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THE APPEALS CHAMBER

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

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

Public Document

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)"

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 16 July 2015, Pre-Trial Chamber I, by Majority, requested the Prosecutor to reconsider her decision not to initiate an investigation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip (the “Impugned Decision”).¹
2. On 27 July 2015, the Prosecutor filed before the Appeals Chamber a Notice of Appeal against the Decision under article 82(1)(a) of the Statute (the “Notice of Appeal”).²
3. On 3 August 2015, the Union of the Comoros filed an application requesting the Appeals Chamber to dismiss *in limine* the Notice of Appeal (the “Dismissal Request”).³
4. On 4 August 2015, the Prosecutor filed a response to the Dismissal Request, asking, *inter alia*, the Appeals Chamber to rule on it as matter of urgency.⁴
5. On 5 August 2015, the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV”), acting as legal representative of unrepresented victims who have communicated with the Court in relation to article 53 proceedings (the “Legal Representative”),⁵ filed the “Victims’ request for directions on the conduct of the

¹ See “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, 16 July 2015 (the “Impugned Decision”).

² See “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)”, ICC-01/13-35 OA, 27 July 2015 (the “Notice of Appeal”).

³ See “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)’”, ICC-01/13-39 OA, 3 August 2015 (the “Dismissal Request”).

⁴ See “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”, ICC-01/13-40 OA, 4 August 2015.

⁵ See “Decision on Victims’ Participation”, ICC-01/13-18, 24 April 2015, p. 10.

proceedings following the "Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecution [Decision] not to initiate an investigation'"".⁶

6. On 6 August 2015, the Appeals Chamber issued the "Directions on the conduct of proceedings", instructing the Prosecutor to make further submissions on the admissibility of the appeal, if deemed necessary, by 14 August 2015; the Union of the Comoros to respond by 19 of August 2015 and the victims who have communicated with the Court to file their observations by the same date.⁷

7. On 14 August 2015, the Prosecutor filed its Further Submissions concerning Admissibility (the "Prosecutor's Further Submissions").⁸

II. VICTIMS' OBSERVATIONS ON THE ADMISSIBILITY OF THE APPEAL

8. The Legal Representative submits that the appeal is inadmissible and must be dismissed *in limine*. Indeed, there is no legal basis under the legal framework of the Court for the filing of such an appeal at the preliminary examination stage. Moreover, 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. Assuming *arguendo* that the Impugned Decision is a "decision with respect to admissibility", the appeal would still be inadmissible because the grounds of appeal identified by the Prosecutor do not relate to an admissibility issue.

⁶ See "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 [Decision] not to initiate an investigation'", ICC-01/13-41 OA, 5 August 2015.

⁷ See "Directions on the conduct of proceedings", ICC-01/13-42 OA, 6 August 2015, paras. 2, 3 and 4.

⁸ See "Prosecution's Further Submissions concerning Admissibility", No ICC-01/13-47 OA, 14 August 2015 (the "Prosecutor's Further Submissions").

A. The applicable legal framework does not provide for a judicial ruling on admissibility at the preliminary examination stage or a right to appeal decisions under article 53 of the Statute

9. The Legal Representative contends that during the preliminary examination stage, 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.

10. The Prosecutor seeks to characterise the Impugned Decision as an implicit “decision with respect to admissibility” on the basis that admissibility rulings are “*not limited, formalistically, to decisions taken solely under articles 18 or 19*”.⁹ The Legal Representative submits that there can be no such an implied decision at the preliminary examination stage. For the same reason, the Legal Representative submits that the Prosecutor cannot file an appeal under article 82(1)(a) of the Statute to request the review of an article 53 decision. In support of this proposition, the Legal Representative relies not only on the express provisions of the Statute, but also on the drafting history of the legal texts of the Court, as well as on the jurisprudence of the Appeals Chamber. When read together, this material can only lead to the conclusion that the Prosecutor has no right to appeal a decision pursuant to article 53 of the Statute on the basis that it is a decision with respect to admissibility under article 82(1)(a).

