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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 *with* Public Annex A

Prosecution Appeal Brief

Source: **Office of the Prosecutor**

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Introduction

1. Central to the creation of the Rome Statute, and the permanent jurisdiction of this Court, was the elaboration of a careful balance between key actors in triggering investigations: States Parties to the Statute or the UN Security Council, an independent Prosecutor, and independent and impartial Judges. The sensitivity of this balance led the drafters of the Statute and the Rules to prescribe expressly the rights and obligations of each of these actors.

2. At the heart of this appeal is the effect to be given to that balance, which is integral to ensuring an appropriate degree of 'reasonable finality' at the preliminary examination stage. Consequently, it not only bears upon the interests of those States and victims who may be concerned in a particular situation, but upon *all* States and persons who seek the protection of the Court, and therefore depend on good stewardship of the Court's limited capacity and resources. The Prosecutor's prior description of the "near-constitutional importance" of the matters arising from this situation is no less true today.[1]

3. The procedural history of this situation has come to illustrate precisely the fundamental dilemma—when a referring State, the Prosecutor, and the Pre-Trial Chamber disagree, for example, about the proper application of article 53(1)(b) of the Statute, ultimately, to whom did the drafters of the Statute entrust the responsibility to make the "final decision"? In the view of the Prosecution, the answer lies—and must lie—in the Statute and the Rules.

4. In 2014, the Prosecutor had determined that there is no reasonable basis to proceed to open an investigation, in the absence of at least one potential case arising from this situation of sufficient gravity so as to be admissible under the Statute.[2] The Government of the Union of the Comoros subsequently obtained an order from the Pre-Trial Chamber, by majority, requesting the Prosecutor to reconsider that determination.[3] Once that order took effect, on 6 November 2015,[4] the Prosecutor carried out this reconsideration, and formally notified the Pre-Trial Chamber of her conclusions on 29 November 2017.[5] The reconsideration was carried out thoroughly and in good faith. Notably, the Prosecutor's Final Decision ran to

[1] Prosecution Notice of Appeal (Admissibility), para. 5. For full citations throughout, *see* Annex A.
[2] *See* Prosecutor's Initial Decision (having first found a reasonable basis to believe crimes had been committed).
[3] First Article 53(3)(a) Request. *But see also* First Article 53(3)(a)(a) Request – Judge Kovács' Opinion.
[4] Appeal Admissibility Decision. The Appeals Chamber had previously ordered suspensive effect of the First Article 53(3)(a) Request: First Suspensive Effect Decision.
[5] *See* Prosecution Notice; Prosecutor's Final Decision.

some 144 pages in length, supplemented by six substantive annexes,[6] and not only directly addressed the reasoning in the First Article 53(3)(a) Request,[7] but also additional arguments raised by the Comoros and others,[8] as well as more than 5,000 pages of information newly made available since the Prosecutor's Initial Decision.[9] Cumulatively, the Prosecution has now considered information emanating from more than 300 passengers aboard the *Mavi Marmara*, as well as other vessels in the flotilla.

5. In January 2018, the Comoros requested the Pre-Trial Chamber "to review the […] new OTP Decisions not to open an investigation".[10] The Prosecution sought to dismiss the Comoros' request *in limine*, on the basis that the Statute provides for no such mechanism of review.[11] While the majority of the Pre-Trial Chamber ("Majority") granted this relief with regard to the Prosecution's assessment of new information or facts made available *since* her initial decision to close the preliminary examination,[12] it otherwise determined that it had jurisdiction to entertain the Comoros' application;[13] declined to receive any further submissions from the Prosecution concerning the merits of the Comoros' application;[14] and "set aside" the Prosecutor's Final Decision insofar as it was made under article 53(3)(a) and rule 108(3), and made further consequential orders.[15] Judge Kovács disssented.[16]

6. Having ordered the Prosecutor to conduct a further reconsideration of her Initial Decision by 15 May 2019,[17] the Pre-Trial Chamber unanimously granted leave to appeal the Decision on 18 January 2019.[18]

