

## **JOINT DISSENTING OPINION OF JUDGE SILVIA FERNÁNDEZ DE GURMENDI AND JUDGE CHRISTINE VAN DEN WYNGAERT**

### **I. INTRODUCTION**

1. We regret that we are unable to join the majority of the Appeals Chamber in relation to the sole question that arises in this decision,<sup>1</sup> namely whether this particular appeal is admissible on the basis that the Impugned Decision<sup>2</sup> is “[a] decision with respect to [...] admissibility” within the meaning of article 82 (1) (a) of the Statute. For the reasons expressed below, we would declare the appeal admissible and proceed to consider its merits.

2. We are of the view that the Impugned Decision exclusively addressed admissibility and that it was therefore necessarily a “decision with respect to [...] admissibility” within the meaning of article 82 (1) (a) of the Statute. We further do not consider that there is anything in either the previous jurisprudence of the Appeals Chamber or in the scheme of the Statute that contradicts this conclusion. Indeed, article 82 (1) (a) of the Statute expressly provides for the Impugned Decision to be the subject of a direct appeal to the Appeals Chamber.

### **II. THE SUBJECT-MATTER OF THE IMPUGNED DECISION**

#### **A. The Prosecutor’s decision**

3. We find it important to focus upon the background to, and findings contained within, the Impugned Decision, so as to see that decision in its context.

4. The Impugned Decision requests the Prosecutor to reconsider her decision pursuant to article 53 (1) of the Statute. Under this provision the Prosecutor is required, having evaluated the information made available to her, to initiate an investigation unless she determines that there is no reasonable basis to do so. Article 53 (1) expressly provides, in relevant part:

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<sup>1</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’” (hereinafter: “Decision of the majority of the Appeals Chamber”), of 6 November 2015, to which this joint dissenting opinion is appended.

<sup>2</sup> In this dissent we adopt the designations that are used in the Decision of the majority of the Appeals Chamber.

In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

[...]

(b) The case is or would be admissible under article 17; [...]

5. Article 17 (1) (d) of the Statute provides that a case is inadmissible before the Court where “[t]he case is not of sufficient gravity to justify further action by the Court”.

6. In the Prosecutor’s Decision not to Initiate an Investigation, the Prosecutor concluded that the information available provided a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed<sup>3</sup> and continued:

However, on the basis of information available, the Office [of the Prosecutor] considers that 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.

Accordingly, the Office [of the Prosecutor] has determined that there is no reasonable basis to proceed with an investigation and has decided to close this preliminary examination.<sup>4</sup>

7. It is clear from the above that the sole basis on which the Prosecutor decided not to initiate an investigation in the present matter was that the potential case(s) arising from an investigation would be inadmissible, pursuant to articles 17 (1) (d) and 53 (1) (b) of the Statute.

8. The Prosecutor’s Decision not to Initiate an Investigation contained a specific section entitled “Admissibility”.<sup>5</sup> In that section, in determining that the potential cases that would arise from an investigation would be inadmissible as a result of not being of sufficient gravity,<sup>6</sup> the Prosecutor, *inter alia*:

<sup>3</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), para. 149.

<sup>4</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), paras 150-151.

<sup>5</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), paras 133-148.

<sup>6</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), para. 148. In that paragraph, the Prosecutor also stated that, in light of her conclusion that the potential cases were not of sufficient gravity (and were therefore inadmissible), it was unnecessary to reach a conclusion on the complementarity aspects of article 17.

- a) referred to the jurisprudence of the Court in relation to the assessment of the gravity requirement of article 17 (1) (d);<sup>7</sup>
- b) referred to an evaluation of gravity including (i) whether those likely to be subject to an investigation include those who may bear the greatest responsibility for the alleged crimes, and (ii) the gravity of the crimes committed;<sup>8</sup> and
- c) stated that an assessment of gravity included an evaluation of the scale, nature, manner of commission of the crimes and their impact – and set out the Prosecutor’s reasoning in respect of each of these factors.<sup>9</sup>

## **B. The Impugned Decision**

9. In the Impugned Decision, in setting out the “[n]ature and scope” of the review that it was conducting under article 53 (3) (a) of the Statute,<sup>10</sup> the Pre-Trial Chamber considered:

The subject-matter of the review under article 53(3)(a) of the Statute is the Prosecutor’s ‘decision not to investigate’, *i.e.* the considerations underlying the final conclusion that an investigation should not be opened.<sup>11</sup>

10. We observe that the “considerations underlying the final conclusion that an investigation should not be opened” related exclusively to admissibility (namely that the potential cases were not of sufficient gravity).

