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PRE-TRIAL CHAMBER I

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

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

Public

**Decision on the Prosecutor's request for leave to appeal the "Decision on
the 'Application for Judicial Review by the Government of the Union of the
Comoros'"**

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

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PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court”) issues this 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’”.¹

I. PROCEDURAL HISTORY

1. On 14 May 2013, the Government of the Union of the Comoros (“the Comoros”) referred to the Prosecutor the situation “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip”.²

2. On 6 November 2014, the Prosecutor decided that there was no reasonable basis to proceed with an investigation into the situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (the “6 November 2014 Decision”).³

3. On 29 January 2015, the Comoros filed the “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation” (the “29 January 2015 Application”), asking Pre-Trial Chamber I to request the Prosecutor to reconsider her 6 November 2014 Decision.⁴

4. On 30 March 2015, the Prosecutor filed the “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute”.⁵ The Prosecutor argued that the 29 January 2015 Application should be dismissed.⁶

¹ ICC-01/13-69.

² ICC-01/13-1-Anx1, p. 3.

³ ICC-01/13-6-AnxA.

⁴ ICC-01/13-3-Red.

⁵ ICC-01/13-14-Red.

⁶ ICC-01/13-14-Red, paras 5 and 105.

5. On 22 June 2015, the Office of Public Counsel for Victims (the “OPCV”) filed the “Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation”.⁷ On the same day, the Legal Representative for Victims (the “LRV”) submitted the “Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015”.⁸ Both groups of victims requested Pre-Trial Chamber I to review the 6 November 2014 Decision and to direct the Prosecutor to reconsider it.⁹

6. On 14 July 2015, Pre-Trial Chamber I received the “Prosecution’s Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)”,¹⁰ which requested the Application for Review to be dismissed.¹¹ On the same day, the Comoros filed the “Response by the Government of the Comoros to Victim Observations filed on 22 June 2015”, in which it further argued that the Pre-Trial Chamber should direct the Prosecutor to reconsider her 6 November 2014 Decision.¹²

7. On 16 July 2015, Pre-Trial Chamber I issued the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (the “16 July 2015 Decision”).¹³ Pre-Trial Chamber I, by majority, requested the Prosecutor to “reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros”.¹⁴

8. On 27 July 2015, the Prosecutor filed her “Notice of Appeal of ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s

⁷ ICC-01/13-27-Red.

⁸ ICC-01/13-28-Red.

⁹ ICC-01/13-27-Red, p. 63; ICC-01/13-28-Red, para. 72.

¹⁰ ICC-01/13-29-Red.

¹¹ ICC-01/13-29-Red, para. 158.

¹² ICC-01/13-30, with Confidential Annex, para. 18.

¹³ Pre-Trial Chamber I, ICC-01/13-34.

¹⁴ Pre-Trial Chamber I, ICC-01/13-34, p. 26. Judge Péter Kovács appended a partly dissenting opinion, ICC-01/13-34-Anx-Corr.

decision not to initiate an investigation' (ICC-01/13-34)" to the Appeals Chamber.¹⁵

9. On 3 August 2015, the Comoros requested to dismiss *in limine* the Prosecution's notice of appeal.¹⁶

10. On 6 November 2015, the Appeals Chamber, by majority, dismissed the Prosecutor's appeal *in limine* because "the Impugned Decision was not one 'with respect to [...] admissibility' within the meaning of article 82(1)(a) of the Statute".¹⁷

11. On 29 November 2017, the Chamber received the "Final decision of the Prosecution concerning the 'Article 53(1) Report' (ICC-01/13-6-AnxA), dated 6 November 2014" (the "29 November 2017 Decision").¹⁸ The Prosecutor contended that she "remained of the view that there was no reasonable basis to proceed with an investigation under article 53(1) of the Statute" and that, as such, an investigation might not be initiated, and the preliminary examination must be closed.¹⁹

12. On 23 February 2018, the Comoros filed the "Application for Judicial Review by the Government of the Union of the Comoros".²⁰ The Comoros requested the Chamber to "review the two new OTP Decisions not to open an investigation [arising from her 29 November 2017 Decision] and to direct the

¹⁵ ICC-01/13-35.