11. The Legal Representative notes that the issue of admissibility is regulated under different provisions of the Statute. However, the earliest stage at which the Statute provides for a possibility for the relevant Chamber to rule on admissibility is contained in article 18 which regulates “Preliminary rulings regarding admissibility” and covers the scenario where a concrete case has not yet been identified by the Prosecution. Sub-provision 1, in rather unambiguous terms, states that a preliminary ruling on admissibility may only be issued by the Chamber after “*a situation has been*

⁹*Idem.*, para. 10.

referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15". A preliminary ruling on admissibility, under article 18 of the Statute, may therefore only be issued once the Prosecutor "commences" or "initiates" an investigation. Such a preliminary ruling on admissibility would be appealable by the State concerned or the Prosecutor in accordance with articles 18(4) and 82(1)(a) of the Statute.

12. The negotiating history of article 18 of the Statute reveals the existence of intense debates regarding the possibility to initiate admissibility proceedings at the investigation stage. As the coordinator for the complementarity regime reported:

"[a]rticle 18 [...] was one of the most controversial provisions included in the Rome Statute [...] The principal concern of many delegations was how the requirement for preliminary rulings fit within the scheme being developed for complementarity. Articles 17 and 19 established a mechanism for States or an accused or suspect to challenge the admissibility of a case. However, this mechanism presupposed that a case existed, whereas the article 18 proposal allowed a form of challenge at an earlier stage, that is, when the Prosecutor was commencing an investigation into a situation and therefore before a case existed. If the States were allowed to challenge at this early stage, it could frustrate the ability of the Prosecutor to initiate an investigation through delay and multiple challenge".¹⁰

13. Both the express terms and the drafting history of article 18 of the Statute demonstrate that a decision on admissibility at the preliminary examination stage was not contemplated by the drafters. Any such ruling would be premature by nature since the legal parameters for the assessment of admissibility are yet to be defined. An appealable decision with respect to admissibility in the sense of article 82(1)(a) of the Statute can therefore only arise from proceedings at the investigation

¹⁰ See HOLMES (J.), "Jurisdiction and Admissibility", in *The International Criminal Court: the Elements of Crimes and Rules of Procedure and Evidence*, Ed. R. Lee (2001), Ardsley, Transnational, pp. 337-338.

stage in accordance with article 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.

14. Moreover, the negotiating history of the Rules of Procedure and Evidence provides a further confirmation that the Impugned Decision cannot be appealed under article 82(1)(a) of the Statute. This very possibility was, indeed, discussed and dismissed by the States parties to the negotiations. A French proposal – subsequently rejected – suggested the inclusion in the rules of a provision relating to article 53 of the Statute to clarify that article 82(1)(a) would also apply to rulings requesting the Prosecutor to reconsider his or her decision not to investigate into a specific situation.¹¹ This view was, however, rejected by several delegations which considered that a challenge regarding jurisdiction or admissibility under article 19 of the Statute was something different from a request for review under article 53.¹²

15. Although the Prosecution refers to these negotiations, it contends that “[t]here was no consensus, however, that such rulings would necessarily not be appealable”.¹³ This contention is misleading in at least two respects: first, the right to appeal a decision cannot be implicit, but must be explicitly provided for in the legal texts of the Court. This is precisely the case for appeals against rulings on admissibility and jurisdiction under articles 18 and 19 of the Statute. Allowing parties and participants to circumvent these requirements based on an asserted implicit right of appeal would lead to procedural uncertainties and may affect the fairness and expeditiousness of the proceedings. Second, the French proposal was clearly rejected in the course of the negotiations.

¹¹ See “Discussion paper proposed by the coordinator: Part 5 of the Rome Statute”, Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, PCNICC/1999/WGRPE/RT.2, 23 February 1999, available at: http://www.legal-tools.org/uploads/tx_ltpdb/doc39393.pdf.

¹² See FRIMAN (H.), ‘Investigation and Prosecution’, in *The International Criminal Court: the Elements of Crimes and Rules of Procedure and Evidence*, Ed. R. Lee (2001), Ardsley, Transnational, pp. 534-535.