11. The Pre-Trial Chamber proceeded to set out the parameters of its article 53 (3) (a) review, by reference to the position of the Prosecutor and the Union of the Comoros:

In the present case, the consideration underlying the Prosecutor’s decision not to investigate the situation referred to her by the Comoros is that the potential cases arising from such situation would not be of sufficient gravity. The Comoros challenge precisely the Prosecutor’s interpretation and application to the present case of the gravity test envisaged in article 17(1)(d) of the Statute

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<sup>7</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), paras 134-136.

<sup>8</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), para. 135.

<sup>9</sup> [Prosecutor’s Decision not to Initiate an Investigation](#), paras 136, 138-141.

<sup>10</sup> [Impugned Decision](#), p. 6.

<sup>11</sup> [Impugned Decision](#), para. 8.

and raise two main grounds of review [...]. The Chamber's determination in the present review is limited to these aspects.<sup>12</sup>

12. We observe that, again, the Pre-Trial Chamber is clear that the scope of its review concerned the interpretation and application of the gravity test under article 17 (1) (d) of the Statute, which had led to the Prosecutor's determination that an investigation would not be initiated because the potential case(s) arising from the situation would be inadmissible.

13. The Pre-Trial Chamber further opined that the Prosecutor's evaluation of, *inter alia*, article 53 (1) (b) of the Statute (namely, considering whether the case is or would be admissible under article 17), required "the application of exacting legal requirements"<sup>13</sup> and that its role was "to exercise independent judicial oversight".<sup>14</sup>

14. At the beginning of its assessment of the Prosecutor's alleged failure properly to address the factors relevant to the determination of gravity under article 17 (1) (d) of the Statute, the Pre-Trial Chamber referred to previous decisions of the Court relating to the interpretation of "sufficient gravity".<sup>15</sup> It recalled, as the Prosecutor similarly had done,<sup>16</sup> that the gravity determination involved a generic assessment of whether those likely to form the object of the investigation bore the greatest responsibility for the alleged crimes committed; and that there had to be both a 'quantitative' and 'qualitative' assessment of gravity, with factors such as the nature, scale, manner of commission of the alleged crimes and their impact on victims being indicators of gravity in a given case.<sup>17</sup>

15. The Pre-Trial Chamber proceeded individually to assess each of the factors addressed by the Prosecutor in coming to her conclusion that the gravity requirement within article 17 (1) (d) was not satisfied.<sup>18</sup> This is highlighted by the five headings under which the Pre-Trial Chamber conducted its assessment in this respect,<sup>19</sup> which

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<sup>12</sup> [Impugned Decision](#), para. 11.

<sup>13</sup> [Impugned Decision](#), para. 14.

<sup>14</sup> [Impugned Decision](#), para. 15.

<sup>15</sup> [Impugned Decision](#), para. 21.

<sup>16</sup> [Prosecutor's Decision not to Initiate an Investigation](#), paras 135-136.

<sup>17</sup> [Impugned Decision](#), para. 21.

<sup>18</sup> [Impugned Decision](#), paras 22-48.

<sup>19</sup> [Impugned Decision](#), pp. 11, 12, 13, 15 and 23 under the headings "i. Consideration with respect to the potential perpetrators of the crimes", "ii. Scale of the crimes", "iii. Nature of the crimes", "iv. Manner of commission" and "v. Impact of the crimes", respectively.

mirror the factors and headings used in the Prosecutor's Decision not to Initiate an Investigation.<sup>20</sup> In respect of these factors, the Pre-Trial Chamber:

