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THE APPEALS CHAMBER

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

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

Public Document

**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'"**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “Principal Counsel”), acting as legal representative of unrepresented victims who have communicated with the Court in relation to article 53 proceedings,¹ hereby submits her response to the Prosecution’s Appeal Brief² in which the Prosecution requests the Appeals Chamber to reverse the “Decision on the ‘Application’ for Judicial Review by the Government of the Union of Comoros” issued by Pre-Trial Chamber I (the “Impugned Decision”)³.

2. The Prosecution specifically requests that the Appeals Chamber “*reverse the [Impugned] Decision insofar as it: determined that the Prosecutor [...] was required to adopt the Pre-Trial Chamber’s reasoning, [...] including particular conclusions of law and fact; set aside the Prosecutor’s Final Decision as invalid; and required the Prosecutor under article 53(3)(a) to conduct a further reconsideration of the Prosecutor’s Initial Decision, according to the reasoning in the First Article 53(3)(a) Request.*”⁴

3. As additional relief, the Prosecution further requests the Appeals Chamber to “*give effect to the principle of reasonable finality in rule 108(3), and exercise its own power under article 83(2)(a) to dismiss the Comoros’ Second Application forthwith, in light of the applicable limits upon the Court’s jurisdiction.*”⁵

4. The Principal Counsel opposes the Prosecution’s appeal in full. She argues preliminarily that the Appeals Chamber should dismiss *in limine* all arguments

¹ See the “Decision on Victims’ Participation” (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, p. 10.

² See the “Prosecution Appeal Brief”, [No. ICC-01/13-85](#), 11 February 2019 (the “Prosecution’s Appeal Brief”).

³ See the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros” (Pre-Trial Chamber I), [No. ICC-01/13-68](#), 15 November 2018 (the “Impugned Decision”).

⁴ See the Prosecution Appeal Brief, *supra* note 2, para. 123.

⁵ *Idem*, para. 124.

pertaining to the issue for which certification was denied by the Pre-Trial Chamber in its decision granting leave to appeal.

5. In any case, in relation to the first ground of appeal, the Principal Counsel submits that the Prosecution fails to demonstrate that the Pre-Trial Chamber erred in law. It merely advances its disagreement with the Impugned Decision based on a mischaracterisation of its findings. Indeed, nothing in the statutory framework prevented the Chamber from conducting a review of the decision of the Prosecutor of 29 November 2017. Contrary to the Prosecution's understanding, the Pre-Trial Chamber has not conducted a new review which is not provided for in the relevant provisions of the texts governing the Court. The 'review' of the Prosecutor's decision of 29 November 2017 was for all means and purposes confined to a review of whether the Prosecutor had indeed addressed the five errors identified by the Pre-Trial Chamber in its previous ruling, wherein it requested the Prosecutor to reconsider her initial decision.

6. In relation to the second ground of appeal, the Principal Counsel submits that again the Prosecution fails to demonstrate that the Pre-Trial Chamber erred in law. The Impugned Decision simply reminded the Prosecutor, who had ignored the legal and factual issues contained within the request to reconsider, that she was – and she remains - bound to implement and follow *that* decision. The legal texts of the Court do not prevent the Pre-Trial Chamber from reviewing the Prosecutor's first decision in terms of its correctness and to find errors. Accordingly, it logically follows that in circumstances where the Chamber finds that the Prosecutor's first decision was affected by certain errors, it is in its power to direct the Prosecution to apply the correct law as set out by the Chamber, or to address a particular error of fact in its review.

II. PROCEDURAL BACKGROUND

7. On 16 July 2015, Pre-Trial Chamber I, by Majority, requested the Prosecutor to reconsider her decision of 6 November 2014 not to initiate an investigation relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip.⁶

8. On 29 November 2017, the Prosecutor notified Pre-Trial Chamber I of her further decision not to initiate an investigation in the situation (the “29 November 2017 Decision”).⁷

9. On 23 February 2018, the Union of the Comoros filed a further “Application for Judicial Review by the Government of the Union of the Comoros”,⁸ asking the Pre-Trial Chamber to review the 29 November 2017 Decision.

10. On 15 November 2018, Pre-Trial Chamber I rendered its “Decision on the “Application for Judicial Review by the Government of the Union of the Comoros” (the “15 November 2018 Decision”) finding, *inter alia*, that “the 29 November 2017 decision cannot be considered to be final within the meaning of rule 108(3) of the Rules”;⁹ requested the Prosecutor to reconsider her decision of 6 November 2014 in accordance with the Pre-Trial Chamber’s 2015 Decision; and to “notify the Chamber and those participating in the proceedings of her final decision no later than Wednesday

⁶ See the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (Pre-Trial Chamber I), [No. ICC-01/13-34](#), 16 July 2015 (the “2015 Decision”).

⁷ See the “Annex 1 to the Notice of Prosecutor’s Final Decision under Rule 108(3)”, [No. ICC-01/13-57-Anx1](#), 30 November 2017 (the “29 November 2017 Decision”).

