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PRE-TRIAL CHAMBER I

Before: **Judges of Pre-Trial Chamber I**

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

Public

Prosecution's Response to the Government of the Union of the Comoros' "Application for Judicial Review" (ICC-01/13-58) (Lack of Jurisdiction)

Source: **Office of the Prosecutor**

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

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Introduction

1. The Pre-Trial Chamber should dismiss the Government of the Union of the Comoros' application *in limine* for lack of jurisdiction.[1] As the Appeals Chamber has already confirmed—and in precisely this situation[2]—the Prosecutor's "final decision" under rule 108(3) is just that: a *final* decision. The Statute grants no power to the Pre-Trial Chamber to review such a decision, nor to review the Prosecutor's independent exercise of discretion under article 53(4). Nor is this surprising, as such powers would contradict the careful approach taken by the drafters of the Rome Statute in triangulating between the interests of States in referring situations to the Court, the need for a due measure of judicial oversight, and the need for prosecutorial independence.

2. Since the Pre-Trial Chamber lacks jurisdiction to hear the Application, the Prosecution considers it inappropriate to delay its submission until expiry of the extended deadline ordered by the Pre-Trial Chamber.[3] Rather, it files this response immediately, in order to allow the legal representatives for the victims fair opportunity to address the Prosecution's jurisdictional objection, and in the interest of judicial economy. Only if the Pre-Trial Chamber rules that it has jurisdiction to hear the Application—and on what basis—should there be any further discussion of this situation on its merits.

3. Indeed, these matters have already received detailed and extensive scrutiny (amounting to hundreds of pages) from all parties involved, including the Prosecution, which demonstrates that the Statute's procedures have been properly and fairly applied. Such an exercise cannot—and should not—be endlessly repeated. The jurisdiction of perpetual review proposed by the Comoros will distort the statutory framework, and burden the Court in executing its mandate. The selective nature of the Court's legal framework necessarily presupposes that some situations—including situations referred to the Court—will not proceed to investigation. Such determinations must be made with due finality.

Submissions

4. In the Comoros' own words, "it is entirely appropriate" to dismiss an application *in limine* where there is real doubt as to its admissibility or the Court's jurisdiction to hear it,

[1] ICC-01/13-58-Red ("Application").
[2] *See* ICC-01/13-51 OA ("Appeal Decision").
[3] *See* ICC-01/13-60 ("Extension Decision"). The Pre-Trial Chamber issued this decision without receiving any submission from the Prosecution.

and to suspend further submissions on the merits from the Parties and participants until that question is settled.[4] This example of good practice applies equally to the Pre-Trial Chamber as it does to the Appeals Chamber. The same "reasons of judicial economy" apply, as does the need to ensure that "further time and resources" by the Parties and participants are not "spent on an inadmissible" application.[5]

5. The Prosecution's objection to the jurisdiction claimed in the Application is, moreover, far from merely procedural. It reflects a principled concern which goes to the heart of the intentions of the drafters of the Statute in creating the regime for State referrals, combining an appropriate degree of judicial oversight with prosecutorial independence. It transcends the parameters of this situation.[6]

6. As the following paragraphs explain, and the Appeals Chamber has confirmed, it was a conscious and deliberate decision by the drafters, ultimately, to leave the "*final* decision" to the Prosecutor—as rule 108(3) expressly states (emphasis added). Yet this state of affairs would be subverted if the Pre-Trial Chamber has the novel jurisdiction of perpetual review now claimed by the Comoros, either with respect to rule 108(3) decisions or article 53(4) determinations—the two legally distinct analyses contained within the Prosecutor's Final Decision.[7] Thus:

- The Prosecution's rule 108(3) reconsideration was consequent on the Pre-Trial Chamber's request.[8] *If* the Pre-Trial Chamber has jurisdiction to review the rule 108(3) decision, then it would only be entitled to consider whether the Prosecution had erred in that respect *based on the information available in November 2014* (when the Prosecution's determination under article 53(1) was made).

- By contrast, the Prosecutor's further and separate discretion under article 53(4)—to determine whether to "reconsider a decision whether to initiate an investigation […] based on new facts or information"—was unrelated to the Pre-Trial Chamber's Request, because it was based on information available *after November 2014* and so

[4] *See* ICC-01/13-39 ("*Comoros* Admissibility Challenge"), paras. 6-7 (citing the practice of the Appeals Chamber in ICC-01/11-01/11-64 and ICC-01/09-74, and stating that "it is entirely appropriate […] to follow this procedure"). *See also* para. 8. The Appeals Chamber agreed with the Comoros that this was indeed the appropriate way to proceed: *see* ICC-01/13-42 OA.
[5] *Comoros* Admissibility Challenge, para. 7.
[6] *See also* Application, para. 12 (referring to the "crucial constitutional" nature of such questions).
[7] *See* Application, paras. 1, 21, 102.
[8] ICC-01/13-34 ("Pre-Trial Chamber's Request"). The Pre-Trial Chamber ruled by majority: *see* ICC-01/13-34-Anx-Corr.

not contained in the Prosecution's determination under article 53(1), which the Pre-Trial Chamber reviewed.

7. Accordingly, the Pre-Trial Chamber's jurisdiction in just *one* of these respects would not suffice to confer jurisdiction in the *other* respect. For example, any jurisdiction to review an article 53(4) decision, *arguendo*, would not permit the Pre-Trial Chamber to review a rule 108(3) decision, and *vice versa*. The Application properly treats these matters separately.[9] Yet this means that, even if the Pre-Trial Chamber finds jurisdiction on *one* basis, the Application should still be dismissed *in limine* with regard to arguments premised on the *other* basis.

