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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 Ibáñez Carranza**

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

**Public Document**

**Response on behalf of the Government of the Union of the Comoros to the “Prosecution  
Appeal Brief”**

**Source:**                    **Rodney Dixon QC, and Stoke White Ltd (London), on behalf of the  
Government of the Union of the Comoros**

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

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## **I. Introduction**

1. The Government of the Union of the Comoros hereby files its response to the “Prosecution Appeal Brief.”<sup>1</sup>
2. This response is filed pursuant to Regulations 24(3), 33 and 34(b) and (c) of the Regulations of the Court, and in accordance with the Appeals Chamber’s “Decision on the Prosecutor’s request for extension of page limit and extension of time limit.”<sup>2</sup>
3. The Prosecution’s latest appeal comes nearly 6 years on from when the Comoros as an ICC States Party referred the Situation to the OTP. The Prosecution has not raised any new arguments in this appeal. As set out below, it has relied on ‘grounds of appeal’ for which it did not receive leave to appeal from the Pre-Trial Chamber. It has disregarded the Chamber’s order on certification.
4. In doing so, the OTP has again clung steadfastly to its fundamentally flawed assertion that it is not required to address and correct the errors identified by Pre-Trial Chamber in the judicial review proceedings concerning the OTP’s refusal to open an investigation into the war crimes committed against civilian passengers of the Gaza Freedom Flotilla. The OTP thus continues to claim that the Pre-Trial Chamber should not have directed the OTP to reconsider its decision in light of these errors by 15 May 2019. This is plainly a completely unsustainable assertion that should be firmly rejected. The OTP’s latest appeal should be refused as being entirely groundless and ill-conceived. The OTP has certainly not demonstrated that the Pre-Trial Chamber committed any discernable errors at all that could require the Appeals Chamber’s intervention.

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<sup>1</sup> Prosecution Appeal Brief, ICC-01/13-85, 11 February 2019 [*hereinafter* “OTP Appeal Brief”].

<sup>2</sup> Decision on the Prosecutor’s request for extension of page limit and extension of time limit, ICC-01/13-80, 25 January 2019, para. 80.

5. The background to this appeal in summary is the following. On 6 November 2014, the Prosecution made its first decision under Article 53(1) in the present Situation in which it found that “the information available provides 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 *Mavi Marmara* by IDF soldiers on 31 May 2010”. However the Prosecution decided that there was no reasonable basis to proceed with investigating these crimes because it took the view 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”.<sup>3</sup>
6. On 16 July 2015, following the Government of the Comoros’s Application for judicial review under Article 53(3)(a)<sup>4</sup>, Pre-Trial Chamber I requested that the Prosecution reconsider its decision of 6 November 2014 not to open an investigation into crimes it had identified as committed during the attack on the Gaza Freedom Flotilla. The Chamber did so on the basis of the particular errors of law and fact that it found were committed by the Prosecution in its assessment of the gravity of the crimes committed.<sup>5</sup>
7. Pre-Trial Chamber I’s decision identified specific errors of law and fact made by the Prosecution; in particular, that the Prosecution’s application of the relevant factors under Article 17(1)(d) for determining whether the case is grave enough to warrant an investigation were erroneous as a matter of law, and were irrational and unreasonable under applicable and well-established legal principles of judicial review. As a result of the errors identified, the Chamber directed the Prosecution to address and correct these errors and in so doing to reconsider its decision not to open an investigation. It was plainly left to the Prosecution to decide whether or not to

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<sup>3</sup> Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, Annex A - Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014, paras. 149-151 [*hereinafter* “First OTP Decision”].

<sup>4</sup> 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, 29 January 2015 [*hereinafter* “Comoros First Application for Judicial Review”].

<sup>5</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, 16 July 2015 [*hereinafter* “PTC’s First Decision on Reconsideration”].

change its original decision as provided by Article 53(3)(a).<sup>6</sup> In other words, by addressing and correcting the errors identified by the Chamber, it was for the Prosecutor to decide whether the result of her determination should be different.

8. Over two years later, on 30 November 2017, the Prosecution made what it called its ‘Final Decision’, which again decided not to open an investigation.<sup>7</sup> On 23 February 2018, the Government of the Comoros requested the Pre-Trial Chamber to review the Prosecution’s decision on the basis that it had “again committed fundamental errors”. In particular, the Comoros highlighted that the OTP had erred in taking the untenable position that it was “not required to address the errors the Chambers found committed in the First OTP Decision.”<sup>8</sup>
  
9. On 15 November 2018, Pre-Trial Chamber I held that the Prosecution had failed to address the errors identified by the Chamber, and therefore directed the Prosecution to reconsider its decision in “accordance with the 16 July 2015 Decision” such that the “*five main errors identified by the Pre-Trial Chamber must serve as the basis for the reconsideration of her 6 November 2014 Decision.*”<sup>9</sup>
  
10. The Chamber specifically noted that there was “*no doubt as to the Prosecutor’s decision to willfully refrain from complying with the 16 July 2015 Decision*”<sup>10</sup> and that the Prosecution had explicitly challenged “*certain fundamental notions*” which “*strike at the very heart of the distribution of authority between the Pre-Trial Chamber and the Office of the Prosecutor.*”<sup>11</sup> In finding that the Prosecution improperly disregarded the Chamber’s decision, the Chamber warned that “*if the Prosecutor were free to disagree with or ignore a decision under article 53(3)(a) of*

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<sup>6</sup> PTC’s First Decision on Reconsideration, paras. 49,50.