¹⁶ ICC-01/13-39.

¹⁷ Appeals Chamber, "Decision on the admissibility of the Prosecution's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'", ICC-01/13-51 (the "6 November 2015 Decision"), para. 66. Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert issued a joint dissenting opinion, ICC-01/13-51-Anx.

¹⁸ ICC-01/13-57-Anx1.

¹⁹ ICC-01/13-57-Anx1, para. 2.

²⁰ ICC-01/13-58-Red.

Prosecutor to reconsider her Decisions in light of the discernable [sic] errors in each of them”.²¹

13. On 13 March 2018, the Chamber received the “Prosecution’s Response to the Government of the Union of the Comoros’ ‘Application for Judicial Review’ (ICC-01/13-58) (Lack of Jurisdiction)”.²² The Prosecutor requested the Chamber to “dismiss the Comoros’ Application *in limine* for lack of jurisdiction” and “stay any requirement for the Parties and participants to address the merits of the Application until it has done so”.²³ According to the Prosecutor, only if the Chamber “rules it has jurisdiction to hear the Application – and on what basis – should there be any further discussion of this situation on its merits”.²⁴

14. On 29 March 2018, the OPCV filed the “Victims’ Response to the Application for Judicial Review by the Government of the Union of the Comoros”.²⁵

15. On 3 April 2018, the LRV filed the “Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s ‘Decision on the Request for an Extension of Time’ of 2 March 2018”.²⁶

16. On 15 November 2018, the Chamber issued, by Majority, the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’” (the “15 November 2018 Decision” or the “Impugned Decision”).²⁷ The Chamber decided by Majority, Judge Péter Kovács partially

²¹ ICC-01/13-58-Red, para. 132.

²² ICC-01/13-61.

²³ ICC-01/13-61, para. 44.

²⁴ ICC-01/13-61, para. 2.

²⁵ ICC-01/13-65, with Confidential *Ex Parte* Annex 1.

²⁶ ICC-01/13-66, with Confidential *Ex Parte* Annex 1.

²⁷ Pre-Trial Chamber I, ICC-01/13-68.

dissenting,²⁸ to request “the Prosecutor to reconsider the 6 November 2014 Decision in accordance with the 16 July 2015 Decision [and] to notify this Chamber and those participating in the proceedings of her final decision no later than Wednesday, 15 May 2019”.²⁹

17. On 21 November 2018, the Prosecutor filed her “Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”” (the “Prosecutor’s Request for Leave to Appeal”)³⁰, seeking leave to appeal the Impugned Decision on three proposed issues³¹ and requesting that the Chamber, “if it deems necessary”, stay the effect of the Impugned Decision pending its ruling on this request.³²

18. On 26 November 2018, the Comoros filed the “Response on behalf of the Government of the Comoros to the Prosecution’s “Request for Leave to Appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros”” (the “26 November 2018 Comoros Response”),³³ submitting that leave to appeal should be rejected.³⁴ On the same day, the OPCV³⁵ and the LRV³⁶ filed their respective responses on behalf of the victims regarding the Prosecutor’s Request for Leave to Appeal, both requesting the Chamber to reject the request.

²⁸ Partly dissenting opinion of Judge Péter Kovács, 15 November 2018, ICC-01/13-68-Anx.

²⁹ 15 November 2018 Decision, p. 45.

³⁰ ICC-01/13-69.

³¹ ICC-01/13-69, paras 7 *et seq.*, 25.

³² ICC-01/13-69, para. 25.

³³ ICC-01/13-71.

³⁴ ICC-01/13-71.

³⁵ Victims’ Response to the Prosecutor’s “Request for Leave to Appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, 26 November 2018, ICC-01/13-70 (the “26 November 2018 OPCV Response”).

³⁶ Response on behalf of the Victims to the Prosecution’s “Request for Leave to Appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros’”, 26 November 2018, ICC-01/13-72 (the “26 November 2018 LRV Response”).

II. THE CHAMBER'S DETERMINATION

19. The Chamber notes articles 21(1)(a) and (3), and 82(1)(d) and (3) of the Rome Statute (the "Statute"), rules 155 and 156(5) of the Rules of Procedure and Evidence (the "Rules") and regulation 65 of the Regulations of the Court.