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[6] *See* Prosecutor's Final Decision (Annex B); Prosecutor's Final Decision (Annex C); Prosecutor's Final Decision (Confidential Annex D); Prosecutor's Final Decision (Annex E); Prosecutor's Final Decision (Annex F); Prosecutor's Final Decision (Annex G).
[7] Prosecutor's Final Decision, paras. 8 (first bullet), 12-94, *especially* paras. 66-94. *See further below* para. 18.
[8] Prosecutor's Final Decision, paras. 8 (second bullet), 95-170.
[9] This did not fall within the parameters of the First Article 53(3)(a) Request, but was separately analysed for the purpose of article 53(4) and made public in the interest of transparency. *See* Prosecutor's Final Decision, paras. 6, 8 (third bullet), 171-331, 333; *see further* Prosecutor's Final Decision (Annex E).
[10] Comoros' Second Application, para. 132.
[11] *See e.g.* Prosecution Response (Lack of Jurisdiction), para. 44.
[12] *See* Decision, paras. 51-55, 118, Disposition; Decision - Judge Kovács' Opinion, paras. 23-31. *See further above* fn. 9; *below* paras. 103-105. This aspect of the Decision has not been certified for appeal.
[13] Decision, paras. 95, 114, Disposition. *But see* Decision - Judge Kovács' Opinion, paras. 1, 4, 10.
[14] Decision, para. 39. *See also* Prosecution Response (Lack of Jurisdiction), paras. 2, 4, 8, 43.
[15] Decision, paras. 115-117, Disposition.
[16] *See* Decision - Judge Kovács' Opinion.
[17] Decision, para. 121, Disposition. The Prosecution notes that rule 108(2) only requires the Prosecutor to conduct any reconsideration under article 53(3)(a) as soon as possible, and does not apparently empower the Pre-Trial Chamber to set any deadline. However, in the specific circumstances of this situation, the Prosecutor did not seek certification of this issue for appeal.
[18] Certification Decision, Disposition.

Submissions

7. In the respectful view of the Prosecution, the Pre-Trial Chamber, acting by majority, erred in two key ways: by requiring the Prosecution to accept particular conclusions of law or fact contained in the First Article 53(3)(a) Request (First Ground of Appeal); and by invalidating and setting aside the Prosecutor's Final Decision, and hence requiring the Prosecution to conduct a further reconsideration of the Prosecutor's Initial Decision (Second Ground of Appeal). The Pre-Trial Chamber unanimously agreed that the issues forming the context for these errors arise from the Decision, requiring the intervention of the Appeals Chamber.[19]

8. This appeal is constructed around these two interlocking issues, and associated errors, which are formulated as the Prosecution's grounds of appeal. They have been reversed from the order in which they were certified,[20] because the Majority's view that the Prosecutor was required to accept particular conclusions of law or fact contained in the First Article 53(3)(a) Request formed a material part of its reasoning in concluding that it was subsequently empowered to determine the validity of the Prosecutor's Final Decision.

9. The Pre-Trial Chamber also declined to certify one additional issue which had been proposed for appeal by the Prosecution[21]—which was "[w]hether 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 […] under rule 108(3)".[22] While the Prosecution has framed its appeal accordingly, and respects this ruling, it nonetheless observes that the legal considerations underlying the issue which was not certified remain "'intrinsically linked to the issue[s] on

[19] Certification Decision, paras. 39, 45-46, 52 (certifying, respectively, "[w]hether 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) […] 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" and "[w]hether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) […] 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"). The Pre-Trial Chamber reformulated the first of these two issues: para. 39.

[20] In other words, the third issue for which the Prosecution sought certification for appeal (and hence the second of the two issues which the Pre-Trial Chamber ultimately certified) is presented as the *first* ground of appeal. The second issue for which the Prosecution sought certification (which the Pre-Trial Chamber reformulated and then certified as its first issue) is the *second* ground of appeal.

[21] Certification Decision, para. 37.

[22] Certification Decision, paras. 31, 35 (characterising the issue as simply a "disagreement" with the Majority's view that the Prosecutor's Final Decision "is not final", and also suggesting that the proposed issue was "too broadly phrased" since a consequent ruling by the Appeals Chamber might limit the Pre-Trial Chamber's future powers to rule on "further requests for reconsideration in a manner not specifically addressed in the [Decision]").

appeal as certified by the [Pre-Trial] Chamber'."[23] To this limited extent, therefore, the scope of the Pre-Trial Chamber's power of review under article 53(3)(a), and the meaning of rule 108(3), are still necessarily canvassed in this appeal.

