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**No. ICC-01/13 OA 2  
Date: 2 September 2019**

**THE APPEALS CHAMBER**

**Before:** Judge Solomy Balungi Bossa, Presiding Judge  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza

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

**Public**

**Judgment**

**on the appeal of the Prosecutor against Pre-Trial Chamber I's  
'Decision on the "Application for Judicial Review by the Government of the  
Union of the Comoros"'**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

**Legal Representatives of Victims**

Mr Rodney Dixon

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**States Representatives**

Mr Rodney Dixon

**REGISTRY**

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**Registrar**

Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ of 15 November 2018 (ICC-01/13-68),

After deliberation,

By majority, Judge Eboe-Osuji and Judge Ibáñez partly dissenting,

*Delivers* the following

## JUDGMENT

The ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’ is confirmed. The Prosecutor is instructed to reconsider her decision not to open an investigation in accordance with the 16 July 2015 Decision and the present judgment and to notify the Pre-Trial Chamber and those participating in the proceedings of her final decision by 2 December 2019.

## REASONS

### I. KEY FINDINGS

1. Neither article 53(3)(a) of the Statute nor rule 108(3) of the Rules preclude a pre-trial chamber from reviewing whether a decision of the Prosecutor that she considers to be ‘final’ actually amounts to a proper ‘final decision’. The pre-trial chamber’s power to review is derived from its statutory power to request reconsideration.

2. If a pre-trial chamber acting pursuant to article 53(3)(a) of the Statute requests the Prosecutor to reconsider her decision not to investigate on the basis of its interpretation of the applicable law, the Prosecutor is bound to follow this interpretation. Furthermore, the Prosecutor is bound to adhere to any directions of the pre-trial chamber to consider certain available information. In addition, when assessing gravity, the Prosecutor is obliged to follow any directions of the pre-trial chamber to take into account certain factors or information relating thereto. In

contrast, the pre-trial chamber may not direct the Prosecutor as to how the information made available to her should be analysed, which factual findings she should reach, how to apply the law to the available information, or what weight she should attach to the different factors in the course of a gravity assessment.

## II. INTRODUCTION

3. States Parties to the Rome Statute may refer situations, in the course of which crimes are alleged to have been committed, to the Prosecutor and request her to initiate an investigation. Article 53(1)(a) of the Statute stipulates the conditions under which the Prosecutor may decide not to initiate an investigation following such a referral. Pursuant to article 53(3)(a) of the Statute, the referring State Party may request the pre-trial chamber to review the Prosecutor's decision not to initiate an investigation. It also provides that, upon such a review, the pre-trial chamber may request the Prosecutor to reconsider her decision not to initiate an investigation. Rule 108(3) of the Rules provides that the Prosecutor shall communicate the 'final decision' to the pre-trial chamber. The present appeal concerns two issues relating to this procedure.

4. The first issue concerns the question of whether Pre-Trial Chamber I (the 'Pre-Trial Chamber'), having requested the Prosecutor to reconsider her decision and having received the Prosecutor's new decision which she considers to be final, may conduct a further review and request the Prosecutor to carry out a reconsideration anew.

5. The second issue relates to the question of whether the Prosecutor, when reconsidering her decision not to initiate an investigation, is bound by the Pre-Trial Chamber's conclusions on law or fact formulated in its request under article 53(3)(a) of the Statute.

### III. PROCEDURAL HISTORY

#### A. Proceedings before the Pre-Trial Chamber

6. 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 [the] Gaza strip’.<sup>1</sup>

7. On 6 November 2014, the Prosecutor determined that there was ‘no reasonable basis to proceed with an investigation’ and decided to close the preliminary examination (the ‘Decision not to Investigate’).<sup>2</sup> In particular, the Prosecutor concluded that, while the information available provided a reasonable basis to believe that war crimes under the Court’s jurisdiction have been committed in the context of interception and takeover of the vessels *Mavi Marmara* and *Eleftheri Mesogios/Sofia* by Israel Defence Forces (the ‘IDF’) soldiers on 31 May 2010,<sup>3</sup> ‘the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court, and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute’.<sup>4</sup>

8. On 29 January 2015, the Comoros requested that the Pre-Trial Chamber review the decision of the Prosecutor pursuant to article 53(3)(a) of the Statute, on the grounds that (i) the Prosecutor failed to take into account facts which did not occur on the three vessels over which the Court had jurisdiction, and (ii) the Prosecutor erred in not addressing factors relevant to the determination of gravity under article 17(1)(d) of the Statute.<sup>5</sup>

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<sup>1</sup> [‘Annex 1: Decision assigning the situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I’](#), ICC-01/13-1-Anx1, p. 1.

<sup>2</sup> ‘Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report’, registered on 4 February 2015, ICC-01/13-6-AnxA (the ‘[Decision not to Investigate](#)’), para. 151.

<sup>3</sup> The Prosecutor determined that there was a reasonable basis to believe that the war crimes of wilful killing under article 8(2)(a)(i), wilfully causing serious injury to body and health under article 8(2)(a)(iii), committing outrages upon personal dignity under article 8(2)(b)(xxi), and, if the blockage by Israel is deemed to be unlawful, also intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Rome Statute. *See* [Decision not to Investigate](#), paras 19 (p. 6), 149.

<sup>4</sup> [Decision not to Investigate](#), para. 150.

<sup>5</sup> [‘Public Redacted Version of Application for Review pursuant to Article 53\(3\)\(a\) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation’](#), ICC-01/13-3-Red, paras 60-135.

9. On 16 July 2015, the Pre-Trial Chamber, by majority, rendered a decision requesting the Prosecutor to reconsider her decision not to initiate an investigation (the ‘16 July 2015 Decision’).<sup>6</sup> The Chamber identified five errors that combined, ‘materially affect[ed] the validity of the Prosecutor’s conclusion [...]’.<sup>7</sup>

10. On 27 July 2015, the Prosecutor filed a notice of appeal against the 16 July 2015 Decision.<sup>8</sup>

11. On 6 November 2015, the Appeals Chamber dismissed the Prosecutor’s appeal *in limine*, finding that ‘the Impugned decision was not one “with respect to [...] admissibility” within the meaning of article 82(1)(a) of the Statute’.<sup>9</sup>

12. On 29 November 2017, the Prosecutor filed her final decision (the ‘Prosecutor’s 29 November 2017 Decision’).<sup>10</sup> The Prosecutor submitted that ‘[h]aving carefully analysed the Request, the Report, and the other information available, the Prosecution remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute’,<sup>11</sup> and that ‘the preliminary examination must be closed’.<sup>12</sup>

13. On 23 February 2018, the Comoros filed the ‘Application for Judicial Review by the Government of the Union of the Comoros’<sup>13</sup> requesting the Pre-Trial Chamber to review the Prosecutor’s 29 November 2017 Decision not to open an investigation and to direct the Prosecutor to reconsider it.<sup>14</sup>

14. On 15 November 2018, the Pre-Trial Chamber issued the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’

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<sup>6</sup> ‘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 (the ‘[16 July 2015 Decision](#)’). *See also* ‘[Partly Dissenting Opinion of Judge Péter Kovács](#)’, ICC-01/13-34-Anx-Corr.

<sup>7</sup> [16 July 2015 Decision](#), para. 49.

<sup>8</sup> ‘[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.

<sup>9</sup> ‘Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”’, ICC-01/13-51 (the ‘[Decision on Admissibility 2015](#)’), para. 66.

<sup>10</sup> ‘Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), date 6 November 2014’, ICC-01/13-57-Anx1 (the ‘[Prosecutor’s 29 November 2017 Decision](#)’).

<sup>11</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 2.

<sup>12</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 2.

<sup>13</sup> ICC-01/13-58-Red (the ‘[23 February 2018 Application](#)’).

<sup>14</sup> [23 February 2018 Application](#), para. 132.

(the ‘Impugned Decision’),<sup>15</sup> in which it requested the Prosecutor to reconsider the Decision not to Investigate in accordance with the 16 July 2015 Decision.<sup>16</sup>

15. On 21 November 2018, the Prosecutor filed her ‘Request for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros”’.<sup>17</sup> On 26 November 2018, the victims represented by Ms Paolina Massidda (the ‘OPCV’), the Comoros, and the victims represented by Mr Rodney Dixon (the ‘LRV’, and together with OPCV, the ‘Victims’) filed their respective responses.<sup>18</sup>

16. On 18 January 2019, the Pre-Trial Chamber granted the Prosecutor’s request for leave to appeal the Impugned Decision with regard to two issues.<sup>19</sup>

## **B. Proceedings before the Appeals Chamber**

17. On 21 January 2019, the Prosecutor filed the ‘Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect’, in which she requested the Appeals Chamber to (i) extend the page limit for the Prosecutor’s appeal brief to a maximum of 50 pages; (ii) extend the time limit for the Prosecutor’s appeal brief until 11 February 2019; and (iii) suspend the effect of the Impugned Decision until the Prosecutor’s appeal has been determined.<sup>20</sup>

18. On 24 January 2019, pursuant to an order of the Appeals Chamber,<sup>21</sup> the Comoros,<sup>22</sup> the OPCV,<sup>23</sup> and the LRV,<sup>24</sup> filed their respective responses.

