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No. ICC-01/13  
Date: 15 November 2018

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Alapini-Gansou

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

**Public**

**Decision on the “Application for Judicial Review by  
the Government of the Union of the Comoros”**

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**PRE-TRIAL CHAMBER I** (the “Chamber”) of the International Criminal Court (the “Court”) issues this Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”.

## **I. PROCEDURAL HISTORY**

1. On 14 May 2013, the Government of the Union of the Comoros (the “Comoros”) referred to the Prosecutor the situation “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip”.<sup>1</sup>
2. On 6 November 2014, the Prosecutor decided that there is no reasonable basis to proceed with an investigation into the situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (the “6 November 2014 Decision”).<sup>2</sup>
3. On 29 January 2015, the Comoros filed the “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” (the “29 January 2015 Application”) asking Pre-Trial Chamber I to request the Prosecutor to reconsider her 6 November 2014 Decision.<sup>3</sup>
4. On 30 March 2015, the Prosecutor filed the “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute”.<sup>4</sup> The Prosecutor argued that the 29 January 2015 Application should be dismissed.<sup>5</sup>

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<sup>1</sup> ICC-01/13-1-Anx1, p. 3.

<sup>2</sup> ICC-01/13-6-AnxA.

<sup>3</sup> 29 January 2015 Application, ICC-01/13-3-Conf, with Confidential Annexes 1, 2, and 3. A public redacted version has also been made available, ICC-01/13-3-Red.

<sup>4</sup> ICC-01/13-14-Conf, with Public Annex. A public redacted version has also been made available, ICC-01/13-14-Red.

<sup>5</sup> ICC-01/13-14-Red, paras 5 and 105.

5. On 22 June 2015, the Office of Public Counsel for Victims (the “OPCV”) filed the “Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation”.<sup>6</sup> On the same day, the Legal Representative for Victims (the “LRV”) submitted the “Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015”.<sup>7</sup> Both groups of victims requested Pre-Trial Chamber I to review the 6 November 2014 Decision and to direct the Prosecutor to reconsider it.<sup>8</sup>

6. On 14 July 2015, Pre-Trial Chamber I received the “Prosecution’s Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)”,<sup>9</sup> which requested the Application for Review to be dismissed.<sup>10</sup> On the same day, the Comoros filed the “Response by the Government of the Comoros to Victim Observations filed on 22 June 2015”, in which it further argued that the Pre-Trial Chamber should direct the Prosecutor to reconsider her 6 November 2014 Decision.<sup>11</sup>

7. On 16 July 2015, Pre-Trial Chamber I issued the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (the “16 July 2015 Decision”).<sup>12</sup> Pre-Trial Chamber I, by majority, requested the Prosecutor to “reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros”.<sup>13</sup>

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<sup>6</sup> ICC-01/13-27-Conf. A public redacted version has also been made available, ICC-01/13-27-Red.

<sup>7</sup> ICC-01/13-28-Conf. A public redacted version has also been made available, ICC-01/13-28-Red.

<sup>8</sup> ICC-01/13-27-Red, p. 63; ICC-01/13-28-Red, para. 72.

<sup>9</sup> ICC-01/13-29-Conf, with Public Annex. A public redacted version has also been made available, ICC-01/13-29-Red.

<sup>10</sup> ICC-01/13-29-Red, para. 158.

<sup>11</sup> ICC-01/13-30, with Confidential Annex, para. 18.

<sup>12</sup> 16 July 2015 Decision, ICC-01/13-34.

<sup>13</sup> 16 July 2015 Decision, ICC-01/13-34, p. 26. Judge Péter Kovács appended a partly dissenting opinion, ICC-01/13-34-Anx-Corr.

8. On 27 July 2015, the Prosecutor filed her “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)” to the Appeals Chamber.<sup>14</sup>

9. On 3 August 2015, 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)””.<sup>15</sup>

10. On 4 August 2015, 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” was filed.<sup>16</sup>

11. On 7 August 2015, the Appeals Chamber received the “*Amicus Curiae* Observations of the European Centre for Law & Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence”, which urged the Appeals Chamber to admit the appeal for consideration.<sup>17</sup>

12. On 14 August 2015, the Prosecutor filed her “Further Submissions concerning Admissibility”, in which she argued that the Appeals Chamber should confirm the admissibility of the appeal.<sup>18</sup>

13. 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)””, which requested the Appeals Chamber to

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<sup>14</sup> ICC-01/13-35.

<sup>15</sup> ICC-01/13-39.

<sup>16</sup> ICC-01/13-40.

<sup>17</sup> ICC-01/13-45, para. 16.

<sup>18</sup> ICC-01/13-47, para. 30.

find that the appeal was inadmissible.<sup>19</sup> On the same day, the Comoros filed the “Response of the Government of the Comoros to the ‘Prosecution’s Further Submissions concerning Admissibility’”, in which it requested the Appeals Chamber to dismiss the Prosecutor’s appeal *in limine*.<sup>20</sup> Furthermore, on that day, the LRV 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)’”, which similarly requested the Appeals Chamber to dismiss the appeal *in limine*.<sup>21</sup>

14. On 6 November 2015, the Appeals Chamber, by majority, dismissed the Prosecutor’s appeal *in limine* because “the Impugned Decision was not one ‘with respect to [...] admissibility’ within the meaning of article 82(1)(a) of the Statute” (the “6 November 2015 Decision”).<sup>22</sup>

15. On 29 November 2017, the Chamber received the “Final decision of the Prosecution concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA), dated 6 November 2014” (the “29 November 2017 Decision”).<sup>23</sup> The Prosecutor contends that she “remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute” and that, “[a]s such, an investigation may not be initiated, and the preliminary examination must be closed”.<sup>24</sup>

16. On 23 February 2018, the Comoros filed the “Application for Judicial Review by the Government of the Union of the Comoros” (the “23 February

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<sup>19</sup> ICC-01/13-48, para. 8 and p. 20.

<sup>20</sup> ICC-01/13-49, para. 17.

<sup>21</sup> ICC-01/13-50, para. 15.

<sup>22</sup> 6 November 2015 Decision, ICC-01/13-51, para. 66. Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert issued a joint dissenting opinion, ICC-01/13-51-Anx.

<sup>23</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1.

<sup>24</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 2.

2018 Application”).<sup>25</sup> The Comoros requests the Chamber to “review the two new OTP Decisions not to open an investigation [arising from her 29 November 2017 Decision] and to direct the Prosecutor to reconsider her Decisions in light of the discernable [sic] errors in each of them”.<sup>26</sup>

17. On 28 February 2018, the OPCV filed the “Request for an extension of time to respond to the ‘Application for Judicial Review by the Government of the Union of Comoros’ (ICC-01/13-58-Conf)”.<sup>27</sup>

18. On 2 March 2018, the Chamber issued the “Decision on the Request for an Extension of Time”, which extended the time limit for the OPCV and ordered it to submit its observations no later than 3 April 2018.<sup>28</sup> The Chamber also ordered the Prosecutor and the victims’ legal representative “in case they wish to make submissions, to do so no later than [...] 3 April 2018”.<sup>29</sup>

19. On 13 March 2018, the Prosecutor filed the “Prosecution’s Response to the Government of the Union of the Comoros’ ‘Application for Judicial Review’ (ICC-01/13-58) (Lack of Jurisdiction)” (the “13 March 2018 Response”).<sup>30</sup> The Prosecutor requests the Chamber to “dismiss the Comoros’ Application *in limine* for lack of jurisdiction” and “stay any requirement for the Parties and participants to address the merits of the Application until it has done so”.<sup>31</sup> According to the Prosecutor, only if the Chamber “rules it has jurisdiction to hear the Application – and on what basis – should there be any further discussion of this situation on its merits”.<sup>32</sup>

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<sup>25</sup> 23 February 2018 Application, ICC-01/13-58-Conf. A public redacted version has also been made available, ICC-01/13-58-Red.

<sup>26</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 132.

<sup>27</sup> ICC-01/13-59.

<sup>28</sup> ICC-01/13-60, p. 4.

<sup>29</sup> ICC-01/13-60, p. 4.

<sup>30</sup> 13 March 2018 Response, ICC-01/13-61.

<sup>31</sup> 13 March 2018 Response, ICC-01/13-61, para. 44.

<sup>32</sup> 13 March 2018 Response, ICC-01/13-61, para. 2.