10. Indeed, the question whether or not the Pre-Trial Chamber is empowered to entertain any further requests for reconsideration under article 53(3)(a) was not only the focus of the Parties' original submissions,[24] but also seemed to divide the Judges of the Pre-Trial Chamber in their separate opinions. In particular, while the Majority had sought to characterise the basis for the Decision merely as enforcing its First Article 53(3)(a) Request[25]—on the basis of the Majority's view that the Prosecutor's Final Decision did not comply with rule 108(3), and was therefore a nullity—Judge Kovács emphasised that the Majority's analysis still inevitably concerned "a *new reconsideration* of the Prosecutor's [Initial Decision]".[26] In his words, the "core" of the Decision "revolves around whether the Chamber is *entitled* to conduct another review" of the Prosecutor's Final Decision.[27] He concluded that it is not.[28]

11. Accordingly, even if the Majority *had* omitted to consider the limits of its general powers of review over rule 108(3) decisions—as the reasoning of the Certification Decision might now suggest—this is highly relevant to the Appeals Chamber's assessment of the legal correctness of the Majority's conclusion that it could nonetheless determine the *validity* of the Prosecutor's Final Decision within the meaning of rule 108(3). Could the Majority have properly interpreted the term "final decision" in rule 108(3)—a question which falls squarely within the scope of the issue certified for appeal[29]—if it did not consider the context of the regime under article 53(3)(a) and rule 108(3) as a whole? Notwithstanding the Pre-Trial Chamber's espoused concern that it might be bound (and limited) by the decision in this appeal,[30] therefore, the Appeals Chamber cannot—and should not—refrain from stating the relevant law, if it is necessary to disposing of the significant issues brought before it.

12. Accordingly, in its first ground of appeal, the Prosecution submits that the Pre-Trial Chamber erred in law in requiring the Prosecutor to accept the reasoning contained in its

[23] *Gbagbo* Appeal Decision, para. 13. *See also* paras. 17-19.
[24] *See e.g.* Comoros' Second Application, paras. 1, 11, 22-36; Prosecution Response (Lack of Jurisdiction), paras. 1-34, 44.
[25] *See e.g.* Decision, paras. 83-87, 90, 92, 94-96, 110-117.
[26] Decision - Judge Kovács' Opinion, para. 1 (emphasis added).
[27] Decision - Judge Kovács' Opinion, para. 9 (emphasis supplied).
[28] Decision - Judge Kovács' Opinion, para. 21.
[29] *See* Certification Decision, para. 39 (referring to what is "considered to be final within the meaning of rule 108(3)").
[30] *See above* fn. 22.

article 53(3)(a) request, including particular conclusions of law or fact. This requirement not only informed the Majority's conclusion that the Prosecutor's Final Decision was invalid and must be set aside, but also informed the content of the request issued to the Prosecution to further reconsider the Prosecutor's Initial Decision. In the Prosecution's view, while article 53(3)(a) and rule 108(2) require the Prosecutor to carry out a reconsideration once requested by the Pre-Trial Chamber, as the Appeals Chamber has previously agreed, the Prosecutor cannot be obliged by it to accept particular conclusions of law or fact. This would have the effect of determining the outcome of her decision under article 53(1)(a) or (b), contrary to the plain intention of the Statute, which leaves the "final decision" to the Prosecutor.

13. Further or alternatively, in its second ground of appeal, the Prosecution submits that the Pre-Trial Chamber erred in law in determining that the Prosecutor's Final Decision was not "final" in the meaning of rule 108(3) (*i.e.*, that it was invalid), and therefore requesting a further reconsideration of the Prosecutor's Initial Decision. This was *ultra vires*. In the Prosecution's view, once a "final decision" has been formally notified under rule 108(3), thus closing a preliminary examination, the Court's jurisdiction over that situation is terminated absent a further decision of the Prosecutor under article 53(4). There is no further power of judicial review, nor any other power, to determine the 'validity' of the Prosecutor's "final decision" based upon scrutiny of the *contents* of a final decision by the Prosecutor.

14. For all these reasons therefore, cumulatively or in the alternative, the Prosecution requests the Appeals Chamber to reverse the Decision, and to exercise its own power under article 83(2)(a) of the Statute to dismiss the Comoros' Second Application in its entirety, for want of jurisdiction. The effect of this will be that the Prosecutor's Final Decision stands, thus closing the preliminary examination in this situation subject to any further decision of the Prosecutor under article 53(4).