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<sup>15</sup> ICC-01/13-68 (the ‘[Impugned Decision](#)’). *See also*, ‘Partly Dissenting Opinion of Judge Péter Kovács’, ICC-01/13-68-Anx (hereinafter: ‘[Judge Kovács Partly Dissenting Opinion](#)’).

<sup>16</sup> [Impugned Decision](#), para. 121.

<sup>17</sup> ICC-01/13-69 (the ‘[Prosecutor’s Request for Leave to Appeal](#)’).

<sup>18</sup> OPCV, ‘[Victims’ Response to the Prosecutor’s “Request for Leave to Appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros”’](#)’, ICC-01/13-70; Comoros, ‘[Response on behalf of the Government of the Comoros to the Prosecutor’s “Request for Leave to Appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros”’](#)’, ICC-01/13-71; LRV, ‘[Response on behalf of the Victims to the Prosecutor’s “Request for Leave to Appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros”’](#)’, ICC-01/13-72.

<sup>19</sup> ‘Decision on the Prosecutor’s request for leave to appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros”’’, ICC-01/13-73 (the ‘[Decision on Prosecutor’s request for leave to appeal](#)’).

<sup>20</sup> [ICC-01/13-74](#) (OA2), paras 2, 16.

<sup>21</sup> ‘[Order on the filing of responses to the request of the Prosecutor for extension of pages, extension of time, and suspensive effect](#)’, 22 January 2019, ICC-01/13-76 (OA2), p. 3.

19. On 25 January 2019, the Appeals Chamber granted the Prosecutor’s request for an extension of the page limit of and the time limit for the filing of its appeal brief, while noting that a decision on the Prosecutor’s request for suspensive effect would be issued separately.<sup>25</sup>
20. On 31 January 2019, the Appeals Chamber rejected the Prosecutor’s request for suspensive effect.<sup>26</sup>
21. On 11 February 2019, the Prosecutor filed her Appeal Brief.<sup>27</sup>
22. On 4 March 2019, the Comoros,<sup>28</sup> the OPCV<sup>29</sup> and the LRV<sup>30</sup> filed their respective responses.
23. On 12 April 2019, the Appeals Chamber informed the parties and participants that a hearing would be held on 1 May 2019,<sup>31</sup> and on 18 April 2019 it issued further directions on the conduct of the hearing.<sup>32</sup>
24. On 1 May 2019, the Appeals Chamber held a hearing with the Prosecutor, the Comoros and the Victims.<sup>33</sup>
25. On 3 May 2019, the Appeals Chamber issued an order by which a hearing for the delivery of the judgment on this appeal was scheduled for 2 September 2019 and

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<sup>22</sup> [‘Response on behalf of the Government of the Union of the Comoros to the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”](#)’, ICC-01/13-79 (OA2).

<sup>23</sup> [‘Victims’ response to the Prosecution’s Omnibus Request](#)’, ICC-01/13-77 (OA2).

<sup>24</sup> [‘Response of the Victims to the “Prosecution’s omnibus request for extension of pages, extension of time, and suspensive effect”](#)’, ICC-01/13-78 (OA2).

<sup>25</sup> [‘Decision on the Prosecutor’s request for extension of page limit and extension of time limit](#)’, ICC-01/13-80 (OA2), p. 3, paras 6, 11, 15-16.

<sup>26</sup> [‘Decision on the Prosecutor’s request for suspensive effect](#)’, ICC-01/13-81 (OA2), p. 3 and paras 11-12.

<sup>27</sup> ‘Prosecution Appeal Brief’, ICC-01/13-85 (OA2) (the [‘Prosecutor’s Appeal Brief](#)’).

<sup>28</sup> ‘Response on behalf of the Government of the Union of the Comoros to the “Prosecution Appeal Brief”’, ICC-01/13-91 (OA2) (the [‘Comoros Response](#)’).

<sup>29</sup> ‘Victims’ Response to the Prosecution’s Appeal of the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros”’, ICC-01/13-90 (OA2) (the [‘OPCV’s Response](#)’).

<sup>30</sup> ‘Response on behalf of Victims to the “Prosecution Appeal Brief”’, ICC-01/13-92 (OA2) (the [‘LRV’s Response](#)’).

<sup>31</sup> [‘Scheduling order for a hearing before the Appeals Chamber](#)’, ICC-01/13-93 (OA2).

<sup>32</sup> [‘Order on the conduct of the hearing before the Appeals Chamber](#)’, ICC-01/13-95 (OA2).

<sup>33</sup> [‘Transcript of hearing, 1 May 2019](#)’, ICC-01/13-T-1-ENG.

the time limit set by the Pre-Trial Chamber for the Prosecutor to reconsider her decision was suspended until the delivery of said judgment.<sup>34</sup>

#### IV. MERITS

##### A. Standard of review

26. With respect to errors of law the Appeals Chamber has held that

[it] will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

A judgment is ‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error’.<sup>35</sup>  
[Footnotes omitted.]

27. The above standard of review will guide the analysis of the Appeals Chamber.

##### B. Applicable law

28. The Appeals Chamber considers it appropriate to set out the main provisions of the Statute and the Rules relevant to the issues raised on appeal.

29. Article 53 of the Statute (‘Initiation of an investigation’) provides that

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

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<sup>34</sup> ‘Scheduling Order for delivery of judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 15 November 2018 entitled ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’’, ICC-01/13-97 (OA2) (the ‘[Scheduling Order](#)’).

<sup>35</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, ‘[Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)’, 1 December 2014, ICC-01/04-01/06-3121-Red (A5), paras 18-19; Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, ‘[Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’](#)’, 7 April 2015, ICC-01/04-02/12-271-Corr (A), para. 20; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ‘[Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’](#)’, 8 March 2018, ICC-01/05-01/13-2275-Red (A, A2, A3, A4, A5), para. 90.

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) 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.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

30. Rule 108 pertains to the decision of the pre-trial chamber under article 53(3)(a) of the Statute and stipulates that

1. A decision of the Pre-Trial Chamber under article 53, paragraph 3 (a), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review.

2. Where the Pre-Trial Chamber requests the Prosecutor to review, in whole or in part, his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible.

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

31. Regulation 29 of the Regulations of the Court, in turn, provides that

In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.

### **C. Order in which the grounds of appeal will be addressed**

32. The Appeals Chamber recalls that the Pre-Trial Chamber granted leave to appeal with regard to the following two issues:

Whether the Pre-Trial Chamber may find that a decision by the Prosecutor further to a request for reconsideration pursuant to article 53(3)(a) of the Statute cannot be considered to be final within the meaning of rule 108(3) of the Rules of Procedure and Evidence in circumstances in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the aforementioned request;<sup>36</sup>

Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues.<sup>37</sup>

33. In relation to the two issues certified on appeal, the Appeals Chamber notes that the Prosecutor raises two grounds of appeal which address the issues certified for leave to appeal in reverse order.<sup>38</sup> Under her first ground of appeal, the Prosecutor addresses the second issue on appeal submitting that the Pre-Trial Chamber, acting by majority, erred by requiring the Prosecutor to accept particular conclusions of law and fact contained in the 16 July 2015 Decision.<sup>39</sup> Further or alternatively, the Prosecutor

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<sup>36</sup> [Decision on Prosecutor's request for leave to appeal](#), para. 39.

<sup>37</sup> [Decision on Prosecutor's request for leave to appeal](#), para. 46, referring to [Prosecutor's Request for Leave to Appeal](#), para. 13.

<sup>38</sup> [Prosecutor's Appeal Brief](#), para. 8.

<sup>39</sup> [Prosecutor's Appeal Brief](#), paras 15 *et seq.*

avers under her second ground of appeal and in relation to the first issue on appeal, that the Pre-Trial Chamber erred by invalidating and setting aside the Prosecutor's 29 November 2017 Decision, thereby requiring the Prosecutor to conduct a further reconsideration of the Decision not to Investigate.<sup>40</sup>

34. The Appeals Chamber finds it appropriate to address the grounds of appeal in the order in which the Pre-Trial Chamber granted leave to appeal the issues, as the matters addressed under the Prosecutor's second ground of appeal are considered to be preliminary to the discussion on the Prosecutor's first ground of appeal.