⁸ See the “Application for Judicial Review by the Government of the Union of the Comoros”, with Confidential Annexes 1-3, No. ICC-01/13-58-Conf, 26 February 2018. A public redacted version was made available on the same day, see [ICC-01/13-58-Red](#).

⁹ See the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” (Pre-Trial Chamber I), [No. ICC-01/13-68](#), 15 November 2018 (the “15 November 2018 Decision”), p. 45.

15 May 2019".¹⁰ On 21 November 2018, the Prosecution filed leave to appeal said ruling.¹¹

12. On 18 January 2019, the Pre-Trial Chamber granted in part leave to appeal, certifying two of the three issues put forth by the Prosecution.¹²

13. On 21 January 2019, the Prosecution filed before the Appeals Chamber a request for extension of the applicable page and time limits, as well as for suspensive effect.¹³ The request for suspensive effect was opposed by both the Union of the Comoros and the two groups of victims participating in the present appeal.¹⁴ None of the participants opposed the request for extension of time and page limits.¹⁵

14. On 25 January 2019, the Appeals Chamber granted the Prosecution's request for extension of time and page limits,¹⁶ imparting corresponding extensions to the other participants,¹⁷ and informing that "*a decision on the Prosecutor's request for suspensive effect will be issued separately*".¹⁸

¹⁰ *Idem*, paras. 120-121.

¹¹ See the "Request for Leave to Appeal the 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", [No. ICC-01/13-69](#), 21 January 2019.

¹² See the "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'" (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019.

¹³ See the "Request for Leave to Appeal the 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", *supra* note 11, para. 16.

¹⁴ See the "Response on behalf of the Government of the Union of the Comoros to the 'Prosecution's omnibus request or extension of pages, extension of time, and suspensive effect'", [No. ICC-01/13-79](#), 24 January 2019; the "Response of the Victims to the 'Prosecution's omnibus request for extension of pages, extension of time, and suspensive effect'", [No. ICC-01/13-78](#), 24 January 2019; and the "Victims' response to the Prosecution's Omnibus Request", [No. ICC-01/13-77](#), 24 January 2019.

¹⁵ *Idem*.

¹⁶ See the "Decision on the Prosecutor's request for extension of page limit and extension of time limit" (Appeals Chamber), [No. ICC-01/13-80](#), 25 January 2019, paras. 11 and 15.

¹⁷ *Idem*, paras. 11 and 16.

¹⁸ *Ibidem*, para. 6.

15. On 31 January 2019, the Appeals Chamber rejected the Prosecution's request for suspensive effect.¹⁹

16. On 11 February 2019, the Prosecution filed its Appeal Brief.²⁰

III. PRELIMINARY MATTERS

17. As a preliminary matter, the Principal Counsel observes that the Prosecution's Appeal Brief fails to comply with regulation 65(4) of the Regulations of the Court in that it does not clearly set out the grounds of appeal and both legal and factual reasons in support of each ground of appeal. By advancing a myriad of arguments addressing aspects of the two issues certified by the Pre-Trial Chamber interchangeably and in an intertwined manner, the Prosecution further disregards the formulation of said issues by the relevant Chamber. While the Appeal Brief could be dismissed *in limine* on this basis alone, it is nevertheless in the interests of the participating victims that the Appeals Chamber resolves the appeal and authoritatively pronounces itself on the challenged principles.

18. However, the Principal Counsel respectfully requests that the Appeals Chamber dismiss *in limine* all arguments pertaining to the issue²¹ for which certification was denied by the Pre-Trial Chamber in its decision of 18 January 2019.²² Such arguments are not validly raised before the Appeals Chamber and must be

¹⁹ See the "Decision on the Prosecutor's request for suspensive effect" (Appeals Chamber), [No. ICC-01/13-81](#), 31 January 2019, para. 12.

²⁰ See *supra* note 2.

²¹ The Prosecution submits that: "While the Prosecution has framed its appeal accordingly, and respects that ruling, it nonetheless observes that the legal considerations underlying the issue which was not certified remain 'intrinsically linked to the issues on appeal as certified by the Pre-Trial Chamber'. To this limited extent, therefore, the scope of the Pre-Trial Chamber's power of review under article 53(3)(a), and the meaning of rule 108(3), are still necessarily canvassed in the appeal." See the Prosecution's Appeal Brief, *supra* note 2, para. 9 (Emphasis added. Internal references omitted).

²² See the "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'", *supra* note 12, paras. 35-37.

dismissed as such.²³ Indeed, the Appeals Chamber has previously declined to consider arguments of an appellant that go beyond the issue in relation to which leave to appeal has been granted,²⁴ and it should do so in the present circumstances as the Prosecution's argument that this issue was 'intrinsically linked' to the ones on appeal are not convincing. Indeed, addressing arguments going beyond the scope of the certified issues is "*unhelpful for the proper determination of the present appeal*".²⁵

19. It is also for this reason that the Principal Counsel refrains from responding to the argumentation in question, but underlines her opposition to the Prosecution's position.

