² [Prosecutor’s Further Submissions](#), para. 4. *See also* para. 7, referring to [DRC Arrest Warrant Judgment](#), para. 18; [Kenya Appeal Decision](#), para. 15; [Mishana Hosseinioun Appeal Decision](#), para. 10; [Libya Appeal Decision](#), paras 13-14; and [Detained Witnesses Appeal Decision](#), para. 33.

⁴³ [Prosecutor’s Further Submissions](#), para. 4. *See also* [Prosecutor’s Further Submissions](#), paras 7-11.

⁴⁴ [Prosecutor’s Further Submissions](#), para. 4.

⁴⁵ [Prosecutor’s Further Submissions](#), para. 5.

⁴⁶ [Prosecutor’s Further Submissions](#), para. 5.

⁴⁷ [Prosecutor’s Further Submissions](#), paras 9-10.

on which it does so”.⁴⁸ The Prosecutor submits that the drafters of the Statute and Rules of Procedure and Evidence also “declined to provide the Court with additional guidance for the interpretation of article 82(1)(a), neither expressly limiting its scope to decisions under articles 18 and 19 nor expressly listing other provisions which may fall within it”.⁴⁹ She submits that, during the negotiations of the Rules of Procedure and Evidence, although there was debate about whether to include a rule providing for admissibility rulings under article 53 (3) (a) to be appealable, it was ultimately decided not to do so.⁵⁰ She submits that “[t]here was no consensus, however, that such rulings would necessarily *not* be appealable”, rather the issue was left for the Court to decide on the facts.⁵¹

19. The Prosecutor also argues that “[a] decision appealed under article 82(1)(a) need not be ‘final’ or ‘conclusive’, provided it is based on a ruling on admissibility”.⁵² The Prosecutor submits that: (i) a requirement that the ruling be final would be “inconsistent with the ambulatory nature of admissibility decisions”;⁵³ (ii) a ruling “is no more than ‘[a]n authoritative decision or pronouncement, [especially] one made by a judge’”,⁵⁴ and the requirement for a ruling “is not a requirement of finality but of the authority or significance of the determination, emanating from its nature, content and relevance”;⁵⁵ and (iii) “any requirement of ‘finality’ under article 82(1)(a) would be misconceived because it overlooks the nature of appeals under article 82”, as there is no requirement that decisions appealable under article 82 must be such that they

⁴⁸ [Prosecutor’s Further Submissions](#), para. 10. *See also* para. 11, referring to [DRC Arrest Warrant Judgment](#), paras 18, 40-41.

⁴⁹ [Prosecutor’s Further Submissions](#), para. 12.

⁵⁰ [Prosecutor’s Further Submissions](#), para. 12, referring to H. Friman, “Investigation and Prosecution”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) (hereinafter: “Friman”), pp. 534-535; and H. Brady, “Appeal and Revision”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) (hereinafter: “Brady”), pp. 578-579.

⁵¹ [Prosecutor’s Further Submissions](#), para. 12.

⁵² [Prosecutor’s Further Submissions](#), p. 8 and paras 13-23.

⁵³ [Prosecutor’s Further Submissions](#), paras 16-17.

⁵⁴ [Prosecutor’s Further Submissions](#), para. 18, referring to *OED Online*, Oxford University Press, June 2015, available at <http://www.oed.com> (accessed 10 August 2015), “ruling, n.”, 2.

⁵⁵ [Prosecutor’s Further Submissions](#), para. 18 and referring in paras 19-22 to her interpretation being “consistent with the legal framework of the Statute, and the practice of this Court”, which, she argues, allow appeals against decisions on admissibility that are neither final nor conclusive, such as those under articles 15, 18 and 58 of the Statute.

would cause “an irreversible situation or irreparable prejudice (thus warranting suspensive effect)” if left uncorrected.⁵⁶

20. Finally, the Prosecutor emphasises that “[t]he [Impugned] Decision is a ‘decision with respect to [...] admissibility’”.⁵⁷ She argues that “the [Impugned] 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)”, which was “the sole basis for the Prosecutor’s original determination”.⁵⁸ She submits that “the [Impugned] 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 [...] with respect to each of the five factors which it considered to be relevant”⁵⁹ and which it considered to “materially affect[...] the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation [...] would not be of sufficient gravity to justify further action by the Court”.⁶⁰ She submits that the Impugned Decision’s “statements, and the ultimate conclusion, plainly constituted a ‘ruling’ on admissibility”.⁶¹ She contends that the “language and tone” of statements in the Impugned Decision “makes clear that they are more than judicial ‘assist[ance]’ or guidance, but purport to be a declaration of the ‘correct’ approach”.⁶²

2. *The Union of the Comoros’ Submissions*

21. The Union of the Comoros requests that the Notice of Appeal should “be dismissed *in limine* on the grounds that the Prosecution has no basis at all under the plain terms of the Statute and the Rules, and given the explicit case law on point, to seek to appeal the impugned decision under [a]rticle 82(1)(a), as of right directly to

⁵⁶ [Prosecutor’s Further Submissions](#), para. 23, referring to *The 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), para. 11; and [Decision on Suspensive Effect](#), paras 7-8.

⁵⁷ [Prosecutor’s Further Submissions](#), p. 13 and paras 24-29.

⁵⁸ [Prosecutor’s Further Submissions](#), para. 25.

⁵⁹ [Prosecutor’s Further Submissions](#), para. 26, referring to [Impugned Decision](#), paras 24, 26, 30, 31, 36, 45, 47-48.

⁶⁰ [Prosecutor’s Further Submissions](#), para. 25, referring to [Impugned Decision](#), para. 49.

⁶¹ [Prosecutor’s Further Submissions](#), para. 27.