8. The Prosecution maintains, however, that the Pre-Trial Chamber should reject *both* purported heads of jurisdiction because they misinterpret the Statute and Rules. As such, the *entirety* of the Application should be dismissed *in limine*. In this analysis, all other considerations are immaterial. The Pre-Trial Chamber may not, for example, decide these jurisdictional questions based on any view it may form, or have formed, on the merits of the Prosecutor's Final Decision—and, as such, the particular composition of the Pre-Trial Chamber is legally irrelevant.[10] Moreover, although the Prosecution will not enter into the merits at this time,[11] it generally urges caution in approaching the observations, characterisations and commentary woven throughout the Application, which it does not accept.[12]

A. The Pre-Trial Chamber has no jurisdiction to review the Prosecutor's final decision under rule 108(3)

9. Article 53(3)(a) of the Statute provides that a State Party which has referred a situation to the Court under article 14 may request the Pre-Trial Chamber to review a decision by the Prosecutor under article 53(1) of the Statute. This is what the Comoros did in early 2015, raising the particular concerns which the Pre-Trial Chamber then considered and addressed.[13]

10. Rule 108(2) of the Rules of Procedure and Evidence—which were also drafted by States, building upon their experience and intentions in drafting the Statute—establishes that the Pre-Trial Chamber may then "request[] the Prosecutor to review, in whole or in part, his

[9] *See e.g.* Application, paras. 42-101 (alleging errors in the Prosecutor's determination under rule 108(3)), 102-131 (alleging errors in the Prosecutor's determination under article 53(4) concerning the information made available since November 2014).
[10] *See* Application, para. 2 (fn. 6).
[11] *See above* paras. 1-2, 4-5; *below* paras. 42-43.
[12] *See e.g.* Application, paras. 3, 4, 6, 8, 10, 13, 51, 56, 66, 92.
[13] *See* ICC-01/13-3-Red.

or her decision". On receipt of such a request,[14] this is what the Prosecutor did in 2016-2017, resulting in what rule 108(3) terms "a final decision".[15]

11. The Application's claim of jurisdiction to review the Prosecutor's Final Decision collapses these distinct procedural stages, and treats a rule 108(3) decision as if it were simply a new article 53(1) determination (*i.e.*, a decision under rule 105).[16] This is incorrect, because rule 108(3) is *lex specialis*, and clearly distinct from article 53(1) and rule 105.

12. The Prosecution notes that the Application's reliance on this argument not only tends to concede the absence of any express provision granting jurisdiction to the Pre-Trial Chamber to review a rule 108(3) final decision, but also implicitly recognises that such an absence of a basis of jurisdiction is fatal. This belies the Application's claim that jurisdictional arguments are in some way "[n]arrow-minded and overly technical"—to the contrary, it is the theory of jurisdiction in the Application which is tenuous. These issues will be addressed in the following paragraphs.

A.1. Jurisdiction for judicial review can only be granted expressly in the Statute

13. The starting point for any discussion of a 'jurisdiction for judicial review' must be this Court's legal framework: notably, the Statute and Rules.[17] This follows, firstly, from this Court's fundamental nature as a treaty body—and hence the need to consider all legal questions arising from that treaty through the proper interpretive lens: the ordinary meaning of the terms used, read in context and in light of their object and purpose.[18] But it also follows, moreover, from the nature of judicial review itself.

14. As the former Chief Justice of the High Court of Australia has observed, all kinds of judicial review—whether "judicial review of administrative decisions, or appellate review of judicial decisions"—"reflect[] a compromise between the desirability of correcting error or

[14] *See* Pre-Trial Chamber's Request.
[15] *See* ICC-01/13-57-Anx1 ("Prosecutor's Final Decision").
[16] Application, paras. 23-25 (concluding "any decision not to investigate […] is subject to judicial review"), 29 ("the OTP's Reconsideration Decision can be reviewed pursuant to Article 53(3)(a) as a decision in accordance with Article 53(1)").
[17] *Cf.* Application, para. 11 (arguing on the basis of "fundamental principles" but also making reference to "what the provisions of the Statute and Rules provide", "what States Parties intended" and "the overall object and purpose").
[18] *See e.g.* ICC-ACRed-01/16, para. 56; ICC-01/09-01/11-1598 OA7 OA8, para. 105; ICC-01/04-168 OA3, para. 33; ICC-01/04-01/06-3121 A5, para. 277.

other injustice and the need for finality", and hence are "determined by legislative policy".[19] This balance is crucial, and it is quite wrong to suggest that one judicial review must as a matter of principle *always* be followed up by the possibility of a second judicial review.[20] To the contrary, multiple factors will inform a legislator's decision where to strike the balance between review and finality, crucially including the question where ultimately the burden of responsibility for a just decision should lie. More generally:

> The idea of justice according to law has a number of elements such as procedural and substantive fairness, reasonable access to independent and impartial courts, openness of process, and an absence of unnecessary cost and delay. Another element is reasonable finality. This reflects the public interest in a manageable system by which disputes, once raised, may be put to rest, and the private interest in avoiding unfair vexation. Finality is closely related to accessibility. Without it, the system would collapse under its own weight.[21]

15. This multiplicity of relevant factors underscores the importance of closely adhering to the Court's legal texts, correctly interpreted, which demonstrate *where* the drafters of the Statute intended to strike the balance between judicial review and finality. In the particular context of review over the Prosecutor's rule 108(3) decisions, such an approach is especially apposite because the Comoros is arguing for a *State*'s interest in obtaining judicial review[22]—and who should know the appropriate extent of a State's interest better than the States who drafted the Statute in the first place?