20. Secondly, the Principal Counsel takes issue with the Prosecution's dismissive statements on the rights of the participating victims expressed in the Appeal Brief.²⁶ *Inter alia*, the Prosecution avers that "[w]hile individuals must have accessible and effective remedies to vindicate their rights, these remedies are primarily situated in national laws. Accordingly, while the Court may in suitable cases provide substantive remedies for victims [...] it is nonetheless not directly amenable to the procedural aspect of the right to an effective remedy for citizens of all States Parties".²⁷

²³ See e.g., ICTY, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-AR.Misc, *Decision on a Prosecution Motion for Enforcement of Order for Trial*, 14 December 2018, para. 9.

²⁴ See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute' (Appeals Chamber), [No. ICC-02/11-01/11 OA 5](#), 16 December 2013, paras. 63 *et seq.* referring to the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the WVU'" (Appeals Chamber), [No. ICC-01/04-01/06-2582 OA 18](#), 8 October 2010, para. 45 (the "*Lubanga* Appeal Decision"). The Appeals Chamber also dismissed submissions in full because the arguments were outside the scope of the certified issues: see the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'" (Appeals Chamber), [No. ICC-01/09-02/11-1032 OA 5](#), 19 August 2015, para. 28.

²⁵ See the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", *supra* note 24, para. 28.

²⁶ See the Prosecution's Appeal Brief, *supra* note 2, paras. 118 *et seq.*

²⁷ *Idem*, para. 119.

21. The Principal Counsel strongly underlines that Victims have a right, recognised by this Court as “*a mandatory requirement stemming from rule 92(2) of the Rules*”, to participate in these proceedings;²⁸ and they are thus entitled to an effective and procedurally proper review of the decision not to investigate, as an expression of their right to an effective remedy.²⁹ The Prosecution’s generic and trivialising reference to the potential interests of “*more than 2 billion citizens of ICC States Parties*”³⁰ is both inapposite and misplaced.

22. Thirdly, the Principal Counsel will also not address the Prosecution’s arguments and expressed disagreement with those parts of the Impugned Decision that concern the powers of the Pre-Trial Chamber to sanction, or the Chamber’s observations likening the Prosecution’s attitude to that of an “*appellate body*”.³¹ Indeed, these matters concern the Prosecution’s intentional non-compliance with a judicial order and lie squarely outside of the scope of the certified issues in the present appeal.

²⁸ See the “Decision on the Victims’ Participation” (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, paras. 6-7. See also the “Decision on the Prosecutor’s request for an extension of page limit and extension of time limit”, *supra* note 16, para. 7; and the “Directions on the conduct of proceedings” (Appeals Chamber), [No. ICC-01/13-42 OA](#), para. 4.

²⁹ See the Impugned Decision, *supra* note 3, para. 120. See also the pronouncements of the European Court of Human Rights on the right of victims to an effective process of examining circumstances of unlawful killings of family members in e.g. *Tunç and Tunç v. Turkey*, App. no. 24014/05, 14 April 2015, paras. 175, 178-181, *Güzelyurtlu and others v Cyprus Turkey*, App. no. 36925/07, Judgment, 29 January 2017, para. 234-235; *Kolevi v. Bulgaria*, App. No. 1108/02, 5 November 2009, para. 201.

³⁰ See the Prosecution’s Appeal Brief, *supra* note 2, para. 119.

³¹ *Idem*, sections I.C.5 and I.C.6 (referring to the Impugned Decision at paras. 98 and 101).

IV. SUBMISSIONS

23. The Principal Counsel recalls that, when alleging errors of law, it is for the appellant to demonstrate the Chamber's erroneous interpretation of the law and that the purported error(s) materially affected the Impugned Decision.³²

24. In this regard, the Prosecution fails to demonstrate that the Pre-Trial Chamber erred in law. The Impugned Decision should therefore be upheld and the Prosecution's appeal dismissed in its entirety.

A. First Ground of Appeal:

"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".

25. The Prosecution submits that the "*Pre-Trial Chamber erred in law in determining that the Prosecution's Final Decision was not 'final' in the meaning of rule 108(3) (i.e., that is was invalid), and therefore requesting a further reconsideration of the Prosecutor's Initial Decision*".³³ In the Prosecution's view, the Pre-Trial Chamber acted *ultra vires*.³⁴ Moreover, it avers that the Court's jurisdiction over a 'situation' is terminated upon the Prosecutor notification of her final decision, "*absent a further decision [...] under article 53(4)*".³⁵

³² See the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 1 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo' (Appeals Chamber), No. ICC-02/11-01/12-75-Red, 27 May 2015, paras. 40-41 (Internal citations omitted).

³³ See the Prosecution's Appeal Brief, *supra* note 2, para. 13.

³⁴ *Idem*.

³⁵ *Ibidem*.