## **D. Prosecutor's second ground of appeal**

### *1. Relevant part of the Impugned Decision*

35. The Pre-Trial Chamber, by majority, considered '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'.<sup>41</sup> Having established that the 16 July 2015 Decision constitutes a judicial decision that 'is no longer susceptible to appellate review',<sup>42</sup> it determined that three consequences flow from this conclusion, namely: (i) the Prosecutor is under an obligation to comply with this decision;<sup>43</sup> (ii) the 16 July 2015 Decision constitutes the basis for the reconsideration of the Prosecutor;<sup>44</sup> and (iii) the Prosecutor's 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 and the Chamber therefore retains jurisdiction to ensure that the Prosecutor complies with the 16 July 2015 Decision.<sup>45</sup>

36. With regard to the third consequence as it relates to the present ground of appeal, the Pre-Trial Chamber considered that the Prosecutor 'manifestly disregarded' the 16 July 2015 Decision and therefore the Prosecutor's 29 November 2017 Decision 'is not the result of a proper exercise of reconsideration' and 'shall be set aside on that

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<sup>40</sup> [Prosecutor's Appeal Brief](#), paras 73 *et seq.*

<sup>41</sup> [Impugned Decision](#), para. 90.

<sup>42</sup> [Impugned Decision](#), para. 95.

<sup>43</sup> [Impugned Decision](#), paras 95-109.

<sup>44</sup> [Impugned Decision](#), paras 95, 110-113.

<sup>45</sup> [Impugned Decision](#), paras 95, 114-116.

basis'.<sup>46</sup> In particular, it considered that, in light of its finding that the 16 July 2015 Decision constitutes a judicial decision, it 'necessarily continues to be vested with the power to ensure that the Prosecutor reconsiders her [Decision not to Investigate] in accordance with the 16 July 2015 Decision', and that this 'continued oversight role further arises from [rule 108(3) of] the Rules', which 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'.<sup>47</sup> According to the Pre-Trial Chamber, this rule allows it to remain apprised of the Prosecutor's final decision and requires the Prosecutor to provide reasons for such a decision. Thus, in the Pre-Trial Chamber's view, the Chamber's oversight role is not necessarily terminated upon the Prosecutor's decision under rule 108(3) of the Rules.<sup>48</sup>

37. The Pre-Trial Chamber therefore considered it appropriate to order the Prosecutor to reconsider her Decision not to Investigate in accordance with the 16 July 2015 Decision, stating that 'the five main errors identified by the Pre-Trial Chamber must serve as the basis for the reconsideration [...]' and that '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'.<sup>49</sup>

38. In his Partly Dissenting Opinion, Judge Kovács stated, *inter alia*, that a decision taken by the Prosecutor pursuant to article 53(1)(a) and/or (b) and rules 105-107 of the Rules 'cannot be reconsidered twice in accordance with article 53(3)(a) of the Statute and rule 108(3) of the Rules',<sup>50</sup> and that once the Prosecutor has reached her conclusion and the decision meets the requirements set out in Rule 108(3), the Prosecutor's decision becomes 'final'.<sup>51</sup>

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<sup>46</sup> [Impugned Decision](#), para. 115.

<sup>47</sup> [Impugned Decision](#), para. 116.

<sup>48</sup> [Impugned Decision](#), para. 116.

<sup>49</sup> [Impugned Decision](#), para. 117.

<sup>50</sup> [Judge Kovács Partly Dissenting Opinion](#), para. 21.

<sup>51</sup> [Judge Kovács Partly Dissenting Opinion](#), paras 17-19.

## 2. Submissions before the Appeals Chamber

### (a) Prosecutor's submissions

39. The Prosecutor submits that the Pre-Trial Chamber erred in invalidating the Prosecutor's 29 November 2017 Decision and requiring the Prosecutor to further reconsider her Decision not to Investigate.<sup>52</sup>

40. The Prosecutor submits that by declaring that 'the primary question [...] is whether the Prosecutor is under an obligation to abide by the [16 July 2015 Decision] or whether she is free to disregard it', the Pre-Trial Chamber misdirected itself.<sup>53</sup> Accordingly, for the Prosecutor, the Impugned Decision must be reversed because it is *ultra vires* – the Pre-Trial Chamber was not, in the Prosecutor's view, competent to entertain the Comoros' further request for reconsideration, and any decision by it other than dismissal *in limine* was therefore wrong in law.<sup>54</sup> In support of this position, the Prosecutor contends that the Pre-Trial Chamber asserted a power to determine the validity of a 'final decision' under rule 108(3) of the Rules.<sup>55</sup>

41. The Prosecutor argues that by its plain terms, particularly rule 108(3) of the Rules but also article 53(3)(a) of the Statute, do not permit the pre-trial chamber to determine the validity of a 'final decision'.<sup>56</sup> She avers that the absence of such power can be drawn from the broader context of the Statute and the Rules.<sup>57</sup> In particular, the Prosecutor submits that jurisdiction for judicial review is only granted expressly in the Statute and that article 53(3) is *lex specialis*.<sup>58</sup> She considers that the Pre-Trial Chamber's approach eliminates the distinction between article 53(3)(a) and 53(3)(b) of the Statute,<sup>59</sup> and that prosecutorial decisions under article 53(4) of the Statute are

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<sup>52</sup> [Prosecutor's Appeal Brief](#), paras 7 and 73-116. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 13, lines 17-22.

<sup>53</sup> [Prosecutor's Appeal Brief](#), para. 74. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 13, lines 17-22.

<sup>54</sup> [Prosecutor's Appeal Brief](#), para. 74. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 19, lines 13-22.

<sup>55</sup> [Prosecutor's Appeal Brief](#), paras 75-79.

<sup>56</sup> [Prosecutor's Appeal Brief](#), paras. 80-90.

<sup>57</sup> [Prosecutor's Appeal Brief](#), paras 91-92. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 14, lines 20-23, p. 148, lines 15-22.

<sup>58</sup> [Prosecutor's Appeal Brief](#), paras 93-101.

<sup>59</sup> [Prosecutor's Appeal Brief](#), para. 102. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 14, lines 20-23, p. 148, lines 10-24.

not subject to judicial review.<sup>60</sup> The term ‘final’ in the Statute and the Rules is used, in the Prosecutor’s view, to restrict further procedural remedies.<sup>61</sup> She contends that the duty to give reasons in rule 108(3) is immaterial,<sup>62</sup> and that the Statute does not grant the pre-trial chamber any general power of ‘oversight’.<sup>63</sup>

42. The Prosecutor contends further that the object and purpose of the Statute confirm that the pre-trial chamber has no power to determine the validity of a ‘final decision’ under rule 108(3) of the Statute,<sup>64</sup> and that this is confirmed by the drafting history of the Statute.<sup>65</sup> In the Prosecutor’s view, the Pre-Trial Chamber’s error materially affects the Impugned Decision.<sup>66</sup>

(b) *Comoros’ submissions*

43. The Comoros submits that the arguments under this ground of appeal should be dismissed as being beyond the appealable issues that the Pre-Trial Chamber certified.<sup>67</sup> In any event, it contends, the arguments are without any substance and should be rejected since the Prosecutor has not shown that the Pre-Trial Chamber committed any discernible error that requires any intervention by the Appeals Chamber.<sup>68</sup> It submits, *inter alia*, that rule 108 of the Rules does not state that the Prosecutor’s ‘final decision’ is ‘itself non-reviewable if the [Prosecutor] fails to comply with the Chamber’s request for review in the first place’,<sup>69</sup> and that this reading accords with the Appeals Chamber’s statements on this issue.<sup>70</sup>

44. According to the Comoros, only once the Prosecutor has addressed the errors identified in its 16 July 2015 Decision can one conclude that the Pre-Trial Chamber is

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<sup>60</sup> [Prosecutor’s Appeal Brief](#), paras 103-105.

<sup>61</sup> [Prosecutor’s Appeal Brief](#), para. 106. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 148, line 25 to p. 149, line 2.

<sup>62</sup> [Prosecutor’s Appeal Brief](#), para. 107.

<sup>63</sup> [Prosecutor’s Appeal Brief](#), paras 108-113.

<sup>64</sup> [Prosecutor’s Appeal Brief](#), para. 114.

<sup>65</sup> [Prosecutor’s Appeal Brief](#), para. 115. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 148, lines 10-22.

<sup>66</sup> [Prosecutor’s Appeal Brief](#), para. 116.

<sup>67</sup> [Comoros Response](#), para. 56. *See also* paras 20-27, 70.

<sup>68</sup> [Comoros Response](#), paras 57-68. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 17-19.

<sup>69</sup> [Comoros Response](#), para. 60.