<sup>7</sup> Notice of Prosecutor’s Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 29 November 2017, paras. 1-170 [*hereinafter* “OTP Reconsideration Decision”].

<sup>8</sup> Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018, paras. 5, 43-54 [*hereinafter* “Second Comoros Application for Judicial Review”].

<sup>9</sup> Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, ICC-01/13-68, 15 November 2018, para. 117 [*hereinafter* “PTC’s Second Decision on Reconsideration”].

<sup>10</sup> PTC’s Second Decision on Reconsideration, para. 83.

<sup>11</sup> PTC’s Second Decision on Reconsideration, 86.

*the Statute, she would to all intents and purposes be acting as an appellate body reviewing the Chamber's decision on the merits.*"<sup>12</sup>

11. In filing the present appeal, the Prosecution has not heeded this warning. It has again sought to challenge the proper function of the Judges and to undermine the very constitution, hierarchy and distribution of responsibilities of the Court.<sup>13</sup> The Prosecution on appeal still seeks to assert that it need not comply with the Chamber's decision requiring the OTP to reconsider its decision on opening an investigation on the basis of the particular errors identified by the Chamber.
  
12. Instead of getting on with reconsidering its decision in light of these specific errors, the Prosecution has filed an appeal using several convoluted and strained arguments to try to patch over a fundamentally flawed central assertion, which is inherently indefensible before any court – that the parties to the proceedings, whether the prosecution, defence, or any other party, can refuse to address an error of law or fact as identified by the Judges of the Court. The OTP goes so far as to claim that it need only address the errors when it agrees that they are errors. The OTP maintains that if it takes a different view to the Chamber, it can refuse to address the errors. It thus claims that the Chamber acted unlawfully, "*ultra vires*", in requiring the OTP to reconsider its decision and that the Comoros' judicial review application should have been rejected *in limine*.
  
13. This core assertion at the heart of the OTP's appeal (as it has been throughout this litigation) is dressed up by the OTP in a misleading way (or that the OTP must know is misconceived), namely that the OTP cannot be bound by the Judges to open an investigation – the final decision is that of the OTP. Yet, it is absolutely clear that the Chamber has NOT held that the OTP must open an investigation or that the Chamber can so direct the OTP. The Comoros has never advanced such an argument.

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<sup>12</sup> PTC's Second Decision on Reconsideration, para. 98.

<sup>13</sup> See, Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 29 November 2017; and Prosecution's Response to the Government of the Union of the Comoros' "Application for Judicial Review" (ICC-01/13-58) (Lack of Jurisdiction), ICC-01/13-61, 13 March 2018.

The Chamber has unequivocally held that it is for the OTP to decide whether to open an investigation or not, and ONLY for the OTP. The final decision on opening an investigation is indeed solely for the Prosecutor.

14. The Chamber has however rightly required the OTP to reconsider its decision on the basis of the discrete errors that it has identified as the Chamber, as it is fully entitled to do under Article 53(3)(a). And the OTP is obviously required to address these errors, whether it agrees with them or not. Moreover, the findings made by the Chamber in identifying these errors are binding on the OTP, as they would be on any party to proceedings before the Court. Were the OTP to have decided, for example, that an investigation into alleged crimes against humanity could not be opened as there was no evidence of any connection to an armed conflict – a clear error of law as no such nexus is required by the ICC Statute – the Chamber’s finding under Article 53(3)(a) that an error of law had been committed and that the OTP therefore had to reconsider its decision, would unquestionably be binding on the OTP to take into account in the process of reconsidering its decision. The OTP clearly could not respond by claiming that the Chamber got the law wrong and that the OTP was free to act as it pleased. It would plainly be nonsensical to conclude otherwise.
  
15. In its appeal the Prosecution attempts to deploy a range of arguments to try to prop up its overarching submission that *it* can decide in Article 53(3)(a) proceedings whether the errors identified by the Chamber need to be addressed and corrected, as only the OTP can make the ‘final’ decision. None of them have any merit at all, and should all be dismissed. The OTP tries to argue that the drafters and the Statute itself have somehow given the Prosecutor the power to ignore the rulings of the Chamber under Article 53(3)(a) and determine when the preliminary proceedings are “final”, suggesting that the “sensitivity of this balance” between the Judges and the OTP has been loaded in favour of the Prosecutor in order to serve all States and all persons who seek the protection of the Court.<sup>14</sup> These are futile and meaningless submissions. They completely miss the main point, namely that the Judges’ foremost

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<sup>14</sup> OTP Appeal Brief, paras. 1, 2.

function is to interpret the law and identify errors of law and fact that the parties are obliged to address and correct. It is of course for the Prosecutor to decide whether to open an investigation or not, but in making that decision the Prosecutor must comply with the law. The Chamber has rightly held that the Prosecutor's reconsideration must be undertaken in accordance with its review decision.<sup>15</sup> The Prosecutor's power to make the 'final' decision does not mean that the OTP can ignore the Judges rulings on the errors committed. If the Prosecutor makes the same errors again, those errors cannot suddenly become insignificant, as though they had been addressed and corrected, when they had not.