26. The Principal Counsel notes that, in the decision granting leave to appeal, the Pre-Trial Chamber reiterated that *“the core part of the Chamber’s conclusion on the Prosecutor’s 29 November 2017 Decision was, inter alia, based on the consequence of the Prosecutor’s failure to reconsider her decision pursuant to article 53(3)(a) of the Statute. As a result the Chamber considered that the ‘29 November 2017 Decision cannot amount to a ‘final decision’ within the meaning of rule 108 of the Rules until the Prosecutor has carried out her reconsideration in accordance with the 16 July 2015 Decision”*”.³⁶

27. The 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.

28. The Prosecution argues that *“[t]he plain terms of [...] particularly rule 108(3) but also article 53(3)(a) – simply make no provision at all for the Pre-Trial Chamber’s power to determine the validity of the decision of the Prosecutor following a request under article 53(3)(a)”*.³⁷ It then requests that the Appeals Chamber *“determine that the wording of article 53 and rule 108(3) is explicit and as such the sole guide to the identification of the decisions reviewable under its provisions”*.³⁸

29. The Principal Counsel posits that, contrary to the Prosecution’s understanding, the Pre-Trial Chamber has not conducted a new review which is not provided for in the relevant provisions of the texts governing the Court. The ‘review’ of the Prosecutor’s decision of 29 November 2017 was for all means and purposes confined to a review of whether the Prosecutor had indeed addressed the five errors identified by the Pre-Trial Chamber in its previous ruling, wherein it requested the Prosecutor to reconsider her initial decision. The Prosecution cannot now challenge

³⁶ See “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’”, *supra* note 12, para. 40 (referring to the Impugned Decision at para. 114).

³⁷ See the Prosecution’s Appeal Brief, *supra* note 2, para. 82.

³⁸ *Idem*.

its obligation to comply with the Chamber's 2015 Decision, as it failed to appeal said ruling on the merits at the relevant time. All the Impugned Decision is concerned with is a review of whether the Prosecutor had complied with the 2015 Decision. It is not, as the Prosecution argues, concerned with a qualitative review of the 'final' decision as a whole.

30. According to the plain language of the relevant statutory provisions, it is indeed the prerogative of the Prosecutor to reach the final decision on whether or not to commence an investigation. However, this does not *per se* mean that decisions she thus renders and considers to be 'final' are immune to review for procedural correctness by their characterisation alone. A decision taken by the Prosecutor pursuant to rule 108(3) of the Rules of Procedure and Evidence (the "Rules") is a discretionary one.³⁹ The concept of discretionary decisions necessarily implies that they are *per se* subject to mechanisms of oversight. Therefore, even 'final' discretionary decisions can be 'remanded back' to the decision-maker to correct mistakes in the process. It then follows that they remain subject to *de novo* review until the identified errors are addressed and remedied. This does not – contrary to what the Prosecution asserts – mean that the result of a subsequent decision taken by the Prosecutor is prescribed by the reviewer. The reviewer – in this case the Pre-Trial Chamber – simply ensures the correctness of the process.

31. The Prosecution is further mistaken to assert that final decisions, including for example a judgment of the Appeals Chamber, may not be further challenged.⁴⁰ It contends that "[t]he requirement for a decision-maker to give reasons does not necessarily imply a further procedural right for the decision in question to be reviewed".⁴¹ This contention is flawed in several aspects. The Prosecution fails to appreciate that there

³⁹ See also the "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'" (Appeals Chamber), [No. ICC-01/13-51](#), 6 November 2015, para. 59.

⁴⁰ See the Prosecution's Appeal Brief, *supra* note 2, para. 108.

⁴¹ *Idem*, para. 107.

are circumstances in which even ‘final’ judgments can be reviewed,⁴² reconsidered⁴³ or challenged, including for instance before human rights courts;⁴⁴ challenges brought in furtherance of an allegation of a violation of the right to be tried by an independent and impartial tribunal;⁴⁵ or even review upon the discovery of new facts. Although these circumstances are extraordinary, negating any circumstance under which a ‘final’ decision could be reviewed is simply not correct.

32. In this regard, the case of *Bochan v. Ukraine (No. 2)* before the European Court of Human Rights (the “ECtHR”)⁴⁶ provides, *mutatis mutandis*, relevant guidance in relation to the scenario of this appeal.

33. In said case, the applicant, having obtained a judgment in her favour from the ECtHR, lodged an exceptional appeal before the Ukrainian Supreme Court which dismissed it after finding that the domestic decisions were correct and well-founded. It also declared inadmissible a further exceptional appeal lodged by the applicant.⁴⁷ The latter then seized the ECtHR for a second time, arguing that, in dismissing her exceptional appeal, the Supreme Court failed to take into account the previous

⁴² See e.g., MICT, *The Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Decision on Ngirabatware’s Motion for Review, 19 June 2017, p. 2. See also, MICT, *The Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R-1, Decision on Sreten Lukić’s Application for Review, 8 July 2015, para. 5; and ECtHR, *Maresti v. Croatia*, App. No. 55759.07, Judgment, 25 June 2009.