⁶² [Prosecutor’s Further Submissions](#), para. 28, referring to [Application to Dismiss by the Union of the Comoros](#), para. 18.

the Appeals Chamber, as the decision is *not* a decision ‘with respect to... admissibility’.”⁶³

22. The Union of the Comoros states that the “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)”, and that the effect or impact of a decision on the question of admissibility is not sufficient to bring it under article 82 (1) (a) of the Statute “without it being itself a conclusive decision made on the admissibility of the case” (footnotes omitted).⁶⁴

23. The Union of the Comoros argues that “[a]t no point in the impugned decision did the Pre-Trial Chamber make any determination on whether potential cases were admissible or inadmissible”,⁶⁵ but rather, it simply requested the Prosecutor to reconsider her decision not to investigate.⁶⁶ It argues that the *DRC Arrest Warrant Judgment*, referenced by the Prosecutor, is “clearly distinguishable from the present case” because the decision impugned in that appeal *was* based on a ruling on the admissibility of the case against Bosco Ntaganda.⁶⁷

24. The Union of the Comoros suggests that “[t]he errors identified by the Pre-Trial Chamber [...] in reaching its decision to request reconsideration, both individually and cumulatively, do not in any way amount to a final decision on whether potential cases are admissible or inadmissible”.⁶⁸ It argues that “[t]hey all concern the reasons for the Prosecutor’s decision and lead to the conclusion that the Prosecutor should be requested to reconsider her decision [...]”.⁶⁹ It submits that they go “no further than potentially ‘impacting’ or ‘affecting’ a possible admissibility decision in the future, if

⁶³ [Application to Dismiss by the Union of the Comoros](#), para. 1, referring to article 82 (1) (a) of the Statute (emphasis in original).

⁶⁴ [Application to Dismiss by the Union of the Comoros](#), paras 11-12, referring, *inter alia*, to the [Kenya Appeal Decision](#), paras 15, 17; [Libya Appeal Decision](#), para. 15; and [Mishana Hosseinioun Appeal Decision](#), para. 11. *See also* [Application to Dismiss by the Union of the Comoros](#), para. 20.

⁶⁵ [Application to Dismiss by the Union of the Comoros](#), para. 13.

⁶⁶ [Application to Dismiss by the Union of the Comoros](#), paras 13, 15, referring to [Impugned Decision](#), paras 8-9.

⁶⁷ [Application to Dismiss by the Union of the Comoros](#), para. 14, quoting [DRC Arrest Warrant Judgment](#), paras 8, 18. *See also* [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 14, referring to [DRC Arrest Warrant Judgment](#), paras 9, 18.

⁶⁸ [Application to Dismiss by the Union of the Comoros](#), para. 16.

⁶⁹ [Application to Dismiss by the Union of the Comoros](#), para. 16, referring to [Impugned Decision](#), paras 30, 34, 38. *See also* [Application to Dismiss by the Union of the Comoros](#), paras 17-18.

that ever arose”, and, as per Appeals Chamber jurisprudence, “do not qualify to be appealed as of right under [a]rticle 82(1)(a)”.⁷⁰ It states that, although the Pre-Trial Chamber “stated that the errors found ‘materially affect the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation referred to her by the Comoros would not be of sufficient gravity to justify further action by the Court,’ this is clearly not a decision about whether the case is admissible”.⁷¹ It argues that “[r]ather, the Chamber has asked the Prosecutor to reconsider the evidence and ‘her decision not to initiate an investigation’ which includes assessing whether the case is admissible”.⁷² It submits that “[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 itself if the issue was brought before it”.⁷³

25. The Union of the Comoros submits that the Appeals Chamber has found that a decision with respect to admissibility in terms of article 82 (1) (a) “should be based on a specific decision under [a]rticles 18 or 19”.⁷⁴

26. The Union of the Comoros submits that the “Pre-Trial Chamber cannot make any ruling on the admissibility of the case in the review proceedings under [a]rticle 53”.⁷⁵ It argues that: (i) “[t]he essence of [a]rticle 53(3)(a) is that Pre-Trial Chamber [*sic*] cannot overrule the Prosecutor and make any binding ruling on whether an investigation must be opened”; and (ii) “[i]ts powers are expressly restricted to requesting the Prosecution only to *reconsider* its decision” (footnote omitted).⁷⁶ In response to the Prosecutor, the Union of the Comoros submits that it “has not argued that only final decisions for all time” fall within article 82 (1) (a), but rather that “only decisions on whether the case is admissible or not at the time that such decisions are made in the proceedings, may be appealed [...]”⁷⁷; therefore, “[e]ven if the issue of

⁷⁰ [Application to Dismiss by the Union of the Comoros](#), para. 17, referring to [Kenya Appeal Decision](#), para. 17.

⁷¹ [Application to Dismiss by the Union of the Comoros](#), para. 19, referring to [Impugned Decision](#), para. 49.

⁷² [Application to Dismiss by the Union of the Comoros](#), para. 19, referring to [Impugned Decision](#), para. 50.

⁷³ [Application to Dismiss by the Union of the Comoros](#), para. 19.

⁷⁴ [Application to Dismiss by the Union of the Comoros](#), para. 20, referring to [Kenya Appeal Decision](#), para. 18.

⁷⁵ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 6.

⁷⁶ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 7.