16. The Government of the Comoros submits that the Prosecution's appeal is no more than a disagreement with the Pre-Trial Chamber's ruling, which the Prosecution seeks to disregard by using manifestly weak arguments to try to avoid applying the Chamber's decision. The OTP has not shown that any discernable errors have been committed by the Pre-Trial Chamber.
17. These proceedings have been going on for an already extended period of time. This latest appeal is a repeat of the same arguments. The Appeals Chamber has refused to suspend the Pre-Trial Chamber's decision. There should rightly be no further delay in the OTP reconsidering its determination in accordance with the Pre-Trial Chamber's decision.
18. Accordingly, the Comoros respectfully requests that the Prosecution's appeal of the Pre-Trial Chamber's decision on reconsideration of 15 November 2018 is dismissed in its entirety, and that the Prosecution is required to reconsider its decision not to investigate the attacks on the Gaza Freedom Flotilla in accordance the Pre-Trial Chamber's decision of 16 July 2015 within the six month time limit set by the Chamber, namely by 15 May 2019.<sup>16</sup>

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<sup>15</sup> See, PTC's Second Decision on Reconsideration, para. 98.

<sup>16</sup> PTC's Second Decision on Reconsideration, para. 121.



**II. Grounds for which Leave to Appeal was Granted by the Pre-Trial Chamber – OTP has failed to comply with Pre-Trial Chamber’s Decision on Leave to Appeal**

19. On 18 January 2019, the Prosecution was granted leave to appeal on two of three grounds for which it sought leave.<sup>17</sup>

20. In its decision, the Pre-Trial Chamber granted the Prosecution’s Second Issue on appeal.<sup>18</sup> In granting this issue on appeal, the Pre-Trial Chamber rephrased the issue to reflect “the Chamber’s understanding of the issue and in accordance with its discretionary power to reformulate appealable issues,” namely that the issue on appeal before the Appeals Chamber is the following:

*“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>19</sup>.*

21. The Pre-Trial Chamber also granted the Prosecution’s Third Issue on appeal,<sup>20</sup> namely:

*“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*

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<sup>17</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, 18 January 2018 [*hereinafter* “Decision on Leave to Appeal”].

<sup>18</sup> Decision on Leave to Appeal, paras. 38-45.

<sup>19</sup> Decision on Leave to Appeal, para. 39.

<sup>20</sup> Decision on Leave to Appeal, paras. 46-52.

*continue to draw her own conclusions provided that she has properly directed her mind to these issues*”<sup>21</sup>.

22. As to the Prosecution’s first proposed ground of appeal which sought to appeal “*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>22</sup>, the Pre-Trial Chamber found that “the Prosecutor’s proposed issue constitutes a disagreement with the Chamber’s analysis” and “is too broadly phrased”. Leave to appeal on this ground was thus refused by the Chamber as being a non-appealable issue.<sup>23</sup>

23. The OTP has proceeded to ignore the Chamber’s order on leave to appeal. It has directly argued that the Pre-Trial Chamber acted “*ultra vires*” in required the OTP to reconsider its decision i.e. the first ground for which the OTP was denied leave to appeal. The OTP has gone straight to this issue and forcefully pressed it throughout its appeal brief. It has also redefined the two issues for which it did get leave, cast them in its own terms, and freely raised issues regardless of the Chamber’s order on leave to appeal. It has used them as a gateway to argue the first ground for which leave was refused. This is clearly unacceptable. It sets a very dangerous precedent that parties can on their own motion raise issues on appeal for which they were not granted leave. The OTP’s appeal should thus be dismissed given that it has flouted the Chamber’s order.

24. The OTP’s central submission is that the “Pre-Trial Chamber was not competent to entertain the Comoros’ further request for reconsideration, and any decision by it other than dismissal *in limine* was thus wrong in law.”<sup>24</sup> Yet, the OTP was never

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<sup>21</sup> Decision on Leave to Appeal, para. 47.

<sup>22</sup> Decision on Leave to Appeal, paras. 31-37.

<sup>23</sup> Decision on Leave to Appeal, para. 35.

<sup>24</sup> OTP Appeal Brief, para. 74.

given leave to appeal this issue. It has impermissibly assumed it can make the appeal about this issue in any event.

25. The OTP has dived straight in to assert that the Pre-Trial Chamber is not permitted to “determine the validity of a ‘final decision’ under Rule 108(3).”<sup>25</sup> The Prosecution has failed to address the issue for which it was granted leave – whether the OTP’s decision on reconsideration is not ‘final’ if the Chamber finds that the Prosecution has not addressed the errors it identified. Instead, the Prosecution invalidly focuses its appeal on the Chamber having erred because it does not have the power to “invalidat[e] the Prosecutor’s final decision and requir[e] the Prosecutor to further reconsider her initial decision.”<sup>26</sup>
26. The Prosecution itself concedes that “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 this appeal” with the Prosecution stating that the “Appeals Chamber cannot – and should not – refrain from” addressing and deciding upon the very ground of appeal for which leave to appeal was not granted.<sup>27</sup>
27. The OTP has clearly disregarded the Pre-Trial Chamber’s order on the certification of appealable issues. Where the OTP disagrees with the Chamber’s order, it has simply disobeyed the terms of the order. The OTP has acted exactly how it wrongly claims in its appeal brief it is entitled to act, namely that if “it respectfully disagrees with the legal reasoning” of the Chamber, it need not follow the Chamber’s findings.<sup>28</sup>
28. The Prosecution’s Appeal Brief should therefore be dismissed, and in any event, none of the arguments raised in the OTP’s redefined ‘grounds’ provide any basis at all for the Pre-Trial Chamber’s decision to be overturned, and should all be rejected.