16. In this respect, notably, the States drafting the Statute and Rules were not only potentially mindful of the interests of a referring State but also the interests of the State forming the *object* of the referral, which is entitled to an independent and neutral assessment of the merits of that referral by the Prosecutor.[23] As such, due caution dictates following the express provisions of the Statute and the Rules with particular fidelity, so as to avoid straying

[19] A.M. Gleeson, 'Finality: the Sir Maurice Byers Lecture', 10 April 2013, *Bar News*, Winter 2013, New South Wales Bar Association ("Gleeson Lecture"), p. 35
[20] *Contra* Application, paras. 11-12.
[21] Gleeson Lecture, p. 41.
[22] *See e.g.* Application, paras. 27 (referring to "the rights of States Parties who have referred a situation to the Prosecutor under Article 14"), 30 (referring to the "right of review of the State Party"), 31 (referring to the "rights of States Parties").
[23] *See e.g.* W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016) ("Schabas"), p. 829 ("the Prosecutor controls access to the Court").

too far either in one direction or the other.[24] Reference to any doctrine of implied powers is thus inappropriate in this context.[25]

17. Nor is there anything novel or indeed "overly technical" in delimiting jurisdiction based on the Court's legal texts.[26] To the contrary, the Appeals Chamber of this Court has, time and again, affirmed—in the context of appeals *stricto sensu*—that "the Statute *defines exhaustively* the right to appeal" in articles 81 and 82,[27] and that any attempts to depart from the Appeals Chamber's "clearly-defined [s]tatutory jurisdiction" must be rejected.[28] If this same logic properly limits an individual person's rights to seek judicial review of decisions affecting them, such a logic may *a fortiori* limit a State's right. It follows, then, that the Comoros must show that the Court's legal texts grant the Pre-Trial Chamber jurisdiction to review a final decision under rule 108(3).

A.2 The Pre-Trial Chamber has no jurisdiction to review rule 108(3) decisions, which do not fall under article 53(1), and hence are not reviewable under article 53(3)(a)

18. As previously stated, the Application's claim that the Pre-Trial Chamber has jurisdiction to review the Prosecutor's Final Decision depends (in this context) on the argument that a "determination" under article 53(1) includes decisions made by the Prosecutor under rule 108(3), and therefore that article 53(3)(a) confers the necessary

[24] *See further* S. Fernández de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence,' in Lee et al, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001) ("Fernández"), p. 240 (any resort to "implied powers" should "be narrowly construed when the interaction with States is at stake").
[25] *See* ICC-01/05-01/13-2276-Red A6 A7 A8 A9, paras. 75-76 (emphasising that "inherent powers" should, "in principle," only be invoked "with respect to matters of procedure" and, even then, "in a very restrictive manner"; that "when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported 'inherent powers' to fill in non-existent gaps"; and that "it is clear that not every 'silence' in the legal framework of the Court constitutes a lacuna"—"to determine whether the absence of a power constitutes a 'lacuna'", the Appeals Chamber "has previously considered whether '[a] gap is noticeable [in the primary source of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions' and, moreover, "[t]he nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether there are gaps justifying […] invocation of 'inherent powers'"). *See also e.g.* ICC-01/09-01/11-1598 OA7 OA8, para. 105 ("exploring the import of the concept of 'implied powers' […] would be incorrect in circumstances where the Court's legal framework provides for a conclusive legal basis"); ICC-02/05-03/09-410, para. 78 ("inherent powers or incidental jurisdiction may only be invoked in a very restrictive manner in the context of the ICC. This caveat is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail").
[26] *Contra* Application, para. 11.
[27] ICC-01/04-168 OA3, para. 39; *see also* para. 35. *See further e.g.* ICC-01/04-01/06-926 OA8, para. 9; ICC-01/04-01/06-2799 OA19, para. 7; ICC-01/04-01/06-2823 OA20, para. 14; ICC-01/04-01/07-3424 OA14, para. 28; ICC-01/05-01/13-1533 OA12, para. 14.
[28] ICC-01/04-01/06-2823 OA20, para. 14. *See also* ICC-01/04-01/06-2799 OA19, para. 8; ICC-01/04-01/07-3424 OA14, para. 30.

competence upon the Pre-Trial Chamber.[29] This is incorrect, and cannot be reconciled with the Statute and the Rules, for the following four reasons.

A.2.i. The Prosecutor's Final Decision was not, in its own terms, an article 53(1) decision

19. In general, the Application depends upon a fundamental misunderstanding of the Prosecutor's reasoning, which did not determine *ab initio* "whether to initiate an investigation"—in the words of article 53(1)—but rather whether *to reconsider* the original article 53(1) determination in light of the Pre-Trial Chamber's Request.[30] Thus, the statement in the Prosecutor's Final Decision that "there *remains* no reasonable basis to proceed with an investigation of this situation" (emphasis added) did no more than recall the conclusion from the Prosecutor's *previous* decision, which was undisturbed.[31] As expressly stated, the test applied was:

> whether the Prosecution, in its original article 53(1) determination, correctly applied the law, acted fairly, and reasonably assessed the available information.[32]

20. Consequently, the Application is incorrect to assert that "Section II" of the Prosecutor's Final Decision (*i.e.*, paragraphs 95-170) "re-analyses the evidence […] to determine whether there is 'sufficient gravity'". Rather, the Prosecutor considered the Comoros' and the victims' arguments against the information made available by November 2014 in order to determine