⁴³ See e.g., ICTY, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, 24 July 2014, Decision on Mićo Stanišić’s Motion Seeking Reconsideration of Decision on Stanišić’s Motion for Declaration of Mistrial and Župljanin’s Motion to Vacate Trial Judgment, 24 July 2014, paras. 11-12.

⁴⁴ See, ECtHR, *Kolevi v. Bulgaria*, *supra* note 29, where the ECtHR held at para. 201: “[...] the Court considers that, having regard to the material available to them as described in the preceding paragraphs, the investigators should have explored the allegation [...], even if the allegation was eventually to prove unfounded. That is so because, as the Court has stated in previous cases, the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines the investigation’s ability to establish the circumstances of the case and the persons responsible. Such an investigation cannot be seen as effective.”

⁴⁵ See e.g., ECtHR, *Bochan v. Ukraine (No. 2)*, App. No. 22251/08, Judgment, 5 February 2015; paras 36-39.

⁴⁶ See, ECtHR, *Bochan v. Ukraine*, App. No. 7577/02, Final Judgment, 3 August 2007.

⁴⁷ See the Legal Summary of *Bochan v. Ukraine (No. 2)*, available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["002-10360"\]}](https://hudoc.echr.coe.int/eng#{) (last consulted on 1 March 2019).

ECtHR's findings.⁴⁸ Thus, in *Bochan v. Ukraine (No. 2)*, the applicant's claim concerned the manner in which the judgment of the Ukrainian Supreme Court had been reached.⁴⁹ Since the matter concerned "*the alleged unfairness of the proceedings on the applicant's exceptional appeal, **as opposed to their outcome as such** and their impact on the proper execution of the [ECtHR]'s judgment of 3 May 2007*",⁵⁰ the ECtHR found that it was competent to deal with it "*without encroaching on the prerogatives of the respondent State*".⁵¹ Recalling that it "*should not act as a court of fourth instance and will not therefore question the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable*",⁵² it found that the Ukrainian Supreme Court had grossly misrepresented the ECtHR's findings⁵³ with the effect of defeating the applicant's attempt to have her claim examined in light of that judgment.⁵⁴ The ECtHR hence concluded that the judgment of the Supreme Court was defective, which in turn constituted a violation under the European Convention of Human Rights (the "ECHR").⁵⁵

34. Just as the *Bochan v. Ukraine (No. 2)* case, the present proceedings are concerned with the review of the manner in which the Prosecutor conducted her reconsideration, *not with the outcome as such*. While the Prosecutor has the prerogative powers to decide whether or not to open an investigation, the Pre-Trial Chamber retains powers of oversight and can order her to take particular legal and factual findings into account⁵⁶ when conducting a reconsideration of her initial decision.

35. In its Appeal Brief, however, the Prosecution misconstrues these review powers of the Pre-Trial Chamber in the context of the decision-making process so as

⁴⁸ *Idem*.

⁴⁹ See, ECtHR, *Bochan v. Ukraine (No. 2)*, *supra* note 45, para. 37.

⁵⁰ *Idem*. Emphasis added.

⁵¹ *Ibidem*.

⁵² *Ibid.*, para. 61.

⁵³ *Ibid.*, para. 63.

⁵⁴ *Ibid.*, para. 64.

⁵⁵ *Ibid.*, para. 65.

⁵⁶ See *infra*, paras. 54 and 56.

to lend force to its argument that the Pre-Trial Chamber should under no circumstances be allowed to ‘interfere’ with any ‘final’ decision of the Prosecutor.⁵⁷ This is a factual distortion of the Impugned Decision. The role of the Pre-Trial Chamber, as was correctly carried out in the Impugned Decision, is that of a guardian of the process; be it the first or second review in the face of the Prosecutor not addressing the errors identified. It is, *mutatis mutandis*, the exact same situation as dealt with by the ECtHR in *Bochan v. Ukraine (No. 2)* discussed *supra*. The second reconsideration - ordered by the Pre-Trial Chamber in light of the five errors previously identified in its 2015 Decision - does not distinguish itself from that ordered in the first review under article 53(3)(a) of the Statute where the Chamber was concerned with the question of whether the Prosecutor committed a discernible mistake or otherwise abused her discretion in any way.

36. It is clear and undisputed that the judicial reviewer may not substitute its own ruling for that of the decision-maker. It may, however, disturb the exercise of the decision-maker’s discretion where a discernible error was committed or not remedied, as in the present instance. Discretion is not properly exercised and should be corrected in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.⁵⁸

37. Similarly, the review standard applicable to the Presidency’s review of administrative decisions taken by the Registrar, for instance, prescribes that “*the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: [...] committed an error of law, failed to act with*

⁵⁷ See the Prosecution’s Appeal Brief, *supra* note 2, para. 15.

⁵⁸ See, *mutatis mutandis*, the “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)’ (Appeals Chamber), [No. ICC-02/11-01/16 OA 8](#), 1 November 2016, para. 21.

*procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached”.*⁵⁹

38. The Principal Counsel argues that the same review powers attach to the Pre-Trial Chamber under article 53(3)(a) of the Statute. Moreover, and contrary to the understanding of the Prosecution,⁶⁰ nothing in rule 108 of the Rules numerically limits the review process in this way. Rule 108(3) 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.

39. The Prosecution is therefore incorrect when it relies on a previous ruling of the Appeals Chamber to advocate for a ‘principle of finality in rule 108(3)’.⁶¹ First of all, since the appeal was dismissed *in limine*, any pronouncements of the Appeals Chamber in said decision cannot - by definition - be regarded as *ratio decidendi*.⁶² Secondly, the core of the Appeals Chamber’s *obiter dicta* of that decision merely confirms that rule 108(3) of the Rules provides that the final decision whether to initiate an investigation lies with the Prosecutor,⁶³ and nothing more than that. However, the Prosecution misrepresents this *dicta* as confirming the view of the commentator⁶⁴ cited by the Appeals Chamber, namely that, “*if, after reconsidering the issue, the Prosecutor still decides not to investigate or prosecute, that is the end of the matter*”.⁶⁵ This passage of the Appeals Chamber’s decision cannot be applied to the situation at hand. The Appeals Chamber made these comments in the abstract; it was

⁵⁹ See the “Decision on the application for judicial review dated 25 March 2013 (Presidency)”, No. ICC-RoR221-01/13/4-Red, 10 June 2013, para. 26.

⁶⁰ See the Prosecution’s Appeal Brief, *supra* note 2, paras. 84-85.

⁶¹ *Idem*, para. 124.

⁶² *Cf.* the Prosecution’s Appeal Brief, *supra* note 2, para. 85.

⁶³ *Idem*, referring to the “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 and investigation” (Appeals Chamber), No. ICC-01/13-51, 6 November 2015, para. 56.

⁶⁴ It is noteworthy that the commentator cited is Appeals Counsel for the Prosecution appearing in the present appeal.

⁶⁵ See the Prosecution’s Appeal Brief, *supra* note 2, fn. 169.

then not faced with or asked to decide on the review of a reconsideration that was not properly carried out.

40. Even if *arguendo* the Appeals Chamber's *dicta* were taken as endorsing the abovementioned citation, the latter still does not, as such, confirm the Prosecution's position, because the key is the "*after reconsidering*" part of that sentence. Indeed, in the Principal Counsel's submission, the matter with which the Appeals Chamber is seized in the present appeal is the emphasis on the "*after reconsidering*"⁶⁶ and the propriety of the process of this reconsideration initiated by the judicial review of the Prosecutor's first decision.

41. Contrary to the Prosecution's arguments,⁶⁷ a plain reading of rule 108(3) of the Rules does not contradict this position. Indeed, rule 108(3) of the Rules is couched in mandatory terms in that the Prosecutor *shall* notify the Chamber of her decision and *shall give reasons* for the conclusion she reaches. An obligation to provide reasons would be devoid of its meaning if it were *per se* barred from review. Therefore, a review of the exercise of the Prosecutor's discretion must logically still remain a residual possibility.

42. It follows that, where a flaw in the process is detected, the Pre-Trial Chamber can require the Prosecution to conduct a *de novo* reconsideration. This does not equate to the Pre-Trial Chamber requiring the Prosecution to adopt its reasoning.⁶⁸

43. In the Impugned Decision, the Pre-Trial Chamber challenged the process of the Prosecutor's review in that she did not address the errors identified in the Chamber's 2015 Decision. The point of the matter is not, as the Prosecution

⁶⁶ *Idem*, para. 85, referring to the "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 and investigation'", *supra* note 39, para. 56.

⁶⁷ *Ibidem*, para. 86.

⁶⁸ *Cf.* the Prosecution's Appeal Brief, *supra* note 2, paras. 22-23.

repeatedly asserts,⁶⁹ that the Chamber sought to impose certain conclusions,⁷⁰ but that it instructed the Prosecutor to address and remedy the five errors it found had marred her initial decision not to investigate. It was open to the Prosecutor to reach the same ‘final conclusion’ had she conducted a genuine review. It is thus incorrect for the Prosecution to assert that the Pre-Trial Chamber obliged it to accept its *conclusions* and thereby dictate the outcome.⁷¹ It is moreover of significant importance in this regard that the Prosecution did not appeal the Chamber’s decision identifying these errors on its merits. Once the timeline for appealing expires, the decision becomes final. The Prosecution cannot now challenge the Chamber’s findings through the backdoor.

44. Therefore, the Principal Counsel posits that for all the above reasons, the Prosecution fails to demonstrate that the Pre-Trial Chamber erred in law. It merely advances its disagreement with the Impugned Decision based on a mischaracterisation of its findings. Nothing in the statutory framework of the Court prevented the Chamber from conducting a review of the decision of the Prosecutor of 29 November 2017. Consequently, this ground of appeal should be dismissed.