<sup>70</sup> [Comoros Response](#), para. 62.

said to no longer have jurisdiction.<sup>71</sup> It also submits that the Prosecutor’s ‘decision on reconsideration was “not the result of a proper exercise of reconsideration”’.<sup>72</sup>

45. Lastly, the Comoros submits that it is ‘completely inappropriate’ for the Prosecutor to equate ‘itself to the Appeals Chamber that provides reasons for its decision but with “no suggestion that it may necessarily be challenged further before the Court”’.<sup>73</sup> The Comoros further contends that both the pre-trial chamber and the Appeals Chamber oversee the Prosecutor’s discretionary powers and more importantly, ‘the [Prosecutor] is not entrusted under the Statute with the power to interpret the law of the Court’.<sup>74</sup>

(c) *OPCV’s submissions*

46. The OPCV submits that the Pre-Trial ‘Chamber acted within its mandate and was entitled to find that the Prosecutor’s decision cannot be viewed as ‘final’ by reason of the flaws in the reconsideration process’.<sup>75</sup>

47. In the Impugned Decision, the Pre-Trial Chamber conducted a review of whether the Prosecutor had complied with the 16 July 2015 Decision; and not ‘a qualitative review’ of the ‘final’ decision as a whole.<sup>76</sup>

48. While the Prosecutor, in the OPCV’s view, has ‘prerogative powers to decide whether or not to open an investigation, the [p]re-[t]rial chamber retains powers of oversight and can order her to take particular legal and factual findings into account when conducting a reconsideration of her initial decision’.<sup>77</sup> The OPCV submits that the Prosecutor’s prerogative to reach the final decision on whether or not to initiate an

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<sup>71</sup> [Comoros Response](#), para. 59. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 5-9, p. 29, lines 3-7, p. 30, line 25 to p. 31, line 3, p. 52, lines 4-7, p. 66, lines 13-16.

<sup>72</sup> [Comoros Response](#), para. 59. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 65, line 18 to p. 66, line 12, p. 138, line 25 to p. 139, line 7, p. 140, lines 2-9.

<sup>73</sup> [Comoros Response](#), para. 65. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 27, line 20 to p. 28, line 3.

<sup>74</sup> [Comoros Response](#), para. 65. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 31, lines 16-18.

<sup>75</sup> [OPCV’s Response](#), para. 27. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 42, line 24 to p. 43, line 7, p. 43, lines 15-16, p. 45, lines 2-4, p. 142, lines 19-21.

<sup>76</sup> [OPCV’s Response](#), para. 29.

<sup>77</sup> [OPCV’s Response](#), para. 34. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 42, lines 17-21, p. 43, lines 8-11, p. 46, lines 8-9, p. 86, line 21 to p. 87, line 2.

investigation does not mean that her decisions are ‘immune to review for procedural correctness’.<sup>78</sup>

49. According to the OPCV, nothing in rule 108 of the Rules numerically limits the review process and this provision simply confines the pre-trial chamber’s role in that it may not interfere with a final decision which is legally sound and properly motivated.<sup>79</sup> This understanding is, in the OPCV’s view, consistent with the wording of rule 108 of the Rules<sup>80</sup> and with the Appeals Chamber previous pronouncement.<sup>81</sup>

50. It follows, for the OPCV, that where a flaw in the process is detected, the pre-trial chamber can require the Prosecutor to conduct a *de novo* reconsideration and, in their view, this does not equate to the pre-trial chamber requiring the Prosecutor to adopt its reasoning.<sup>82</sup> It furthermore noted that the Prosecutor did not appeal the Chamber’s decision identifying these errors on its merits, and since the decision has now become final, she ‘cannot now challenge the Chamber’s findings through the backdoor’.<sup>83</sup>

(d) *LRV’s submissions*

51. The LRV argue that in the second ground of appeal, the Prosecutor also addresses arguments for which leave to appeal was not granted and urges the Appeals Chamber to dismiss the appeal on this basis alone.<sup>84</sup>

52. The LRV argue, *inter alia*, that a decision by the Prosecutor ‘can only be final once it has addressed all the issues that it was required to consider and correct’.<sup>85</sup> The LRV argue that the use of the word ‘final’ does not mean the decision is not

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<sup>78</sup> [OPCV’s Response](#), paras 30-35, making reference to ECtHR, *Bochan v. Ukraine (No. 2)*, App. No. 22251/08, Judgment, 5 February 2015, paras 36-39. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 46, lines 4-7.

<sup>79</sup> [OPCV’s Response](#), para. 38. See also [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 45, line 23 to p. 46, line 3.

<sup>80</sup> [OPCV’s Response](#), paras 38-41.

<sup>81</sup> [OPCV’s Response](#), paras 39-40.

<sup>82</sup> [OPCV’s Response](#), para. 42.

<sup>83</sup> [OPCV’s Response](#), para. 43.

<sup>84</sup> [LRV’s Response](#), paras 45-48.

<sup>85</sup> [LRV’s Response](#), para. 51.

reviewable and to argue otherwise would ‘undermine the whole purpose of the judicial review proceedings’.<sup>86</sup>

### 3. *Determination by the Appeals Chamber*

#### (a) *The issue on appeal*

53. The Appeals Chamber notes that the second ground of appeal, as formulated by the Prosecutor, concerns primarily the question of whether the Pre-Trial Chamber had the power to request the Prosecutor to carry out a reconsideration of her Decision not to Investigate, after she had already notified the Pre-Trial Chamber of the Prosecutor’s 29 November 2017 Decision, which, in the Prosecutor’s view, amounted to a ‘final decision’ on reconsideration in terms of rule 108(3) of the Rules.

54. The Appeals Chamber notes that the Comoros, as well as the Victims, argue that some of the Prosecutor’s arguments under this ground of appeal fall outside the scope of the issues in relation to which the Pre-Trial Chamber granted leave to appeal.<sup>87</sup> In this regard, they note that the Pre-Trial Chamber refused leave to appeal the following issue:

Whether the Pre-Trial Chamber may entertain and rule upon the merits of further requests for reconsideration under article 53(3)(a) of the Statute, once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision not to initiate an investigation under rule 108(3).<sup>88</sup>

55. The Appeals Chamber is not persuaded by the arguments of the Comoros and the Victims. The Pre-Trial Chamber granted leave to appeal in relation to the following issue:

Whether the Pre-Trial Chamber may find that a decision by the Prosecutor further to a request for reconsideration pursuant to article 53(3)(a) of the Statute cannot be considered to be final within the meaning of rule 108(3) of the Rules of Procedure and Evidence in circumstances in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the aforementioned request;<sup>89</sup>

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<sup>86</sup> [LRV’s Response](#), para. 54.

<sup>87</sup> [Comoros Response](#), paras 22-27, 70; [OPCV’s Response](#), paras 4, 18; [LRV’s Response](#), paras 8-10, 45-48.

<sup>88</sup> [Decision on Prosecutor’s request for leave to appeal](#), para. 31.

<sup>89</sup> [Decision on Prosecutor’s request for leave to appeal](#), para. 39.

56. The Appeals Chamber notes that this issue includes the question of whether a pre-trial chamber has the power to determine whether the Prosecutor has conducted her reconsideration properly resulting in a decision that is ‘final’ in terms of rule 108(3) of the Rules. The additional question – raised amongst others by the Prosecutor under this ground of appeal – of whether a pre-trial chamber may request the Prosecutor to carry out a further reconsideration if it has found that the Prosecutor’s decision was not a ‘final decision’ is intrinsically linked<sup>90</sup> to the former question and therefore may be considered in this appeal.

(b) *The Pre-Trial Chamber’s power to review the Prosecutor’s final decision pursuant to rule 108(3)*

57. Article 53(3)(a) of the Statute empowers the pre-trial chamber, at the request of the referring State Party or the Security Council, to review a decision of the Prosecutor not to open an investigation, which is based on article 53(1) of the Statute.<sup>91</sup> The pre-trial chamber, upon review, ‘may request the Prosecutor to reconsider that decision’. If the Prosecutor is requested to reconsider her initial decision, the procedure to be followed by the Prosecutor is provided for in rule 108 of the Rules.

58. The Appeals Chamber observes that rule 108(3) of the Rules refers to the Prosecutor’s decision, once she has conducted her reconsideration, as a ‘final decision’. In its Decision on Admissibility 2015, the Appeals Chamber recalled that the relevant drafting history of what eventually became article 53(3) of the Statute confirmed the view that, while judicial review of the Prosecutor’s decision not to

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<sup>90</sup> See e.g., Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ‘[Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#)’, 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 13, referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ‘[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court”](#)’, 18 December 2015, ICC-02/11-01/15-369 (OA7), paras 25-26; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘[Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”](#)’, 27 May 2008, ICC-01/04-01/07-521 (OA5), para. 37; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, ‘[Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54\(3\)\(e\) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”](#)’, 21 October 2008, ICC-01/04-01/06-1486 (OA13), paras 14, 17.