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<sup>25</sup> OTP Appeal Brief, paras. 73-101, 114, 115.

<sup>26</sup> OTP Appeal Brief, paras. 73-101, 114, 115.

<sup>27</sup> OTP Appeal Brief, paras. 9-11.

<sup>28</sup> OTP Reconsideration Decision, paras. 13, 33, 66.

**III. First Ground of Appeal as Redefined by the OTP on its own motion: “The Pre-Trial Chamber erred in Requiring the Prosecutor Under Article 53(3)(A) to Accept Particular Conclusions of Law or Fact”**

29. The Pre-Trial Chamber granted the Prosecution leave to appeal on the following specific ground:

*“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>29</sup>*

30. In its Appeal Brief the OTP turns this ground into a blatant argument that it need not address errors identified by the Chamber if it does not believe they are errors. The OTP does not actually focus on the appeal issue for it was granted leave by the Chamber. The Prosecution misuses the issue for which it was granted leave to claim that the Pre-Trial Chamber has acted “*ultra vires*” – the OTP asserts 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 or fact”<sup>30</sup>; that the Prosecution need not abide by the Chamber’s decision because “the Prosecutor cannot be obliged by it [the Chamber] to accept particular conclusions of law or fact”<sup>31</sup>; and, in particular that the Prosecutor cannot be required to reconsider her decision “‘in accordance with’ the ‘five main errors’ identified”<sup>32</sup> as that would amount to the Pre-Trial Chamber “militating to the opposite conclusion” from that of the Prosecution.<sup>33</sup>

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<sup>29</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, 18 January 2018, para. 46.

<sup>30</sup> OTP Appeal Brief, para. 12.

<sup>31</sup> OTP Appeal Brief, para. 12.

<sup>32</sup> OTP Appeal Brief, para. 17.

<sup>33</sup> OTP Appeal Brief, para. 16.

31. In essence, the OTP asserts, irrespective of the issue for which it was granted leave to appeal, that the Pre-Trial Chamber had no authority to make its decision requiring reconsideration, and should not have done so.
32. This submission should be dismissed as it goes far beyond the issue for which leave to appeal was granted. In any event, it is a wholly flawed submission. The OTP has certainly not shown that the Pre-Trial Chamber has erred in any way that could require the Appeals Chamber's attention.
33. As emphasised above, requiring the OTP to address the legal errors it has committed is plainly a perfectly permissible judicial function. Only the Prosecutor is empowered to decide to open an investigation, not the Chamber, but the Prosecutor cannot just ignore the errors identified in judicial review proceedings pursuant to Article 53(3)(a). If that were correct, such review proceedings would be redundant. There would be no point in going through judicial review proceedings if the OTP could ignore the outcome of these proceedings. Most importantly, it would clearly undermine the primary judicial function of the Chamber were the Prosecutor permitted in such proceedings to refuse to abide by the Judge's findings on the basis that it took a different view of the law.
34. The Prosecution declares that "judicial decisions are always to be respected" but in the same breath argues that the Chamber's "apparent view that it is inherent in such a judicial decision that its reasoning must be binding upon the Prosecutor is incorrect."<sup>34</sup> This is a contradiction in terms. It is undisputed that judicial decisions must always be followed – there can be no room to still try to suggest that the Judge's findings can be disregarded if the Prosecutor so chooses.
35. The Prosecution repeatedly states that it is "subject to an obligation of *process*" but "not subject to an obligation of *result*."<sup>35</sup> As it did in its decision on reconsideration,

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<sup>34</sup> OTP Appeal Brief, paras. 20, 21.

<sup>35</sup> OTP Appeal Brief, para. 22.

the Prosecution continues incorrectly to assert that because the Appeals Chamber stated that the Prosecution “retains ultimate discretion over how to proceed”<sup>36</sup>, the Prosecution has complete discretion to “act only on the basis of its own independent view of the law and the facts.”<sup>37</sup> This is the wholly defective foundation for its decision on reconsideration in which the OTP claimed that it “cannot concur with the majority of the Pre-Trial Chamber” because “it respectfully disagrees with the legal reasoning in the Request concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under article 53(3), and the considerations relevant to the substantive analysis carried out by the majority.”<sup>38</sup> The Prosecution asserted that “[g]iven its disagreement with the majority of Pre-Trial Chamber I’s interpretation” of the law it “cannot concur in the basic premise of the Request” and therefore the OTP decided it would not follow the Chamber’s Decision to Reconsider on the interpretation of the law and the errors identified by the Chamber.<sup>39</sup>

36. The Pre-Trial Chamber rightly found that a “decision issued by the Pre-Trial Chamber under article 53(3)(a) of the Statute must lead to an obligation of compliance” with the findings of the Chamber<sup>40</sup> because if the “*Prosecutor were free to disagree with or ignore a decision under article 53(3)(a) of the Statute, she would to all intents and purposes be acting as an appellate body reviewing the Chamber’s decision on the merits*” which would “*contravene the judicial role of the Chambers and, in particular, the supervisory role of the Pre-Trial Chambers over the Prosecutor’s actions.*”<sup>41</sup>

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<sup>36</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, 6 November 2015, para. 59.

<sup>37</sup> OTP Reconsideration Decision, para. 4.