[29] *See above* para. 11.
[30] *Contra* Application, para. 28 ("Article 53(1) is the only provision the Prosecutor could base her Reconsideration Decision on as it sets out the specific requirements to open an investigation […] The Prosecutor has obviously considered and applied them in order to come to her new decision").
[31] *See e.g.* Prosecutor's Final Decision, paras. 2, 9-11, 332. *See also* para. 1 ("The conclusions of this final decision are based on the outcome of that reconsideration").
[32] Prosecutor's Final Decision, para. 5 (concluding: "The Prosecution's reconsideration has been conducted on such a basis."). *See further* paras. 8 (noting that, for the purpose of rule 108(3), the Prosecution considered "whether the reasoning in the [Pre-Trial Chamber] Request disclosed a well founded basis to reach a different conclusion than that contained in the Report" or whether any other argument disclosed such a basis), 34, 80, 87, 93-94 (considering whether it was "appropriate" to depart from the prior analysis based on the Pre-Trial Chamber's Request), 97-98 (having considered other issues raised before the Pre-Trial Chamber but not addressed in its Request, finding that none of them "leads the Prosecution to depart from its conclusions in the Report, or indeed shows that those conclusions were unreasonable, unfair, or legally incorrect"), 104 (explaining that in its original determination the Prosecution had considered it necessary to treat with caution evidence of possible live fire before the boarding operation, for the reasons recapitulated in paragraphs 106-123, which did not constitute a new analysis), 129 ("nothing requires or justifies reconsideration of the Report"), 134 ("none of the arguments raised […] leads the Prosecution to reach a new conclusion to that contained in the Report"), 147 ("[n]othing […] leads the Prosecution to determine that it should depart from the approach taken in the Report"), 154 ("departure in this respect from the conclusions of the Report is neither required nor justified"), 159 ("nothing requires or justifies departing from the conclusions in the Report"), 165 ("nothing requires or justifies departing from the conclusions in the Report"), 170 ("nothing requires or justifies departing from the conclusions in the Report"), 171 ("The preceding sections have detailed why […] nothing […] requires or justifies reconsideration of the reasoning or conclusions of the Report"), 332 ("the Prosecution hereby decides to uphold the disposition of the Report").

whether the Prosecutor's previous determination was correct, fair, and reasonable.[33] Although as a matter of internal good practice, members of the Prosecution did again review all of the information made available, this did not mean that the Prosecutor's Final Decision itself represented a *new* decision on the material points. To the contrary, the Prosecutor expressly found no basis to depart from her prior conclusions.[34]

A.2.ii. Rule 108(3) decisions fall under article 53(3)(a), not article 53(1)

21. In any event, the plain terms of article 53 do not support the Pre-Trial Chamber's jurisdiction to review rule 108(3) decisions. Although it is true that article 53(3)(a) permits the referring State to request a "review" of decisions under article 53(1), nothing in article 53(1) precisely defines what constitutes such a decision—it certainly cannot be said to be "absolutely clear" on this point.[35] Indeed, to the contrary, academic opinion consistently suggests that rule 108(3) does *not* fall within article 53(1).[36]

22. Reference to the Rules is far more instructive. Both the Statute *and* the Rules are primary sources of law for this Court[37] and, unlike the Regulations of the Court, both the Statute and the Rules were drafted by States.[38] Thus, although the Statute is superior to the Rules in case of any conflict,[39] the Rules were drafted precisely to "be consistent with the Statute".[40] The drafters therefore not only consciously sought to give effect to the Statute (by supplementing its provisions "when more detailed provisions are required"[41]) but were supremely well qualified to do so. It follows that the Rules may be a vital reference point in interpreting a particular provision of the Statute, both as relevant context but also as a vital insight into the relevant object and purpose. This is one such case.

[33] *Contra* Application, para. 28. *See further above* fn. 32 (references to the Prosecutor's Final Decision).
[34] *See above* fn. 31.
[35] *Contra* Application, para. 29.
[36] *See e.g.* M. Bergsmo et al, 'Article 53: Initiation of an Investigation,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016) ("Bergsmo et al"), p. 1378, mn. 40 ("The decision arrived at would then be delivered pursuant to *a paragraph 3* review. This would mean that *it could not be said that the decision upon reconsideration was a decision under paragraphs 1 or 2*. As such, neither the Security Council nor the referring State(s) Party would be entitled to request a further review", emphasis added).
[37] *See* Statute, art. 21(1)(a).
[38] *See e.g.* Statute, arts. 51(1), 52(1). *See also* Fernández, p. 239 (the initial version of the Rules was drafted by the Preparatory Commission, which "would be open to all States signatories of the Final Act and other States which had been invited to participate in the [Rome] Conference").
[39] Statute, art. 51(5).
[40] Statute, art. 51(4).
[41] Fernández, p. 235.

23. The Rules clearly reject the notion that article 53(3)(a) can properly be interpreted as granting the Pre-Trial Chamber jurisdiction to review final decisions under rule 108(3), on the basis that they fall under the auspices of article 53(1).[42]

- First, rule 107—which is the *sole* rule setting out the procedure for a State to request a review under article 53(3)(a)—states expressly and exhaustively to which decisions it applies.[43] Those are decisions under rules 105 and rule 106. Rule 105(1) governs the procedure "[w]hen the Prosecutor decides not to initiate an investigation under article 53, paragraph 1". Rule 106(1) governs the procedure "[w]hen the Prosecutor decides that there is not a sufficient basis for prosecution under article 53, paragraph 2". Accordingly, the Rules do not contemplate that a State may request a review under article 53(3)(a) for any other type of decision. This context is highly relevant to the correct interpretation of articles 53(1) and 53(3)(a).

- Second, and conversely, rule 108 expressly sets out the procedure for the Pre-Trial Chamber to "request" the Prosecutor to reconsider a rule 105 decision, and for the Prosecutor then to issue her "final decision" in that regard. Several aspects contradict any notion that reviews under article 53(3)(a) may apply to rule 108(3) decisions.

    - The title of rule 108 is "Decision of the Pre-Trial Chamber under article 53, paragraph 3 (a)". The obvious implication is that the drafters did not understand a rule 108(3) decision to fall under article 53(1)—and thus to be amenable to further judicial review under article 53(3)(a)—but to fall into a *separate* category *outside* the scope of judicial review.