¹³ See Prosecution’s Further Submissions, *supra* note 8, para. 12.

16. This reading of the relevant legal texts is also supported by the cautious approach taken by the Appeals Chamber in previous decisions. For instance, in the “Judgement 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’” (the “DRC Judgement”), the Appeals Chamber cautioned against premature rulings on admissibility even at the investigation stage, stating :

“[I]f the Pre-Trial Chamber makes a determination that the case against a suspect is admissible without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of a case pursuant to article 19 (2) (a) of the Statute, he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment. A degree of predetermination is inevitable. If, on the other hand, the Pre-Trial Chamber decides that the case against the suspect is inadmissible, the situation for the suspect could be even worse: pursuant to article 82 (1) (a) of the Statute, decisions with respect to admissibility can be appealed by the Prosecutor as a matter of right; the present appeal is an appeal of this kind. If the Appeals Chamber overturns the Pre-Trial Chamber’s decision and determines that the case is admissible, the suspect would be faced with a decision by the Appeals Chamber that the case is admissible. The right of the suspect to challenge the admissibility of the case before the Pre-Trial and - potentially - the Appeals Chamber thus would be seriously impaired”.¹⁴

17. Therefore, the Legal Representative contends that the legal texts of the Court do not provide for the possibility to appeal a decision under article 53 of the Statute. In any case, the Legal Representative further submits that the Impugned Decision cannot be qualified as a “decision with respect to admissibility” in the sense of article 82(1)(a) of the Statute.

¹⁴ See “Judgement 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’”, ICC-01/04-169-US-Exp OA, 13 July 2006, para. 50; reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp on 23 September 2008 (the “DRC Judgement”).

B. The Impugned Decision is not a “*decision with respect to admissibility*”

18. The Prosecutor concedes that she does not have “*a general right of appeal of decisions under article 53(3)(a)*”, but nevertheless argues that “*such decisions are not excluded from the scope of article 82(1)(a) where they are made with respect to jurisdiction or admissibility*”.

i. *The operative part of the Impugned Decision is not related to admissibility*

19. At the outset, the Legal Representative contends that the Prosecutor improperly represents the Pre-Trial Chamber’s findings by drawing inferences which do necessarily flow from the Impugned Decision. For instance, the Prosecutor submits that the appeal is admissible because the Impugned Decision is based on “*the Pre-Trial Chamber’s view, by majority, 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*”.¹⁵ Nowhere in the Impugned Decision is there any finding with respect to the admissibility or inadmissibility of the situation or potential case(s). In fact, the Impugned Decision does not contain the word “admissibility” at all, while the word “admissible” is mentioned once¹⁶ and the term “inadmissible” is only mentioned in the procedural background.¹⁷ Nor is there any positive finding by the Pre-Trial Chamber regarding the gravity of a specific case, contrary to the Prosecution’s assertion.¹⁸

20. In alleging that the Pre-Trial Chamber was “*unequivocal about [admissibility]*” and that it found “*any potential case or cases arising from this situation [to be] admissible*”,¹⁹ the Prosecutor seems to suggest in the Notice of Appeal that the Pre-

¹⁵ See Notice of Appeal, *supra* note 2, para. 8.

¹⁶ See Impugned Decision, *supra* note 1, para. 13.

¹⁷ *Idem.*, para. 2.

¹⁸ See Notice of Appeal, *supra* note 2, para. 8.

¹⁹ *Idem.*

Trial Chamber had reached “conclusive” and “final” findings regarding admissibility. Nevertheless, in her Further Submissions, the Prosecutor appears to have departed from her initial position. Indeed, although she reiterates her argument according to which the Impugned Decision is based “*on a clear and unequivocal ruling on admissibility, concluding that any potential case arising from this situation is sufficiently grave*”, she nevertheless discusses at length how an appealable decision under article 82(1)(a) of the Statute need not be “conclusive”.²⁰ A factual or legal finding cannot be “unequivocal” and “not conclusive” at once. This inconsistency in the Prosecutor’s submissions makes it difficult, if not impossible, for the other participants to identify the specific admissibility-related issues which merit appeal review.