<sup>91</sup> See rule 107 of the Rules which stipulates the procedure for review under article 53(3)(a).

investigate should be possible, the ‘ultimate decision’ as to whether to initiate an investigation is that of the Prosecutor.<sup>92</sup> The Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, adopts this interpretation as being correct.

59. Nevertheless, the Appeals Chamber considers that neither article 53(3)(a) of the Statute nor rule 108(3) of the Rules preclude a pre-trial chamber from reviewing whether a decision of the Prosecutor that she considers to be ‘final’ pursuant to rule 108(3) of the Rules actually amounts to a proper ‘final decision’. Indeed, if the pre-trial chamber lacked such power, the Prosecutor could simply decide to ignore the basis for the pre-trial chamber’s request for reconsideration. This would in turn negate the effectiveness of the procedure under article 53(3)(a) of the Statute as a whole.

60. The pre-trial chamber’s power to review the Prosecutor’s decision pursuant to rule 108(3) of the Rules is derived from its statutory power to request reconsideration. The Appeals Chamber considers that a ‘request’ by the pre-trial chamber under article 53(3)(a) of the Statute is a judicial decision, which by its very nature, imbues the pre-trial chamber with power to once again review the Prosecutor’s decision following reconsideration. In considering whether the Prosecutor’s ‘final decision’ actually amounts to a proper ‘final decision’, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that the scope of the pre-trial chamber’s review is, however, limited to establishing whether the Prosecutor carried out the reconsideration in accordance with the pre-trial chamber’s request for reconsideration.

61. In the case at hand, the Appeals Chamber finds no merit in the Prosecutor’s assertion that the Pre-Trial Chamber lacked the power under article 53(3) (a) of the Statute and rule 108(3) of the Rules to ‘set aside’ her ‘final’ decision and require her to further consider her initial decision.<sup>93</sup> As discussed above, the Appeals Chamber finds that the Pre-Trial Chamber’s power to review the Prosecutor’s decision following a request for reconsideration is derived from the judicial nature of such a ‘request’ and, by majority, considers that it is limited to establishing whether the Prosecutor carried out the reconsideration in accordance with the pre-trial chamber’s

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<sup>92</sup> [Decision on Admissibility 2015](#), para. 62 referring to the International Law Commission, [Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994](#), General Assembly Official Records, Forty-ninth Session Supplement No. 10 (A/49/10), p. 93, para. 7.

<sup>93</sup> [Prosecutor’s Appeal Brief](#), paras 73-123.

request for reconsideration. Accordingly, the Appeals Chamber rejects the Prosecutor's second ground of appeal.

## **D. Prosecutor's first ground of appeal**

### *1. Relevant part of the Impugned Decision*

62. The Pre-Trial Chamber found that the 16 July 2015 Decision constitutes a judicial decision that is no longer susceptible to appellate review.<sup>94</sup> It derived three consequences from this conclusion.<sup>95</sup> First, it found that the Prosecutor is under an obligation to comply with the 16 July 2015 Decision, and must reconsider her decision not to proceed with an investigation in accordance with this decision.<sup>96</sup> Second, it found that the 16 July 2015 Decision constitutes the basis for the Prosecutor's reconsideration under rule 108(2) and (3) of the Rules.<sup>97</sup> The Pre-Trial Chamber noted that after deciding not to follow the 16 July 2015 Decision, the Prosecutor reconsidered the Decision not to Investigate on the basis, 'exclusively', of the submissions made by the parties during the litigation before the Pre-Trial Chamber.<sup>98</sup> Such an approach was, according to the Pre-Trial Chamber, 'evidently unsustainable',<sup>99</sup> and unsupported by a legal basis.<sup>100</sup> Third, the Prosecutor's 29 November 2017 Decision 'cannot amount to a "final decision" [...] until the Prosecutor has carried out her reconsideration in accordance with the 16 July 2015 Decision'.<sup>101</sup>

### *2. Submissions before the Appeals Chamber*

#### *(a) Prosecutor's submissions*

63. The Prosecutor argues that the plain terms of article 53(3)(a), in their ordinary meaning, make clear that the Pre-Trial Chamber's decision imposes an obligation of 'process' but not of 'result'.<sup>102</sup> The context of the Statute and Rules confirms that an article 53(3)(a) 'request' does not bind the Prosecutor to the Pre-Trial Chamber's

<sup>94</sup> [Impugned Decision](#), paras 88-94.

<sup>95</sup> [Impugned Decision](#), para. 95.

<sup>96</sup> [Impugned Decision](#), paras 96-109.

<sup>97</sup> [Impugned Decision](#), paras 110-113.

<sup>98</sup> [Impugned Decision](#), para. 111.

<sup>99</sup> [Impugned Decision](#), para. 111.

<sup>100</sup> [Impugned Decision](#), para. 113.

<sup>101</sup> [Impugned Decision](#), paras 114-116.

<sup>102</sup> [Prosecutor's Appeal Brief](#), paras 20-26. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 14, lines 1-4, p. 18, lines 2-5.

reasoning.<sup>103</sup> In this regard, the Prosecutor submits that: the Pre-Trial Chamber’s approach eliminates the distinction between article 53(3)(a) and 53(3)(b);<sup>104</sup> the Pre-Trial Chamber’s power to issue requests under article 53(3)(a) without reviewing the available information is inconsistent with any binding effect of its reasoning;<sup>105</sup> the duty to give reasons under rule 108(1) and 108(3) does not justify the Pre-Trial Chamber’s interpretation of article 53(3)(a);<sup>106</sup> the Pre-Trial Chamber overlooked the ‘nuanced procedural effects of “decisions”’, especially in matters of judicial review;<sup>107</sup> the Court’s power to issue sanctions is immaterial;<sup>108</sup> and comparing the Prosecutor with an ‘appellate body’ is misplaced and immaterial.<sup>109</sup>

64. The Prosecutor further contends that the object and purpose of the Statute confirm that an article 53(3)(a) request does not bind the Prosecutor to the Pre-Trial Chamber’s reasoning,<sup>110</sup> and that this is confirmed by the drafting history of the Statute,<sup>111</sup> and further confirmed by the Appeals Chamber.<sup>112</sup> In the Prosecutor’s view, the Pre-Trial Chamber’s error materially affects the Impugned Decision.<sup>113</sup>

*(b) Comoros’ submissions*

65. As a general argument, the Comoros submits that the Prosecutor has disregarded the Pre-Trial Chamber’s decision granting leave to appeal and that she redefined the appealable issues. For these reasons, the Prosecutor’s Appeal Brief should be dismissed in its entirety.<sup>114</sup>

66. With regard to the first ground of appeal, the Comoros first contends that the Prosecutor’s general submission that the Pre-Trial Chamber had no authority to make

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<sup>103</sup> [Prosecutor’s Appeal Brief](#), paras 27-53. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 14, lines 20-23, p. 148, lines 10-22.

<sup>104</sup> [Prosecutor’s Appeal Brief](#), paras 28-32. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 14, lines 20-23, p. 148, lines 10-24.

<sup>105</sup> [Prosecutor’s Appeal Brief](#), paras 33-35. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 15, lines 8-13.

<sup>106</sup> [Prosecutor’s Appeal Brief](#), paras 36-39.

<sup>107</sup> [Prosecutor’s Appeal Brief](#), paras 40-47.

<sup>108</sup> [Prosecutor’s Appeal Brief](#), paras 48-50.

<sup>109</sup> [Prosecutor’s Appeal Brief](#), paras 51-53.

<sup>110</sup> [Prosecutor’s Appeal Brief](#), paras 54-60.

<sup>111</sup> [Prosecutor’s Appeal Brief](#), paras 61-65. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 148, lines 10-22.

<sup>112</sup> [Prosecutor’s Appeal Brief](#), paras 66-71. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 55, lines 3-7.

<sup>113</sup> [Prosecutor’s Appeal Brief](#), para. 72.