20. On 15 March 2018, the Comoros filed the “Application by the Government of the Union of the Comoros regarding the Pre-Trial Chamber’s Scheduling Order” (the “15 March 2018 Application”).<sup>33</sup> The Comoros requests the Chamber to “(i) [...] maintain its schedule as set by its Decision of 2 March 2018 that the parties should file their full submissions on jurisdiction and the merits by 3 April 2018; (ii) alternatively, if the Chamber is minded to grant the OTP’s request to consider its challenge to jurisdiction *in limine*, at the very least [to set] a schedule [...] to permit the Comoros to respond to the OTP’s *in limine* application and submissions by 3 April 2018 when the participating victims have to file”.<sup>34</sup>

21. On 29 March 2018, the OPCV filed the “Victim’s Response to the Application for Judicial Review by the Government of the Union of the Comoros” (the “OPCV Response”).<sup>35</sup>

22. On 3 April 2018, the LRV filed the “Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s ‘Decision on the Request for an Extension of Time’ of 2 March 2018” (the “LRV Response”).<sup>36</sup>

23. On 11 April 2018, the Comoros filed the “Request on behalf of the Government of the Union of the Comoros in respect of Scheduling Order” (the “11 April 2018 Request”).<sup>37</sup> The Comoros requests “the Pre-Trial Chamber to rule on its [...] [15 March 2018 Application] and to provide a scheduling order that rightfully permits the Comoros to respond to the [...] [13 March 2018 Response]”.<sup>38</sup>

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<sup>33</sup> 15 March 2018 Application, ICC-01/13-62.

<sup>34</sup> 15 March 2018 Application, ICC-01/13-62, para. 2.

<sup>35</sup> OPCV Response, ICC-01/13-65, with Confidential *Ex Parte* Annex 1.

<sup>36</sup> LRV Response, ICC-01/13-66, with Confidential *Ex Parte* Annex 1.

<sup>37</sup> 11 April 2018 Request, ICC-01/13-67.

<sup>38</sup> 11 April 2018 Request, ICC-01/13-67, p. 3.

## II. INTRODUCTION

24. The 16 July 2015 Decision and the 29 November 2017 Decision lie at the heart of the present decision. Therefore, the Chamber considers it appropriate to briefly summarise these two decisions.

### A. The 16 July 2015 Decision

25. In the 16 July 2015 Decision, Pre-Trial Chamber I considered that, under article 53(3)(a) of the Rome Statute (the “Statute”), “the scope of review is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor’s conclusion not to investigate”.<sup>39</sup> It further clarified that “[i]n the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word ‘shall’ in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts”.<sup>40</sup>

26. The review carried out by Pre-Trial Chamber I led to the conclusion that the Prosecutor had committed five errors in deciding 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 within the meaning of article 17(1)(d) of the Statute, namely: “(i) the Prosecutor’s failure to consider that the persons likely to be the object of the investigation into the situation could include those who bear the greatest responsibility for the identified crimes; (ii) the Prosecutor’s error as to how the scale of the identified crimes can be taken into account for the assessment of the gravity of the identified crimes; (iii) the Prosecutor’s error in correctly appreciating the nature of the identified crimes; (iv) the Prosecutor’s error in fact in properly assessing the

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<sup>39</sup> 16 July 2015 Decision, ICC-01/13-34, para. 10.

<sup>40</sup> 16 July 2015 Decision, ICC-01/13-34, para. 13.

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’; and (v) the Prosecutor’s error in determining the impact of the identified crimes”.<sup>41</sup>

27. On this basis, Pre-Trial Chamber I requested the Prosecutor to reconsider her decision not to initiate an investigation.<sup>42</sup>

### **B. The 29 November 2017 Decision**

28. Following the 16 July 2015 Decision, the Prosecutor issued her 29 November 2017 Decision. This decision is divided into three parts.

29. The first part of the 29 November 2017 Decision addresses whether the 16 July 2015 Decision “discloses a well founded basis to reach a different conclusion than that contained in the” 6 November 2014 Decision.<sup>43</sup>

30. In this regard, the Prosecutor avers that, based on her “independent analysis of the law”, she “cannot concur with the majority” of Pre-Trial Chamber I.<sup>44</sup> The Chamber highlights the following arguments invoked by the Prosecutor in support of her position.<sup>45</sup> The Prosecutor explains that she “does

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<sup>41</sup> 16 July 2015 Decision, ICC-01/13-34, para. 49.

<sup>42</sup> 16 July 2015 Decision, ICC-01/13-34, para. 50.

<sup>43</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 8.

<sup>44</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 13.

<sup>45</sup> For more examples, *see also* 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 16 (“[the Chamber’s] observations, jointly and severally, may lead to some misunderstanding of the legal standard [...] [i]n particular, they appear to overlook significant considerations”); para. 19 (“The Request may introduce some confusion into the standard of proof to be applied by the Prosecution [...] This assertion is not only unsupported, but inconsistent with the Statute”); para. 26 (“Respectfully, the Prosecution cannot concur in this view”); para. 73 (“The Request does not sufficiently address the interplay between qualitative and quantitative factors in the gravity determination, [...] [t]his materially affected the analysis concerning the second and fifth factors analysed in the Request”); para. 80 (“the Request [...] apparently misunderstood or overlooked this reasoning in the [6 November 2014 Decision], its conclusions [...] were materially affected”); para. 81 (“The silence of the Request concerning this distinction materially affected its analysis”); para. 88 (“The Request did not

not consider that [...] [one of the majority's conclusions] is correct"<sup>46</sup> and that she "doubts this logic".<sup>47</sup> She further states that, given her "disagreement with the majority of Pre-Trial Chamber I's interpretation [of a provision], which directly affects the correctness of the legal standard applied in the Report, the Prosecution cannot concur in the basic premise of the Request".<sup>48</sup> In a similar manner, she claims that the 16 July 2015 Decision "fails to provide sufficient reasoning with respect to at least five legal or factual issues in the Report [which] materially affects the analysis in" this Decision.<sup>49</sup> The Prosecutor is also of the view that the 16 July 2015 Decision "does not address [certain issues]".<sup>50</sup> She, in addition, argues that this Decision "appears to contain insufficient reasoning or misunderstandings material" to certain facts or arguments.<sup>51</sup> Finally, the Prosecutor submits that "[h]ad the Pre-Trial Chamber correctly interpreted the legal standard [...] it would not have issued the" 16 July 2015 Decision.<sup>52</sup>

31. The Prosecutor concludes that she "disagrees with, and cannot follow, the reasoning of the" 16 July 2015 Decision in conducting her reconsideration.<sup>53</sup> She is even of the view that, "[o]n this basis alone, this reconsideration could be terminated".<sup>54</sup>

32. However, the Prosecutor also states that, in the exercise of her discretion under article 53(3)(a) of the Statute and rule 108 of the Rules of the Procedure and Evidence (the "Rules"), she "nevertheless further considered whether any

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adequately address the factual context"); para. 93 ("The failure of the Request to address this fact [...] significantly undermines its factual conclusions").

<sup>46</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 24.

<sup>47</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 25.

<sup>48</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 33. *See also* para. 65.

<sup>49</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 72.

<sup>50</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 83.

<sup>51</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 94.

<sup>52</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 33. *See also* paras 35 and 66.

<sup>53</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 95.

<sup>54</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 95.

argument raised by the Comoros or the victims in the recent litigation should in any event lead to a new conclusion”.<sup>55</sup>

33. Accordingly, in the second part of the 29 November 2017 Decision, the Prosecutor considers seven issues raised before Pre-Trial Chamber I: (i) “[r]elevance of allegations of live fire, prior to the boarding, to analysis concerning any plan or policy”; (ii) “[c]onsiderations related to the victims of the identified crimes”; (iii) “[r]elevance of allegations of mistreatment of detainees on Israeli territory”; (iv) “[r]elevance of alleged damage to CCTV cameras aboard the *Mavi Marmara*”; (v) “[c]onsiderations related to the occurrence of the identified crimes uniquely aboard the *Mavi Marmara*”; (vi) “[n]ature of the identified crimes aboard the *Mavi Marmara*”; and (vii) “[c]onsiderations related to the perpetrators of the identified crimes”.<sup>56</sup>

34. The Prosecutor concludes that “none of these issues, either separately or cumulatively”, leads her to depart from the conclusions adopted in the 6 November 2014 Decision or “shows that those conclusions were unreasonable, unfair, or legally incorrect”.<sup>57</sup>

35. Finally, mindful of her “residual discretion under article 53(4) of the Statute”, the Prosecutor devotes the third part of the 29 November 2017 Decision to an assessment of “the information newly made available since 6 November 2014”.<sup>58</sup>

36. In more specific terms, the Prosecutor states that she has reviewed and analysed “more than 5,000 pages of information”, including: (i) “personal accounts, including by many of the participating victims”; (ii) “personal observations by some participating victims ‘in response’ to the findings of

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<sup>55</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 96.

<sup>56</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 97 (emphasis in original).

<sup>57</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 98.

<sup>58</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 172.

the” 6 November 2014 Decision; (iii) “an opinion by a retired military officer”; (iv) “an opinion by a forensic pathologist”; (v) “copies of forensic reports prepared by the Turkish authorities (of which some were, in whole or in part, already in the Prosecution's possession), as well as various photographs”; and (vi) “compilations of quotations, extracts, and other illustrative material prepared by counsel in support of their written observations”.<sup>59</sup>

37. Having considered this information, the Prosecutor does not find it necessary to exercise her “residual discretion under article 53(4) of the Statute to reconsider the conclusions of the” 6 November 2014 Decision.<sup>60</sup>

### III. THE CHAMBER’S DETERMINATION

38. The Chamber notes articles 21 and 53(1), (3)(a) and (4) of the Statute and rules 105 to 110 of the Rules.

#### A. Preliminary Matters

39. In the 13 March 2018 Response, the Prosecutor requests the Chamber to “dismiss the Comoros’ Application *in limine* for lack of jurisdiction” and “stay any requirement for the Parties and participants to address the merits of the Application until it has done so”.<sup>61</sup> The Chamber recalls that it ordered the Prosecutor, should she wish to make submissions on the 23 February 2018 Application, to do so by no later than 3 April 2018.<sup>62</sup> However, the Prosecutor chose to make submissions on jurisdiction only, notwithstanding the lack of directions from the Chamber to that effect. Furthermore, the Chamber considers that providing submissions on jurisdiction separately from the submissions on the merits of the 23 February 2018 Application would cause

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<sup>59</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 172.