20. Article 82(1)(d) of the Statute provides as follows:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. Accordingly, the Chamber is required under Article 82(1)(d) of the Statute to determine:

- (i) whether there is an appealable issue emanating from the 15 November 2018 Decision;
- (ii) whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and
- (iii) whether, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁷

22. The Chamber wishes to recall that the remedy provided for in article 82(1)(d) of the Statute is of a restrictive character. Pre-Trial Chamber I, in its previous composition, stated that "the drafting history of article 82 indicates that interlocutory appeals were meant to be admissible only under limited

³⁷ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8. *See also* Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

and very specific circumstances”.³⁸ In the main, the object of article 82(1)(d) of the Statute is to prevent the impact of erroneous decisions on the fairness of the proceedings or the outcome of the trial.³⁹

23. The Chamber underscores that, pursuant to article 82(1)(d) of the Statute, it is for the chamber whose decision is impugned to determine – at its discretion – which issues are appealable and which are not.⁴⁰

24. Finally, due to the cumulative nature of the leave to appeal criteria set out in Article 82(1)(d) of the Statute, the failure to satisfy any one of the stipulated criteria must result in the rejection of a request for leave to appeal.⁴¹

A. Arguments of the parties

25. The Prosecutor has identified three issues in the 15 November 2018 Decision for which she requests leave to appeal, namely:

- (i) 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

³⁸ Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 31 March 2006, ICC-01/04-135-tEN, para. 22. *See also* paras 21, 23-24.

³⁹ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 19.

⁴⁰ Pre-Trial Chamber I, The Prosecutor v. Al-Hassan, Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”, 18 September 2018, ICC-01/12-01/18-130-tENG, para. 30. *See also* Appeals Chamber, The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’”, 18 December 2015, ICC-02/11-01/15-369, para. 18; “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, 1 November 2016, ICC-02/11-01/15-744, para. 13.

⁴¹ *See, for example*, Trial Chamber IX, The Prosecutor v. Dominic Ongwen, Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, par. 8.

Chamber of her final decision not to initiate an investigation under rule 108(3) of the Rules (the “First Issue”);⁴²

- (ii) whether and under what circumstances the Pre-Trial Chamber may set aside the conclusion and reasons of the Prosecutor—her final decision not to initiate an investigation—once it has been formally notified to the Pre-Trial Chamber under rule 108(3) of the Rules (the “Second Issue”);⁴³ and
- (iii) whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108 of the Rules, 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 (the “Third Issue”).⁴⁴

The Prosecutor submits that these questions amount to appealable issues⁴⁵ and that they meet the requirements set out in article 82(1)(d) of the Statute. Consequently, the Prosecutor requests the Chamber to “certify the proposed issues for appeal”.⁴⁶

26. The Comoros request that the Chamber reject the Prosecutor’s Request for Leave to Appeal, arguing that the questions she raised do not meet the requirements under article 82(1)(d) of the Statute.⁴⁷ Specifically, the Comoros submit that the Prosecutor didn’t identify any appealable issues⁴⁸ that may significantly affect the fairness and expeditiousness of the proceedings or the

⁴² ICC-01/13-69, para. 9.

⁴³ ICC-01/13-69, para. 11.

⁴⁴ ICC-01/13-69, para. 13.

⁴⁵ ICC-01/13-69, para. 8. *See also* paras 10, 12, 14.

⁴⁶ ICC-01/13-69, para. 25.

⁴⁷ ICC-01/13-71, paras 3, 8, 36.

⁴⁸ ICC-01/13-71, paras 13-14, 16.

outcome of the trial.⁴⁹ Additionally, the Comoros submit that the Prosecutor has not established that an immediate resolution of these issues may materially advance the proceedings.⁵⁰

27. The OPCV submits that the First and Second Issues do not emanate from the Impugned Decision since the latter stated that the 29 November 2017 Decision was not a final decision and therefore the Prosecutor cannot qualify her decision as “final” when formulating the issues.⁵¹ The OPCV is also of the view that the Third Issue is not an appealable issue as it is too broadly framed.⁵²