B. Second Ground of Appeal:

“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 properly directed her mind to these issues”.

45. In the 2015 Decision, the Pre-Trial Chamber found that the Prosecution’s analysis relating to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic

⁶⁹ *Idem*, paras. 28, 32, 33, 38, 70 and 72.

⁷⁰ See *infra*, para. 56.

⁷¹ See the Prosecution’s Appeal Brief, *supra* note 2, para. 12.

and the Kingdom of Cambodia bound for the Gaza Strip was affected by five errors.⁷² The Prosecution did not appeal the merits of this ruling. Instead, in its reconsidered decision, the Prosecutor asserted that she had for herself assessed the merits of the request in undertaking her reconsideration, as she retained ultimate discretion over how to proceed and was not restricted by a lawful binding order under the Statute, since “*the Court ha[d] no power to make such a binding order*”;⁷³ and the Prosecution may act only on the basis of its own independent view of the law and of the facts.⁷⁴

46. In the Impugned Decision, the Pre-Trial Chamber found that the ‘request’ under article 53(3)(a) of the Statute constituted a judicial decision which must form the basis of the Prosecutor’s reconsideration.⁷⁵ Since the findings contained in the 2015 Decision were not disturbed on appeal, the Pre-Trial Chamber further found that said ruling “*thus acquired the authority of a final decision within the legal framework of the Court*”.⁷⁶ The Chamber went on to state that “[t]he possibility of the Prosecutor simply disregarding a decision under article 53(3)(a) of the Statute would mean that the oversight function of the Pre-Trial Chamber is without effect and that a State Party’s opportunity to challenge the Prosecutor’s decision not to proceed with an investigation is devoid of substance”.⁷⁷ The Principal Counsel agrees with this reading of the object and purpose of the review proceedings under article 53(3)(a) and the logical consequence - as expressed by the Pre-Trial Chamber in the Impugned Decision - that, in the circumstances, the Prosecutor could not subsequently “*simply choose not to follow this Decision*”.⁷⁸

⁷² *Idem*, para. 49. See also the Impugned Decision, *supra* note 3, para. 26.

⁷³ See the Prosecutor’s 29 November 2017 Decision, *supra* note 7, para. 4.

⁷⁴ *Idem*, para. 4.

⁷⁵ See the Impugned Decision, *supra* note 3, para. 87.

⁷⁶ *Idem*, para. 94.

⁷⁷ *Ibidem*, para. 106.

⁷⁸ *Ibid.*, para. 108.

47. The Prosecution submits that “*the Pre-Trial Chamber erred in law in requiring the Prosecutor to accept the reasoning contained in its article 53(3)(a) request, including particular conclusions of law and fact*”.⁷⁹ It further avers that “*the Appeals Chamber has previously agreed [that] the Prosecutor cannot be obliged by [the Pre-Trial Chamber] to accept particular conclusions of law or fact.*”⁸⁰ The Prosecution, however, fails to provide a reference to the alleged ‘previous finding’ of the Appeals Chamber.

48. In sum, in its Appeal Brief, the Prosecution again challenges the authority of the Pre-Trial Chamber to require it to carry out the reconsideration process, arguing that a request “*does not bind the Prosecutor to the Trial Chamber’s reasoning*”.⁸¹ This is not the subject of this ground of appeal. Parts of this question – the authority of the Pre-Trial Chamber *vis-à-vis* the Prosecutor under article 53(3)(a) of the Statute - are dealt with in the first ground of appeal. This second ground solely relates to whether *in carrying out her reconsideration*, the Prosecutor is obliged to accept certain conclusions of the Pre-Trial Chamber.

49. It is the 2015 Decision that directed the Prosecutor to accept legal interpretations and possible interpretations of fact. The Prosecution chose not to follow that decision. The Impugned Decision simply reminded the Prosecutor, who had ignored these legal and factual issues contained within the request to reconsider, that she was – and she remains - bound to implement and follow *that* decision.

50. The Principal Counsel notes that the Appeals Chamber previously pronounced itself on a very similar scenario⁸² where it stated that “*throughout the Document in Support of the Appeal, the Prosecutor commingles arguments against the*

⁷⁹ See the Prosecution’s Appeal Brief, *supra* note 2, para. 12.

⁸⁰ *Idem*.

⁸¹ *Ibidem*, headings I.A. to I.C.

⁸² See the *Lubanga* Appeal Decision, *supra* note 24, paras. 45 *et seq.*

Impugned Decision with challenges to the Trial Chamber's prior orders".⁸³ In this case, and unsurprisingly, the Appeals Chamber declined to entertain these challenges.