I. THE PRE-TRIAL CHAMBER ERRED IN REQUIRING THE PROSECUTOR UNDER ARTICLE 53(3)(A) TO ACCEPT PARTICULAR CONCLUSIONS OF LAW OR FACT (FIRST GROUND OF APPEAL)

15. The Majority considered that the Prosecutor's Final Decision failed to comply with the Pre-Trial Chamber's First Article 53(3)(a) Request,[31] on the basis that this "constitute[d] a

[31] *See* Decision, paras. 31, 37, 81-84, 108, 111, 113, 115.

judicial decision which *must* form the basis for the Prosecutor's reconsideration".[32] To the extent this implied that the Prosecutor must simply *accept* the Pre-Trial Chamber's reasoning in its article 53(3)(a) "request", including particular conclusions of law or fact, this is erroneous. The Pre-Trial Chamber has no power under article 53(3)(a) to require the Prosecutor to reach a different conclusion under article 53(1)(a) or (b), but can only require her to conduct a reconsideration—which is an obligation of 'process' but not of 'result'. This is the only way in which article 53(3)(a) and rule 108(2) can correctly be interpreted, having regard to their plain terms, the broader context, and the object and purpose of the Statute as a whole, as required by the constant practice of this Court.[33] This is also the *ratio decidendi* of the Appeals Chamber's prior decision in this situation.[34]

16. While even the Majority seemed at one point to respect this interpretation,[35] the effect of its reasoning was nonetheless to reach the opposite conclusion. Since article 53(1)(b) is a law-driven analysis, there can be no residual discretion for the Prosecution to conclude that article 53(1)(b) is not satisfied if it is compelled to accept key propositions of law and fact militating to the opposite conclusion. Consequently, obliging the Prosecutor to accept the reasoning of the Pre-Trial Chamber in carrying out her reconsideration can *only* result in requiring her to alter her conclusion under article 53(1)(b), which is contrary to the effect of article 53(3)(a) and rule 108(2).

17. The Majority's erroneous interpretation of the Prosecutor's obligation under article 53(3)(a) further contributed to its erroneous view of its own competence to determine the validity of the Prosecutor's decision under rule 108(3).[36] On this basis, it not only set aside the Prosecutor's Final Decision (for failing to accept the Pre-Trial Chamber's conclusions of law or fact) but also required the Prosecutor to conduct a further reconsideration "in accordance with" the "five main errors" identified in the Article 53(3)(a) Request, and to demonstrate in detail how it has "assessed the relevant facts in light of the specific directions"

[32] Decision, para. 90 (emphasis added).
[33] *See e.g.* *[Redacted]* Appeal Decision, para. 56; *Ruto and Sang* Summons Appeal Decision, para. 105; *DRC* Appeal Decision, para. 33; *Lubanga* AJ, para. 277. *See especially* VCLT, art. 31(1) (stating the general rule that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").
[34] Appeal Admissibility Decision, paras. 50-51. *See also below* paras. 66-71.
[35] Decision, para. 109 (recalling that "[t]he Prosecutor's obligation to comply with the [First Article 53(3)(a) Request] does not entail an obligation as to the result of the reconsideration"). *See also below* paras. 66-67.
[36] *See below* paras. 73-116 (Second Ground of Appeal).

contained in the First Article 53(3)(a) Request.[37] As explained under this ground of appeal, and further or alternatively under the Second Ground, this was *ultra vires*.

I.A. The Pre-Trial Chamber required, and requires, the Prosecutor to accept the reasoning, including particular conclusions of law or fact, contained in an article 53(3)(a) "request"

18. The Decision evinces the Majority's expectation that, beyond addressing the specific factors for reconsideration set out in the First Article 53(3)(a) Request, the Prosecutor was required to reach *the same* factual and legal conclusions as the previous majority of the Pre-Trial Chamber ("Former Majority"). While not stated in express terms, this is the only reasonable interpretation of its criticism, since it cannot reasonably be suggested that the Prosecutor's Final Decision entirely omitted to address the "five main errors" identified in the First Article 53(3)(a) Request.[38] To the contrary:

- The first issue concerned the likely objects of any investigation.[39] The Prosecutor's Final Decision explained that the Prosecutor had previously considered whether those bearing greatest responsibility could be prosecuted, clarifying a remark in prior litigation before the Pre-Trial Chamber which appeared to cause confusion.[40]

- The second issue concerned the scale of identified crimes.[41] The Prosecutor's Final Decision explained that the Prosecutor's previous assessment was informed by qualitative as well as quantitative characteristics, and that qualitative factors distinguished this situation from *Abu Garda* and *Banda*.[42]

- The third issue concerned the nature of certain identified crimes.[43] The Prosecutor's Final Decision stressed that it was the undisputed *factual* nature of the relevant conduct which had properly been taken into account for the gravity analysis, not its legal label.[44]

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[37] Decision, para. 117.
[38] *Contra e.g.* Decision, para. 113 (characterising the Prosecutor's Final Decision as "*exclusively* addressing the Parties' and participants' submissions", emphasis supplied).
[39] First Article 53(3)(a) Request, para. 23.
[40] Prosecutor's Final Decision, paras. 94 (first bullet). *See also* paras. 166-170 (addressing additional arguments by the Comoros and victims concerning this factor).
[41] First Article 53(3)(a) Request, para. 26.
[42] Prosecutor's Final Decision, paras. 73-74, 76-80. *See also* paras. 127-131 (addressing additional arguments by the Comoros and victims concerning this factor).
[43] First Article 53(3)(a) Request, para. 30.
[44] Prosecutor's Final Decision, paras. 81-87. *See also* paras. 160-165 (addressing additional arguments by the Comoros and victims concerning this factor).

- The fourth issue concerned the manner of commission of the identified crimes.[45] The Prosecutor's Final Decision explained—at length—why the Prosecutor could not find a reasonable basis to believe that the crimes formed part of a plan or policy,[46] based on her sole review of the available information.[47]

- The fifth issue concerned the impact of the identified crimes.[48] The Prosecutor's Final Decision explained the basis on which this had been assessed by the Prosecutor, and noted that the Former Majority appeared to take a different view of what constitutes a 'reasonable' interpretation of the facts.[49]

19. The Majority's view that the Prosecutor is required simply to *adopt* the Former Majority's reasoning and conclusions from the First Article 53(3)(a) Request is further confirmed by the Certification Decision, which stated that the question "[w]hether the Prosecutor […] is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request" is indeed an "issue which arises from the Impugned Decision."[50]

I.B. The plain terms of article 53(3)(a), in their ordinary meaning, make clear that the Pre-Trial Chamber's decision—a "request"—imposes an obligation of 'process' but not of 'result'

20. In examining the scope of the Pre-Trial Chamber's power under article 53(3)(a), the starting point should be the plain terms of the provision itself, and related provisions such as rule 108(2). These strongly suggest 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". While the Majority seemed at least to recognise the salience of the term "request" in article 53(3)(a),[51] it then failed to analyse its significance—instead, it declared that it is "indisputable" and "inevitable" that a "'request' pursuant to article 53(3)(a) […] constitutes a judicial decision which must form the basis for the Prosecutor's reconsideration".[52] This was based only on a cursory

[45] First Article 53(3)(a) Request, paras. 31-45.
[46] Prosecutor's Final Decision, paras. 88-93, 94 (second and third bullets). *See also* paras. 97-126, 135-159 (addressing additional arguments by the Comoros and victims concerning this factor).
[47] Notably, the Pre-Trial Chamber never requested access to the information reviewed by the Prosecution, under rule 107(2): *see* Prosecutor's Final Decision, para. 68; *further below* paras. 33-34.
[48] First Article 53(3)(a) Request, paras. 47-48.
[49] Prosecutor's Final Decision, paras. 73, 75-76, 79-80. *See also* paras. 127, 130-134 (addressing additional arguments by the Comoros and victims concerning this factor).
[50] Certification Decision, paras. 46-47.
[51] Decision, paras. 88-89.
[52] Decision, paras. 90, 92.

analysis of rule 108(1).[53] The Majority's apparent view that it is inherent in such a judicial decision that its *reasoning* must be binding upon the Prosecutor is incorrect.