- a) found that the Prosecutor failed to consider whether the persons likely to be the object of the investigation would include those who bear the greatest responsibility for the crimes;<sup>21</sup> and that this failure affected the determination of the gravity of the potential case(s);<sup>22</sup>
- b) considered that the scale of the crimes in the potential case(s) arising from the situation "are a compelling indicator of sufficient, and not of insufficient gravity" and continued that the Prosecutor committed a material error in this regard;<sup>23</sup>
- c) in relation to the Prosecutor's conclusion that the available information did not indicate that the treatment of the affected passengers amounted to torture or inhuman treatment, noted that whether it did so was relevant to the evaluation of gravity (in respect of the nature of the crimes)<sup>24</sup> and found that the Prosecutor erred in her conclusion in this regard;<sup>25</sup>
- d) in relation to the manner of commission of the alleged crimes, found that the Prosecutor's analysis was affected by errors of fact,<sup>26</sup> rendering her conclusion in this respect unsustainable, which the Pre-Trial Chamber found "was ultimately considered by the Prosecutor as an indicator of insufficient gravity of the potential case(s)";<sup>27</sup> and
- e) found that the determination of the Prosecutor that the impact of the crimes was a factor militating against the conclusion that the potential case(s) would be of sufficient gravity was flawed.<sup>28</sup>

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<sup>20</sup> [Prosecutor's Decision not to Initiate an Investigation](#), paras 135-136 and 138-141.

<sup>21</sup> [Impugned Decision](#), para. 23.

<sup>22</sup> [Impugned Decision](#), para. 24.

<sup>23</sup> [Impugned Decision](#), para. 26.

<sup>24</sup> [Impugned Decision](#), para. 28.

<sup>25</sup> [Impugned Decision](#), para. 30.

<sup>26</sup> [Impugned Decision](#), para. 44. *See generally*, paras 31-45.

<sup>27</sup> [Impugned Decision](#), para. 45.

<sup>28</sup> [Impugned Decision](#), paras 46-48.

16. Further to its individual assessment of the above factors, the Pre-Trial Chamber concluded that their combination materially affected “the validity of the Prosecutor’s conclusion that the potential case(s) arising from the situation referred to her by the Comoros would not be of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute”.<sup>29</sup>

17. Accordingly, the Chamber requested the Prosecutor to reconsider her decision not to initiate an investigation in the situation referred to her by the Union of the Comoros.<sup>30</sup>

### **C. Conclusions on the subject-matter of the Impugned Decision**

18. In light of the above, we draw the following conclusions:

- a) the Prosecutor’s determination that an investigation should not be initiated was based exclusively on her conclusion that the potential case(s) arising from the situation were not of sufficient gravity and were therefore inadmissible;
- b) the nature and scope of the review in the Impugned Decision – as set out by the Pre-Trial Chamber itself – related exclusively to the Prosecutor’s above conclusion that the potential cases were inadmissible in coming to the determination that an investigation should not be initiated;
- c) on the facts of this case, there was no material difference in substance between the Prosecutor’s determination not to initiate an investigation and the determination that the potential cases were inadmissible;
- d) the conclusions of the Pre-Trial Chamber, upon which it based its decision to request the Prosecutor to reconsider her decision not to initiate an investigation, were founded exclusively upon an examination of those factors that the Prosecutor had set out to conclude that the potential case(s) were of insufficient gravity and therefore inadmissible; and

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<sup>29</sup> [Impugned Decision](#), para. 49.

<sup>30</sup> [Impugned Decision](#), para. 50 and p. 26.

e) the Pre-Trial Chamber examined each factor relied upon by the Prosecutor in determining that the potential case(s) were of insufficient gravity and therefore inadmissible, and it concluded that those factors contained errors which, in combination, materially affected the Prosecutor's conclusion that the potential case(s) would not be of sufficient gravity to justify further action by the Court within the meaning of article 17 (1) (d) of the Statute and were therefore inadmissible.

19. It is thus clear that the Impugned Decision exclusively addressed the subject of the admissibility of the potential case(s) arising out of the situation and concluded that the Prosecutor's determination that any such cases were inadmissible was materially affected by errors.

20. We agree with the majority of the Appeals Chamber that, in the present case, the Pre-Trial Chamber did not specifically rule that the potential case(s) arising in this situation were admissible.<sup>31</sup> However, it clearly found fault with all of the main reasons that the Prosecutor had advanced in her determination that there were no admissible cases in the situation; and it provided reasons to indicate that the contrary conclusion would be true, namely that there would indeed be admissible cases in the situation.

21. As such, and for the reasons further developed below, we consider that the Impugned Decision, taken in the context of review proceedings under article 53 (3) (a), is "[a] decision with respect to [...] admissibility" within the meaning of article 82 (1) (a) of the Statute.