28. As to the other criteria of article 82(1)(d) of the Statute, the OPCV submits that the issues do not affect the fairness of the proceedings since the Impugned Decision is in compliance with the Statute and the Rules, and the Chamber provided the Prosecutor with ample time to reconsider her 29 November 2017 Decision.⁵³ The OPCV considers that the issues do not affect the expeditious conduct of the proceedings either because it solely depends on the Prosecutor to decide how expeditious the proceedings will be.⁵⁴

29. Finally, the OPCV submits that an immediate resolution of the issues by the Appeals Chamber will not materially advance the proceedings as an Appeals Chamber decision would in no way accelerate the Prosecutor’s decision-making process.⁵⁵

30. The LRV submits that the issues identified by the Prosecutor are not appealable issues, but merely questioning again the balance of power

⁴⁹ ICC-01/13-71, paras 19, 21, 24, 26.

⁵⁰ ICC-01/13-71, paras 28, 32.

⁵¹ ICC-01/13-70, paras 16-17, 20-24.

⁵² ICC-01/13-70, paras 26-27.

⁵³ ICC-01/13-70, para. 30.

⁵⁴ ICC-01/13-70, para. 30.

⁵⁵ ICC-01/13-70, para. 31.

between the Chamber and the Prosecutor.⁵⁶ Furthermore, the LRV argues that the issues do not affect the fair and expeditious conduct of the proceedings but would undermine it since the reconsideration of the issues would be grossly unfair to the victims and lengthen the proceedings even more.⁵⁷ Finally, the LRV submits that the proceedings would not be materially advanced since the Prosecutor is only requesting for the re-litigation of the same legal arguments.⁵⁸

B. Conclusion of the Chamber

1. First Issue

31. The Prosecutor seeks leave to appeal the Impugned Decision with respect to the following First Issue:

‘Whether the Pre-Trial Chamber may entertain and rule upon the merits of further requests for reconsideration under article 53(3)(a) of the Statute, once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision not to initiate an investigation under rule 108(3).’⁵⁹

32. The Prosecutor submits that the question of whether the Chamber has the power to supervise and review the Prosecution’s decisions that she has characterized as “final”, is a “fundamental question of jurisdiction” amounting to an appealable issue that “clearly arises from the [15 November 2018] Decision”.⁶⁰ Consequently, the Prosecutor contends that this issue “significantly affect[s] the fair and expeditious conduct of the proceedings⁶¹ [and] the outcome of the preliminary examination⁶²”, entailing that its “[i]mmediate resolution [...] by the Appeals Chamber may materially

⁵⁶ ICC-01/13-72, paras 12-13, 15.

⁵⁷ ICC-01/13-72, para. 16.

⁵⁸ ICC-01/13-72, para. 18.

⁵⁹ ICC-01/13-69, para. 9.

⁶⁰ ICC-01/13-69, paras 9-10.

⁶¹ ICC-01/13-69, para. 15.

⁶² ICC-01/13-69, para. 18.

advance the proceedings”.⁶³ Accordingly, the Prosecutor submits that this issue constitutes a sufficient ground for granting leave to appeal the 15 November 2018 Decision.⁶⁴

33. Firstly, the Chamber recalls that an appealable issue is an “identifiable subject or topic requiring a decision for its resolution [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one”.⁶⁵ It has been consistently held that a mere disagreement or a conflict of opinion does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.⁶⁶

⁶³ ICC-01/13-69, para. 20.

⁶⁴ ICC-01/13-69, paras 7-8, 25.

⁶⁵ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9. *See also* Pre-Trial Chamber I, Situation in Darfur, Sudan, “Décision relative à la requête sollicitant l’autorisation d’interjeter appel du conseil ad hoc pour la Défense”, 23 November 2006, ICC-02/05-33, p. 5; Pre-Trial Chamber I, The Prosecutor v. Al Hassan, Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”, 18 September 2018, ICC-01/12-01/18-130-tENG, para. 31.