<sup>38</sup> OTP Reconsideration Decision, para. 13.

<sup>39</sup> OTP Reconsideration Decision, paras. 33, 66.

<sup>40</sup> PTC’s Second Decision on Reconsideration, para. 100.

<sup>41</sup> PTC’s Second Decision on Reconsideration, para. 98.

37. In its current appeal, however, the Prosecution continues to rely on the *obligation of 'process' but not of 'result'*<sup>42</sup> argument to claim that it can ignore the Chamber's findings. It takes the bizarre position that the Prosecutor cannot be directed to correct errors identified by the Judges as that would mean that the Pre-Trial Chamber is "militating" the Prosecution to a specific result or conclusion.<sup>43</sup>
38. This claim could not be further from the truth. The Judges have not in any way directed that a certain conclusion must be reached by the Prosecution on whether it will ultimately open an investigation or not following its reconsideration. Indeed, the Pre-Trial Chamber itself specifically confirmed that having identified errors which must be corrected, "*the Prosecutor's obligation to comply with the 16 July 2015 Decision does not entail an obligation as to the result of the reconsideration.*"<sup>44</sup>
39. The errors have been correctly identified by the Chamber to ensure that the *process* of reconsideration will be undertaken by the OTP in accordance with the legal requirements as determined by the Judges. The OTP is certainly not obliged by the Pre-Trial Chamber to arrive at a particular and pre-determined *result* about opening an investigation or not.
40. Indeed, the Prosecution has conceded that the Chamber can intervene "*if the Prosecution misinterpreted the law, breached a principle of natural justice, or was unfair; if it took irrelevant information into account in reaching its decision, or failed to take account of relevant information; or if it reached a factual conclusion which was so unreasonable that no reasonable person with the same information could have made it.*"<sup>45</sup> That is exactly what the Judges have found that the Chamber is empowered to rule on in judicial review proceedings pursuant to Article 53(3)(a). The Chamber's findings on these issues plainly cannot be ignored by the OTP as

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<sup>42</sup> OTP Appeal Brief, paras. 15, 16, 20-26, 65. See also, OTP Reconsideration Decision, para. 3.

<sup>43</sup> OTP Appeal Brief, paras. 16, 22.

<sup>44</sup> PTC's Second Decision on Reconsideration, para. 109.

<sup>45</sup> OTP Reconsideration Decision, para. 63.

though they have not been made. Such an inexplicable position would completely undermine the elementary premise on which the Court as a court of law is founded.

41. The Prosecution argues that its “*obligation of ‘process’ but not of ‘result’*” is routed in the text of Article 53(3)(a) and Rule 108(2).<sup>46</sup> There is no merit at all in this submission, and the Pre-Trial Chamber has definitely not committed any error in its decision. Article 53(3)(a) and Rule 108(2) do not expressly or implicitly permit the OTP to refuse to address errors identified by the Chamber in judicial review proceedings, and nor is there anything concrete in the drafting history which could in any way support such an outcome. The OTP has also misconstrued academic writing on this subject.<sup>47</sup> Academic comment has correctly stated that the ultimate decision about opening an investigation is that of the Prosecutor and that following its reconsideration it “*would not strictly speaking be obliged to come to a different conclusion.*”<sup>48</sup> That is an entirely sound statement. It does not follow in any sense however that in reaching that conclusion about whether to open an investigation the OTP is entitled to overlook the errors identified by the Chamber, and the legal requirements it has clarified.

42. In no legal system is the prosecutor (or any party to the litigation) free to refuse to follow the rulings and findings of the judiciary on the law, as the OTP suggests. If that were permissible, the entire legal system would be rendered futile.

43. The OTP further tries to draw a wholly artificial distinction between the “relief or remedy” granted by the Chamber, which are binding on the OTP and the “reasoning in the decision” and “conclusions of law and fact”, which it claims are not.<sup>49</sup> The

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<sup>46</sup> OTP Appeal Brief, para. 22.

<sup>47</sup> See, 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, 6 November 2015, note 134 referencing the opinion of M. Bergsmo and P. Kruger, “Article 53: Initiation of an investigation”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck *et al.*, 2nd ed., 2008), p. 1065, at p. 1075: “[Article 53 (3) (a) of the Statute].

<sup>48</sup> *Id.*

<sup>49</sup> OTP Appeal Brief, para. 43.



OTP twists the question to be not “whether an article 53(3)(a) request is binding, but the way in which it is binding”<sup>50</sup> in order to attempt to claim that it is not bound “to adopt the Pre-Trial chamber’s reasoning, including any particular conclusions of law and fact.”<sup>51</sup> This is an absurd assertion. It is not for the OTP to pick and choose which parts of the Chamber’s findings it will follow. The relief ordered by the Chamber is obviously based exclusively on the findings and conclusions of the Chamber.

44. The irrationality of the OTP’s claim is evident in countless situations. If the Pre-Trial Chamber, for example, rejected an application for leave to appeal, it would be ludicrous to suggest that the only part of this decision which is binding is the rejection of the application. And that the Chamber’s reasoning about the application of the legal test for granting leave was not binding (namely if there is an issue that “*would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*” and that an immediate resolution of such an issue by the Appeals Chamber may “*materially advance the proceedings*”).<sup>52</sup>
45. It would be equally absurd, for instance, if the Chamber’s decision to grant suspensive effect would only have the consequence of suspending the effect of a decision, but create no precedent in respect of the underlying legal test on which the decision is based (namely, that suspensive effect should only be granted if implementation of the decision “*would be very difficult to correct and may be irreversible*”).<sup>53</sup>

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<sup>50</sup> OTP Appeal Brief, para. 25.