    - Rule 108(3) sets out, in terms, a distinct procedure for the Prosecutor's final decision, instead of simply cross-referring to rule 105. It thus underlines that the two kinds of decisions differ in nature.

    - Rule 108(3) expressly describes the Prosecutor's decision as a "*final*" decision. The word "final"—meaning "[c]oming at the end", "the last stage of a process; leaving nothing to be looked for or expected; ultimate", "[p]utting an end to something […] not to be undone, altered, or revoked; conclusive"[44]—strongly

[42] *Contra* Application, paras. 29-30.
[43] *See* rule 107(1)
[44] *See Oxford English Dictionary*, "final, *adj*.".

> suggests that the drafters did not anticipate that a rule 108(3) decision could be subject to a further review by the Pre-Trial Chamber, and thus perpetually lead to further decisions by the Prosecutor.[45]

24. The strong implication of the Rules—that article 53(3)(a) grants the Pre-Trial Chamber no jurisdiction to review a rule 108(3) decision—is supported by the object and purpose of the Statute, and particularly the referral regime in articles 14 and 53. This object and purpose—and especially the careful balance struck between the interests of the referring State, judicial oversight, and prosecutorial independence—is clearly illustrated by the drafters' express choice to limit the Pre-Trial Chamber to "*request[ing]*" the Prosecutor to "reconsider" her decision.[46] Necessarily inherent in this notion is the idea that the Prosecutor may properly decide *not* to alter her original reasoning.

25. It follows therefore that the Comoros' purposive argument—*i.e.*, the drafters must have intended the Pre-Trial Chamber to have a further jurisdiction to review rule 108(3) decisions, in order to ascertain whether or not the Prosecutor had properly complied with the original article 53(3)(a) request[47]—must be incorrect. This would only make sense if the Prosecutor was *obliged* to amend her reasoning or conclusion in a rule 108(3) decision. But since she is not,[48] as indeed the Comoros at least previously seemed to recognise,[49] the jurisdiction

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[45] *Contra* Application, para. 27.

[46] Statute, art. 53(3)(a). In referring to the Pre-Trial Chamber's "request[]", rule 108(2) states that the Prosecutor "shall" undertake the "reconsideration" (meaning, in this context, necessary deliberation, *i.e.* an obligation of process) "as soon as possible".

[47] *See e.g.* Application, paras. 30-31, 36.

[48] *Contra* Application, paras. 33-36 (arguing furthermore that "the Prosecutor is bound in good faith to reconsider her decision at the direction of the Chamber", and attempting to distinguish between not being "obliged to change the result" yet being "obliged [to] address the errors that the Chamber has identified"). The Prosecution notes that the Comoros makes no attempt to reconcile this view with the plain terms of article 53(3)(a) and rule 108(3). On this issue, *see further below* paras. 30-31. *See also* Bergsmo et al, p. 1378, mn. 39 ("[Article 53(3)(a)] is silent on whether the Prosecutor is bound by a request of the Pre-Trial Chamber. The intention of the provision, however, is not to infringe on the independence of the Prosecutor. Whilst the Prosecutor will indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not, strictly speaking, be obliged to come a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided that the Prosecutor had properly applied his or her mind in coming to the conclusion"); Schabas, p. 829 ("Ultimately, then, the Prosecutor must decide in all cases whether or not to conduct an investigation. […] Even [under article 53(3)(a)], all that the Pre-Trial Chamber may do is 'request the Prosecutor to reconsider that decision'. The combined effect of articles 15 and 53 is to ensure that the Prosecutor controls access to the Court. She is the lynchpin of the Court"), 842 (once she has completed a reconsideration under rule 108(3), "[i]f the Prosecutor stands by the original decision, there would seem to be no further recourse") G. Bitti, 'Article 53: Ouverture d'une enquête,' in J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: commentaire article par article* (Paris: Editions Pedone, 2012), pp. 1214-1215 ("*la Chambre préliminaire ne peut que demander au Procureur de revoir sa décision: c'est en effet le Procureur qui conserve le dernier mot! L'examen de la décision du Procureur par la Chambre préliminaire aboutit donc à une simple recommandation*").

proposed by the Comoros cannot fulfil the function claimed. To the extent the Comoros seems to imply that review is necessary because a Prosecutor might act in bad faith,[50] this is contradicted by article 42 of the Statute—which requires the Prosecutor (and indeed her deputy or deputies) to be "of high moral character", just like the Judges of this Court.

A.2.iii. Concerns raised in the Application do not require the Pre-Trial Chamber's jurisdiction to review rule 108(3) decisions

26. Likewise, the other hypothetical concerns raised in the Application neither arise in this situation, nor in any event do they support the view that article 53(3)(a) was intended to establish jurisdiction to review rule 108(3) decisions.[51] At most, they demonstrate that certain specific types of decision taken by the Prosecutor after an article 53(3)(a) request fall *outside* the scope of a rule 108(3) decision, and not that a rule 108(3) decision is itself reviewable.

27. For example, the Comoros identifies the possibility of the Prosecutor making—*for the first time*—a 'complementarity' or 'interests of justice' determination, having conducted a rule 108(3) reconsideration. Yet in this latter scenario, the Statute already sets out the regime. Just as in this case the Prosecution distinguished between a rule 108(3) reconsideration and an exercise of article 53(4) discretion,[52] the Prosecution would in that hypothetical situation distinguish between a rule 108(3) reconsideration and a *new* rule 105 decision with regard to the article 53(1)(c) requirement. Consistent with article 53(3)(b) and rule 109, this new rule 105 decision would *necessarily* be liable to review by the Pre-Trial Chamber. By contrast, however, the rule 108(3) reconsideration would remain outside that review.[53]

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[49] *See Comoros* Admissibility Challenge, para. 22 ("There is in any event nothing so 'important' about the Prosecution's proposed grounds of appeal […] The Prosecutor has only been *requested* to reconsider her decision not to open an investigation. She has *not* been ordered to investigate any crimes—*the decision to open an investigation remains hers and is entirely within her discretion*. The Chamber has pointed to relevant evidence and important factors which it has *requested* her to take into account when reconsidering her decision", emphasis added).