⁶⁶ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9: “There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject”; Pre-Trial Chamber I, Prosecutor v. Saif Gaddafi et al., Decision on the “Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’”, ICC-01/11-01/11-490, 11 December 2013, para. 5; Pre-Trial Chamber I, The Prosecutor v. Al Hassan, Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”, 18 September 2018, ICC-01/12-01/18-130-tENG, para. 33. *See also* Trial Chamber V, Situation in the Republic of Kenya, “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Disclosure of Information related to Prosecution Intermediaries’”, 8 October 2013, ICC-01/09-01/11-1018-Red, para. 6, and “Decision on the joint defence request for leave to appeal the decision on witness preparation”, 11 February 2013, ICC-01/09-01/11-596, para. 6; Pre-Trial Chamber II, The Prosecutor v. Bosco Ntaganda, “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la

34. Secondly, the Chamber recalls that an appealable issue must arise from the Impugned Decision, which means that the issue identified by the appellant must be a “specific issue which has been dealt with in”⁶⁷, or must “emanate” from, the Impugned Decision and “cannot represent a hypothetical concern or abstract legal question”.⁶⁸

35. Applying the afore-mentioned jurisprudence to the case at hand, the Chamber finds that the first question raised by the Prosecutor cannot be considered as an appealable issue. First, the Prosecutor’s proposed issue constitutes a disagreement with the Chamber’s analysis contained in the 15 November 2018 Decision. This is clearly evidenced by the Prosecutor’s contention that her decision not to initiate an investigation under rule 108(3) of the Rules is final,⁶⁹ when this Chamber has unequivocally concluded that the Prosecutor’s 29 November 2017 Decision is not final.⁷⁰ Second, and more importantly, the Prosecutor’s question is too broadly phrased. In the view of the Chamber, granting leave to appeal on this issue could lead to hypothetical situations in which a pre-trial chamber may or may not be able to rule upon further requests for reconsideration in a manner not specifically addressed in the Impugned Decision. As such, the question raised by the Prosecutor does

Décision sur la confirmation des charges datée du 9 juin 2014”, 4 July 2014, ICC-01/04-02/06-322, para. 33.

⁶⁷ Trial Chamber IV, Situation in Darfur, Sudan, Decision on the “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, ICC-02/05-03/09-428, 13 December 2012, para. 7.

⁶⁸ Pre-Trial Chamber II, Decision on the Prosecutor “Application for Leave to Appeal the ‘Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, 18 September 2009, ICC-01/05-01/08-532, para. 17. *See also* Pre-Trial Chamber I, The Prosecutor v. Laurent Gbagbo, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, ICC-02/11-01/11-464, 31 July 2013, para. 8; Pre-Trial Chamber II, The Prosecutor v. Bosco Ntaganda, Decision on the Defence Request for Leave to Appeal, ICC-01/04-02/06-207, 13 January 2014, para. 11.

⁶⁹ *See for example*, ICC-01/13-69, paras 5, 9 and footnote 14.

⁷⁰ Pre-Trial Chamber I, ICC-01/13-68, paras 95, 114-116.

not arise out of the narrow basis on which the Chamber based its 15 November 2018 Decision.

36. In light of the fact that the Prosecutor has not identified an appealable issue, there is no need for the Chamber to examine whether the other two criteria under article 82(1)(d) of the Statute have been met.

37. Accordingly, the Prosecutor's Request for Leave to Appeal the Impugned Decision with respect to the First Issue is rejected.

2. Second Issue

38. The Prosecutor seeks leave to appeal the Impugned Decision with respect to the following Second Issue:

‘Whether and under what circumstances the Pre-Trial Chamber may set aside the conclusion and reasons of the Prosecutor – her final decision not to initiate an investigation – once it has been formally notified to the Pre-Trial Chamber under rule 108(3)’.⁷¹

39. In order to reflect the Chamber's understanding of the issue and in accordance with its discretionary power to reformulate appealable issues,⁷² the Chamber considers it appropriate to rephrase the issue put forth by the Prosecutor as follows:

‘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’;

40. In the view of the Chamber, this issue arises from the Impugned Decision since the core part of the Chamber's conclusion on the Prosecutor's 29 November 2017 Decision was, *inter alia*, based on the consequences of the

⁷¹ ICC-01/13-69, para. 11.

⁷² See *supra*, para. 23.