### III. AN ADMISSIBILITY DECISION UNDER ARTICLE 82 (1) (A) OF THE STATUTE

#### **A. The ordinary meaning of article 82 (1) (a) and relevant drafting history**

22. We consider that the wording of article 82 (1) (a) is clearly broad enough to cover the type of decision rendered in the present case. We further note that this conclusion is not contradicted by the drafting history of the Rules of Procedure and

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<sup>31</sup> See Decision of the majority of the Appeals Chamber, para. 50.

Evidence in relation to appeals. As referred to by the majority of the Appeals Chamber, during the course of the negotiations of the Rules of Procedure and Evidence, a proposal by France to include an express provision to clarify that article 82 (1) (a) would apply to review decisions under article 53 (3) (a) was not adopted. However, as noted by the majority of the Appeals Chamber, it appears from academic commentary that this proposal was not clearly rejected.<sup>32</sup> It was seemingly left out because no conclusive answer emerged from the debates – and it was thus left to the Court to decide whether a decision under this provision could be appealed and under what conditions.<sup>33</sup> In any event, we consider that, given the nature of the Impugned Decision in the present case, as fully described above, it is clear from the wording of article 82 (1) (a) itself that it can be appealed directly to the Appeals Chamber.

### **B. The prior jurisprudence of the Appeals Chamber under article 82 (1) (a)**

23. The relevant jurisprudence of the Appeals Chamber under article 82 (1) (a) of the Statute is set out in the Decision of the majority of the Appeals Chamber. That jurisprudence has followed a restrictive approach to the admissibility of appeals brought under article 82 (1) (a) to the extent that it has considered that “the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case”.<sup>34</sup>

24. However, we note that the prior jurisprudence of the Appeals Chamber deals with issues of admissibility of cases already identified in the context of a situation under investigation. This jurisprudence has been delivered in the context of article 19 of the Statute, which deals with determinations of admissibility, and the finding that “the operative part of the decision itself must pertain directly to a question on the

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<sup>32</sup> See Decision of the majority of the Appeals Chamber, para. 65.

<sup>33</sup> Friman, p. 535. The view of Brady is also noted in this context. Having referred to the French proposal, and the opposition of other delegations thereto, she opines that, “The wording of article 82, paragraph 1(a) is capable of being interpreted so as to cover the Pre-Trial Chamber’s decisions under article 53, paragraph 3(a), when the decision involves jurisdiction or admissibility”, albeit that she argues that there is “a compelling counter-argument” to this approach, namely that this appears to be contrary to article 53 itself. See Brady, pp. 578-579. We address article 53 in the next section of this dissent.

<sup>34</sup> [Kenya Appeal Decision](#), para. 16. See also the subsequent citation of this passage in the [Mishana Hosseinioun Appeal Decision](#), para. 10, and in the [Detained Witnesses Appeal Decision](#), para. 33.



jurisdiction of the Court or the admissibility of a case”<sup>35</sup> must be seen in that context. This jurisprudence does not address the novel circumstances at hand in which the Prosecutor decides not to open an investigation in a situation on grounds of inadmissibility of *potential* cases within that situation. A novel question thus arises in relation to which neither article 18 nor article 19 is applicable.

25. The present appeal relates to a pre-trial decision under article 53 (3) (a), the operative part of which will necessarily pertain to whether the Prosecutor should be requested to reconsider her decision not to initiate an investigation rather than to whether a case is admissible as such. This appeal is the first of its kind and requires, in our view, a novel approach.

26. This novel approach requires the focus to be on the subject-matter of the impugned decision in order to determine whether the essence of the decision pertains to admissibility. In this regard, previous jurisprudence may be of guidance only to the extent that it requires more than “an indirect or tangential link between the underlying decision and questions of [...] admissibility”.<sup>36</sup>

27. We therefore consider that neither the wording of, nor jurisprudence of the Appeals Chamber under, article 82 (1) (a) renders the present appeal inadmissible.