<sup>51</sup> OTP Appeal Brief, para. 27.

<sup>52</sup> See, *Prosecutor v. Kony*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 20, 21.

<sup>53</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008”, 22 May 2008, ICC-01/04-01/06-1347 (OA 9, OA 10), para. 23. The reasoning for this decision was relied upon in *Prosecutor v. Bemba*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, ICC-01/05-01/08-817, 9 July 2010, para. 11.

46. The Prosecution also tries to rely on the requirement for the OTP to give reasons under Rule 108(3) to support its claim that the Chamber’s reasoning is non-binding.<sup>54</sup> This too makes no sense. While the Chamber makes findings on the proper interpretation of the law or identified errors, thus providing reasons to explain its findings, the Prosecution must “demonstrate in detail how she has assessed the relevant facts in light of the specific directions contained in the 16 July 2015 Decision”. The latter process does not in any way render the former findings non-binding.
47. As the Pre-Trial Chamber has rightly held, the Prosecution’s requirement under Rule 108(3) of providing details and reasons for its decision on reconsideration “indicates that the Chamber’s oversight role is not necessarily terminated upon the Prosecutor’s decision.”<sup>55</sup> The OTP has not shown that the Chamber erred in making this finding.
48. In addition, and very importantly, the reason for the Chamber to have to set out its findings in detail and for the Prosecution to explain the reasons for its conclusion and how it applied the facts to the law, is in order to “respect the internationally recognized human rights of victims ... to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court” and on what basis.<sup>56</sup>
49. It is inconceivable that the Chamber’s reasoning to reach its “particular conclusions of law or fact” are of no consequence or can be disregarded.<sup>57</sup> On the contrary, the Chamber’s interpretation of the law based on its detailed and considered reasoning in its judicial decisions establishes precedent, and binds and guides the parties in all future proceedings.

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<sup>54</sup> OTP Appeal Brief, para. 39.

<sup>55</sup> PTC’s Second Decision on Reconsideration, para. 116.

<sup>56</sup> PTC’s Second Decision on Reconsideration, para. 120.

<sup>57</sup> As the Prosecution argues: OTP Appeal Brief, para. 27.

50. The OTP tries to single out decisions under Article 53(3)(a) as being somehow different to other decisions and thus not binding. Without providing any sources or citations, the Prosecution claims that “article 53(3)(a) ‘requests’ have a particular character which precludes the possibility that their *reasoning*, including conclusions of law or fact, may bind the Prosecutor in subsequently carrying out her ‘reconsideration.’”<sup>58</sup> The OTP places great emphasis on the word “request” in Article 53(3)(a) to attempt to argue that it can simply refuse to correct the errors it has made. But as the Pre-Trial Chamber properly found “*if the Prosecutor were at liberty to set aside a decision of the Chamber under article 53(3)(a) of the Statute, she would essentially negate the opportunity afforded to a State Party to challenge that decision under the Statute.*”<sup>59</sup> It cannot be right that the Chamber is merely asking the OTP whether it *may* wish to consider the errors that the Judges have identified, leaving it entirely to the OTP.

51. The Government of the Comoros submits that such a position would frustrate the purpose of Article 53(3)(a). If the Prosecution were allowed to simply disregard the findings of Chamber on errors identified and on its interpretation of the law and legal requirements, then it would render pointless the entire process under Article 53(3)(a). It would be a wholehearted waste of time and of the Court’s resources.

52. The Pre-Trial Chamber was thus fully justified in rejecting the Prosecution’s attempt to act “as an appellate body reviewing the Chambers decision on the merits” and as though it was “free to disagree with or ignore” the Chamber’s decision.<sup>60</sup> There is no basis at all for the OTP to claim that it is “decision-maker” on a par with or superior to the Chamber in this situation, or in any situation.<sup>61</sup> This is a particularly presumptuous claim.<sup>62</sup>

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<sup>58</sup> OTP Appeal Brief, paras. 20, 22.

<sup>59</sup> PTC’s Second Decision on Reconsideration, para. 100.

<sup>60</sup> PTC’s Second Decision on Reconsideration, para. 98. See, OTP Appeal Brief, paras. 51-53.

<sup>61</sup> OTP Appeal Brief, paras. 37, 53.

<sup>62</sup> It should be noted that in its Second Decision on Reconsideration, the Pre-Trial Chamber expressed concern for the Prosecution’s use of “inappropriate language” which it found to be “unbefitting of a judicial document” (PTC’s Second Decision on Reconsideration, para. 82); language stating that the Chamber “seems to confuse the standard of proof” or that the Chamber’s assertions were “not only unsupported, but

53. The Pre-Trial Chamber was absolutely correct to find that this type of contention would “*turn the logic of the Statute completely on its head*” and “contravene the judicial role of the Chambers and, in particular, the supervisory role of the Pre-Trial Chambers over the Prosecutor’s actions.”<sup>63</sup>

54. The Chamber was equally justified to reject the OTP’s claim that the function and powers of the Pre-Trial Chamber are somehow not equal to those of the Trial Chamber.<sup>64</sup> This is merely another false device used by the OTP to try to avoid having to genuinely and in good faith consider and address the Chamber’s findings on the errors of law and fact.