<sup>60</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 333.

<sup>61</sup> 13 March 2018 Response, ICC-01/13-61, para. 44.

<sup>62</sup> ICC-01/13-60, p. 4.

further delay. Accordingly, this aspect of the 13 March 2018 Response is rejected.

40. In addition, the Chamber notes that, in the 15 March 2018 Application, the Comoros requests: “(i) that the Pre-Trial Chamber [...] maintain its schedule as set by its Decision of 2 March 2018 that the parties should file their full submissions on jurisdiction and the merits by 3 April 2018; (ii) alternatively, if the chamber is minded to grant the OTP’s request to consider its challenge to jurisdiction *in limine*, at the very least a schedule is set by the Chamber to permit the Comoros to respond to the OTP’s *in limine* application and submissions by 3 April 2018 when the participating victims have to file”.<sup>63</sup>

41. The Chamber notes that it has already maintained the schedule set out in the 2 March 2018 Decision. Therefore, the 15 March 2018 Application has become moot. Accordingly, the Chamber considers that the 11 April 2018 Application has become moot as well, given that the latter contains a request identical to the one set forth in the 15 March 2018 Application.

## **B. Analysis**

42. The Chamber observes that the Prosecutor invokes two separate legal bases for reconsidering her 29 November 2017 Decision, namely article 53(3)(a) and article 53(4) of the Statute.<sup>64</sup> For the sake of clarity, the Chamber considers it necessary to first assess and dispose of the Prosecutor’s reconsideration pursuant to article 53(4) of the Statute before turning to her reconsideration pursuant to article 53(3)(a) of the Statute, which will constitute the main part of the Chamber’s analysis.

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<sup>63</sup> 15 March 2018 Application, ICC-01/13-62, para. 2.

<sup>64</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, paras 171-172. *See also supra*, paras 28-37.

1. The Prosecutor's Decision under Article 53(4) of the Statute

a. The Parties' Submissions

(i) *The Submissions of the Comoros*

43. The Comoros argues that "the OTP's Decision on the New Evidence is reviewable by the Chamber under Article 53(3)(a)".<sup>65</sup> In this regard, the Comoros asserts that this decision "certainly is a decision about whether to open an investigation pursuant to and in accordance with Article 53(1) and the specific criteria listed therein".<sup>66</sup> According to the Comoros, "[t]he Prosecutor has confirmed as much in stating that 'such [new] material may in principle be considered by the Prosecution as a basis, in its independent discretion under article 53(4), to reconsider its current determination under article 53(1)'" of the Statute.<sup>67</sup> The Comoros also takes the view that "[i]t would be disingenuous for the OTP to try to argue that its new decision was made purely under Article 53(4) and had nothing at all to do with Article 53(1), and thus is non-reviewable".<sup>68</sup>

44. The Comoros further states that "[i]t would be untenable if a new decision in which the Prosecutor had committed fundamental errors, was free of any judicial scrutiny under proper standards of judicial review when Article 53(3)(a) makes clear that any decision not to open an investigation can be reviewed".<sup>69</sup> According to the Comoros, "to rule otherwise, would mean that (i) the Prosecutor would be free, unchecked, to make the same and other fundamental errors when considering new evidence; (ii) if she rejected the evidence on grounds not previously considered in her first decision, such

<sup>65</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 37.

<sup>66</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 38.

<sup>67</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 38.

<sup>68</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 39.

<sup>69</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 41.



grounds could never be reviewed even though not considered by the Chamber in the first review; and (iii) the Pre-Trial Chamber would be stripped of its power under Article 53(3)(b) to review ‘on its own initiative’ a decision that ‘an investigation would not serve the interests of justice’ if the Prosecutor decided to refuse to open an investigation on this basis upon receiving new evidence”.<sup>70</sup>

(ii) *The Submissions of the Prosecutor*

45. The Prosecutor avers that the Statute grants no power to the Pre-Trial Chamber “to review the Prosecutor’s independent exercise of discretion under article 53(4)” of the Statute.<sup>71</sup> In the view of the Prosecutor, the reason is that “[a]n article 53(4) determination is [...] clearly not a further article 53(1) decision, as illustrated by the fact that it is not governed by rules 105 or 106” of the Rules.<sup>72</sup> The Prosecutor argues that, “[i]nstead, somewhat like a rule 108(3) decision, an article 53(4) decision concerns the discretion *whether* to reconsider, demonstrated by the word ‘may’” and that “[i]t does not include the substantive assessment of the article 53(1) criteria, in the event that the article 53(4) question is resolved positively”.<sup>73</sup>

46. In addition, the Prosecutor is of the view that “the ‘new facts or information’ which may trigger the Prosecutor’s consideration of her discretion under article 53(4) may reach the Prosecutor from *any* source”.<sup>74</sup> According to the Prosecutor, this means that “the election by a State, individual or organisation to provide information to the Prosecutor does not confer upon them any special procedural status, much less a power to seek a

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<sup>70</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 41.

<sup>71</sup> 13 March 2018 Response, ICC-01/13-61, para. 1.

<sup>72</sup> 13 March 2018 Response, ICC-01/13-61, para. 38.

<sup>73</sup> 13 March 2018 Response, ICC-01/13-61, para. 38 (emphasis in original).

<sup>74</sup> 13 March 2018 Response, ICC-01/13-61, para. 40 (emphasis in original).

judicial review over the Prosecutor’s exercise of discretion”.<sup>75</sup> The Prosecutor further argues that she “is not even obliged to notify any person when she is exercising her article 53(4) discretion, especially if resolved negatively” and “[i]f there is no right of notification, there can be no right of review – it would be unenforceable”.<sup>76</sup>

*(iii) The Submissions of the OPCV*

47. The OPCV states without further elaboration that it “agrees with the Comoros that the Chamber has the power to review the Prosecutor’s application of articles 17 and 53 of the Statute when she reconsiders her initial decision on the basis of new evidence and facts”.<sup>77</sup>

*(iv) The Submissions of the LRV*

48. The LRV asserts that “[t]he only logical interpretation of [...] [article 53(4) of the Statute] is that it must be understood and applied in accordance [sic] Article 53 as whole” and that “[i]t is not a free-standing provision”.<sup>78</sup>

49. The LRV further argues that “no one disputes that the Prosecution enjoys a broad discretion to decide whether to review new evidence and whether to open an investigation based on this evidence, but that discretion has to be exercised lawfully and free from errors of law and fact”.<sup>79</sup> Thus, in the view of the LRV, “[a] decision not investigate on the basis of new evidence is equally susceptible to review as it too must be taken lawfully and is in essence no different in terms of the applicable criteria than any other decision not to open an investigation”.<sup>80</sup>

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<sup>75</sup> 13 March 2018 Response, ICC-01/13-61, para. 40.

<sup>76</sup> 13 March 2018 Response, ICC-01/13-61, para. 40.

<sup>77</sup> OPCV Response, ICC-01/13-65, para. 55.

<sup>78</sup> LRV Response, ICC-01/13-66, para. 40.

<sup>79</sup> LRV Response, ICC-01/13-66, para. 42.

<sup>80</sup> LRV Response, ICC-01/13-66, para. 43.

50. The LRV also explains that, if the 23 February 2018 Application were to be dismissed, “an absurd dichotomy [would be created] in the treatment of evidence if evidence considered before the Prosecution made a first determination under Article 53(1) is subject to review by the Pre-Trial Chamber, but not the evidence submitted any later”.<sup>81</sup>

b. Conclusion

51. The Comoros is correct in pointing out that, in fact, the Prosecutor adopted two decisions in the 29 November 2017 Decision, namely one pursuant to article 53(3)(a) of the Statute and another one pursuant to article 53(4) of the Statute.

52. Article 53(4) of the Statute reads as follows: “[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information”. Article 53(4) of the Statute thus involves a different type of reconsideration from the reconsideration arising from article 53(3)(a) of the Statute. The former arises from “new facts or information”, while the latter must be conducted on the basis of the information already in the Prosecutor’s possession.

53. As is apparent from the references to “may” and “at any time”, a reconsideration pursuant to this provision falls within the Prosecutor’s discretionary power. Nevertheless, considering that the Statute does not set forth any other criteria in relation to the decision of the Prosecutor whether to initiate an investigation, the criteria set forth in article 53(1) of the Statute must necessarily apply in the context of article 53(4) of the Statute. Moreover, the exercise of the Prosecutor’s discretion under article 53(4) of the Statute must, at a minimum, be exercised in accordance with the applicable law governing decisions in relation to whether to initiate an investigation, be

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<sup>81</sup> LRV Response, ICC-01/13-66, para. 44.

devoid of arbitrariness and fall in line with the object and purpose of the Statute to put an end to impunity.