<sup>114</sup> [Comoros Response](#), paras 19-28.

its decision requiring reconsideration should be dismissed as it goes ‘far beyond’ the issue for which leave to appeal was granted.<sup>115</sup> The Comoros further submits that requiring the Prosecutor to address the legal errors it has committed is ‘a perfectly permissible judicial function’.<sup>116</sup> Only the Prosecutor is empowered to decide to open an investigation,<sup>117</sup> but if he or she were to disregard these errors in his or her reconsideration, the judicial review proceedings under article 53(3)(a) of the Statute would be ‘redundant’ and ‘pointless’,<sup>118</sup> and this ‘would essentially negate the opportunity afforded to a State Party to challenge that decision under the Statute’.<sup>119</sup>

67. The Comoros further contends that judicial decisions are always binding and the Prosecutor cannot decide to disregard the Judges’ findings,<sup>120</sup> nor can he or she decide which parts of the decision to follow.<sup>121</sup>

68. The Comoros therefore submits that this ground of appeal should be dismissed, particularly given that the Prosecutor has not established that the Pre-Trial Chamber committed any discernible errors that would warrant the Appeals Chamber’s intervention.<sup>122</sup>

*(c) OPCV’s submissions*

69. The OPCV contends that it is the 16 July 2015 Decision that directed the Prosecutor to accept legal interpretations and possible interpretations of fact. The Impugned Decision simply reminded the Prosecutor that she was and remained bound to implement and follow the 16 July 2015 Decision.<sup>123</sup> In this respect, the OPCV contends that the Appeals Chamber should decline to entertain the Prosecutor’s

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<sup>115</sup> [Comoros Response](#), para. 32.

<sup>116</sup> [Comoros Response](#), para. 33. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 1-9.

<sup>117</sup> [Comoros Response](#), paras 13, 38-39. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 2-4.

<sup>118</sup> [Comoros Response](#), paras 33, 51. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 10-11.

<sup>119</sup> [Comoros Response](#), para. 50, referring to the [Impugned Decision](#), para. 100. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 31, lines 5-8.

<sup>120</sup> [Comoros Response](#), para. 34.

<sup>121</sup> [Comoros Response](#), paras 43-45. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 10-16, p. 28, lines 4-20, p. 65, lines 10-12.

<sup>122</sup> [Comoros Response](#), para. 55. *See also* [Transcript of hearing, 1 May 2019](#), ICC-01/13-T-1-ENG, p. 26, lines 17-22.

<sup>123</sup> [OPCV’s Response](#), para. 49.

arguments.<sup>124</sup> Although the core questions under this ground of appeal pertain to a decision of the Pre-Trial Chamber that has become final, the OPCV submits that in any event the Prosecutor (i) fails to demonstrate an error; (ii) puts forth arguments that merely disagree with the Impugned Decision, and further (iii) challenges parts of a previous ruling, not subject to this appeal.<sup>125</sup> For these reasons, the OPCV argues that this ground of appeal should be dismissed in its entirety.<sup>126</sup>

(d) *LRV's submissions*

70. As a general observation, the LRV submits that the Prosecutor has failed to demonstrate that the Pre-Trial Chamber has committed any discernible errors in the Impugned Decision,<sup>127</sup> that the Appeals Chamber should reject her appeal in its entirety, and ensure that the Prosecutor immediately reconsiders her decision not to open an investigation in accordance with the 16 July 2015 Decision.<sup>128</sup> First, the LRV argues that the Prosecutor failed to comply with the Pre-Trial Chamber's decision granting leave to appeal, by including arguments related to a ground of appeal which had not been certified, and by redefining the remaining two grounds of appeal.<sup>129</sup> It argues that for this reason alone, the Prosecutor's appeal should be dismissed.<sup>130</sup> In any event, the LRV submits, that none of the arguments advanced constitute valid grounds of appeal and that they should therefore be rejected.<sup>131</sup>

71. With regard to the first ground of appeal, the LRV submits that the Prosecutor is 'plainly not at liberty to refuse to address the errors identified by the Chamber in judicial review proceedings', and that this position does not in any way undermine the independence of the Prosecutor to ultimately decide whether to open an investigation.<sup>132</sup> It submits that indeed the Prosecutor has the final say with regard to whether or not investigations should be initiated but notes that, in making her final

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<sup>124</sup> [OPCV's Response](#), para. 51, making reference to [Lubanga Appeal Decision](#), paras 45 *et seq.*

<sup>125</sup> [OPCV's Response](#), paras 52-57.

<sup>126</sup> [OPCV's Response](#), para. 57.

<sup>127</sup> [LRV's Response](#), para. 2.

<sup>128</sup> [LRV's Response](#), para. 6.

<sup>129</sup> [LRV's Response](#), paras 7-14.

<sup>130</sup> [LRV's Response](#), para. 14.

<sup>131</sup> [LRV's Response](#), para. 15.

<sup>132</sup> [LRV's Response](#), para. 18.

decision, she is bound to consider the errors highlighted by the Pre-Trial Chamber and discuss them, regardless of the outcome reached.<sup>133</sup>

### 3. *Determination by the Appeals Chamber*

72. The Appeals Chamber notes that the Pre-Trial Chamber granted leave to appeal in respect of the following issue:

Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues.<sup>134</sup>

73. In the Impugned Decision, the Pre-Trial Chamber recalled that the Prosecutor's appeal against the 16 July 2015 Decision had been dismissed *in limine* and the 16 July 2015 Decision thus 'acquired the authority of a final decision'.<sup>135</sup> The Pre-Trial Chamber found that the 16 July 2015 Decision should have therefore been the 'basis' for the Prosecutor's reconsideration.<sup>136</sup> It noted that the Prosecutor, rather than proceeding in that way, decided not to 'follow' the 16 July 2015 Decision, and instead reconsidered her earlier decision 'on the basis of the submissions made by the parties during the litigation before the Pre-Trial Chamber'.<sup>137</sup> For that reason, the Pre-Trial Chamber found that the Prosecutor's 29 November 2017 Decision was 'not the result of a proper exercise of reconsideration by the Prosecutor and shall be set aside on that basis'.<sup>138</sup> The Pre-Trial Chamber considered it 'appropriate to order the Prosecutor to reconsider the 6 November 2014 Decision in accordance with the 16 July 2015 Decision', requiring the Prosecutor to 'demonstrate in detail how she has assessed the relevant facts in light of the specific directions contained in the 16 July 2015 Decision'.<sup>139</sup>

74. In order to determine whether the Pre-Trial Chamber was correct in finding that the Prosecutor's 29 November 2017 Decision was 'not the result of a proper exercise

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<sup>133</sup> [LRV's Response](#), para. 68.

<sup>134</sup> [Decision on Prosecutor's request for leave to appeal](#), para. 46.

<sup>135</sup> [Impugned Decision](#), para. 94. *See also* paras 88-93.

<sup>136</sup> [Impugned Decision](#), para. 110.

<sup>137</sup> [Impugned Decision](#), para. 111.

<sup>138</sup> [Impugned Decision](#), para. 115.

<sup>139</sup> [Impugned Decision](#), para. 117.

of reconsideration by the Prosecutor’, it is first necessary to determine what ‘reconsideration’ in terms of article 53(3)(a) of the Statute means, and the manner in which the Prosecutor should take into account a pre-trial chamber’s request to reconsider her initial decision not to initiate an investigation. The Statute and the Rules are silent in this regard. Therefore, these questions must be considered within the broader context of the pre-trial chamber’s power to review the Prosecutor’s initial decision not to initiate an investigation and the role of the Prosecutor in the preliminary investigation phase of the proceedings.

75. Article 53(1) of the Statute provides that the Prosecutor shall initiate an investigation unless there is no reasonable basis to proceed, taking into account the factors listed in this provision. Pursuant to article 53(3) of the Statute, the pre-trial chamber retains the power to review, under certain circumstances, a decision by the Prosecutor not to initiate an investigation. Where the Prosecutor’s decision not to initiate an investigation is based solely on considerations regarding the interests of justice (article 53(1)(c) of the Statute), the pre-trial chamber’s power to review is robust: a pre-trial chamber may carry out a review on its own motion and the Prosecutor’s decision not to investigate ‘shall be effective only if confirmed by the Pre-Trial Chamber’.<sup>140</sup> If the Prosecutor’s decision is not confirmed, the Prosecutor ‘shall proceed with the investigation’.<sup>141</sup> Thus, article 53(3)(b) of the Statute, read with rule 110(2) of the Rules, empowers the pre-trial chamber to effectively override the Prosecutor’s decision not to initiate an investigation, if that decision was based solely on the interests of justice.

76. In contrast, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that where the Prosecutor’s decision not to initiate an investigation is based on the criteria of article 53(1)(a) or (b) of the Statute, as in the present case, the pre-trial chamber’s power of review is more limited. First, under article 53(3)(a) of the Statute, the pre-trial chamber may not carry out a review unless requested to do so by the referring State Party or the Security Council.<sup>142</sup> Second,

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<sup>140</sup> Article 53(3)(b) of the Statute.

<sup>141</sup> Rule 110(2) of the Rules.