55. Accordingly, the Appeals Chamber should dismiss this redefined ‘ground of appeal’, particularly given that the OTP has not established that any discernable errors have been committed by the Pre-Trial Chamber that come anywhere near warranting the Appeals Chamber’s intervention.

**IV. Second Ground of Appeal as Redefined by the OTP on its own motion: “The Pre-Trial Chamber Erred in Invalidating the Prosecutor’s Final Decision and Requiring the Prosecutor to Further Reconsider Her Initial Decision”**

56. As noted above, the OTP in the introduction to this ‘ground for appeal’ makes no effort to disguise that it is arguing a point of appeal not certified by the Pre-Trial Chamber. The OTP directly asks the Appeals Chamber to consider its argument that

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inconsistent with the Statute.” (PTC’s Second Decision on Reconsideration, para. 82 citing OTP Reconsideration Decision, paras. 17, 19, 30, 31.) The Government of the Comoros submits that the Prosecution’s tone and attitude towards the Pre-Trial Chamber has not changed and the Appeal Brief contains very similar contemptuous language towards the Chamber; such as, for example, asserting that the Chamber has an “erroneous view of its own competence”, that the Chamber’s “apparent view[s]” are “incorrect”, or describing the Chamber’s findings as “militating to the opposite conclusion.” (OTP Appeal Brief, paras. 16, 17.) It is a further indication that the Prosecution has not respected any part of the Pre-Trial Chamber’s decision. The OTP continues to regard itself as superior to the Chamber, and to unilaterally assign to itself the right to refuse to follow the Chamber’s findings.

<sup>63</sup> PTC’s Second Decision on Reconsideration, para. 98.

<sup>64</sup> OTP Appeal Brief, para. 41.

“the Pre-Trial Chamber was not competent to entertain the Comoros’ further request for reconsideration” and to find that the Chamber was “wrong in law” and should have dismissed the application *in limine*.<sup>65</sup> The arguments under this ‘second ground’ should therefore be dismissed forthwith as being beyond the appealable issues that were certified.

57. The arguments are in any event without any substance at all, and should be rejected. The OTP has not shown that the Pre-Trial Chamber committed any discernable error at all in its decision that requires any intervention from the Appeals Chamber.

58. The Prosecution relies heavily on the word “final” in Rule 108(3) to claim that upon issuing its decision after reconsideration under Rule 108(3), the proceedings “at issue are deemed ... complete, without further ordinary recourse by the Parties”, and that the Pre-Trial Chamber thus no longer has the power to review the Prosecution’s decision. The Pre-Trial Chamber properly answered this claim and committed no error in making its ruling.

59. The Pre-Trial Chamber correctly held that the Prosecution’s decision on reconsideration “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.”<sup>66</sup> It follows logically that should the Prosecution fail to do this, then the Pre-Trial Chamber “necessarily retains jurisdiction until the Prosecutor has complied with the 16 July 2015 Decision.”<sup>67</sup> The Government of the Comoros submits that the Chamber plainly committed no error in finding that the Prosecution “manifestly disregarded the 16 July 2015 Decision” meaning that the OTP’s decision on reconsideration was “not the result of a proper exercise of reconsideration” and that the “Pre-Trial Chamber’s oversight role under article 53(3)(a) of the Statute continues to be in effect.”<sup>68</sup>

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<sup>65</sup> OTP Appeal Brief, para. 74.

<sup>66</sup> PTC’s Second Decision on Reconsideration, para. 114.

<sup>67</sup> PTC’s Second Decision on Reconsideration, para. 114.

<sup>68</sup> PTC’s Second Decision on Reconsideration, paras. 115, 116.

60. Indeed, Rule 108 does not state that the OTP's "final decision" is itself non-reviewable if the OTP fails to comply with the Chamber's request for review in the first place.

61. It is an entirely reasonable conclusion that the OTP's "final decision" does not terminate the "Court's jurisdiction over that situation".<sup>69</sup> The Prosecution's decision is not "final" *for all time*, regardless of how the OTP conducted the process of reconsideration. While the Prosecution states that the term "final" in Rule 108(3) cannot be "regarded as 'arbitrary'",<sup>70</sup> it must be read to mean "final" by reference to the Chamber's request for reconsideration and compliance with this decision which is the very basis for the reconsideration in the first place. If the Prosecution properly applied its mind to reconsideration by correcting the errors identified and applying the law as interpreted by the Judges, then the Prosecution's decision on reconsideration can be considered as final on the basis of Chamber's decision in the first instance.

62. This conclusion fully accords with the Appeals Chamber's statements on the issue. While the Prosecution again seeks to rely on the Appeals Chamber's decision on the admissibility of the Prosecution's appeal under Article 82(1)(a) to try to argue that the Appeals Chamber has already interpreted the term "final decision" in the same way as the OTP<sup>71</sup>, it must be recognised that the Appeals Chamber did not have to, and certainly did not, decide this issue. The Appeals Chamber's statements are all *obiter dictum*, but in any event, they are not against the findings made by the Pre-Trial Chamber. The Appeals Chamber has certainly not decided that there can be no review of the OTP Reconsideration Decision. On the contrary an academic article cited by the Appeals Chamber specifically notes that "[p]rosecutorial independence"

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<sup>69</sup> OTP Appeal Brief, paras. 13, 52.