54. Subject to the considerations mentioned in the preceding paragraph, the Chamber finds that a decision adopted by the Prosecutor under article 53(4) of the Statute cannot be challenged by the referring entity. Article 53(3)(a) of the Statute explicitly specifies that the right of the referring entity to challenge the Prosecutor's decision not to investigate or not to prosecute is limited to "a decision of the Prosecutor under paragraph 1 or 2 not to proceed". Article 53(4) of the Statute does not contain an analogous clause. Moreover, while the procedure under article 53(3) of the Statute is regulated in rules 107 to 110 of the Rules, the Rules do not provide for such a procedure in relation to reconsideration pursuant to article 53(4) of the Statute.

55. The Chamber therefore dismisses the 23 February 2018 Application *in limine*, in the circumstances of this case, in so far as it relates to the Prosecutor's reconsideration pursuant to article 53(4) of the Statute.

## 2. The Prosecutor's Decision under Article 53(3)(a) of the Statute

### a. The Parties' Submissions

#### (i) *The Submissions of the Comoros*

56. The Comoros submits that "[a] decision made pursuant to and in accordance with Article 53(1) is one which '*decid[es] whether to initiate an investigation*' taking into account the three criteria listed in Article 53(1) subparagraphs (a)-(c)" of the Statute.<sup>82</sup> According to the Comoros, "[t]here can be no doubt whatsoever that the Prosecutor has acted pursuant to

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<sup>82</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 24 (emphasis in original).

Article 53(1)".<sup>83</sup> Accordingly, in the view of the Comoros, the 29 November 2017 Decision "can be reviewed pursuant to Article 53(3)(a) as a decision in accordance with Article 53(1)" of the Statute.<sup>84</sup>

57. The Comoros also claims that, "even though Rule 108 uses the words 'final decision' following a request by the Chamber for reconsideration, the Rules do not state that this 'final decision' is itself non-reviewable".<sup>85</sup> Thus, the Comoros states that "[i]t is indeed a 'final' decision in response to the Chamber's request for consideration, but it is not 'final' as regards any further review proceedings that may be initiated on the basis of errors committed by the Prosecutor, by referring State Parties".<sup>86</sup>

58. Furthermore, the Comoros asserts that "it is correct that Rule 107(1) for the filing of such a review refers to the decision having been notified under Rule 105(1) and not Rule 108(3), but this is only a provision as to the timing for the filing of a review application".<sup>87</sup> According to the Comoros, "[i]t is not concerned with the substantive point of whether a right of review exists in the first place".<sup>88</sup>

59. The Comoros further avers that "[i]t would be absurd if this right were strictly limited to only a first decision and no others that could have the same errors, or worse ones", since "[i]t would defeat the intention of States Parties and the overall object and purpose of incorporating a judicial review procedure specifically and only for States Party referrals".<sup>89</sup> Thus, in the view of the Comoros, "[i]f it were right that no review is permissible after reconsidering a decision, then if the Prosecutor came back and decided not to

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<sup>83</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 27.

<sup>84</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 29.

<sup>85</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 27.

<sup>86</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 27.

<sup>87</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 29.

<sup>88</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 29.

<sup>89</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 30.

investigate on a completely different basis, such as complementarity, that decision would be beyond review even if decided erroneously”.<sup>90</sup>

60. The Comoros additionally points out that the Appeals Chamber “did not decide the issue of whether a second review is permissible”.<sup>91</sup> According to the Comoros, “[o]n the contrary an academic article cited by the Appeals Chamber specifically notes that ‘[p]rosecutorial independence’ allows the Prosecution to come to ‘the same conclusion as before ... *provided* the Prosecutor ha[s] properly applie[d] [...] her mind in coming to the conclusion’”.<sup>92</sup>

61. The Comoros also submits that “the OTP has stated [that] the Pre-Trial Chamber’s request under Rule 108(2) ‘impose[s] an obligation only of *process*, and not of result’, but this process involves addressing the errors made and is itself reviewable”.<sup>93</sup> The Comoros further argues that “[t]he Prosecutor cannot decide to refuse to address the request of the Chamber”, as “[t]hat would undermine the entire justice system”.<sup>94</sup>

62. Finally, the Comoros asserts that “there would be no point of having a review if the Prosecutor could simply ignore the outcome, or not address the errors identified by the Chamber”.<sup>95</sup>

(ii) *The Submissions of the Prosecutor*

63. The Prosecutor claims that the Pre-Trial Chamber has no jurisdiction to review the Prosecutor’s final decision under rule 108(3).<sup>96</sup>

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<sup>90</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 30.

<sup>91</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 32.

<sup>92</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 32 (emphasis in original).

<sup>93</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 35 (emphasis in original).

<sup>94</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 35.

<sup>95</sup> 23 February 2018 Application, ICC-01/13-58-Red, para. 33.

<sup>96</sup> 13 March 2018 Response, ICC-01/13-61, paras 9-34.

64. In this regard, the Prosecutor explains that the Appeals Chamber has “affirmed—in the context of appeals *stricto sensu*—that ‘the Statute *defines exhaustively* the right to appeal’ in articles 81 and 82, and that any attempts to depart from the Appeals Chamber’s ‘clearly-defined [s]tatutory jurisdiction’ must be rejected”.<sup>97</sup> According to the Prosecutor, “[i]f this same logic properly limits an individual person’s rights to seek judicial review of decisions affecting them, such a logic may *a fortiori* limit a State’s right” and, thus, “the Comoros must show that the Court’s legal texts grant the Pre-Trial Chamber jurisdiction to review a final decision under rule 108(3)”.<sup>98</sup>

65. She argues that, “in general, the [23 February 2018] Application depends upon a fundamental misunderstanding of the Prosecutor’s reasoning, which did not determine *ab initio* ‘whether to initiate an investigation’—in the words of article 53(1)—but rather whether *to reconsider* the original article 53(1) determination in light of the Pre-Trial Chamber’s Request”.<sup>99</sup>

66. The Prosecutor further points out that “academic opinion consistently suggests that rule 108(3) does *not* fall within article 53(1)”.<sup>100</sup>

67. She also claims that “rule 107—which is the *sole* rule setting out the procedure for a State to request a review under article 53(3)(a)—states expressly and exhaustively to which decisions it applies” and “[t]hose are decisions under rules 105 and rule 106”.<sup>101</sup> According to the Prosecutor, “[r]ule 105(1) governs the procedure ‘[w]hen the Prosecutor decides not to initiate an investigation under article 53, paragraph 1’” and “[r]ule 106(1) governs the procedure ‘[w]hen the Prosecutor decides that there is not a

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<sup>97</sup> 13 March 2018 Response, ICC-01/13-61, para. 17 (emphasis in original).

<sup>98</sup> 13 March 2018 Response, ICC-01/13-61, para. 17 (emphasis in original).

<sup>99</sup> 13 March 2018 Response, ICC-01/13-61, para. 19 (emphasis in original).

<sup>100</sup> 13 March 2018 Response, ICC-01/13-61, para. 21 (emphasis in original).

<sup>101</sup> 13 March 2018 Response, ICC-01/13-61, para. 23 (emphasis in original).

sufficient basis for prosecution under article 53, paragraph 2”<sup>102</sup> Accordingly, the Prosecutor argues that “the Rules do not contemplate that a State may request a review under article 53(3)(a) for any other type of decision”<sup>103</sup>

68. In addition, the Prosecutor asserts that “rule 108(3) expressly describes the Prosecutor’s decision as a ‘*final*’ decision”<sup>104</sup> In the view of the Prosecutor, “[t]he word ‘final’—meaning ‘[c]oming at the end’, ‘the last stage of a process; leaving nothing to be looked for or expected; ultimate’, ‘[p]utting an end to something [...] not to be undone, altered, or revoked; conclusive’—strongly suggests that the drafters did not anticipate that a rule 108(3) decision could be subject to a further review by the Pre-Trial Chamber”<sup>105</sup>

69. With regard to “the possibility of the Prosecutor making—*for the first time*—a ‘complementarity’ or ‘interests of justice’ determination, having conducted a rule 108(3) reconsideration”, the Prosecutor notes that she “would in that hypothetical situation distinguish between a rule 108(3) reconsideration and a *new* rule 105 decision with regard to the article 53(1)(c) requirement”<sup>106</sup>

70. Finally, the Prosecutor argues that the Appeals Chamber “ruled expressly on whether the Pre-Trial Chamber’s Request was binding upon the Prosecutor” and, “[i]n so doing, it necessarily also ruled by implication that the Pre-Trial Chamber has no further jurisdiction to review the Prosecutor’s rule 108(3) reconsideration, since such a jurisdiction would undermine its conclusions concerning the Prosecutor’s ultimate discretion and the finality of her decision”<sup>107</sup>

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<sup>102</sup> 13 March 2018 Response, ICC-01/13-61, para. 23 (citations omitted).