⁷⁷ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 8, referring to [Prosecutor’s Further Submissions](#), para. 23.

admissibility is ‘central’ to the decision”, it does not suffice to allow for an appeal under article 82 (1) (a).⁷⁸ The Union of the Comoros submits that the Prosecutor “seeks to leave open the possibility that a ‘ruling’ on admissibility need not decide whether a case is admissible or not”, arguing that this would be contrary to the Appeals Chamber’s jurisprudence and would rather constitute a decision that impacts a future decision on admissibility but is not appealable.⁷⁹

27. The Union of the Comoros argues that the Prosecutor has “selectively drawn from the [*Kenya Appeal Decision*] to attempt to show that [the Impugned Decision] has somehow met the Court’s criteria in the present case”,⁸⁰ although it has not.⁸¹ It argues that “[n]o matter how central the question of admissibility is to a decision, and therefore, how much the decision ‘affects’ or ‘impacts’ an ultimate decision on admissibility, this is not sufficient to permit an appeal under [a]rticle 82(1)(a)”.⁸²

3. *Victims’ Submissions*

(a) *First Group of Victims’ Observations on the Admissibility of the Appeal*

28. Relying on the express provisions of the Statute, the drafting history of the legal texts of the Court, and the jurisprudence of the Appeals Chamber, the first group of victims argue that “the relevant statutory provisions do not foresee a judicial ruling on admissibility or a right to directly appeal decisions under article 53 of the Statute” during the preliminary examination stage.⁸³ They submit that “[a]n appealable decision with respect to admissibility in the sense of article 82(1)(a) of the Statute can [...] only arise from proceedings at the investigation stage in accordance with article

⁷⁸ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 8.

⁷⁹ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 9, referring to [Prosecutor’s Further Submissions](#), para. 18; [Kenya Appeal Decision](#), paras 15, 17; [Libya Appeal Decision](#), para. 13; and [Mishana Hosseinioun Appeal Decision](#), para. 10; [Detained Witnesses Appeal Decision](#), para. 33; [DRC Arrest Warrant Judgment](#), para. 18.

⁸⁰ [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 11.

⁸¹ [Comoros’ Response to the Prosecutor’s Further Submissions](#), paras 10-16.

⁸² [Comoros’ Response to the Prosecutor’s Further Submissions](#), para. 16, referring to [Application to Dismiss by the Union of the Comoros](#), paras 12-13.

⁸³ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 9. See also paras 9-17, referring to J. Holmes, “Jurisdiction and Admissibility”, in R. S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), pp. 337-338; Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, 16-26 February 1999, [Discussion paper proposed by the coordinator: Part 5 of the Rome Statute: Investigation and Prosecution](#), 23 February 1999, PCNICC/1999/WGRPE/RT.2; Friman, pp. 534-535; and [DRC Arrest Warrant Judgment](#), para. 50.

18 of the Statute or later, pursuant to articles 17 and 19 of the Statute, when a concrete case has been identified by the Prosecutor”.⁸⁴ They further submit that a right to appeal has to be explicitly provided for in the legal texts, recalling articles 18 and 19.⁸⁵

29. The first group of victims submit that “the Impugned Decision is not a ‘decision with respect to admissibility’ that can be the subject of an appeal under article 82(1)(a) of the Statute”.⁸⁶ They argue that the Impugned Decision does not contain “any finding with respect to the admissibility or inadmissibility of the situation or potential case(s)” or “regarding the gravity of a specific case”, and that “the Prosecutor improperly represents the Pre-Trial Chamber’s findings” in this regard.⁸⁷ The first group of victims recognise that “the Pre-Trial Chamber may have to review the Prosecutor’s assessment as to whether a ‘*case is or would be admissible under article 17*’” in its review under article 53 (3) (a) of the Statute, but state that this “does not alter the nature of the review process”, which must be distinguished from that under articles 17, 18 and 19 of the Statute.⁸⁸ They argue that references in the Impugned Decision to gravity establish at best an “indirect or tangential link” between the decision and the question of admissibility, are not sufficient to qualify the decision as relating to admissibility,⁸⁹ and “constitute mere *obiter dicta*” (footnotes omitted).⁹⁰

30. The first group of victims assert that: (i) a decision under article 53 of the Statute cannot be appealed under article 82 (1) (a) as, “by nature, said decision does not constitute a final ruling and is not meant to reach definitive findings or conclusions”; and (ii) its “binding nature [...] is limited to the reconsideration as such and does not extend to the way in which the Prosecutor reconsiders her previous assessment of the crimes [...]”.⁹¹ They contend that the “final decision under article

⁸⁴ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 13.

⁸⁵ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 15.

⁸⁶ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 8, 17-32.

⁸⁷ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 19, referring to [Notice of Appeal](#), para. 8. *See also* [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 21-22, referring to [Kenya Appeal Decision](#), para. 15; and [DRC Arrest Warrant Judgment](#), para. 18.

⁸⁸ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 24.

⁸⁹ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 25, referring to [Kenya Appeal Decision](#), para. 15.

⁹⁰ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 25.

⁹¹ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 26-27.

53 of the Statute is [...] taken by the Prosecutor, on the basis of the directions provided by the Pre-Trial Chamber during the review process”.⁹² They submit that, “[i]n contrast, a ‘decision with respect to admissibility’ is a decision taken by the relevant Chamber [...] under articles 17, 18 and 19 of the Statute”, whose findings on “admissibility are ‘final’ in the sense that they cannot be reviewed or subjected to the Prosecutor’s further assessment as it is the case in article 53 proceedings”.⁹³

31. The first group of victims further argue that an appealable determination “must be conclusive and explicit in order to allow subsequent review on appeal” and that “[i]f the Pre-Trial Chamber does not address the question of admissibility or does not reach a definitive finding on admissibility, as is the case in the present proceedings, the Appeals Chamber would be considering the issue of admissibility for the first time” (footnote omitted), thereby defeating its corrective function and expanding the scope of its appellate review.⁹⁴

32. The first group of victims submit that, even assuming the Impugned Decision could be appealed under article 82 (1) (a) of the Statute, “the appeal would still be inadmissible because the issues identified by the Prosecutor are not linked to a

⁹² [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 28-29, referring to rule 108 of the Rules of Procedure and Evidence.

⁹³ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 29.