28. As indicated above, we consider it important to focus on the subject-matter of the Impugned Decision. We are not persuaded that the subject-matter of the Prosecutor’s grounds of appeal demonstrates that the appeal falls outside the scope of article 82 (1) (a) of the Statute, as argued by the OPCV,<sup>37</sup> and noted at paragraph 52 of the Decision of the majority of the Appeals Chamber. It is important to distinguish the nature of the Impugned Decision from the grounds of appeal that are brought in relation to it. Once it has been determined that the Impugned Decision in the present case is one with respect to admissibility, an appeal is permitted under article 82 (1) (a). Furthermore, as we have set out above, the conclusions of the Pre-Trial Chamber, upon which it based its decision to request the Prosecutor to reconsider her

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<sup>35</sup> [Kenya Appeal Decision](#), para. 15. *See also* the subsequent citation of this passage in the [Mishana Hosseinioun Appeal Decision](#), para. 10. This passage was also cited in the [Detained Witnesses Appeal Decision](#), para. 33 (although that decision concerned jurisdiction, not admissibility).

<sup>36</sup> *See* [Kenya Appeal Decision](#), para. 15.

<sup>37</sup> *See* [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 33-44.

decision not to initiate an investigation, were founded exclusively upon an examination of those factors that the Prosecutor had set out to conclude that the potential case(s) were of insufficient gravity and therefore inadmissible – a conclusion which the Pre-Trial Chamber found to be materially affected by errors. In the circumstances of the present case, grounds of appeal addressing the manner in which the Pre-Trial Chamber came to its conclusions are therefore directly relevant to the correctness of the Impugned Decision and are appropriately raised in the context of an appeal under article 82 (1) (a) of the Statute.

#### IV. ADMISSIBILITY DECISIONS UNDER ARTICLE 53

29. We find unpersuasive the argument that “[a] decision with respect to [...] admissibility” within the meaning of article 82 (1) (a) cannot relate to proceedings under article 53<sup>38</sup> and can, in effect, only relate to proceedings in respect of articles 18 and 19 of the Statute.<sup>39</sup>

30. We recognize that, contrary to these latter two provisions, there is no express reference to the right to appeal in article 53 itself. However, article 53 (1) (b) requires the Prosecutor to consider whether “[t]he case is or would be admissible under article 17”; the Pre-Trial Chamber can, in certain circumstances, review decisions of the Prosecutor based upon such considerations under article 53 (3) (a); and article 82 (1) (a) provides that “[a] decision with respect to [...] admissibility” can be appealed. There is therefore express reference to admissibility both in the body of article 53 (1) (b) and article 82 (1) (a). It is our view that, in circumstances in which the subject-matter of decisions under article 53 (3) (a) is admissibility, the plain wording of article 53 (1) (b), read in conjunction with article 82 (1) (a), allows for an interpretation that a direct appeal would be admissible despite the absence of an express reference to that effect within the body of article 53 itself.<sup>40</sup> We note in this

<sup>38</sup> See the Decision of the majority of the Appeals Chamber, paras 53-60.

<sup>39</sup> See [First Group of Victims’ Observations on the Admissibility of the Appeal](#), paras 9-17, 29. See also [Application to Dismiss by the Union of the Comoros](#), paras 3, 19.

<sup>40</sup> Such an express reference, in the provision relating to the first-instance proceedings, is not a prerequisite to an automatic right to appeal. There is, for example, no reference within the body of article 60 to the right directly to appeal decisions rendered under that provision to the Appeals Chamber. Yet there is no doubt that decisions rendered pursuant to that provision can be appealed directly to the Appeals Chamber under article 82 (1) (b) (under which either party may appeal decisions granting or denying release).

regard that article 82 (1) (a) refers broadly to decisions “with respect to [...] admissibility”, without limiting its application to specific articles of the Statute.

31. Similarly, we consider that the existence of a concrete case is not a necessary condition for a decision with respect to admissibility to exist or an appeal to be brought pursuant to article 82 (1) (a) of the Statute, noting, also, that appeals can be brought directly under article 18.<sup>41</sup> In this regard the Appeals Chamber has previously held:

For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. *The same is true for preliminary admissibility challenges under article 18 of the Statute.* Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. [...]

In contrast, article 19 of the Statute relates to the admissibility of concrete cases.<sup>42</sup> [Emphasis added.]