<sup>103</sup> 13 March 2018 Response, ICC-01/13-61, para. 23.

<sup>104</sup> 13 March 2018 Response, ICC-01/13-61, para. 23 (emphasis in original).

<sup>105</sup> 13 March 2018 Response, ICC-01/13-61, para. 23.

<sup>106</sup> 13 March 2018 Response, ICC-01/13-61, para. 27 (emphasis in original).

<sup>107</sup> 13 March 2018 Response, ICC-01/13-61, para. 30.



*(iii) The Submissions of the OPCV*

71. The OPCV argues that “the Prosecutor is bound by the [...] [16 July 2015 Decision] and must therefore implement it to correct the errors identified by the Chamber in the [...] [6 November 2014 Decision], regardless of whether the Prosecutor disagrees with the Chamber’s consideration of the evidence and information in her decision”.<sup>108</sup> According to the OPCV, “[a]s a natural consequence of [...] [this] obligation, the Prosecutor’s [...] [29 November 2017 Decision] may be judicially reviewed to assess whether the errors identified by the Chamber in the [...] [16 July 2015 Decision] have been addressed or not by the Prosecutor”.<sup>109</sup>

72. In addition, the OPCV explains that “the Prosecutor cannot indirectly challenge now the Chamber’s findings in the [...] [16 July 2015 Decision] and fully disregard them”.<sup>110</sup>

73. The OPCV also submits that it “agrees with the Prosecutor that requests under article 53(3)(a) of the Statute impose on the latter an obligation only of *process*, and not of result” and the 16 July 2015 Decision “is therefore binding on the Prosecutor as to the *process* to be followed when reconsidering the” 6 November 2014 Decision.<sup>111</sup>

74. Furthermore, the OPCV is of the view that “the Prosecutor’s [29 November 2017 Decision] [under rule 108(3) of the Rules] is entirely ‘final’ only as to the result thereof, namely to start an investigation or not to do so”.<sup>112</sup>

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<sup>108</sup> OPCV Response, ICC-01/13-65, para. 24.

<sup>109</sup> OPCV Response, ICC-01/13-65, para. 25.

<sup>110</sup> OPCV Response, ICC-01/13-65, para. 32.

<sup>111</sup> OPCV Response, ICC-01/13-65, para. 29 (emphasis in original).

<sup>112</sup> OPCV Response, ICC-01/13-65, para. 41.

75. Finally, the OPCV argues that “the Appeals Chamber has ruled that the Prosecutor’s Final Decision cannot be reversed by the Chamber pursuant to article 53(3)(a) of the Statute *as to its content*, i.e. when the Chamber ‘*disagrees with the findings or conclusions of the Prosecutor*’”.<sup>113</sup> However, according to the OPCV, “any decision not to proceed adopted by the Prosecutor under article 53(1) of the Statute is reviewable as to the *method* whereby the Prosecutor has reached said decision”.<sup>114</sup>

(iv) *The Submissions of the LRV*

76. According to the LRV, if the 23 February 2018 Application “were to be dismissed *in limine*, the result would be a complete denial of the Victim’s [sic] rights to an effective investigation”.<sup>115</sup>

77. The LRV argues that the power of the judiciary to review prosecutorial decisions “is well accepted the world over as being within the purview of the judiciary to scrutinise the actions of prosecutors”.<sup>116</sup> In the view of the LRV, this power “is not limited to a single review - that would be highly unusual and artificial - it is a procedure that can be repeated where necessary and in order to ensure that identifiable errors are addressed in the interests of justice and the integrity of the proceedings”.<sup>117</sup>

78. Furthermore, the LRV is of the view that “there is no dispute that it is the OTP’s final decision whether to open an investigation or not but that does not mean that the Judges are precluded from reviewing that decision when it is taken unlawfully”.<sup>118</sup>

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<sup>113</sup> OPCV Response, ICC-01/13-65, para. 44 (emphasis in original)

<sup>114</sup> OPCV Response, ICC-01/13-65, para. 45 (emphasis in original).

<sup>115</sup> LRV Response, ICC-01/13-66, para. 22.

<sup>116</sup> LRV Response, ICC-01/13-66, para. 25.

<sup>117</sup> LRV Response, ICC-01/13-66, para. 25.

<sup>118</sup> LRV Response, ICC-01/13-66, para. 28.

79. The LRV also explains that “it is illogical for the Prosecution to claim that its decision is pursuant to Rule 108 if it still decides not to open an investigation on the same grounds, but [that] somehow [it] is made pursuant to Rule 105 if the OTP continues to decide not to open an investigation [...] on a different basis. Rules 105 and 108 make no provision for such a distinction”.<sup>119</sup>

80. Lastly, the LRV points out that “the Appeals Chamber has never held that the OTP can decide if it should address the errors identified in a ruling on a judicial review, and nor would it, as there would be no point to the review if the OTP was free to simply ignore the decision”.<sup>120</sup> The LRV further specifies that “the Prosecutor decides whether to open an investigation, but this is not the same as saying that the Prosecutor can disregard the Chamber’s findings”.<sup>121</sup>

#### b. Conclusion

81. It is underlined that the situation in which the Chamber finds itself is extraordinary in so far as the Prosecutor’s 29 November 2017 Decision explicitly rejects the Chamber’s 16 July 2015 Decision,<sup>122</sup> asserting that the Pre-Trial Chamber does not have the power to make “a binding order”<sup>123</sup> under article 53(3)(a) of the Statute.

82. At the outset, the Chamber notes the Prosecutor’s use of inappropriate language in her 29 November 2017 Decision. By way of example, the Prosecutor states that the 16 July 2015 Decision “seems to confuse the standard of proof which the Prosecution must apply”.<sup>124</sup> She also asserts that

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<sup>119</sup> LRV Response, ICC-01/13-66, para. 30.

<sup>120</sup> LRV Response, ICC-01/13-66, para. 32.

<sup>121</sup> LRV Response, ICC-01/13-66, para. 32.

<sup>122</sup> *See supra*, paras 30-31.

<sup>123</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 4.

<sup>124</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 17.

it “may introduce some confusion into the standard of proof to be applied by the Prosecution under article 53(1)” of the Statute and that a certain assertion “is not only unsupported, but inconsistent with the Statute”.<sup>125</sup> Such language is unbecoming of a judicial document.

83. In addition, the text of the 29 November 2017 Decision leaves no doubt as to the Prosecutor’s decision to willfully refrain from complying with the 16 July 2015 Decision. One of the introductory paragraphs states that

Based on its independent analysis of the law, the Prosecution cannot concur with the majority of the Pre-Trial Chamber. In particular, it respectfully disagrees with the legal reasoning in the Request concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under article 53(3), and the considerations relevant to the substantive analysis carried out by the majority. In such circumstances, having regard to the Prosecution’s independent mandate and the nature of its reconsideration under article 53(3) and rule 108, it must consider these matters afresh and cannot simply follow the approach of the Request.<sup>126</sup>

84. Furthermore, the Prosecutor chose herself not to follow the 16 July 2015 Decision even though she had attempted to bring similar arguments before the Appeals Chamber,<sup>127</sup> the appeal was declared inadmissible *in limine* and she failed to seek leave to appeal under article 82(1)(d), the correct basis to proceed if she had wished to challenge the standards applied by the Pre-Trial Chamber.

85. Finally, the Prosecutor considers that she is empowered to independently determine the appropriate basis for her reconsideration pursuant to article 53(3)(a) of the Statute, namely the arguments raised by the parties in the litigation before the Pre-Trial Chamber, as opposed to the decision of the Chamber.

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<sup>125</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 19. *See for more examples supra*, paras 30-31.

<sup>126</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 13.

<sup>127</sup> ICC-01/13-35, paras 17-27.

86. The Prosecutor is, therefore, challenging certain fundamental notions enshrined in the Statute. Her assertions strike at the very heart of the distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor.

87. Accordingly, the primary question arising from the 29 November 2017 Decision is whether the Prosecutor is under an obligation to abide by the 16 July 2015 Decision or whether she is free to disregard it and adopt another basis for her reconsideration in the exercise of her discretion. In order to answer this question, the Chamber must determine whether a “request” within the meaning of article 53(3)(a) of the Statute constitutes a binding judicial decision and, if so, what the legal consequences flowing from any such conclusion are.

(i) *The Nature of the 16 July 2015 Decision*

88. Article 53(3)(a) of the Statute reads as follows

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.

89. Accordingly, article 53(3)(a) of the Statute provides the Pre-Trial Chamber with the discretion to review decisions by the Prosecutor not to proceed with an investigation or a prosecution pursuant to article 53(1) of the Statute and to “request” the Prosecutor to reconsider such a decision at the request of either a State Party to the Statute or the United Nations Security Council.

90. For the reasons that follow, the Chamber considers it indisputable that a “request” pursuant to article 53(3)(a) of the Statute constitutes a judicial decision which must form the basis for the Prosecutor’s reconsideration.