<sup>70</sup> OTP Appeal Brief, para 84.

<sup>71</sup> OTP Appeal Brief, para. 85.

allows the Prosecution to come to “the same conclusion as before ... *provided* the Prosecutor ha[s] properly applie[d] [...] her mind in coming to the conclusion.”<sup>72</sup>

63. The Prosecution also argues that the “absence [in the Statute or Rules] of any provision *expressly* supporting the power” to retain its oversight role must “be a significant obstacle to this conclusion.”<sup>73</sup> It wrongly asserts that the Chamber failed “to acknowledge this concern, or to address these arguments” when the Chamber in fact examined both Article 53(3)(a) and Rule 108(3) to find clear support for its conclusions.<sup>74</sup>

64. For example, the Pre-Trial Chamber noted that although Rule 108(3) uses the word “final” it also compels the Prosecution to “notify the Pre-Trial Chamber in writing” of its decision on reconsideration and include “the reasons for the conclusion.”<sup>75</sup> The Pre-Trial Chamber highlighted that these requirements demonstrate that the Chamber “continues to be vested with the power to ensure that the Prosecutor reconsiders her 6 November 2014 Decision in accordance with the 16 July 2015 Decision.”<sup>76</sup>

65. The Prosecution’s challenge to this finding is unfounded. The OTP likens itself to the Appeals Chamber that provides reasons for its decisions but with “no suggestion that it may necessarily be challenged further before the Court.”<sup>77</sup> This analogy is completely inappropriate. Unlike the Appeals Chamber, the Prosecution is an organ of the Court that is under the supervisory role of both the Pre-Trial Chamber and the Appeals Chamber. The OTP is not entrusted under the Statute with the power to interpret the law of the Court. Therefore, Rule 108(3)’s requirement that the Prosecution provide details and reasons to the Pre-Trial Chamber on whether it

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<sup>72</sup> See, 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, 6 November 2015, footnote 134.

<sup>73</sup> OTP Appeal Brief, paras. 80-82.

<sup>74</sup> OTP Appeal Brief, para. 80.

<sup>75</sup> PTC’s Second Decision on Reconsideration, para. 116 citing Rule 108 of the Rules of Procedure and Evidence.

<sup>76</sup> PTC’s Second Decision on Reconsideration, para. 116.

<sup>77</sup> OTP Appeal Brief, para. 107.

faithfully and lawfully implemented the Chamber's decision, can rightly be regarded as underscoring that the Pre-Trial Chamber's "oversight role is not necessarily terminated upon the Prosecutor's decision under rule 108(3) of the Rules."<sup>78</sup>

66. It is astounding that the Prosecution continues to signal to the Pre-Trial Chamber that it has no intention of complying with its findings, comparing itself to an appellate body which is beyond reproach.

67. The OTP even takes the distinctly bold position that the Pre-Trial Chamber has an "erroneous view of its own competence to determine the validity of the Prosecutor's decision."<sup>79</sup> The Prosecution tries to argue that the distinction between Articles 53(3)(a) and 53(3)(b)<sup>80</sup> demonstrates that the Pre-Trial Chamber has no power at all to review the Prosecution's decision on reconsideration. In its decision on admissibility of the Prosecution's Article 82(1)(a) appeal in 2015, the Appeals Chamber did note that "the distinction between the powers of the Pre-Trial Chamber under article 53(3)(a) and (b) reflects a conscious decision on the part of the drafters to preserve a higher degree of prosecutorial discretion regarding decisions not to investigate."<sup>81</sup> However, nowhere did the Appeals Chamber state that any higher degree of prosecutorial discretion would permit the Prosecutor totally to disregard errors of law and fact identified by the Pre-Trial Chamber, and its interpretation of the applicable law, in judicial review proceedings. That would have been an astonishing ruling, and certainly was one not made.

68. None of the arguments raised by the OTP in its redefined 'second ground of appeal' carry any weight at all. They amount to nothing more than a brazen attempt by the OTP to avoid having to consider and address the findings of the Pre-Trial Chamber

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<sup>78</sup> PTC's Second Decision on Reconsideration, para. 116.

<sup>79</sup> OTP Appeal Brief, para. 17.

<sup>80</sup> OTP Appeal Brief, paras. 102-105.

<sup>81</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, 6 November 2015, para. 59.



in judicial review proceedings. They undoubtedly do not show that the Chamber committed any errors that need be considered by the Appeals Chamber.

**V. Conclusion**

69. For all of these reasons, the Government of the Union of the Comoros respectfully requests that the Prosecution's appeal of the Pre-Trial Chamber's decision on reconsideration of 15 November 2018 is dismissed in its entirety.

70. The OTP has addressed issues in this appeal for which it did not receive certification, and it has in any event not demonstrated in any way that the Pre-Trial Chamber committed any discernable errors that require the attention of the Appeals Chamber.

71. The Appeals Chamber should uphold the Pre-Trial Chamber's order for the Prosecution to reconsider its decision not to investigate the attack on the Gaza Freedom Flotilla in accordance the Pre-Trial Chamber's decision of 16 July 2015 by 15 May 2019.<sup>82</sup>



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**Rodney Dixon QC**

**Counsel on behalf of the Government of the Union of the Comoros**

Dated 4<sup>th</sup> March 2019

London

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<sup>82</sup> PTC's Second Decision on Reconsideration, para. 121.