51. The Principal Counsel submits that the Appeals Chamber should also in the present case refuse to entertain the Prosecution's arguments challenging the authority of the Pre-Trial Chamber to issue orders that bind it. The matter has been authoritatively settled by the Appeals Chamber, and, moreover, it does not arise from the certified issues and should be rejected *in limine*, as argued *supra*.⁸⁴

52. Nevertheless, given the issues certified, the Principal Counsel finds herself in the delicate position of effectively having to respond to a matter that arises out of a decision that would ordinarily be barred from appeal. Although the Principal Counsel holds the view that the core question under this ground of appeal pertains to a decision of the Pre-Trial Chamber that has become final, she will attempt to address the issue as certified.

53. In light of the above it is unsurprising that the Prosecution renews previous arguments and sets out its views on the nature of a 53(3)(a) request, contending that the Chamber's "*emphasis on the 'binding' nature of a judicial decision may be misplaced*";⁸⁵ and that the Chamber's interpretation of the object and purpose of article 53(3)(a) of the Statute "*gives too much weight to one theoretical reading of the purpose of article 53(3)(a), disregarding other tenable readings*".⁸⁶ The Prosecution's arguments reflect a mere disagreement with the Pre-Trial Chamber's interpretation of the provision. It opposes the Chamber's reading thereof and simply offers its own interpretation as another 'tenable reading' which would "*seek to reconcile it with the broader interests reflected in the Statute as a whole*". Yet, it neither defines the latter concept,⁸⁷ nor does it

⁸³ *Idem*.

⁸⁴ See *supra*, para. 22.

⁸⁵ See the Prosecution's Appeal Brief, *supra* note 2, para. 42.

⁸⁶ *Idem*, para. 56.

⁸⁷ *Ibidem*.

demonstrate that the Chamber's reading is in any way erroneous. As such, the Prosecution fails to demonstrate any *error* in the conclusions of the Pre-Trial Chamber.

54. As submitted *supra* in relation to the first ground of appeal, nothing prevents the Pre-Trial Chamber from reviewing the Prosecutor's first decision in terms of its correctness and to find mistakes such as errors of law, taking into account irrelevant factors, failing to take into account relevant factors, or reaching a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached. Accordingly, it logically follows that, in circumstances where the Chamber finds that the Prosecutor's first decision was affected by certain errors, it is in its power to direct the Prosecution to apply the correct law as set out by the Chamber, or to address a particular error of fact in its review. If the Prosecution is then of the opinion that the Pre-Trial Chamber misstated the law or misapprehended a particular fact, it can challenge these interpretations by appealing pursuant to article 82(1)(d) of the Statute. If it does not appeal, then the ruling becomes binding, including in case of reconsideration proceedings.

55. In this instance, the Prosecution failed to appeal the part of the Pre-Trial Chamber's 2015 Decision identifying the five errors. To divert attention from this failing, it now seeks to again challenge the underlying principle and even maintains that its previous appeal – which was dismissed *in limine* by the Appeals Chamber –⁸⁸ “*should have been susceptible to appeal under article 82(1)(a)*” of the Statute as then argued.⁸⁹

⁸⁸ See the “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’” *supra* note 39.

⁸⁹ See the Prosecution's Appeal Brief, *supra* note 2, para. 70.

56. Finally, the Prosecution also misconstrues the effect of being obliged to accept particular conclusions of law or fact.⁹⁰ It suggests that being obliged in this way would effectively “bind[] the Prosecutor to adopt those same conclusions”⁹¹ and effectively lead to referring entities having a ‘dispositive’ role in the matter.⁹² The fundamental misunderstanding may lie in the somewhat unfortunate choice of terminology that does not exactly reflect the essence of the Chamber’s ruling. In its 2015 Decision, the Pre-Trial Chamber required the Prosecution to apply the former’s legal interpretations and to take into consideration specific relevant facts it had failed to consider when reaching its conclusions.⁹³ These matters, according to the Pre-Trial Chamber, affected the decision.⁹⁴ The Pre-Trial Chamber never *imposed conclusions*, as such. It was therefore open to the Prosecutor, as is indeed her role, to reach the same final conclusion, namely not to initiate an investigation or to reach a conclusion in favour of opening an investigation. The Impugned Decision does not question the Prosecutor’s role under rule 108(3) of the Rules in terms of the ultimate decision. It merely finds – and rightly so – that, in arriving at a final decision, the Prosecutor is obliged to *address the errors* pointed out in the 2015 Decision.

57. Therefore, the Principal Counsel posits that, since the Prosecution fails to demonstrate an error, puts forth arguments that merely disagree with the Impugned Decision and further challenges parts of previous ruling not subject to this appeal, the second ground of appeal should also be dismissed in its entirety.

⁹⁰ See the second issue of appeal certified by the Pre-Trial Chamber.

⁹¹ See the Prosecution’s Appeal Brief, *supra* note 2, para. 60.

⁹² *Idem*.

⁹³ See e.g., the 2015 Decision, *supra* note 6, paras. 41 and 43.

⁹⁴ See e.g., the 2015 Decision, *supra* note 6, paras. 45, 47 and 48.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully requests the Appeals Chamber to dismiss the Prosecution's Appeal in its entirety.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 4th day of March 2019

At Genoa, Italy