<sup>142</sup> As already noted by the Appeals Chamber, in the absence of such a request, the Pre-Trial Chamber has no power to enter into a review of the Prosecutor’s decision not to proceed with an investigation

upon review, the pre-trial chamber may only ‘request’ the Prosecutor to ‘reconsider’ the decision not to investigate. In addition, as stated in the Decision on Admissibility 2015, albeit as *obiter dictum*, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that rule 108(3) of the Rules provides that the ‘final decision’ is for the Prosecutor. As such, the pre-trial chamber, in requesting reconsideration, cannot direct the Prosecutor as to the *result* of her reconsideration,<sup>143</sup> since the Prosecutor ‘retains ultimate discretion over how to proceed’.<sup>144</sup> This reflects a conscious choice of the drafters of the Rome Statute to leave the Prosecutor with a margin of appreciation in respect of her decision whether to initiate an investigation when carrying out a reconsideration following a decision by a pre-trial chamber under article 53(3)(a) of the Statute requesting her to do so.

77. That said, the Appeals Chamber considers that the pre-trial chamber’s request for reconsideration is more than just a trigger of the Prosecutor’s obligation to reconsider her decision. If the Prosecutor could ignore the basis for the pre-trial chamber’s request for reconsideration, the judicial review proceedings under article 53(3)(a) of the Statute would be meaningless. Therefore, when the Prosecutor is reconsidering her decision not to investigate upon a request by the pre-trial chamber, it will not suffice for the Prosecutor to do so in a perfunctory manner such that the authenticity of the exercise could be questioned. Rather, the Prosecutor is required to demonstrate how she addressed the relevant issues in light of the pre-trial chamber’s directions.

78. At the core of this ground of appeal lies the question of whether the Prosecutor, when reconsidering her decision not to initiate an investigation, is bound by the pre-trial chamber’s conclusions on law or fact formulated in its request under article 53(3)(a) of the Statute. In this regard, the Appeals Chamber notes that the Prosecutor’s decision whether to initiate an investigation under article 53(1)(a) and (b) of the Statute necessarily involves questions of law and fact. The Appeals Chamber considers that where questions of law arise, the only authoritative interpretation of the relevant law is that espoused by the Chambers of this Court and

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on its own motion, irrespective of how erroneous it may consider the Prosecutor’s admissibility determination to be. [Decision on Admissibility 2015](#), para. 56.

<sup>143</sup> See [Impugned Decision](#), para. 109.

<sup>144</sup> [Decision on Admissibility 2015](#), para. 59.

not the Prosecutor. It is therefore not open to the Prosecutor, despite the margin of appreciation that she enjoys in deciding whether to initiate an investigation or not, to disagree with, or fail to adopt, a legal interpretation of the pre-trial chamber that is contained in a request for reconsideration. This applies both to the pre-trial chamber's interpretation of the substantive law as well as of the procedural law, for instance, in respect of the legal standards to be applied to the evaluation of evidence etc. In the view of the Appeals Chamber, article 53(3)(a) of the Statute does not support the view that the Prosecutor is not required to correct any legal errors that the pre-trial chamber has identified. To assume, based solely on the terms used in that provision, that the Prosecutor may simply ignore legal errors identified by the pre-trial chamber would lead to an unreasonable result, which cannot be countenanced. In this regard, the Appeals Chamber observes that, where the Prosecutor disagrees with the pre-trial chamber's interpretation of the applicable law, she may avail herself of any available avenues to appeal the ruling.

79. The Appeals Chamber also does not consider that requiring the Prosecutor to correct legal errors identified by the pre-trial chamber means that there is no longer any meaningful distinction between the pre-trial chamber's power under article 53(3)(a) and (b) of the Statute. As stated above, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, finds that under article 53(3)(a) of the Statute, the final decision as to whether to initiate an investigation will always be for the Prosecutor and it is speculative to assume that, once a legal error is corrected, the only course of action that the Prosecutor may pursue will always be to initiate an investigation. Depending on the circumstances and given that a decision on whether to initiate an investigation will be based on a variety of factors, it is possible that, even once a legal error is corrected, the Prosecutor may still arrive at the same conclusion as before, namely not to initiate an investigation.

80. Whereas the Prosecutor is therefore bound by a pre-trial chamber's interpretation of the applicable law, as contained in a request for reconsideration, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that different considerations apply as far as questions of fact are concerned. In this regard, the Appeals Chamber considers that the Prosecutor cannot ignore a request by the pre-trial chamber to take into account certain available information

when determining whether there is a sufficient factual basis to initiate an investigation. However, it is not for the pre-trial chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach. Rather, it is primarily for the Prosecutor to evaluate the information made available to her and apply the law (where relevant, as interpreted by the pre-trial chamber) to the facts found. This is consistent with the role of the Prosecutor at the preliminary investigation phase of the proceedings.

81. To the extent that the Prosecutor's decision is based on the assessment of gravity under article 53(1)(b) read with article 17(1)(d) of the Statute, the Appeals Chamber notes that the assessment of gravity involves, as in the case at hand, the evaluation of numerous factors and information relating thereto, which the Prosecutor has to balance in reaching her decision. In this regard, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor's decision. Accordingly, the Appeals Chamber, by majority, finds that it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors. The pre-trial chamber may, however, oblige the Prosecutor to take into account certain factors and/or information relating thereto when reconsidering her decision not to initiate an investigation.

82. In sum, where the pre-trial chamber requests reconsideration of the Prosecutor's decision not to investigate on the basis of its interpretation of the applicable law, the Prosecutor is bound to follow this interpretation. Furthermore, the Prosecutor is bound to adhere to any directions of the pre-trial chamber to consider certain available information. In addition, when assessing gravity, the Prosecutor is obliged to follow any directions of the pre-trial chamber to take into account certain factors or information relating thereto. In contrast, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that the pre-trial chamber may not direct the Prosecutor as to how the information made available to her should be analysed, which factual findings she should reach, how to apply the law to the available information, or what weight she should attach to the different factors in the course of a gravity assessment.

83. It remains to be determined whether, in the case at hand, the Prosecutor carried out her reconsideration in accordance with the 16 July 2015 Decision. For the reasons that follow, the Appeals Chamber finds that the Prosecutor did not do so.

84. At the outset, the Appeals Chamber notes the finding of the Pre-Trial Chamber that the 16 July 2015 Decision had ‘acquired the authority of a final decision’.<sup>145</sup> In the view of the Appeals Chamber, this finding was correct. The Prosecutor had unsuccessfully tried to appeal that decision under article 82(1)(a) of the Statute, an appeal which the Appeals Chamber had dismissed *in limine*, and the time limits for any other potential avenues for appeal had expired. Therefore, the Prosecutor could no longer challenge the 16 July 2015 Decision, which had become final. Consequently, the Prosecutor had to conduct her reconsideration on the basis of the 16 July 2015 Decision.

85. The Appeals Chamber observes that in various passages of the Prosecutor’s 29 November 2017 Decision, the Prosecutor simply expressed her disagreement with the Pre-Trial Chamber’s reasoning and/or conclusions. For example, in the introduction to the Prosecutor’s 29 November 2017 Decision, the Prosecutor stated that she ‘regrets that [she] cannot concur in much of the [16 July 2015 Decision]’s analysis’, and continued by stating that ‘[a]s the Appeals Chamber has since emphasised, the [16 July 2015 Decision] is non-binding and does not fetter the Prosecution’s exercise of discretion under rule 108(3)’.<sup>146</sup> In this regard, she added that ‘since the Prosecution is obliged by the Statute to “act independently as a separate organ of the Court”, it can only act *either* for reasons which the Prosecution itself considers well founded *or* pursuant to a lawful binding order under the Statute. Where the Court has no power to make such a binding order, as now, the Prosecution may act only on the basis of its own independent view of the law and the facts’.<sup>147</sup>

86. On that basis, the Prosecutor stated that

[b]ased 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

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<sup>145</sup> [Impugned Decision](#), para. 94.

<sup>146</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 3.

<sup>147</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 4.

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>148</sup>

87. The Appeals Chamber notes that with respect to the interpretation of the standard of review applied and the 'reasonable basis to proceed' standard the Pre-Trial Chamber stated:

Upon review, the Chamber must request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact.<sup>149</sup>

[...] The Prosecutor's assessment of the criteria listed in this provision does not necessitate any complex or detailed process of analysis. In 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. Indeed, it is precisely the purpose of an investigation to provide clarity. [...]. Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome.<sup>150</sup>

88. In this regard, the Prosecutor, with reference to the drafting history of article 53(1) of the Statute, stated:

In this context, the Prosecution does not agree with the majority's conclusion that the Prosecution must accept as true (for the purpose of a preliminary examination) any information or claim which is not "manifestly false". This seems to mistake the function of article 53(1), treating it as a standard which controls the reception and interpretation of individual pieces of information (a 'screening' standard) rather than a standard which governs the conclusions which are reached (a 'result' standard). The Prosecution does not consider that this is correct. Article 53(1) requires a result standard, in the sense that the Prosecution must be satisfied of a "reasonable *basis to proceed* under the

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<sup>148</sup> [Prosecutor's 29 November 2017 Decision](#), para. 13; *see also* para. 36.