32. As noted above, the express terms of article 53 (1) (b) itself refer to the Prosecutor being required to consider whether “[t]he case is or would be admissible under article 17”. As has also previously been held by the Appeals Chamber:

It should also be noted that article 17 applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute). [...] The factors listed in article 17 are also relevant for the Prosecutor’s decision to initiate an

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<sup>41</sup> See [Application to Dismiss by the Union of the Comoros](#), para. 3: “The present decision is merely a decision requesting the Prosecutor to reconsider her decision not to initiate an investigation pursuant to Article 53 – it is accordingly clearly *not* a final decision on whether the case is admissible or not. There is not even a ‘case’ to speak of at the present stage in the proceedings – the Prosecutor has only been asked to reconsider her decision and in her preliminary examination to re-examine whether she should open an investigation”.

<sup>42</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, [ICC-01/09-01/11-307](#) (OA) (hereinafter: “*Ruto et al.* Admissibility Judgment”), paras 39-40; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, [ICC-01/09-02/11-274](#) (OA) (hereinafter: “*Muthaura et al.* Admissibility Judgment”), paras 38-39.

investigation under article 53 (1) of the Statute or to seek authorisation for a *proprio motu* investigation under article 15 [...].<sup>43</sup>

33. In the present case, in her determination of whether the “case is *or would be* admissible under article 17”<sup>44</sup> (emphasis added), the Prosecutor determined that *all* potential cases would be inadmissible. It was this determination that led her to conclude that an investigation should not be initiated into the situation as a whole. Those determinations also formed the subject-matter of the Pre-Trial Chamber’s review. We are of the view that, in accordance with the Statute, it is not only possible but also desirable in the interests of judicial economy to address issues of admissibility of cases – whether actual or potential – as early as possible.

34. We further note the emphasis that the majority of the Appeals Chamber places on prosecutorial discretion in the context of article 53 of the Statute and its drafting history.<sup>45</sup> However, we believe that the considerations relied upon by the majority of the Appeals Chamber do not alter the nature of the Impugned Decision, which is, in our view, clearly one “with respect to [...] admissibility”.

35. First, the fact that the statutory scheme in relation to article 53 leaves the “final decision” as to whether or not to initiate an investigation to the Prosecutor does not detract from the influence that the findings of the Pre-Trial Chamber in its review decision may have upon the Prosecutor. As referenced by the majority of the Appeals Chamber, the intention of the drafters may have been to preserve a higher degree of prosecutorial discretion for the Prosecutor based upon the considerations set out in article 53 (1) (a) and (b) of the Statute, as opposed to those in article 53 (1) (c). However, as argued by the Prosecutor, although she

retains discretion in deciding how further 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 Impugned Decision]. Furthermore, the manner in which the Prosecutor exercises her discretion will inevitably be informed by the [Impugned Decision], and its reasoning.<sup>46</sup>  
[Footnote omitted.]

<sup>43</sup> [Ruto et al. Admissibility Judgment](#), para. 38; [Muthaura et al. Admissibility Judgment](#), para. 37.

<sup>44</sup> Article 53 (1) (b) of the Statute.

<sup>45</sup> See Decision of the majority of the Appeals Chamber, paras 53-64.

<sup>46</sup> [Prosecutor’s Further Submissions](#), para. 27.

36. Where, as in the present case, the reasoning exclusively concerns the admissibility of the potential case(s) in a situation, the ability to appeal such a decision directly is not only specifically provided for in article 82 (1) (a), but it is also desirable. As demonstrated by the presence of article 82 (1) (a) within the statutory scheme, decisions with respect to admissibility and jurisdiction have a separate appellate regime because it is important that they are settled as soon as possible in the proceedings.

37. Second, we note that the fact that article 82 (1) (a) allows a direct appeal against a decision of the Pre-Trial Chamber in the circumstances described does not constitute any greater restriction of the discretion of the Prosecutor under article 53 than that already provided by the terms of that article. It simply enables the Appeals Chamber to review the decision that the Pre-Trial Chamber has taken under article 53 of the Statute where it is one with respect to admissibility.

## V. CONCLUSION

38. For all of the reasons expressed above, we find that the Impugned Decision in the present case was “[a] decision with respect to [...] admissibility” under article 82 (1) (a) of the Statute. We would therefore declare this appeal to be admissible, without prejudice to our subsequent consideration of its merits.

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

  
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**Judge Silvia Fernández de Gurmendi**

  
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**Judge Christine Van den Wyngaert**

Dated this 6th day of November 2015

At The Hague, The Netherlands