[50] *See e.g.* Application, para. 31 (considering scenarios in which a prosecutor simply confirmed "his or her prior decision without any reasons", contravening 108(3), or merely paid "lip service").

[51] *Contra* Application, para. 30.

[52] *See above* para. 6.

[53] The same, arguably, might be true if the Prosecutor made—*for the first time*—a complementarity assessment having conducted a rule 108(3) reconsideration. Although the Statute does not point so directly to this conclusion (because complementarity falls under article 53(3)(a) not (b)), the same logic would hold. By definition, a "reconsideration" means a new consideration of the matters already decided—its ambit would not include an entirely new legal question, such as 'complementarity' or 'interests of justice' if that was not contained in the original decision.

A.2.iv. The Appeals Chamber has already ruled that the Prosecutor has "ultimate discretion" in considering the reasoning of an article 53(3)(a) request

28. The Pre-Trial Chamber need not simply take the Prosecution's word on the absence of the Pre-Trial Chamber's jurisdiction to review rule 108(3) decisions. To the contrary, the Appeals Chamber has *already* effectively decided the question, in this very situation, and the Prosecution has expressly relied on that determination.[54] The Prosecution thus strongly urges the Pre-Trial Chamber to follow the Appeals Chamber's reasoning.

29. The Prosecution had appealed the Pre-Trial Chamber's Request under article 82(1)(a), in part, to pre-empt any suggestion that the Pre-Trial Chamber's reasoning constituted a binding determination of admissibility, which would oblige the Prosecutor to accept its reasoning, in whole or part, in conducting the rule 108(3) review.[55] If the reasoning in the Request (which exclusively addressed matters of admissibility) was indeed binding upon the Prosecution, then it must have constituted an appealable "ruling".[56]

30. Accordingly, in holding that the Prosecution's appeal was *inadmissible*, the Appeals Chamber ruled expressly on whether the Pre-Trial Chamber's Request was binding upon the Prosecutor. In so doing, it necessarily also ruled by implication that the Pre-Trial Chamber has no further jurisdiction to review the Prosecutor's rule 108(3) reconsideration, since such a jurisdiction would undermine its conclusions concerning the Prosecutor's ultimate discretion and the finality of her decision.[57]

31. The Appeals Chamber specifically determined that the Prosecution's appeal was inadmissible because, among other reasons, "[t]o find that the [Pre-Trial Chamber's Request] was a *decision* with respect to admissibility would also fail to respect the discretion that has been granted to the Prosecutor in the context of article 53."[58] Although this decision was reached by majority, even the dissenting judges agreed on the question of the Prosecutor's discretion under rule 108(3).[59] Relevantly, the majority observed:

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[54] *See e.g.* Prosecutor's Final Decision, paras. 3-4. *See further below* para. 29.
[55] *Contra* Application, para. 47.
[56] This is the case notwithstanding the Prosecution's *further* view that, in any event, the final or binding quality of a decision is not a *sine qua non* for it to constitute a "ruling": *see e.g.* ICC-01/13-47, paras. 18-23, 27.
[57] *Contra* Application, para. 32. On the link between these issues, *see e.g. above* para. 25.
[58] Appeal Decision, para. 60 (emphasis added).
[59] *See e.g.* ICC-01/13-51-Anx, paras. 35, 37 ("the fact that the statutory scheme in relation to article 53 leaves the 'final decision' as to whether or not to initiate an investigation to the Prosecutor does not detract from the *influence* that the findings of the Pre-Trial Chamber in its review decision *may have* upon the Prosecutor. *As referenced by the majority of the Appeals Chamber, the intention of the drafters may have been to preserve a*

- "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 based on the considerations set out in article 53(3)(a) and (b)";[60]

- "under article 53(3)(a) of the Statute, the Prosecutor is obliged to reconsider her decision not to investigate, but retains *ultimate discretion over how to proceed*";[61]

- the Statute's drafting history reflects a conscious choice to reject any power to "direct the Prosecutor to commence a prosecution", and especially an awareness that, while "there should be some possibility of judicial review", *the "ultimate decision" must remain with the Prosecutor* both as a consequence of her independence and the necessary practicalities associated with her function;[62] and

- it is "clear" that the Pre-Trial Chamber's review under article 53(3)(a) "cannot lead to a determination […] that would have the effect of obliging the Prosecutor to initiate an investigation" because *"the final decision in this regard" is "reserved for the Prosecutor"*.[63]

32. Since the Application seems to disagree with the nature of a "request" under article 53(3)(a),[64] notwithstanding the plain language of the Statute, it is unsurprising that it disagrees also with the proper interpretation of the Appeals Chamber's judgment to this effect. Yet it is futile—and in contradiction with the Statute—to suggest that the discretion

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higher degree of prosecutorial discretion for the Prosecutor […] [W]e note that the fact that article 82(1)(a) allows a direct appeal against a decision of the Pre-Trial Chamber in the circumstances described *does not constitute any greater restriction of the discretion of the Prosecutor under article 53 than that already provided* by the terms of that article. It simply enables the Appeals Chamber to review the decision that the Pre-Trial Chamber has taken […] where it is one with respect to admissibility", emphasis added).

[60] Appeal Decision, para. 59.

[61] Appeal Decision, para. 59.