21. Notwithstanding the inherent contradictions in the Prosecutor’s submissions, the Legal Representative argues that, even on the basis of the most flexible approach, the Impugned Decision cannot be regarded as a decision with respect to admissibility in the sense of article 82(1)(a) of the Statute. In the Kenya Situation, the Appeals Chamber has clarified the requirements for a ruling to be considered as a “decision with respect to admissibility”. In this regard, the Appeals Chamber ruled that the operative part of the relevant decision must be directly related to a question of admissibility and that “[i]t is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility”.²¹

22. The Appeals Chamber’s holding in the Kenya Situation is also consistent with its previous judgments on admissibility. For instance, in the Democratic Republic of the Congo situation, the Appeals Chamber found that a decision on an application for warrants of arrest may qualify as a decision with respect to admissibility that may

²⁰ See Prosecutor’s Further Submissions, *supra* note 8, paras. 13-23.

²¹ See “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’”, ICC-01/09-78 OA, 10 August 2011, para. 15.

be subject to appeal under article 82(1)(a) of the Statute if it is based on a ruling of the admissibility of the case against the suspect.²²

23. The circumstances of the instant proceedings are markedly different because the Impugned Decision does not make any pronouncement on the admissibility of a case and its operative part does not directly relate to any question of admissibility. Rather, it simply “*requests the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros*”.²³

24. The Legal Representative recognises that in the process of conducting a review under article 53(3)(a) of the Statute, 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*”. However, this review process must be distinguished from admissibility proceedings under articles 17, 18 and 19 of the Statute. The Pre-Trial Chamber’s consideration of the admissibility factor, as part of other factors set out in article 53 of the Statute, does not alter the nature of the review process. Nor does this mean that the relevant Chamber would have to issue a decision with respect to admissibility each time it requests the Prosecutor to review her decision not to investigate in a specific situation.

25. Therefore, the Pre-Trial Chamber’s references in the Impugned Decision to the gravity of certain acts establish, at the best, an “*indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility*” which does not suffice for qualifying the decision as related to admissibility.²⁴ For the purpose of appellate

²² See DRC Judgement, *supra* note 14, para. 18.

²³ See Impugned Decision, *supra* note 1, p. 26.

²⁴ See *supra* note 21, para. 15.

review, these references do not alter the nature of the Impugned Decision and may not be appealed as such because they constitute mere *obiter dicta*.²⁵

ii. A “decision with respect to admissibility” needs to be final

26. The Legal Representative further submits that a decision pursuant to article 53 of the Statute cannot be the subject of an appeal under article 82(1)(a) because, by nature, said decision does not constitute a final ruling and it is not meant to reach definitive findings or conclusions. Rather, said decision establishes the first step of a broader procedural process by which the Court assesses the correctness of the Prosecutor's decision not to investigate into a specific situation.

27. There can be no doubt that a decision requesting the Prosecutor to reconsider her position has, as the Appeals Chamber noted, "*binding effects on the parties*".²⁶ However, the binding nature of said decision 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 allegedly committed in a specific situation.

28. This conclusion is consistent with the wording of rule 108 of the Rules of Procedure and Evidence according to which :

"[...] 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".²⁷

29. A final decision under article 53 of the Statute is therefore taken by the Prosecutor, on the basis of the directions provided by the Pre-Trial Chamber during

²⁵ See "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497 OA 8, 25 September 2009, para. 38.

²⁶ See "Decision on suspensive effect", ICC-01/13-43 OA, 6 August 2015, para. 7.