⁹⁴ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 31, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007”, 27 April 2007, [ICC-01/04-01/06-873](#) (OA 8), para. 6; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, 24 July 2014, [ICC-01/11-01/11-565](#) (OA 6), para. 57; *The Prosecutor v. Uhuru Muigai Kenyatta et al.*, “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’”, 28 July 2011, [ICC-01/09-02/11-202](#) (OA), para. 12; and *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014, ICC-01/11-01/11-547-Conf (OA 4); a public redacted version was filed on 21 May 2014 ([ICC-01/11-01/11-547-Red](#) (OA 4)), para. 43. See also [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 30-32, referring to *The Prosecutor v. Simone Gbagbo*, “Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’”, 27 May 2015, ICC-02/11-01/12-75-Conf (OA); a public redacted version was filed on 27 May 2015 ([ICC-02/11-01/12-75-Red](#) (OA)), para. 33; *The Prosecutor v. Uhuru Muigai Kenyatta et al.*, “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’”, 28 July 2011, [ICC-01/09-02/11-202](#) (OA), paras 10-11; and *The Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, [ICC-02/04-01/05-408](#) (OA 3), para. 8.

question of admissibility”.⁹⁵ They highlight the fact that the Prosecutor “does not seek to reverse or amend the Pre-Trial Chamber’s presumed findings with respect to admissibility but, rather, seeks to challenge the Chamber’s determination concerning the opening of an investigation”.⁹⁶ In their submission, this relief cannot be granted in an appeal under article 82 (1) (a) of the Statute, “which may only be invoked for the review of a decision concerning admissibility or jurisdiction”.⁹⁷ They submit that “[n]one of the three grounds identified by the Prosecutor as the subject-matter of the appeal directly relates to admissibility, nor does the Prosecutor challenge any specific finding on admissibility”.⁹⁸ They draw a distinction between the present appeal, the subject-matter of which they submit “is not even remotely linked to a question of admissibility”,⁹⁹ and the appeal in the *DRC Arrest Warrant Judgment*, where the impugned decision was a decision on admissibility and “the Prosecution advanced grounds of appeal specific and of direct relevance to the interpretation of article 17 of the Statute”.¹⁰⁰

33. Finally, the first group of victims indicate their “serious concerns and disbelief at the news that the Prosecutor had appealed the Impugned Decision”, which they perceive “as a sign of unwillingness by the Prosecutor to listen to their concerns and to understand what really happened on board of the vessels”.¹⁰¹

(b) Second Group of Victims’ Observations on the Admissibility of the Appeal

34. The second group of victims indicate that they “are most disappointed by the Prosecution’s decision to seek to appeal the Pre-Trial Chamber’s decision, instead of

⁹⁵ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 33.

⁹⁶ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 34, referring to [Notice of Appeal](#), para. 31.

⁹⁷ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 35. See also [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 36, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the ‘Registrar’s Submissions under Regulation 24bis of the Regulations of the Court In Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800’ of 5 October 2011”, 21 November 2011, [ICC-01/04-01/06-2823](#) (OA 20), para. 15; and [DRC Arrest Warrant Judgment](#), paras 90, 92.

⁹⁸ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 39, referring to [Notice of Appeal](#), para. 17. [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 40, referring to [Notice of Appeal](#), paras 20, 23. [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 41, referring to [Notice of Appeal](#), paras 24, 27.

⁹⁹ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 38,

¹⁰⁰ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 37, 42, referring to [DRC Arrest Warrant Judgment](#), paras 12, 18.

¹⁰¹ [First Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 45.

reconsidering without delay the decision not to open an investigation into the crimes committed against them”.¹⁰² They support the Union of the Comoros “in requesting the Appeals Chamber to find that the appeal is inadmissible based on the clear and express provisions of the Statute and the Appeals Chamber’s jurisprudence”.¹⁰³ They argue that “[t]here is no proper legal basis for the appeal” and that the Prosecutor should reconsider her decision as soon as possible.¹⁰⁴ In their view, “[i]t is only through this candid and impartial process of re-evaluation that the [v]ictims may obtain justice for the inexcusable and very serious crimes that have been perpetrated against them”.¹⁰⁵

35. They submit that “[i]t is disingenuous for the Prosecution to argue that the present decision of the Pre-Trial Chamber is in fact one in which the Pre-Trial Chamber has ordered that the potential cases *are* admissible”, when “[t]he Chamber is without question not authorised to make any such ruling under [a]rticle 53”.¹⁰⁶ They highlight the fact that the Prosecutor argued precisely the opposite before the Pre-Trial Chamber, “namely that the Pre-Trial Chamber cannot overrule the decision of the Prosecutor to close a preliminary examination merely because it takes a different view of the gravity of the case”.¹⁰⁷

36. The second group of victims submit that the Appeals Chamber’s jurisprudence “confirms that only decisions which determine whether the case is admissible or not at that stage in the proceedings when the decision is made, may be appealed under [a]rticle 82(1)(a)” and argue that the Prosecutor “has distorted and corrupted the ICC’s case law on point in attempting to carve out an exception to make its appeal admissible”.¹⁰⁸

¹⁰² [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 3. *See also* para. 13.

¹⁰³ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 4.

¹⁰⁴ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 5. *See also* para. 13.

¹⁰⁵ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 5.

¹⁰⁶ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 8, referring to [Prosecutor’s Further Submissions](#), paras 24-29 (emphasis in original).

¹⁰⁷ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), para. 9, referring to [Prosecutor’s Submissions of 30 March 2015](#), paras 13-16.

¹⁰⁸ [Second Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 10-11, referring to [Application to Dismiss by the Union of the Comoros](#), paras 10, 14; [DRC Arrest Warrant Judgment](#),

C. Determination of the Appeals Chamber

37. The Prosecutor brings this appeal pursuant to article 82 (1) (a) of the Statute, according to which “[a] decision with respect to jurisdiction or admissibility” is directly appealable. As the Appeals Chamber has decided to address the admissibility of the appeal before deciding on the merits, the sole question in this decision is whether this particular appeal is admissible, i.e. whether the Impugned Decision in this case is “[a] decision with respect to [...] admissibility”. The Appeals Chamber underlines that it has taken no view on the merits of the grounds of appeal raised by the Prosecutor for the purpose of determining this question.