<sup>149</sup> [16 July 2015 Decision](#), para. 12.

<sup>150</sup> [16 July 2015 Decision](#), para. 13.

Statute”, including the criteria in article 53(1)(a) to (c). Indeed, consistent with other standards of proof under the Statute, it may be legally erroneous to apply the article 53(1) standard to individual pieces of information in isolation.<sup>151</sup>

Given its disagreement with the majority of Pre-Trial Chamber I’s interpretation of article 53(1), which directly affects the correctness of the legal standard applied in the Report, the Prosecution cannot concur in the basic premise of the Request. In particular, rather than considering the totality of the available information, and assessing the conclusions which could “reasonably” be drawn from that totality, the majority seemed to consider that an investigation was required if *any* piece of information, in isolation, permitted a relevant inference. The Prosecution respectfully submits that, had the Pre-Trial Chamber correctly interpreted the legal standard under article 53(1), it would not have issued the Request.<sup>152</sup>

89. Moreover, with regard to the Pre-Trial Chamber’s standard of review under article 53(3)(a) of the Statute, the Prosecutor stated:

Given its disagreement with the majority of Pre-Trial Chamber I’s interpretation *in practice* of article 53(3)(a), which directly affects the correctness of the standard of review applied in the Report, the Prosecution cannot concur in the basic premise of the Request. In particular, rather than applying an error-based standard of review, providing *some* deference to the Prosecution on factual matters and thus only criticising factual conclusions which were objectively *unreasonable*, the majority seemed to conduct a *de novo* review and to request the Prosecution to reconsider the Report based on its own disagreement with its conclusions. Had it correctly interpreted the standard of review under article 53(3)(a), the Prosecution considers that the Pre-Trial Chamber would not have issued the Request.<sup>153</sup>

90. The above-cited paragraphs of the Prosecutor’s 29 November 2017 Decision reflect the Prosecutor’s incorrect assumption that it was open for her to disagree with the Pre-Trial Chamber’s legal interpretation of the standard to be applied by the Prosecutor under article 53(1) of the Statute and the standard of review under article 53(3)(a) of the Statute in circumstances where the 16 July 2015 Decision had become final.<sup>154</sup> In addition, the unfortunate language used by the Prosecutor to express her disagreement demonstrates that she was entirely misinformed as to what was required of her in conducting the requested reconsideration.

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<sup>151</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 24 referring to the [16 July 2015 Decision](#), para. 35.

<sup>152</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 33.

<sup>153</sup> [Prosecutor’s 29 November 2017 Decision](#), para. 66. *See also* [Impugned Decision](#), paras 30-31 and [Prosecutor’s 29 November 2017 Decision](#), paras 25, 35, 65, 72, 83, 94-95.

<sup>154</sup> *See supra* para. 84.

91. On the other hand, the Appeals Chamber notes that, in the 16 July 2015 Decision, the Pre-Trial Chamber appears to have directed the Prosecutor as to what factual findings she should reach and what weight she should assign to certain factors in her gravity assessment.

92. For example, in discussing the third and fourth errors, the Pre-Trial Chamber appears to have applied its interpretation of the ‘reasonable basis to proceed’ standard to the facts when it stated:

In light of this information, there is merit in the Comoros’ statement that the exclusion, through an assessment of severity of the pain and suffering inflicted by the conduct in question, of the possibility of the war crime of torture or inhuman treatment under article 8(2)(a)(ii) of the Statute having been committed was “surprisingly premature”. The proper differentiation between this crime and the war crime of outrages upon personal dignity under article 8(2)(b)(xxi) of the Statute (which according to the Prosecutor is sufficiently demonstrated) involves the application of a threshold to the level of severity of the pain and suffering inflicted by the conduct in question and *cannot credibly be attempted on the basis of the limited information available at this stage, i.e. before the Prosecutor has even started an investigation. At this stage, the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test. The Prosecutor thus erred in not reaching this conclusion.* [Emphasis added].<sup>155</sup>

*Contrary to what is implied by the Prosecutor, the availability of contradicting information should not mean that one version should be preferred over another, but both versions should be properly considered.* Even more, if, as stated by the Prosecutor, the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded. *For the purpose of her decision under article 53(1) of the Statute, the Prosecutor should have accepted that live fire may have been used prior to the boarding of the Mavi Marmara, and drawn the appropriate inferences.* This fact is extremely serious and particularly relevant to the matter under consideration, as it may reasonably suggest that there was, on the part of the IDF forces who carried out the identified crimes, a prior intention to attack and possibly kill passengers on board the *Mavi Marmara*. Thus, the Chamber concludes that the Prosecutor erred in her assessment of the facts. [Emphasis added].<sup>156</sup>

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<sup>155</sup> [16 July 2015 Decision](#), para. 30.

<sup>156</sup> [16 July 2015 Decision](#), para. 36. *See also* paras 38, 41, 43.

93. Furthermore, in discussing the second and fifth errors, the Pre-Trial Chamber appears to have directed the Prosecutor to assign specific weight to the following factors concerning gravity when it stated that (i) ‘[t]he factor of scale should have been taken into account by the Prosecutor as militating in favour of sufficient gravity, rather than the opposite, and in failing to reach this conclusion, the Prosecutor committed a material error’ [emphasis added] and (ii) ‘[i]n the view of the Chamber, the conclusion of the Prosecutor is flawed [...] [because] [t]he Prosecutor failed to consider that, before attempting a determination of the *impact of the identified crimes* on the lives of the people in Gaza, the significant impact of such crimes on the lives of the victims and their families, which she duly recognised, *is, as such, an indicator of sufficient gravity*’ [emphasis added].<sup>157</sup>

94. As a result, the Appeals Chamber finds, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, that in reviewing the Decision not to Investigate, it was inappropriate for the Pre-Trial Chamber to direct the Prosecutor as to how to apply its interpretation of the ‘reasonable basis to proceed’ standard to the facts, what factual findings she should reach and to suggest the weight to be assigned to certain factors affecting the gravity assessment, as demonstrated above. Accordingly, the Appeals Chamber, by majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, considers that when reconsidering her decision not to initiate an investigation, the Prosecutor is not bound by these determinations of the Pre-Trial Chamber. However, in the Appeals Chamber’s view, the Prosecutor’s failure to follow the Pre-Trial Chamber’s legal interpretations as stipulated above<sup>158</sup> affected the Prosecutor’s 29 November 2017 Decision. For that reason, and notwithstanding the fact that, as set out above, the Appeals Chamber, by majority, agrees with some of the arguments the Prosecutor has raised under this ground of appeal, the Pre-Trial Chamber did not err when it decided to direct the Prosecutor to carry out a new reconsideration of her Decision not to Investigate. Accordingly, the Appeals Chamber rejects the Prosecutor’s first ground of appeal.

95. Finally, the Appeals Chamber notes that the unfortunate language and tone in which the Prosecutor chose to address the Pre-Trial Chamber’s reasoning in the

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<sup>157</sup> [16 July 2015 Decision](#), paras 26 and 47.

<sup>158</sup> See *supra* paras 86-90.

Prosecutor's 29 November 2017 Decision was disrespectful.<sup>159</sup> In the Appeals Chamber's view, the Prosecutor should in the future exercise more restraint when addressing Chambers of the Court.

## V. APPROPRIATE RELIEF

96. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case, having rejected the Prosecutor's grounds of appeal, the Appeals Chamber finds it appropriate to confirm the Impugned Decision and, accordingly to direct the Prosecutor to reconsider her Decision not to Investigate in accordance with the 16 July 2015 Decision and the present judgment. Noting that the time limit set by the Pre-Trial Chamber for the Prosecutor to reconsider her decision was suspended until the delivery of the present judgment,<sup>160</sup> the Impugned Decision is amended on this discrete point and the Appeals Chamber directs the Prosecutor to notify the Pre-Trial Chamber and those participating in the proceedings of her final decision by 2 December 2019.

Judge Eboe-Osuji and Judge Ibáñez issue partly dissenting opinions to this judgment. Judge Eboe-Osuji's opinion is appended to the judgment whilst Judge Ibáñez's opinion will be filed in due course.

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



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**Judge Solomy Balungi Bossa**  
**Presiding Judge**

Dated this 2nd day of September 2019

At The Hague, The Netherlands

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<sup>159</sup> [Prosecutor's 29 November 2017 Decision](#), paras 4, 16, 19, 26, 73, 80-81, 88, 93-95. *See also Impugned Decision*, para. 30 and footnote 45.

<sup>160</sup> [Scheduling Order](#), p. 3.