²⁷ We underline.

the review process. In contrast, a “decision with respect to admissibility” is a decision taken by the relevant Chamber of the Court either *proprio motu* or in response to a challenge made under articles 17, 18 and 19 of the Statute. The findings of the Chamber in relation to the question of 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. This is clear from the various statutory provisions which confer on the relevant Chamber the power to issue decisions with respect to admissibility. Accordingly, the Impugned Decision cannot be construed as a “decision with respect to admissibility” because it only provides directions to the Prosecutor for making her final decision on the opening of an investigation in accordance with rule 108 of the Rules of the Procedure and Evidence.

iii. A “decision with respect to admissibility” needs to be conclusive and explicit so as to enable appellate review

30. The Legal Representative also submits that a decision requesting the Prosecutor to reconsider her decision not to investigate into a specific situation cannot be appealed under article 82(1)(a) of the Statute because it is not “conclusive”. In this regard, the Appeals Chamber has consistently held that “*its function is corrective in nature and the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber*”.²⁸ It has further explained that “*its function is not to decide anew on the admissibility of the case*”.²⁹ Instead, it is “*to determine*

²⁸ See “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”, ICC-01/11-01/11-565 OA 6, 24 July 2014, para. 57. See also “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”, ICC-01/09-02/11-202 OA, 28 July 2011, para. 12; the “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”, para. 13 and the “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”, ICC-01/11-01/11-547-Red OA 4, 21 May 2014, para. 43.

²⁹ See “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”, ICC-02/11-01/12-75-Red OA, 27 May 2015, para. 33. See also “Decision on the Filing

whether the determination by the Pre-Trial Chamber on the admissibility of the case was in accord with the law".³⁰

31. The determination of the Pre-Trial Chamber must be conclusive and explicit in order to allow subsequent review on appeal. If 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.³¹ This would not only defeat the corrective nature of interlocutory appeals, but would also expand the scope of appellate proceedings beyond that of the "*relevant proceedings before the Pre-Trial Chamber*".³²

32. The purpose of appellate review under article 82(1)(a) of the Statute is therefore limited to final rulings at first instance, and it is not to interfere with directions that are still the subject of a reconsideration by the Prosecutor. Further guidance regarding the "finality" and "conclusiveness" requirements may be drawn from the jurisprudence of the Court in the context of reparations proceedings. In deciding that the appeals against the Trial Chamber's decision on reparations were admissible, the Appeals Chamber stated: "*In this regard, the Appeals Chamber considers that the practical effect [of the previous finding] is that the Impugned Decision represents the final judicial decision in respect of reparations, apart from such monitoring and oversight required of the Trial Chamber under the Regulations of the Trust Fund after an order for*

of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", ICC-01/09-02/11-202 OA, 28 July 2011, para. 11.

³⁰ See "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", ICC-02/04-01/05-408 OA 3, 16 September 2009, para. 8. See also "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", ICC-01/09-02/11-202 OA, 28 July 2011, para. 10.

³¹ "See "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", ICC-01/04-01/06-873 OA 8, 27 April 2007, para. 6.

³² See *supra* note 28.

reparations has been issued [...]".³³ The appeals were therefore found to be admissible because the decision issued by the Trial Chamber was "final" and "conclusive". In contrast, the Impugned Decision does not make any conclusive determination on admissibility and cannot be qualified as being final and conclusive.

C. The subject-matter of the proposed appeal falls outside the scope of review under article 82(1)(a) of the Statute

33. Assuming *arguendo* that the Impugned Decision is appealable under article 82(1)(a) of the Statute, the Legal Representative submits that the appeal would still be inadmissible because the issues identified by the Prosecutor are not linked to a question of admissibility.

i. *The relief sought is not related to a finding of admissibility*

34. The Prosecution requests the "*Appeals Chamber [...] to reverse the Decision, and to dismiss the Comoros' application under article 53(3)(a) of the Statute*".³⁴ 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.³⁵

35. The Legal Representative contends that the relief sought cannot be granted in the context of an appeal brought under article 82(1)(a) of the Statute, which may only be invoked for the review of a decision concerning admissibility or jurisdiction. Therefore, the Prosecutor's request for the dismissal of the Union of Comoros' application pursuant to article 53(3) of the Statute falls outside the scope of appellate review under said article.

³³ See "Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations and directions on the further conduct of proceedings", ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012, para. 63.