38. The Impugned Decision was rendered pursuant to article 53 (3) (a) of the Statute. It requests the Prosecutor to reconsider her decision not to initiate an investigation into the situation referred to her by the Union of the Comoros. The Appeals Chamber notes that the Prosecutor’s Decision not to Initiate an Investigation was exclusively based on her conclusion that “the potential case(s) that would likely arise from an investigation [...] would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute”.¹⁰⁹ It is the Pre-Trial Chamber’s review decision under article 53 (3) (a) of the Statute that is impugned in the present proceedings.

39. Articles 53 and 82 of the Statute do not provide expressly for a right of appeal against decisions rendered pursuant to article 53 (3) (a). The question to be resolved in this decision is, therefore, whether the Impugned Decision is “[a] decision with respect to [...] admissibility” in the sense of article 82 (1) (a) of the Statute.

40. In determining this matter, the Appeals Chamber has taken into account: (i) the Appeals Chamber’s prior jurisprudence regarding the admissibility of appeals brought under article 82 (1) (a) of the Statute, referred to extensively in the submissions filed in relation to the admissibility of the appeal; (ii) the statutory scheme for review of prosecutorial decisions not to investigate; and (iii) relevant drafting history.

paras 8-9, 18; [Kenya Appeal Decision](#), paras 15-18; [Libya Appeal Decision](#), paras 13-16; [Mishana Hosseinioun Appeal Decision](#), paras 10-12; and [Detained Witnesses Appeal Decision](#).

¹⁰⁹ [Prosecutor’s Decision not to Initiate an Investigation](#), para. 150.

1. Prior Jurisprudence and the Impugned Decision

41. The Appeals Chamber has examined the admissibility of appeals brought under article 82 (1) (a) of the Statute on a number of previous occasions. In particular, the Appeals Chamber recalls the detailed analysis of the scope of article 82 (1) (a) of the Statute that was set out in the *Kenya Appeal Decision*. The Appeals Chamber held:

Article 82 (1) (a) of the Statute provides that either party may appeal “a decision with respect to jurisdiction or admissibility”. The Appeals Chamber understands from the phrase “decision with respect to” that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.¹¹⁰

42. Referring to its *DRC Arrest Warrant Judgment*, the Appeals Chamber proceeded to state:

As previously held by the Appeals Chamber, 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. The French version of article 82 (1) (a) of the Statute confirms this interpretation as it provides that a party may only appeal a “[d]écision sur la compétence ou la recevabilité”.¹¹¹

43. The Appeals Chamber continued:

The Appeals Chamber’s reading of the plain meaning of article 82 (1) (a) of the Statute is also confirmed by its relationship with other provisions of the Statute. Article 82 (1) (a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute. Article 18 (4) of the Statute provides that the State concerned or the Prosecutor may appeal to the Appeals Chamber against a preliminary ruling of the Pre-Trial Chamber regarding admissibility in accordance with article 82 of the Statute. Article 19 of the Statute provides that the Court may decide on the admissibility of a case either on its own motion, on request of the Prosecutor or in response to a challenge brought by certain specified persons or States. Article 19 (6) of the Statute provides that “[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82”. 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) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those

¹¹⁰ [Kenya Appeal Decision](#), para. 15.

¹¹¹ [Kenya Appeal Decision](#), para. 15, referring to [DRC Arrest Warrant Judgment](#), para. 18.

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.¹¹²

44. The Appeals Chamber proceeded to recall its previous findings in relation to appeals under article 82 (1) (b) of the Statute that the “effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision”, and held that “the same logic applies to appeals under article 82 (1) (a) of the Statute”.¹¹³ The Appeals Chamber stated:

It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a “decision with respect to [...] admissibility” under article 82 (1) (a).¹¹⁴

45. The Appeals Chamber notes that the relevant passages of the *Kenya* Appeal Decision that are set out above have, in whole or in part, been consistently endorsed and applied in decisions rejecting appeals brought under article 82 (1) (a) of the Statute against decisions that were found not to be decisions “with respect to jurisdiction or admissibility”.¹¹⁵ In the *Libya* Appeal Decision, the Appeals Chamber stated that its jurisprudence required “a finding on whether the case [...] was admissible [...] for a decision to be appealed under article 82 (1) (a) of the Statute”.¹¹⁶

46. The submissions on the admissibility of the present appeal also place considerable emphasis on the Appeals Chamber’s acceptance, in the *DRC* Arrest Warrant Judgment, of an appeal brought under article 82 (1) (a) of the Statute against a decision rejecting an application for a warrant of arrest. In that instance, the Appeals Chamber highlighted that, although the impugned decision was one concerning an application for warrants of arrest, the decision not to issue such a warrant for Mr Ntaganda “was based on a ruling of the admissibility of the case against him” and

¹¹² [Kenya Appeal Decision](#), para. 16.

¹¹³ [Kenya Appeal Decision](#), para. 17, referring to *Prosecutor v Thomas Lubanga Dyilo*, “Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la confirmation des charges’ of 29 January 2007”, 13 June 2007, [ICC-01/04-01/06-926](#) (OA 8), para. 15.

¹¹⁴ [Kenya Appeal Decision](#), para. 17.

¹¹⁵ [Mishana Hosseinioun Appeal Decision](#), para. 10; [Libya Appeal Decision](#), para. 13; [Detained Witnesses Appeal Decision](#), para. 33.