[62] Appeal Decision, paras. 61-63 (*especially* text accompanying fn. 138).

[63] Appeal Decision, para. 64. *See also* para. 56 (stating that rule 108(3) "provides that the 'final decision' is for the Prosecutor", citing H. Brady, 'Appeal and Revision,' in Lee et al, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001), p. 579). The Application seeks to dismiss the relevance of this authority relied upon by the Appeals Chamber based on its author's current role as a senior lawyer in the Office of the Prosecutor (Application, para. 32, fn. 43)—yet that author was a member of the Australian national delegation at the Preparatory Commission, one of the two national delegations which "presented comprehensive proposals for rules" and "had a particular role to play by assisting in merging and redrafting their own initiatives in light of the debates": Fernández, p. 241, fn. 26. Furthermore, the author wrote the book chapter in question soon after the Rules were adopted and more than a decade before joining the Court. Likewise, a member of the other national delegation (France) has stated that the Prosecutor was given the "*dernier mot*" in the context of article 53(3)(a): *see above* fn. 48.

[64] *See above* para. 25.

identified by the Appeals Chamber can possibly refer to the *end result* (whether or not to open an investigation) in distinction from any so-called duty to "address the errors that the Chamber has identified" (understood to mean a duty to *accept* the Pre-Trial Chamber's reasoning).[65]

33. To the contrary, as all the Parties agree, the *chapeau* of article 53(1) *requires* that an investigation "*shall*" be opened if the article 53(1) criteria are met.[66] As such, the Prosecutor's "ultimate discretion" envisaged by the Appeals Chamber in rule 108(3) *cannot* be vested in the decision whether "to open an investigation" (which is a legal mandate, if the conditions are met). It must instead relate to the Prosecutor's evaluation whether the *reasoning in the Pre-Trial Chamber's article 53(3)(a) request* requires departing from the *Prosecution's previous reasoning* concerning the article 53(1) criteria.[67] The Prosecution therefore meets its 'obligation of process' under rule 108(3) by duly considering that question, as it did extensively in the Prosecutor's Final Decision—yet it was not bound to accept the Pre-Trial Chamber's views on matters of law or fact.[68] The Prosecution's careful analysis in no way constituted an "appeal by the back door", much less an attempt "to usurp the Pre-Trial Chamber and strip it of all powers". Instead, it simply reflected a good faith effort to follow the Appeals Chamber's own direction.[69]

34. Consequently, the Appeals Chamber must be understood to have endorsed the Prosecution's power under article 53(3)(a) and rule 108(3) to decide for itself whether to follow the Pre-Trial Chamber's reasoning. Such a position renders otiose any further review by the Pre-Trial Chamber of the Prosecutor's "final decision", since it would lack any procedural object.

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[65] *Contra* Application, paras. 33-35. For example, the Comoros asserts that rule 108(3) "involves *addressing the errors made* and is itself reviewable. The Chamber *cannot order the Prosecutor to investigate but it can require the Prosecutor to address the errors in her reasoning process*, as it has done, which she is bound to do […] That would undermine the entire justice system, if the Prosecutor could simply brush aside what the Judges have requested and refuse to address the errors identified, or fail to do so in practice" (emphasis added). *See also* paras. 45-46, 49.

[66] *See e.g.* Prosecutor's Final Decision, para. 16; ICC-01/13-29-Red, para. 23.

[67] *Contra* Application, para. 36. In response to the Comoros' apparent concern, the Prosecution further notes that, although it generally seeks to ensure consistency in its own decision-making, its decisions are not of a nature to form part of the applicable law of the Court in the meaning of article 21(2). As such, Prosecution decisions are not "precedent" in any legal sense.

[68] *Cf.* Application, para. 32.

[69] *Contra* Application, para. 48.

B. The Pre-Trial Chamber has no jurisdiction to review the Prosecutor's exercise of discretion under article 53(4)

35. In addition to its claim that the Pre-Trial Chamber may review the Prosecutor's rule 108(3) decision, the Application claims that the Pre-Trial Chamber may review the Prosecutor's separate and unrelated exercise of discretion under article 53(4).

36. Article 53(4)—which, crucially, applies to *all* preliminary examinations and investigations conducted by the Prosecutor, and not only State referrals under article 14—provides simply:

> The Prosecutor *may*, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information. [Emphasis added.]

37. Quite unlike article 53(1), (2), and (3), the Rules impose no requirements at all upon the Prosecutor in exercising her broad discretion under article 53(4). Accordingly, she is free not only to determine *if* she wishes to undertake an article 53(4) reconsideration but also *when*, *how*, and in *what form* she may do so.

38. An article 53(4) determination is thus clearly not a further article 53(1) decision,[70] as illustrated by the fact that it is not governed by rules 105 or 106.[71] Instead, somewhat like a rule 108(3) decision, an article 53(4) decision concerns the discretion *whether* to reconsider, demonstrated by the word "may". It does not include the substantive assessment of the article 53(1) criteria, in the event that the article 53(4) question is resolved positively. For example, in the *Iraq/United Kingdom* situation, the Prosecution announced on 13 May 2014 that an article 53(4) determination had been made to reopen that preliminary examination. By contrast, the further substantive decision whether to open an investigation in that situation is yet to be made.

39. The Application not only collapses the obvious distinction between these two types of decision,[72] but also ignores the express content of the Prosecutor's Final Decision, which was in this part made public "in the interest of transparency".[73] This stated expressly that "the Prosecution has further considered the information newly made available since 6 November 2014" in order "to consider whether new facts or information *make it appropriate to*

[70] *Contra* Application, para. 38.
[71] *See above* para. 23.
[72] *Contra* Application, paras. 39-41.
[73] Prosecutor's Final Decision, para. 178.

reconsider [the] prior determination under article 53(1)".[74] This analysis consistently resulted in the determination that "[n]one of the information available, including the newly provided information, *requires the Prosecution to exercise its discretion to reconsider* its determination under article 53(4) of the Statute".[75] There was "no new fact or information which materially alter[ed] the analysis".[76] Accordingly, it cannot be said that this article 53(4) determination amounted to an article 53(1) decision.