91. The Chamber notes that rule 108(1) of the Rules specifically refers to “[a] *decision* of the Pre-Trial Chamber under article 53, paragraph 3 (a)” of the Statute (emphasis added). Furthermore, this rule stipulates that such a request “shall contain reasons”, additionally emphasising its nature as a judicial decision.

92. Therefore, the inevitable conclusion is that a request issued by the Pre-Trial Chamber under article 53(3)(a) of the Statute and rule 108(1) of the Rules constitutes a judicial decision addressed to the Prosecutor.

93. The Pre-Trial Chamber has been created to, *inter alia*, exercise judicial oversight over the Prosecutor’s responsibilities during the early stages of the proceedings.<sup>128</sup> Similar to article 15(3), article 53(3)(a) of the Statute concerns a specific aspect of this judicial oversight role. Such a role evidently comprises the power to issue decisions. Indeed, in the context of judicial proceedings, the Chamber cannot but render decisions. This is confirmed by two narrowly defined exceptions to this principle, namely article 56(2)(a) and (e) and article 59(5) of the Statute. Article 56(2)(a) and (e) of the Statute indicate that a Pre-Trial Chamber may make recommendations regarding procedures to be followed in the context of a unique investigative opportunity. The same provision nevertheless provides the Pre-Trial Chamber simultaneously with the power to issue orders in this regard. Accordingly, while a Pre-Trial

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<sup>128</sup> See for example K. Khan, “Article 34”, in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2016), p. 1200 (“[T]he creation of the Pre-Trial Division was a function of the decision to require judicial oversight of investigations”). See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC: Official Records (Volume II), 15 June - 17 July 1998, A/CONF.183/13 p. 66 (“Ms. Johnson (Norway) [...] confidence building checks and balances were necessary to establish the independence of the Prosecutor. [...] Norway perceived the proposal for a pre-trial chamber as a significant step forward”); p. 82 (“Mr. Baja (Philippines) [...] the Prosecutor should be independent [...] subject to the safeguards provided by a supervisory pre-trial chamber”), p. 91 (“Mr. Hashim (Brunei Darussalam) [...] The Prosecutor should be allowed to perform his or her tasks without necessary hindrance but subject to the control of the Pre-Trial Chamber”).

Chamber *may* issue recommendations, it retains the authority to issue orders, even in the context of this particular situation. The second situation is even more specific as it concerns the arrest proceedings in the custodial State. In this context, a Pre-Trial Chamber may make recommendations in case an arrested person applies to the competent authorities for interim release pending surrender. Apart from these exceptions, the Chamber renders decisions.

94. Finally, the Chamber notes that the Prosecutor sought to appeal the 16 July 2015 Decision on the basis of article 82(1)(a) of the Statute. By appealing it, the Prosecutor herself treated the 16 July 2015 Decision as a judicial decision. The Prosecutor's appeal was subsequently declared inadmissible by the Appeals Chamber and dismissed *in limine*.<sup>129</sup> The Chamber notes in that regard that the Prosecutor elected not to seek leave to appeal the 16 July 2015 Decision under article 82(1)(d) of the Statute.<sup>130</sup> The 16 July 2015 Decision has thus acquired the authority of a final decision within the legal framework of the Court.

*(ii) The Consequences Arising from the Conclusion  
that the 16 July 2015 Decision Constitutes a Final  
Judicial Decision*

95. The Chamber considers that, having established that the 16 July 2015 Decision constitutes a judicial decision that is no longer susceptible to appellate review, three consequences flow from this conclusion. First, the Prosecutor is under an obligation to comply with this decision to the extent specified below. Second, the 16 July 2015 Decision constitutes the basis for the reconsideration of the Prosecutor. Third, the 29 November 2017 Decision is not a "final decision" within the meaning of rule 108(3) of the Rules and the

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<sup>129</sup> 6 November 2015 Decision, ICC-01/13-51, para. 66.

<sup>130</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, footnote 5.

Chamber retains jurisdiction to ensure that the Prosecutor complies with the 16 July 2015 Decision.

The Prosecutor is Obligated to Comply with the  
16 July 2015 Decision

96. In the view of the Chamber, it is self-evident that the primary consequence arising from the conclusion that the 16 July 2015 Decision constitutes a final judicial decision is that the Prosecutor is under an obligation to comply with the 16 July 2015 Decision. In the view of the Chamber, compliance within the context of article 53(3)(a) means that the Prosecutor has to base her reconsideration decision on the Pre-Trial Chamber's decision requesting the Prosecutor to reconsider her decision not to initiate an investigation as further developed below.

97. First, such an obligation arises from the object and purpose of article 53(3)(a) of the Statute in two ways.

98. The Statute entrusts the Prosecutor with a number of discretionary powers during the early phases of the proceedings before the Court. However, as mentioned above, the Pre-Trial Chamber has been brought into being to, *inter alia*, oversee the exercise of these powers and article 53(3)(a) of the Statute constitutes a specific aspect of this judicial oversight role. This distribution of authority translates *ipso jure* into an obligation on the part of the Prosecutor to comply with a decision adopted under this provision. Any other approach would turn the logic of the Statute completely on its head. If the Prosecutor were free to disagree with or ignore a decision under article 53(3)(a) of the Statute, she would to all intents and purposes be acting as an appellate body reviewing the Chamber's decision on the merits. That would clearly contravene the judicial role of the Chambers and, in particular, the supervisory role of the Pre-Trial Chambers over the Prosecutor's actions.



99. In this regard, the Chamber recalls that the Appeals Chamber has clarified that “[t]he authority of the judges over the parties within the context of the trial does not negate any Statutory duties of the Prosecutor, but [...] it does mean that when there is a conflict between the Prosecutor’s perception of his duties and the orders of the Trial Chamber, the Trial Chamber’s orders must prevail”.<sup>131</sup> This means that the Prosecutor’s discretionary powers are limited and informed by the decisions of the Pre-Trial Chamber. This is especially the case when it comes to questions of law. It goes without saying that the authoritative interpretation of the applicable law is in the hands of the Chambers. The Chamber further considers that the phase of the proceedings does not affect the distribution of authority under the Statute. There is no indication in the Statute that the oversight role of the Pre-Trial Chamber over the parties to the proceedings, including the Prosecutor, is in any way reduced at the early stages of the proceedings. In sum, the Prosecutor must exercise her discretionary powers in keeping with the decisions issued by the Pre-Trial Chamber in the exercise of its statutorily assigned oversight role.

100. In addition, as stated by Pre-Trial Chamber I: “[t]he object and purpose of article 53(3)(a) of the Statute is to give referring entities the opportunity to challenge, and have the Chamber test, the validity of the Prosecutor’s decision not to investigate”.<sup>132</sup> A State Party to the Statute seized the Chamber in the matter under consideration, which entails that the Chamber must ensure that this entity may effectively exercise its opportunity to challenge the Prosecutor’s decision not to proceed with an investigation. It follows that, if

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<sup>131</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” (Lubanga Appeals Chamber Decision), 8 October 2010, ICC-01/04-01/06-2582, para. 48.

<sup>132</sup> 16 July 2015 Decision, ICC-01/13-34, para. 9.

the Prosecutor were at liberty to set aside a decision of the Chamber under article 53(3)(a) of the Statute, she would essentially negate the opportunity afforded to a State Party to challenge that decision under the Statute. Therefore, a decision issued by the Pre-Trial Chamber under article 53(3)(a) of the Statute must lead to an obligation of compliance on the part of the Prosecutor in order to give effect to a State Party's opportunity to challenge the Prosecutor's decision not to proceed with an investigation, as explicitly recognised under the Statute.

101. Second, a contextual interpretation of article 53(3)(a) of the Statute also leads to the conclusion that the Prosecutor must comply with a decision adopted by the Pre-Trial Chamber under this provision.

102. In this regard, the Chamber notes that, pursuant to article 71 of the Statute, "the Court may sanction persons present before it who commit misconduct, including [...] deliberate refusal to comply with its directions". This provision does not make a distinction between a Pre-Trial Chamber, a Trial Chamber, or even the Appeals Chamber. Although article 71(1) of the Statute refers to "persons present before it",<sup>133</sup> rule 171 of the Rules, both in its English and French version, makes reference to "misconduct consist[ing] of deliberate refusal to comply with an oral or *written direction* by the Court" (emphasis added). The Chamber notes in this context that the misconduct provisions of other international courts are not limited to misconduct committed during courtroom proceedings.<sup>134</sup>

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<sup>133</sup> The French version of article 71 of the Statute refers unambiguously to misconduct during a hearing ("l'inconduite à l'audience").

<sup>134</sup> Rule 46 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone; Rule 38 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia; and Rule 60 of the Rules of Procedure and Evidence of the Special Tribunal for the Lebanon.