¹¹⁶ [Libya Appeal Decision](#), para. 15.

that, to that extent, it was a decision with respect to admissibility under article 82 (1) (a) of the Statute.¹¹⁷

47. In the impugned decision in that case, the Pre-Trial Chamber had rejected the application for a warrant of arrest against Bosco Ntaganda on the grounds that the case against him was inadmissible by virtue of article 17 (1) (d) of the Statute.¹¹⁸ The Pre-Trial Chamber expressly found that the case against Mr Ntaganda

does not meet the gravity threshold provided for in article 17 (1) (d) of the Statute. The Chamber therefore finds that the case against Mr Bosco Ntaganda is inadmissible. Accordingly, the Chamber does not consider it possible to issue a warrant of arrest for Mr Bosco Ntaganda, and for this reason no further question concerning the Prosecution's Application in relation to Mr Bosco Ntaganda need be analysed.¹¹⁹

48. The impugned decision in that case was therefore based on a specific ruling that the case against Mr Ntaganda was inadmissible – something which it also decided, *inter alia*, in its operative part.¹²⁰ In the ensuing appeal, the Appeals Chamber considered that the Pre-Trial Chamber had the discretion to determine admissibility in the circumstances of that case (where the Prosecutor was seeking an arrest warrant against Mr Ntaganda) on its own motion, pursuant to article 19 (1) of the Statute.¹²¹ Although the Appeals Chamber held, *inter alia*, that the Pre-Trial Chamber's exercise of its discretion was erroneous in the circumstances of that case, this does not alter the fact that the Pre-Trial Chamber had the power to determine admissibility in that context.¹²²

49. The Appeals Chamber notes the Prosecutor's argument that the Appeals Chamber's findings in the *Kenya* Appeal Decision support her submission that the

¹¹⁷ [DRC Arrest Warrant Judgment](#), para. 18.

¹¹⁸ "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 10 February 2006, ICC-01/04-118-Conf-Exp-Corr (hereinafter: "Arrest Warrant Decision"), paras 29-89. *See*, in particular, paras 77-89. The Appeals Chamber notes that, in this and in the next paragraph of the present decision, it is referring directly to a decision that remains confidential and *ex parte*. However, the parts referred to in this paragraph were already made public, in essence, in the *DRC Arrest Warrant Judgment* (see, *inter alia*, paras 8, 36 and 51 of that judgment). In addition, the Appeals Chamber does not regard the reference, in the next paragraph of this decision, to the ruling that the case was inadmissible being decided, *inter alia*, in the operative part of the Arrest Warrant Decision to contain information that needs to be kept confidential.

¹¹⁹ Arrest Warrant Decision, para. 89.

¹²⁰ Arrest Warrant Decision, p. 66.

¹²¹ [DRC Arrest Warrant Judgment](#), paras 2, 47-48.

¹²² [DRC Arrest Warrant Judgment](#), para. 48.

present appeal is admissible.¹²³ The Appeals Chamber considers that its prior findings in the *Kenya* Appeal Decision establish strict conditions for appeals of “decisions with respect to [...] admissibility” under article 82 (1) (a) of the Statute, requiring that such decisions consist of or are based on a ruling that a case is admissible or inadmissible and that the operative part of the decision must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case.

50. In the present case, and taking into account its previous jurisprudence which has been set out above, the Appeals Chamber observes that the Impugned Decision did not consist of, nor was it based upon, a ruling on admissibility which could be appealed under article 82 (1) (a). Although the Appeals Chamber has some sympathy with the Prosecutor’s submissions regarding “the language and tone” of the Impugned Decision,¹²⁴ it does not consider such factors to alter the nature of the proceedings. The Impugned Decision is a request to the Prosecutor to reconsider her decision not to initiate an investigation – and, as set out more fully below, the ultimate decision as to whether to do so is for her. While the Impugned Decision might conceivably have an effect on the admissibility of potential cases arising out of the situation, in that it could potentially lead to the Prosecutor coming to a different conclusion in relation to admissibility (pursuant to article 53 (1) (b)) at the time that she reconsiders her initial decision not to initiate an investigation, the Impugned Decision is not by its nature a decision determining admissibility.

51. The Appeals Chamber further observes that the operative part of the Impugned Decision did not pertain directly to a question of the admissibility of a case, but rather requested “the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros”,¹²⁵ based upon the Pre-Trial Chamber’s appreciation of the facts. The Impugned Decision provides the reasons for the Pre-Trial Chamber’s request to the Prosecutor to reconsider her decision – it does not determine admissibility.

52. The Appeals Chamber also notes that the summary of the Prosecutor’s intended grounds of appeal, set out in the Notice of Appeal, appears to indicate that the

¹²³ [Prosecutor’s Further Submissions](#), paras 8-10.

¹²⁴ [Prosecutor’s Further Submissions](#), para. 28.

¹²⁵ [Impugned Decision](#), p. 26.

Prosecutor's appeal primarily requires the Appeals Chamber to consider the scope of article 53 review proceedings as opposed to reviewing a pre-trial determination of admissibility. The first ground of appeal is that the Impugned Decision applied an incorrect standard of review;¹²⁶ the second ground is that the Impugned Decision misinterpreted the legal standard to be applied by the Prosecutor in the assessment of information for the purposes of her decision under article 53 of the Statute;¹²⁷ and the third ground is that the Impugned Decision was insufficiently reasoned.¹²⁸

2. *Statutory Scheme for Review of Prosecutorial Decisions not to Investigate*

53. The fact that the Impugned Decision did not contain any ruling on admissibility is consistent with its nature as a decision reviewing the Prosecutor's decision not to proceed with an investigation with a view to determining whether she should be requested to reconsider that decision pursuant to article 53 (3) (a) of the Statute. The statutory scheme is of significance in this context.

54. Under article 53 (1) of the Statute, the Prosecutor shall initiate an investigation unless she determines that there is no reasonable basis to proceed, having considered whether, *inter alia*, the case is or would be admissible under article 17.¹²⁹ Pursuant to article 53 (3) (a) of the Statute, the Pre-Trial Chamber may review such a decision of the Prosecutor at the request of the referring State or the Security Council and "*may request the Prosecutor to reconsider that decision*" (emphasis added).¹³⁰ In the event that the Pre-Trial Chamber so requests, pursuant to rules 108 (2) and (3) of the Rules of Procedure and Evidence,

¹²⁶ [Notice of Appeal](#), paras 17-19.

¹²⁷ [Notice of Appeal](#), paras 20-23.

¹²⁸ [Notice of Appeal](#), paras 24-27.