Prosecutor's failure to properly 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".⁷³

41. With respect to the fair and expeditious conduct of the proceedings, the Chamber considers that the fairness of the proceedings is the balance to be struck between, on the one hand the Prosecutor's discretionary powers during the early phase of the proceedings before the Court and the principle of finality⁷⁴ and, on the other hand, a State Party's as well as, indirectly, the victims' opportunity to challenge the Prosecutor's decision not to proceed with an investigation, as explicitly recognised by article 53(3)(a) of the Statute. In the Chamber's view, the Second Issue significantly affects this balance as it is crucial whether a reconsideration decision can be considered as "final" in the sense of rule 108 of the Rules, and when it cannot be considered as final and may thus be subject to review. Seeing that this could either shorten or

⁷³ Impugned Decision, para. 114.

⁷⁴ On the principle of finality see Trial Chamber II, *Décision relative à la requête du Bureau du conseil public pour les victimes aux fins de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 du Statut de Rome*, 26 June 2018, ICC-01/04-01/077-3801-Red, para. 32 "[L]a Chambre estime opportun de rappeler que la finalité d'une procédure juridique constitue un principe fondamental et constant dans tous les systèmes juridiques. Ce principe reflète l'idée qu'il est d'intérêt public que tout litige ait une fin ainsi que la nécessité de la sécurité et de la stabilité des solutions juridiques" referring to, *inter alia*, International Criminal Tribunal for the Former Yugoslavia, *Le Procureur c. Radovan Karadzic*, MICT-13-55-0136/02, *Décision relative à une demande de version expurgées de décisions rendues en application de l'article 75 (H) du Règlement du TPIY*, 18 July 2016, MICT-13-55-0136/02, p. 5 "[L]a sécurité juridique présuppose le respect du principe de l'autorité de la chose jugée, selon lequel aucune partie n'est habilitée à solliciter le réexamen d'une décision ou d'un jugement définitif et exécutoire à seule fin d'obtenir qu'une question soit entendue et tranchée à nouveau" and European Court of Human Rights (ECtHR), *Brumdescu c. Roumanie*, 28 October 1999, 28342/95, para. 61 "[L]e droit à un procès équitable devant un tribunal, garanti par l'article 6 § 1 de la Convention, doit s'interpréter à la lumière du préambule de la Convention, qui énonce la prééminence du droit comme élément du patrimoine commun des États contractants. Un des éléments fondamentaux de la prééminence du droit est le principe de la sécurité des rapports juridiques, qui veut, entre autres, que la solution donnée de manière définitive à tout litige par les tribunaux ne soit plus remise en cause".

lengthen the duration of the proceedings, the Second Issue, as a result, also significantly affects the expeditious conduct of the proceedings.

42. Given the Chamber's finding that the Second Issue, as reformulated, significantly affects the fair and expeditious conduct of the proceedings, there is no need for the Chamber to examine whether this issue could also significantly affect the outcome of the trial.

43. The Chamber next turns to the question of whether an immediate resolution by the Appeals Chamber may materially advance the proceedings. In this context, the Chamber notes that the fact that the Prosecutor's appeal against the 16 July 2015 Decision was not heard by the Appeals Chamber on the merits has led to different interpretations of article 53(3)(a) of the Statute and rule 108 of the Rules by the Prosecutor and the judges within the Pre-Trial Chamber. Granting the request would allow the Appeals Chamber to clarify the applicable statutory regime for the present case but also for any future cases and thus to "settle the matter [...] through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial".⁷⁵ In particular, a resolution by the Appeals Chamber may clarify the delineation of powers since the Second Issue seems to strike at the core of the balance between the supervisory role of the Pre-Trial Chamber and the discretionary power of the Prosecutor during the early stages of the proceedings.

44. For these reasons, the Chamber is satisfied that the Second Issue, as reformulated, significantly affects the fair and expeditious conduct of the

⁷⁵ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 14. *See also* paras 15-18.

proceedings, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

45. Accordingly, the Chamber grants the Prosecutor's Request for Leave to appeal the Impugned Decision with respect to the Second Issue, as reformulated above.

3. Third Issue

46. The Prosecutor seeks leave to appeal the Impugned Decision with respect to the following Third Issue:

'Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues'.⁷⁶

47. The Chamber considers that the Third Issue is a discrete, identifiable issue which arises from the Impugned Decision. In this regard, the Chamber notes that it has already identified that the judges and the Prosecutor herself have expressed diverging views.⁷⁷

48. As to the fair and expeditious conduct of the proceedings, the Chamber considers that legal certainty is an indispensable element of fair proceedings.⁷⁸

⁷⁶ ICC-01/13-69, para. 13.