³⁴ See Notice of Appeal, *supra* note 2, para. 31.

³⁵ *Idem*.

36. For the same reason, the Appeals Chamber has no jurisdiction “*to reverse the [Impugned] Decision*”³⁶ so that the Prosecutor is no longer required to reconsider her decision not to initiate an investigation. Indeed, pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may only reverse a judicial ruling with respect to admissibility or jurisdiction, and may not therefore reverse or amend a decision pursuant to article 53 of the Statute. This view is in line with the Appeals Chamber’s general approach that appellate review would be permissible “*only to the extent that such review may fall within the scope of an appeal properly brought under articles 81 or 82 of the Statute*”.³⁷ It is also consistent with the DRC Judgement, in which the Appeals Chamber reversed the decision of the Pre-Trial Chamber only “*in so far as it declares the case against Mr. Bosco Ntaganda inadmissible*”, without addressing any other aspects in relation to the issuance of a warrant of arrest under article 58 of the Statute.³⁸

37. In particular, in the DRC Judgement – a precedent heavily relied upon by the Prosecutor – the Appeals Chamber held that “[t]he Prosecutor has filed an interlocutory appeal pursuant to article 82(1)(a) of the Statute. Although the impugned decision is a decision on an application for warrants of arrest, the decision by the Pre-Trial Chamber to reject the Prosecutor’s application in respect of Mr. Bosco Ntaganda was based on a ruling of the admissibility of the case against him”.³⁹ Most importantly, the Appeals Chamber noted that “[t]o this extent, the impugned decision is a decision “with respect to admissibility, as required by article 82 (1) (a) of the Statute. The Prosecutor has limited his appeal to this aspect of the impugned decision”.⁴⁰ It is therefore clear that said appeal was admissible not only because the appealed decision was “with respect to admissibility”, but also because the Prosecution had limited its appeal to the admissibility “aspects”

³⁶ *Ibid.*

³⁷ See “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”, ICC-01/04-01/06-2823 OA 20, 21 November 2011, para. 15.

³⁸ See DRC Judgement, *supra* 14, p. 2, paras. 90 and 92.

³⁹ *Idem.*, para. 18.

⁴⁰ *Ibid.*

of the decision concerned. As the Appeals Chamber specified, the appeal could only be admissible “*to this extent*”.

38. In contrast with the DRC Judgement, the subject-matter of the present appeal is not even remotely linked to a question of admissibility.

ii. The grounds of appeal identified by the Prosecutor are not related to a question of admissibility

39. None 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. To the contrary, under the first ground of appeal, the Prosecutor challenges the standard of review applied by the Pre-Trial Chamber under article 53(3) of the Statute. More specifically, the Prosecutor contends that the Pre-Trial Chamber “*exceeded [its] mandate under article 53(3) of the Statute*” and failed to strike a balance “*between prosecutorial independence and accountability*”.⁴¹ None of these issues can be said to be, even remotely, linked to a question of admissibility.

40. Similarly, under the second ground of appeal, the Prosecutor argues that the Pre-Trial Chamber “*misinterpreted the legal standard to be applied by the Prosecutor under article 53 of the Statute*” and “*applied a legal standard for the conduct of preliminary examinations that is not only inconsistent with the plain text of the Statute, but misconceives the nature of the analytical process*”.⁴² In alleging these errors, the Prosecutor fails to identify any finding regarding admissibility, but rather seeks to address the much “*broader policy implications for how cases may be selected*”.⁴³ Regardless of the perceived importance of these “policy implications”, they cannot be properly addressed in appellate proceedings under article 82(1)(a) of the Statute.

⁴¹ See Notice of Appeal, *supra* note 2, para. 17.

⁴² *Idem.*, para. 20.

⁴³ *Ibid.*, para. 23.