¹²⁹ Article 53 (1) of the Statute provides: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber".

¹³⁰ Article 53 (3) (a) of the Statute provides: "At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision".

2. [...] the Prosecutor shall reconsider that decision as soon as possible.
3. Once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. This notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion. It shall be communicated to all those who participated in the review.

55. The scheme outlined above shows that, under article 53 (1) (b) of the Statute, in the context of deciding whether there is a reasonable basis to initiate an investigation, the Prosecutor must determine whether cases that may arise from any investigation are or would be admissible. Article 53 of the Statute provides a distinct scheme for the judicial review by the Pre-Trial Chamber of negative admissibility determinations by the Prosecutor, i.e. where she finds that such cases are not or would not be admissible. Article 53 makes no express provision for an appeal of the decision of the Pre-Trial Chamber requesting the Prosecutor to reconsider her decision not to initiate an investigation, where such decision is based on the admissibility or the inadmissibility of the case, or indeed in any other circumstances.

56. The Appeals Chamber further notes that the Pre-Trial Chamber's review of the Prosecutor's decision must be triggered by a request for review from the referring State or the Security Council. In the absence of such a request, the Pre-Trial Chamber has no power to enter into a review of the Prosecutor's decision not to proceed with an investigation on its own motion, irrespective of how erroneous it may consider the Prosecutor's admissibility determination to be. In addition, in the event that, upon review, the Pre-Trial Chamber disagrees with the findings or conclusions of the Prosecutor, it may request reconsideration of that decision. Rule 108 (3) of the Rules of Procedure and Evidence then provides that the "final decision" is for the Prosecutor.¹³¹

57. This scheme for judicial review of the Prosecutor's decision based on article 53 (1) (b) of the Statute shows that admissibility in this context is to be treated differently from admissibility in the context of articles 18 and 19 of the Statute.

¹³¹ See generally, in this context, Brady, p. 579: "Under article 53, paragraph 3(a), if the Pre-Trial Chamber does not confirm the Prosecutor's decision not to proceed, it may ask the Prosecutor to reconsider that decision. This implies that if, after reconsidering the issue, the Prosecutor *still* decides not to investigate or prosecute, that is the end of the matter, regardless of whether that decision was based on jurisdictional or admissibility issues. Conversely, if the Pre-Trial Chamber confirms the Prosecutor's decision not to proceed, that would also seem to end the matter, once again regardless of whether that decision was based on jurisdictional or admissibility issues" (emphasis in original).

Article 18 (4) of the Statute provides that “[t]he State concerned or the Prosecutor may appeal to the Appeals Chamber against a [preliminary] ruling of the Pre-Trial Chamber [regarding admissibility], in accordance with article 82” of the Statute. Article 19 of the Statute provides that the Court may determine the admissibility of a case on its own motion, on request of the Prosecutor or in response to a challenge brought by certain specified persons or States.¹³² Article 19 (6) of the Statute provides that “[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82”. Accordingly, articles 18 and 19 of the Statute explicitly provide for a direct right of appeal for the parties against such determinations.

58. The Appeals Chamber observes that, had the drafters intended to institute equivalent layers of judicial review and control over decisions not to investigate taken by the Prosecutor (and indirectly over determinations of admissibility made in this context), the Pre-Trial Chamber would have been given the power, under article 53 (3) (a) of the Statute, to confirm or not to confirm the determination of the Prosecutor. However, such a power is absent from that article. Conversely, the Appeals Chamber notes that such power is reserved for the Pre-Trial Chamber under article 53 (3) (b) of the Statute in relation to decisions of the Prosecutor not to proceed with an investigation on the basis of “substantial reasons to believe that an investigation would not serve the interests of justice”. In this context, the Pre-Trial Chamber may review the Prosecutor’s decision on its own initiative and the decision “shall be effective only if confirmed by the Pre-Trial Chamber”.¹³³

¹³² See articles 19 (1), (2) and (3) of the Statute.

¹³³ Article 53 (3) (b) stipulates that: “In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on [article 53 (1) (c) or 53 (2) (c)]. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber”. In addition, rule 110 (2) of the Rules provides: “When the Pre-Trial Chamber does not confirm the decision by the Prosecutor [under article 53 (1) (c) or 53 (2) (c)], he or she shall proceed with the investigation or prosecution”. Article 53 (1) (c) provides that, in deciding whether to initiate an investigation, the Prosecutor shall consider whether: “Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”. Article 53 (2) provides in relevant part: “If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: [...] (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion”.

59. In the Appeals Chamber's assessment, the distinction between the powers of the Pre-Trial Chamber under article 53 (3) (a) and (b) reflects a conscious decision on the part of the drafters to preserve a higher degree of prosecutorial discretion regarding decisions not to investigate based on the considerations set out in article 53 (1) (a) and (b) of the Statute. Indeed, under article 53 (3) (a) of the Statute, the Prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed.¹³⁴

60. The Appeals Chamber therefore considers that to allow the present appeal to be heard on the grounds that the Impugned Decision is a decision with respect to admissibility would rupture the scheme for judicial review of decisions of the Prosecutor as explicitly set out in article 53, introducing an additional layer of review by the Appeals Chamber that lacks any statutory basis. To find that the Impugned Decision was a decision with respect to admissibility would also fail to respect the discretion that has been granted to the Prosecutor in the context of article 53.

3. *Relevant Drafting History*

61. The Appeals Chamber considers that the above understanding of article 53 (3) (a) of the Statute is also confirmed by its drafting history.¹³⁵ It is instructive to note the first draft of what was later to become article 53 of the Statute in the 1993 draft statute for an international criminal court prepared by the Working Group of the International Law Commission. This provision empowered the Bureau of the Court, "acting as a Review Chamber, and at the request of the complainant State or the Security Council", to review a decision of the Prosecutor not to proceed with an investigation on the ground that no possible basis existed for action by the Court, and

¹³⁴ See, in this context, the opinion of M. Bergsmo and P. Kruger, "Article 53: Initiation of an investigation", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1065, at p. 1075: "[Article 53 (3) (a) of the Statute] is silent on whether the Prosecutor is bound by a request of the Pre-Trial Chamber. The intention of the provision, however, is not to infringe on the independence of the Prosecutor. Whilst the Prosecutor will indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not strictly speaking be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided the Prosecutor had properly applied his or her mind in coming to the conclusion".