⁷⁷ See *supra*, para. 43.

⁷⁸ Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 28 July 2010, ICC-01/04-01/07-2297, para. 59 "Under the European Convention the need for certainty is an indispensable element of a right to a fair hearing. The ECtHR stated that "[t]he right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty". In the ECtHR the standard of "lawfulness" is set by the Convention. The standard "requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a

In this regard, the Chamber notes that for the principle of legal certainty to be respected, the outcome of the proceedings needs to be predictable to the parties to a degree that is reasonable in the circumstances of the case. As such, the Third Issue significantly affects the fairness of the proceedings since the settlement of this issue would clarify the statutory regime of article 53(3)(a) of the Statute and would ensure that this situation, and similar situations, can be resolved properly according to the law. The clarification of the applicable regime and, by extension, the increased predictability of the outcome of the proceedings, by its very nature, also significantly affects the expeditious conduct of the proceedings.

49. In light of the Chamber's view that the Third Issue significantly affects the fair and expeditious conduct of the proceedings, there is no need for the Chamber to examine whether this issue also significantly affects the outcome of the trial.

50. Regarding the question of whether an immediate resolution by the Appeals Chamber may materially advance the proceedings, the Chamber refers to its above conclusions on the Second Issue⁷⁹ which also apply to the Third Issue.

51. For these reasons, the Chamber is satisfied that the Third Issue significantly affects the fair and expeditious conduct of the proceedings, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

52. Accordingly, the Chamber grants the Prosecutor's Request for Leave to Appeal the Impugned Decision with respect to the Third Issue.

given action may entail." referring to ECtHR, *Medvedyev and Others v. France*, 29 March 2010, 3394/03, para. 80.

⁷⁹ See *supra*, para. 43.

4. Prosecutor's Request for provisional stay of the Impugned Decision

53. The Chamber notes that the Prosecutor requests that the Chamber provisionally stay the Impugned Decision.⁸⁰ The Prosecutor submits that “requiring the Prosecution to commence any reconsideration while further proceedings [are] ongoing would risk defeating the object of any appeal process”.⁸¹ The Prosecutor indicates that “the Pre-Trial Chamber is not itself requested to authorise suspensive effect – a power confined to the Appeals Chamber”, but requests the Chamber “to take the necessary measures to prevent the Appeals Chamber’s power being frustrated in the event of an appeal”.⁸² Accordingly, the Prosecutor requests the Chamber “if it deems necessary, to stay the effect of the Decision pending its ruling on this request”.⁸³

54. The Chamber does not deem it necessary to stay the effect of the 15 November 2018 Decision.

55. The Chamber underlines that, in so deciding, it ensures that the reconsideration that the Prosecutor has been requested to undertake does not incur any further delays. As indicated in the Impugned Decision, preliminary examinations must be concluded within a reasonable time, which “has manifestly not been the case for the preliminary examination in the situation at stake”.⁸⁴ Furthermore, this determination does not frustrate the Appeals Chamber’s power to order suspensive effect of the Impugned Decision, based on article 82(3) of the Statute and rule 156(5) of the Rules, since the deadline set for the Prosecutor to notify her decision is 15 May 2019. In the view of the

⁸⁰ ICC-01/13-69, para. 22.

⁸¹ ICC-01/13-69, para. 23.

⁸² ICC-01/13-69, para. 24.

⁸³ ICC-01/13-69, para. 25.

⁸⁴ ICC-01/13-68, para. 119.

Chamber, this leaves sufficient time for the Prosecutor to request suspensive effect of the Impugned Decision, if she so wishes, and for the Appeals Chamber to decide upon such a request.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Prosecutor's Request for Leave to Appeal the Impugned Decision with respect to the Second Issue, as reformulated in paragraph 39, and on the Third Issue; and

REJECTS the remainder of the Request.

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



Judge Péter Kovács, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Reine Alapini-Gansou

Dated this 18 January 2019.

At The Hague, Netherlands