103. In any event, the Chamber has the power to address misconduct occurring *outside the courtroom* by having “recourse to its broad discretionary power to ensure a fair trial and uphold the interests of justice as provided for in Article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in Article 64(6)(f) of the Statute”.<sup>135</sup> Although article 64 of the Statute does not expressly apply to the Pre-Trial Chamber *prima facie*, the Appeals Chamber has held that “the essence of its relevant underlying principles – ensuring ‘that a trial is fair and expeditious’ [...] and adopting ‘such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’” are equally applicable to Pre-Trial proceedings, since “protecting the integrity of the proceedings [...] is a matter that is *necessarily* within the jurisdiction of the Pre-Trial Chamber”.<sup>136</sup> Indeed, a court has the authority to undertake all acts reasonably required to perform its functions, including the ability to sanction breaches of its orders and similar conduct occurring outside the courtroom.<sup>137</sup> This interpretation is further supported by regulation 29 of the Regulations of the Court, which provides that “[i]n case of non-compliance by a participant [...] with an order of a Chamber [...], the Chamber may issue any order that is deemed necessary in the interests of justice”.

104. Accordingly, the Chamber has the power to sanction parties in case of deliberate refusal to comply with its instructions, on the basis of either article 71 of the Statute and rule 171 of the Rules or article 64 of the Statute and

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<sup>135</sup> Trial Chamber V(B), *The Prosecutor v. Kenyatta*, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers (“Kenyatta Professional Ethics Decision”), 31 May 2013, ICC-01/09-02/11-747, para. 14.

<sup>136</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”, 10 November 2011, ICC-01/09-02/11-365, para. 46 (emphasis added).

<sup>137</sup> Kenyatta Professional Ethics Decision, para. 15.

regulation 29 of the Regulations of the Court. Such a power necessarily presupposes that the parties to the proceedings are, in the first place, *under an obligation to comply* with instructions issued by a Chamber, including those contained in a decision issued by a Pre-Trial Chamber.

105. Third, even if *arguendo* a request under article 53(3)(a) of the Statute could potentially be interpreted as not imposing an obligation on the Prosecutor to comply with a decision of the Chamber, as the Prosecutor appears to believe, the principle of effectiveness nonetheless requires that a request under article 53(3)(a) of the Statute be interpreted as entailing an obligation of compliance on the part of the Prosecutor.

106. Indeed, according to this principle, “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted”.<sup>138</sup> The possibility of the Prosecutor simply disregarding a decision under article 53(3)(a) of the Statute would mean that the oversight function of the Pre-Trial Chamber is without effect and that a State Party’s opportunity to challenge the Prosecutor’s decision not to proceed with an investigation is devoid of substance. This interpretation must, therefore, yield to the interpretation giving effect to article 53(3)(a) of the Statute, namely that a decision under this provision compels the Prosecutor to comply with it.

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<sup>138</sup> Yearbook of the International Law Commission, Vol II, UN Doc. A/CN.4/SER.A/1966/Add.1, 18 January 1966, p. 219. *See also* Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, para. 25 (“a treaty [...] provision, must be read in such a way so as not to devoid [...] one or more of [the treaty’s] provisions of any of meaningful content”) *referring to* ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits), Judgement of 9 April 1949, p. 24.

107. Fourth, the Chamber underlines that it is also a principle of law recognised in different legal systems that parties to legal proceedings must comply with judicial decisions.<sup>139</sup> In the words of Trial Chamber I, “[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it [...]”.<sup>140</sup> The Appeals Chamber has fully endorsed this statement.<sup>141</sup> This principle applies to all phases of the proceedings before this Court.<sup>142</sup>

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<sup>139</sup> See for example Article 500 of the French Code de procédure civile, “A force de chose jugée le jugement qui n’est susceptible d’aucun recours suspensif d’exécution” ; Article 398 of the Burkinabe Code de procédure civile, “Le jugement qui n’est susceptible d’aucun recours suspensif d’exécution a force de chose jugée et est exécutoire [...]”. Those articles should be read bearing in mind: French Cour de cassation, 9 december 2010, N° 09-66152, “[la décision] [...] a force obligatoire en vertu de l’autorité de la chose jugée” ; S. Guinchard and F. Ferrand, *Procédure civile droit interne et droit communautaire*, 28<sup>ème</sup> édition, Dalloz, 2006, para. 225, “L’autorité de la chose jugée présente deux aspects: un aspect positif, tout d’abord dans la mesure où elle implique que le plaideur dont le droit a été reconnu peut se prévaloir du jugement et des avantages qui en découlent pour lui et cela a trois point de vue qui se déclinent tous avec le même mot: force exécutoire, force de la vérité légale, force probante. Cela montre bien que l’autorité de la chose jugée étend son emprise à tous les effets du jugement, pas seulement à son effet obligatoire”. See also, USA Supreme Court, *Ellis v. Dyson*, 1975, 421 U.S. 426, “The general principle [is] that final judgments have *res judicata* effect and are binding on the parties” (emphasis in original); Nigerian Supreme Court, *Alhaji Isiyaku Yakubu Enterprises Ltd & Anor v. Mr S.B. Omobolaje & Ors*, 2006, 1 SCNJ 86, “Parties and the court are bound by the judgment of the court”; Indian Supreme Court, *Vishal N Kalsaria Vs Bank of India & ORS*, 2016, “Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent state of that proceeding”. This principle is also recognised in the international courts and tribunals. See for example Article 59 of the ICJ Statute, “The decision of the Court has [...] binding force [...] between the parties”; Article 46 of the European Convention on Human Rights, “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. International criminal courts and tribunals have also explicitly referred to this principle. See for example ICTY, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Case No. IT-95-9, Trial Chamber III, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 9, “The [...] Decision thus stands and is binding upon the parties to it”; STL, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Case No. STL-11-01/PT/PRES, The President, Decision on the Head of Defence Office Request for Review of the Registrar’s Decision Relating to the Assignment of a Local Resource Person, 21 December 2012, para. 5, “The parties did not appeal against the Pre-Trial Judge’s decision. As a judicial determination, it is binding on the parties”.

<sup>140</sup> Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time Limit to Disclose the Identity of

108. Fifth, the Prosecutor is incorrect in stating that “the Appeals Chamber has confirmed that it lacks jurisdiction to hear such an appeal”<sup>143</sup> and “[g]iven the nature of the procedures under articles 15 and 53, there is no obvious forum for the Prosecution and Pre-Trial Chamber to resolve and reconcile any differences in their view of these provisions, except in clearly reasoned submissions such as these”.<sup>144</sup> It is evident that the proceedings before the Pre-Trial Chamber and the Appeals Chamber constitute the relevant fora. The Chamber recalls that the Prosecutor herself seized the Appeals Chamber. She cannot later explain her actions, because her appeal was declared inadmissible, simply by stating that “[o]ut of an abundance of caution [...] the Prosecution sought to appeal the Request and thus to seek independent confirmation of the applicable law”<sup>145</sup> under article 82(1)(a) of the Statute. The Chamber underlines that Pre-Trial Chamber I issued a decision which must form the basis for the Prosecutor’s reconsideration under article 53(3)(a) of the Statute, which was appealed by the Prosecutor. Subsequently, the Appeals Chamber declared the Prosecutor’s appeal under article 82(1)(a) inadmissible and since the Prosecutor did not request leave to appeal pursuant to article 82(1)(d) of the Statute, the 16 July 2015 Decision has, as indicated above, become final within the legal framework of the Court. In the circumstances, having not had the 16 July 2015 Decision considered by the Appeals Chamber, the Prosecutor obviously cannot now simply choose not to follow this Decision; she is obliged to comply with it.

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Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, ICC-01/04-01/06-2517-Red, para. 27.

<sup>141</sup> Lubanga Appeals Chamber Decision, ICC-01/04-01/06-2582, para. 48.

<sup>142</sup> *See also supra*, paras 102-104.

<sup>143</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 4.

<sup>144</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 14.

<sup>145</sup> 29 November 2017 Decision, ICC-01/13-57-Anx1, para. 4.

109. Having said that, the Chamber notes that in the course of dismissing the Prosecutor's appeal *in limine*, the Appeals Chamber, in its 6 November 2015 Decision, set out the statutory scheme for review of prosecutorial decisions not to investigate for the purposes of deciding the question of admissibility pursuant to article 53 and rule 108.<sup>146</sup> In this context, the Appeals Chamber held that while "[t]he Prosecutor is *obliged to reconsider* her decision not to investigate, [...] [she] retains ultimate discretion over how to proceed".<sup>147</sup> Thus, the Prosecutor's obligation to comply with the 16 July 2015 Decision does not entail an obligation as to the result of the reconsideration. In the corresponding footnote, however, the Appeals Chamber endorsed the statement that "[i]f the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial discretion, provided that the Prosecutor had *properly applied his or her mind* in coming to the conclusion".<sup>148</sup> Accordingly, while confirming the Prosecutor's discretion as to the outcome of the reconsideration process, the statement at the same time confirms, on any intelligible reading of the references to "obliged to reconsider" and "properly applied his or her mind", that the Prosecutor is under an obligation to reconsider the decision not to proceed with an investigation *in accordance with the decision issued by the Pre-Trial Chamber under article 53(3)(a) of the Statute*. In this context, the Chamber cannot overlook that, in her submissions to the Appeals Chamber, the Prosecutor explicitly

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<sup>146</sup> 6 November 2015 Decision, ICC-01/13-51, para. 53 *et seq.*

<sup>147</sup> 6 November 2015 Decision, ICC-01/13-51, para. 59 (emphasis added). This is confirmed by the context of article 53(3)(a) of the Statute. Article 53(3)(b) of the Statute stipulates that, upon review of the Pre-Trial Chamber of a decision not to proceed with an investigation or prosecution on the basis of "the interests of justice", such a decision "shall be effective only if confirmed by the Pre-Trial Chamber". Article 53(3)(a) of the Statute does not contain an analogous clause.