40. Furthermore, the "new facts or information" which may trigger the Prosecutor's consideration of her discretion under article 53(4) may reach the Prosecutor from *any* source. Accordingly, the election by a State, individual or organisation to provide information to the Prosecutor does not confer upon them any special procedural status, much less a power to seek a judicial review over the Prosecutor's exercise of discretion. Indeed, the Prosecutor is not even obliged to notify any person when she is exercising her article 53(4) discretion, especially if resolved negatively—and this makes complete sense since it is, in some ways, a *continuing* process as new information may gradually accrete over time. If there is no right of notification, there can be no right of review—it would be unenforceable.

41. Likewise, it is also important to note that the provision of further information by a State Party *in relation to an existing situation*, which it has *already referred* to the Court under article 14, does not constitute a *new* referral. As such, providing new information does not 'refresh' that State's rights under article 53. Such a position is not only incompatible with the plain scheme of the Statute, but would be significantly burdensome as a State could serially trigger new rights by simply 'drip-feeding' information to the Court. Instead, the Statute strikes a fair balance by conferring upon a referring State the full process envisaged in article 53 and rules 104 to 110, including potentially a review by the Pre-Trial Chamber under article 53(3). Necessarily, however, article 53(4) only applies once the Prosecution has determined that the preliminary examination should be 'closed', in the sense of no longer being an ongoing active endeavour—and when the State's right of review has already been

[74] Prosecutor's Final Decision, para. 172.
[75] Prosecutor's Final Decision, paras. 191, 196-197, 203. *See also* paras. 186, 206, 211, 214, 221, 225, 231, 237-239 (noting that the new information is now more specific in some respects, but does not "show that the Prosecution was unreasonable in its prior conclusion concerning the relevance of the[] allegations" in question and thus declining to exercise discretion under article 53(4)). More generally, addressing the specific arguments presented by the Comoros and victims, *see further* paras. 241 ("none of these issues requires or justifies departing from the original conclusions in the Report, under article 53(4)"), 242, 247, 252, 259, 263, 276, 279, 283, 287, 292, 300, 304, 318, 322, 328.
[76] Prosecutor's Final Decision, para. 333. *See also* para. 6.

exhausted.[77] At this point, as Professor Schabas has explained, the referral goes into a state of "suspended animation"[78]—it may be reactivated, but only at the Prosecutor's discretion. In this way, article 53(4) both reflects the interest in due finality but also allows a limited residual forum—again, it bears repeating, vested in a person of "high moral character"[79]—for concerned States, organisations, or other individuals to take steps to try and open an investigation.

C. The Pre-Trial Chamber should rule *in limine* on the jurisdictional questions

42. In drafting the Application, the Comoros was manifestly aware that the Pre-Trial Chamber's jurisdiction on these issues is in real doubt.[80] It presented all the jurisdictional arguments it considered necessary as part of that filing.[81] This response by the Prosecution—that the Application should be dismissed *in limine* for lack of jurisdiction—is thus legitimate and unexceptional, addressing a critical issue that was plainly anticipated. Accordingly, although the Prosecution does not object to the victims filing their observations in response to both Parties' arguments, no further submissions by the Comoros are warranted.

43. The Prosecution further submits that, on receipt of this filing, the Pre-Trial Chamber should stay the deadline for any response on the *substantive* merits of the Application, pending a ruling on jurisdiction.[82] This same stay should apply both to the Prosecution and to the legal representatives for the victims (on all matters other than the jurisdictional issue). This will also obviate the need for any party or participant to request an extension of pages to respond to the lengthy Application,[83] and promotes judicial economy, the proper use of limited resources, and procedural clarity.

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[77] *See* rule 107(1) (this right lapses 90 days after a rule 105 or rule 106 notification).
[78] Schabas, p. 844.
[79] *See above* para. 25.
[80] *See e.g.* Application, para. 11 (anticipating that the Prosecution "will likely argue that there is no right to review" the Prosecutor's Final Decision under rule 108(3)).
[81] *See* Application, paras. 21-36 (arguing that the Pre-Trial Chamber has jurisdiction to review a final decision under rule 108(3)), 37-41 (arguing that the Pre-Trial Chamber has jurisdiction to review the Prosecution's determination under article 53(4)).
[82] *See* Extension Decision (setting deadline of 3 April 2018).
[83] The Application is 61 pages long, including the contents page (which is counted: *see* regulation 36(1)-(2)), and also contains 92 pages of annexes. (Since these annexes are not intended to be "argumentative", however, they will be addressed no further in this response on jurisdiction: *see* Application, para. 13 (fn. 11).) The relevant page limit for the Application is only 20 pages: *see* regulation 37(1). Although the Comoros appears to consider that the applicable page limit is 60 pages, presumably on the basis of regulation 38(2)(d), this is incorrect since the Prosecutor's Final Decision was not rendered under article 53(1) but under rule 108(3). Accordingly, the Application cannot be brought under article 53(3)(a).

Conclusion

44. For all the reasons above, the Pre-Trial Chamber should dismiss the Comoros' Application *in limine* for lack of jurisdiction. In any event, it should promptly issue a ruling on the jurisdictional issue, and stay any requirement for the Parties and participants to address the merits of the Application until it has done so.

Fatou Bensouda, Prosecutor

Dated this 13th day of March 2018

At The Hague, The Netherlands