¹³⁵ See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations Treaty Series 18232, article 32.

to “*direct the Prosecutor to commence a prosecution*” where it found that there was a sufficient basis to proceed (emphasis added).¹³⁶

62. The corresponding provision in the 1994 draft statute for an international criminal court prepared by the Working Group of the International Law Commission contained a key difference. Instead of the Bureau of the Court having the power to *direct* the Prosecutor to commence a prosecution, draft article 26 (5) provided that the Presidency, at the request of a complainant State or the Security Council, shall, *inter alia*, review a decision of the Prosecutor not to initiate an investigation, “and may request the Prosecutor to reconsider the decision” (emphasis added).¹³⁷ The commentary to this provision stated, *inter alia*, as follows:

This reflects the view that there should be some possibility of judicial review of the Prosecutor’s decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor.¹³⁸

63. Whereas the body responsible for the review under article 53 (3) (a) of the Statute was subsequently changed from the Presidency to the Pre-Trial Chamber, the review itself remained one to be carried out with a view to determining whether to request the Prosecutor to reconsider his or her decision not to initiate an investigation.

¹³⁶ [Report of the Working Group on a draft statute for an international criminal court](#), Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993), Document A/48/10, Article 30 (1), p. 112.

¹³⁷ [Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994](#), General Assembly Official Records, Forty-ninth Session Supplement No. 10 (A/49/10), pp. 90-91. Draft article 26 provided, in relevant part: “1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency. [...] 4. If, upon investigation and having regard, *inter alia*, to the matters referred to in article 35 [“Issues of admissibility”], the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment. 5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.”

¹³⁸ [Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994](#), General Assembly Official Records, Forty-ninth Session Supplement No. 10 (A/49/10), p. 93, para. 7.

64. What is clear from the above statutory scheme, as well as the drafting history of article 53 (3) (a) of the Statute, is that the Pre-Trial Chamber's review under this provision cannot lead to a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation, the final decision in this regard being reserved for the Prosecutor. Contrary to the arguments of the Prosecutor, reviews and requests by the Pre-Trial Chamber under article 53 (3) (a) of the Statute are not, by their nature, either final decisions on, or determinations of, admissibility – in the sense of being freestanding decisions on admissibility – at the time that they are issued. The Impugned Decision in the present case is a request to the Prosecutor to reconsider her decision not to initiate an investigation. That request remains to be acted upon by the Prosecutor in the present case.

65. The Appeals Chamber further notes that, during the course of the negotiations of the Rules of Procedure and Evidence in respect of article 53,¹³⁹ a proposal by France to include an express provision to clarify that article 82 (1) (a) would apply to review decisions under article 53 (3) (a)¹⁴⁰ was not adopted.¹⁴¹ While it appears from academic commentary on the French proposal that views were divided in relation to this issue,¹⁴² it is at least clear that there was no agreement to adopt the proposal and that it forms no part of the Court's legal texts.

¹³⁹ Rules 104-110 of the Rules of Procedure and Evidence.

¹⁴⁰ See Preparatory Commission for the International Criminal Court, 16-26 February 1999, [Proposal by France on Rules of Procedure and Evidence: Part 3, Trial proceedings; Section 3, Pre-trial phase; Subsection 1, Commencement of investigation and proceedings](#), 12 February 1999, PCNICC/1999/DP.6, pp. 3-4: Proposed rule 55.2 (c), which provided that: "If the ruling of the Pre-Trial Chamber [under article 53 (3) (a) of the Statute] concerns the jurisdiction of the Court or the admissibility of the case, the parties to the proceedings before the Pre-Trial Chamber may appeal this ruling in accordance with article 82, paragraph 1 (a)".

¹⁴¹ During the same session of the Preparatory Commission at which France had presented its proposal, a "Discussion paper proposed by the coordinator" was circulated which contained a proposed rule 5.6 dealing with decisions of the Pre-Trial Chamber under article 53 (3). The French proposal was not included in the proposed rule. However, a footnote to the rule stated that: "While undertaking a review under article 53, the Pre-Trial Chamber may have to address issues relating to article 19. In turn, this may raise issues about the right to appeal a decision under article 19". See, Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, 16-26 February 1999, [Discussion paper proposed by the coordinator: Part 5 of the Rome Statute; Investigation and Prosecution](#), 23 February 1999, PCNICC/1999/WGRPE/RT.2, p. 2. This footnote was apparently "maintained in the text until the fifth session [of the Preparatory Commission] when, in an effort to consolidate all appeal issues in Chapter 8, it was deleted". See Brady, p. 578, fn. 19.

¹⁴² See Friman, pp. 534-535. See also Brady, pp. 578-579.

4. Conclusion

66. For all of the above reasons, the Appeals Chamber finds that the Impugned Decision was not one “with respect to [...] admissibility” within the meaning of article 82 (1) (a) of the Statute. The Prosecutor’s purported appeal is therefore inadmissible. As such, it is dismissed *in limine*.

67. Having determined that the Prosecutor’s appeal is inadmissible, the Appeals Chamber considers that the Prosecutor’s Request for Extension of Pages and the Request to submit *Amicus Curiae* Observations are both moot, noting that the merits of the appeal will not be adjudicated upon. Both requests are accordingly dismissed.

Judge Silvia Fernández de Gurmendi and **Judge Christine Van den Wyngaert** append a joint dissenting opinion to this judgment.

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



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 6th day of November 2015

At The Hague, The Netherlands