41. Likewise, under the third ground of appeal, the Prosecutor makes a general allegation that the Pre-Trial Chamber “*erred in law by failing to provide sufficient reasoning*”.⁴⁴ Again, she does not specifically identify, let alone address, the admissibility-related aspects of the Impugned Decision. Indeed, the Prosecutor’s main submission under the third ground is that the Pre-Trial Chamber’s alleged “inadequate reasoning” impeded “*the Prosecution’s ability meaningfully to comply with the request for reconsideration*”.⁴⁵ The Prosecutor further argues that it “*is left to speculate as to the proper contours of any reconsideration*”.⁴⁶ The third ground of appeal therefore relates to the extent to which a ruling under article 53(3) of the Statute needs to be reasoned, and is not linked to any specific finding on admissibility in the Impugned Decision.

42. The Prosecutor’s reliance on the DRC Judgment is therefore clearly unfounded.⁴⁷ The issues set out in the Notice of Appeal are markedly different from those addressed in the DRC Judgement when the Prosecution advanced grounds of appeal specific and of direct relevance to the interpretation of article 17 of the Statute. Indeed, in that instance, the Prosecutor requested the Appeals Chamber to review *inter alia* (i) the interpretation of the gravity requirement under article 17(1)(d) of the Statute and (ii) the Pre-Trial Chamber’s alleged failure to provide adequate notice and request specific submissions from the Prosecution on the issue of admissibility.⁴⁸

43. In conclusion, the Legal Representative notes that the filing of the appeal was motivated by factors that are not related to the issue of admissibility. As acknowledged by the Prosecutor, the purpose of the proposed appeal is “*to obtain a clear statement of the governing law*” under article 53 of the Statute,⁴⁹ in addition to clarifying the degree of “*judicial oversight*” and the appropriate “*field of deference*” to

⁴⁴ *Ibid.*, para. 24.

⁴⁵ *Ibid.*, para. 27.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, paras. 11-12.

⁴⁸ See DRC Judgement, *supra* note 14, para. 12.

⁴⁹ See Notice of Appeal, *supra* note 2, para. 23.

be accorded to the Prosecution's assessment.⁵⁰ It can therefore be inferred that the Prosecutor is mostly concerned with the policy implications for how cases may be selected and the standard to be applied by the Pre-Trial Chamber in the course of the review process under article 53 of the Statute.⁵¹

44. Article 82(1)(a) proceedings are not the appropriate *forum* for addressing issues that are linked to the review of the correctness of the Pre-Trial Chamber's determination under article 53 of the Statute. The Prosecutor may not, under the guise of appealing a decision pursuant to article 82(1)(a) of the Statute, engage in an unrestrained discussion of all aspects related to the review of a decision not to initiate an investigation into a specific situation. Both the proposed grounds of appeal and the relief sought provide a clear and unequivocal indication that the subject-matter of the present appeal falls outside the permissible scope of review under article 82(1)(a) of the Statute.

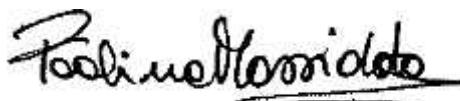
45. Finally, the Legal Representative wishes to inform the Appeals Chamber that the victims she represents have indicated their serious concerns and disbelief at the news that the Prosecutor had appealed the Impugned Decision. Indeed, after the issuance of the Pre-Trial Chamber's decision requesting the Prosecutor to review its previous determination not to open an investigation into the events they have suffered from, the victims expressed their satisfaction and expected the Prosecutor to take actions showing her will to pursue justice and fight against impunity. The filing of the Notice of Appeal has been perceived by the victims as a sign of unwillingness by the Prosecutor to listen to their concerns and to understand what really happened on board of the vessels.

⁵⁰ *Idem.*, para. 9.

⁵¹ See Notice of Appeal, *supra* note 2, para. 23.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Appeals Chamber to find that the appeal is inadmissible.

It is hereby certified that this document contains a total of 5,952 words and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court.⁵²



**Paolina Massidda
Principal Counsel**

Dated this 19th day of August 2015

At The Hague, The Netherlands

⁵² This statement (20 words) and accompanying footnote, not itself included in the word count, follows the Appeals Chamber's direction. See "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'", ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.