<sup>148</sup> 6 November 2015 Decision, ICC-01/13-51, footnote 134 (emphasis added) referring to 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* (2008), p. 1075.

indicated that, “although the Prosecutor retains discretion in deciding how further to proceed under rule 108 (although not *whether* to proceed under rule 108), she will exercise that discretion – and be seen to exercise that discretion, both by the public and the judiciary – *in the context of* [...] [the 16 July 2015 Decision]. Furthermore, the manner in which the Prosecutor exercises her discretion will inevitably be *informed by* [...] [*this*] ruling, and its reasoning”.<sup>149</sup>

The 16 July 2015 Decision is the Basis for the  
Prosecutor’s Reconsideration

110. The second consequence of the conclusion that the 16 July 2015 Decision is a final judicial decision is that it constitutes the basis for the reconsideration of the Prosecutor under rule 108(2) and (3) of the Rules.

111. The Chamber notes, however, that after deciding not to follow the 16 July 2015 Decision, the Prosecutor reconsidered the 6 November 2014 Decision on the basis of the submissions made by the parties during the litigation before the Pre-Trial Chamber. The Prosecutor, thus, claims the authority to disregard a judicial decision and, in its place, to reconsider her decision not to proceed with an investigation on the basis of submissions provided in the context of proceedings to which she herself was a party. Such an approach is evidently unsustainable.

112. As set out above,<sup>150</sup> the Prosecutor is a party to the proceedings and is subject to judicial oversight from the Pre-Trial Chamber. Besides rejecting the binding effect of the 16 July 2015 Decision, the Prosecutor additionally misconstrues this division of authority by asserting the power to autonomously determine the basis for her reconsideration.

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<sup>149</sup> ICC-01/13-47, para. 27 (emphasis added).

<sup>150</sup> See *supra* para. 93.



113. Furthermore, while the Prosecutor does not even attempt to identify a legal basis in support of her approach, the Rules establish that the Prosecutor's reconsideration must proceed on the basis of the Chamber's decision under article 53(3)(a) of the Statute. Rule 105(5) of the Rules compels the Prosecutor to provide reasons for her decision not to initiate an investigation in notifying the referring entity. Rule 108(1) of the Rules provides that the Pre-Trial Chamber's decision under article 53(3)(a) of the Statute "shall contain reasons" and rule 108(3) of the Rules similarly states that the Prosecutor must give "reasons" for her final decision. Considering that rule 105(5) of the Rules concerns the Prosecutor's duty to give reasons for her decision not to investigate, her duty to give reasons under rule 108(3) of the Rules must, necessarily, arise from the reasons provided by the Chamber under rule 108(1) of the Rules. If the Prosecutor were empowered to ignore the Chamber's decision under article 53(3)(a) of the Statute, her obligation to give reasons under rule 108(3) of the Rules would become meaningless. This means that rule 108 of the Rules, read together with rule 105(5) of the Rules, does not leave any room for the Prosecutor to disregard the Chamber's decision and independently decide on the basis for her reconsideration. Thus, what the Prosecutor is barred from doing and what she has done here, is to set aside the Chamber's decision in order to *exclusively* address the Parties' and participants' submissions.

The 29 November 2017 Decision is not a  
"Final Decision"

114. The third consequence arising from the conclusion that the 16 July 2015 Decision constitutes a final judicial decision is that the 29 November 2017 Decision cannot amount to a "final decision" within the meaning of rule 108(3) of the Rules until the Prosecutor has carried out her reconsideration in accordance with the 16 July 2015 Decision. The Chamber therefore necessarily

retains jurisdiction until the Prosecutor has complied with the 16 July 2015 Decision.

115. Rule 108 of the Rules, under its third paragraph, refers to “a final decision” taken by the Prosecutor following a request for reconsideration under article 53(3)(a) of the Statute. However, the Prosecutor, as she freely admits, manifestly disregarded the 16 July 2015 Decision. The Chamber is therefore of the view that the 29 November 2017 Decision is not the result of a proper exercise of reconsideration by the Prosecutor and shall be set aside on that basis.

116. This also means that the Pre-Trial Chamber’s oversight role under article 53(3)(a) of the Statute continues to be in effect. In light of the Chamber’s finding that the 16 July 2015 Decision constitutes a judicial decision, the Chamber necessarily continues to be vested with the power to ensure that the Prosecutor reconsiders her 6 November 2014 Decision in accordance with the 16 July 2015 Decision. The Chamber’s continued oversight role further arises from the Rules. Rule 108(3) of the Rules requires the Prosecutor to “notify the Pre-Trial Chamber in writing” and stipulates that this “notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion”. This rule, therefore, allows the Chamber to remain apprised of the Prosecutor’s final decision and requires the Prosecutor to provide reasons for such a decision. This indicates that the Chamber’s oversight role is not necessarily terminated upon the Prosecutor’s decision under rule 108(3) of the Rules.

### 3. Conclusion

117. In light of the foregoing, the Chamber considers it appropriate to order the Prosecutor to reconsider her 6 November 2014 Decision in accordance with the 16 July 2015 Decision. Specifically, the five main errors identified by the Pre-Trial Chamber must serve as the basis for the reconsideration of her

6 November 2014 Decision. In other words, the Prosecutor must demonstrate in detail how she has assessed the relevant facts in light of the specific directions contained in the 16 July 2015 Decision.

118. Regarding article 53(4) of the Statute, the Pre-Trial Chamber does not have the power under the Statute to review the Prosecutor's decision in the specific circumstances of this case. Accordingly, this part of the 23 February 2018 Application is dismissed *in limine*.

119. As a final point, the Chamber underlines that this matter has been under consideration for an extended period of time. As recently recalled by this Chamber, preliminary examinations must be concluded within a reasonable time.<sup>151</sup> This has manifestly not been the case for the preliminary examination in the situation at stake. As a matter of fact, it took more than two years, after the 6 November 2015 Appeals Chamber decision declaring her appeal inadmissible, for the Prosecutor to issue her 29 November 2017 Decision, which, as set out above,<sup>152</sup> wilfully refrains from complying with the 16 July 2015 Decision.

120. This is irreconcilable with the Prosecutor's duty to reconsider her decision "as soon as possible", as prescribed by rule 108(2) of the Rules. Furthermore, the Chamber is of the view that the Prosecutor is mandated to respect the rights of both the referring entity, here a State Party, and the victims during the conduct of a preliminary examination, including the reconsideration provided for in article 53(3)(a) of the Statute. With regard to the right of the referring State Party, Pre-Trial Chamber III stated that "in the view of the Chamber, the preliminary examination of a situation pursuant to

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<sup>151</sup> *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, para. 84.

<sup>152</sup> *See supra*, paras 83-84.

article 53(1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13(a) and 14 of the Statute, regardless of its complexity”.<sup>153</sup> With regard to the rights of victims, this Chamber recently stated that “the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations”;<sup>154</sup> it is therefore necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court, a matter which depends entirely on the Prosecutor’s decision of whether to open an investigation. Extended preliminary examinations affect the rights of victims and maintain them in a state of uncertainty which is prejudicial.

121. Therefore, the Chamber feels compelled to not only request the Prosecutor to reconsider her 6 November 2014 Decision in accordance with the 16 July 2015 Decision but also to set a deadline of 6 months for the Prosecutor to do so.

**FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY**

**REJECTS** the 13 March 2018 Response in so far as it requests the Chamber to dismiss the 23 February 2018 Application *in limine*;

**REJECTS** the 15 March 2018 Application as moot;

**REJECTS** the 11 April 2018 Request as moot;

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<sup>153</sup> Pre-Trial Chamber III, *Situation in the Central African Republic*, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6, p. 4.

<sup>154</sup> *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 88.

**DISMISSES** the 23 February 2018 Application in so far as it is based on article 53(4) of the Statute *in limine*;

**GRANTS** the 23 February 2018 Application in so far as it is based on article 53(3)(a) of the Statute;


**FINDS** that the 29 November 2017 decision cannot be considered to be final within the meaning of rule 108(3) of the Rules;

**REQUESTS**, accordingly, the Prosecutor to reconsider the 6 November 2014 Decision in accordance with the 16 July 2015 Decision; and

**REQUESTS** the Prosecutor to notify this Chamber and those participating in the proceedings of her final decision no later than Wednesday, 15 May 2019.

Judge Péter Kovács appends a partly dissenting opinion.

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

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**Judge Péter Kovács, Presiding Judge**

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**Judge Marc Perrin de Brichambaut**

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**Judge Reine Alapini-Gansou**

Dated this day, 15 November 2018

At The Hague, Netherlands