21. The Prosecution starts by emphasising that, of course, judicial decisions are always to be respected. And indeed the binding quality of the Pre-Trial Chamber's decision when acting under article 53(3)(a) is precisely stressed and explained by rule 108(2), which provides that "[w]here the Pre-Trial Chamber requests the Prosecutor to review" her decision, "the Prosecutor *shall* reconsider" as soon as possible.[54] There can be no dispute therefore that the Prosecutor is at least subject to an obligation of 'process' when "requested" to conduct a reconsideration under article 53(3)(a). The Appeals Chamber has previously said as much.[55]

22. Yet at the same time article 53(3)(a) and rule 108(2) employ two terms which signify that the Pre-Trial Chamber's decision under article 53(3)(a) has a particular character, and to that extent may not share the same attributes, *arguendo*, as other kinds of judicial decisions. In particular, these terms suggest that while the Prosecutor is indeed subject to an obligation of *process* when requested by the Pre-Trial Chamber under article 53(3)(a), she is not subject to an obligation of *result*—and this, in turn, must mean that she is not required to adopt the Pre-Trial Chamber's reasoning, including particular conclusions of law or fact. This is also consistent with rule 108(3), which anticipates that once she has received a request under article 53(3)(a), it is the Prosecutor who will take a "final decision" and notify the Pre-Trial Chamber of that decision in writing.[56]

23. First, both article 53(3)(a) and rule 108(2) describe the Pre-Trial Chamber's decision under article 53(3)(a) as a "request". In its ordinary usage, the term "request" means "to ask (a person), especially in a […] formal manner, to do something".[57] While such a term may therefore initially seem anomalous in describing a judicial decision, its employment was not inadvertent—reference to the other equally authoritative linguistic versions of the Statute shows consistent usage of similar terms in article 53(3)(a) as opposed to more peremptory alternatives, including in Arabic ("تطلب"), Chinese ("要求"), French ("*demander*"), Russian

[53] *See below* para. 25.
[54] Rule 108(2) (emphasis added).
[55] *See* Appeal Admissibility Decision, para. 59; *further below* para. 67. The Prosecution notes that the Majority highlighted one passage of the Prosecutor's Final Decision as suggesting that an article 53(3)(a) request is not a "binding order": Decision, para. 81 (citing Prosecutor's Final Decision, para. 4). The Prosecution regrets any ambiguity in this passage, which referred to the question of whether the Pre-Trial Chamber's *reasoning* was binding, and not the Prosecutor's duty to carry out a reconsideration (which indeed she had done).
[56] *See below* paras. 82-86, 89.
[57] *Oxford English Dictionary*, "request, *v.*".

("просить"), and Spanish ("*pedir*"). Likewise, the term "request" tends to arise elsewhere in the Statute either precisely in accordance with its ordinary meaning (such as when a Party petitions a Chamber)[58]—indeed, a usage which *also* occurs in article 53(3)(a) itself[59]—or to acknowledge some other kind of nuance affecting the decision in question.[60] Accordingly, article 53(3)(a) and rule 108(2) must at least be interpreted to give some kind of effect to the choice of the word "request". Since the obligation of *process* upon the Prosecutor is indisputable in light of rule 108(2), which requires her to carry out a reconsideration, this may imply that the Pre-Trial Chamber's decision nonetheless leaves open to the Prosecutor to decide the outcome of her reconsideration, and consequently the reasoning upon which it must necessarily be based.

24. Second, indeed, both article 53(3)(a) and rule 108(2) characterise the activity to be undertaken by the Prosecutor as "reconsideration". In its ordinary meaning, this term means "[t]o consider (a matter or thing) again", or "to consider (a decision, conclusion, opinion, or proposal) a second time, with a view to changing or amending it; to rescind, alter".[61] While it is true that this process definitely contemplates the possibility of reaching a new and different conclusion, again it does not *mandate* it. To the contrary, if the drafters' intent had been to compel the Prosecutor to reach a different conclusion, other terms could have been employed in article 53(3)(a), such as "amend that decision" or "reach a new decision".[62] The drafters did not do so. This too must be taken into account.

25. In this context, while it is true that rule 108(1) specifically refers to "[a] *decision* of the Pre-Trial Chamber under article 53, paragraph 3 (a)" (emphasis added), this is not inconsistent with either of the preceding observations.[63] The question at issue is not whether an article 53(3)(a) request is binding, but the *way* in which it is binding. Indeed, the Majority itself recognised that other forms of judicial decision under the Statute may nonetheless be qualified to some extent in their procedural effects, such as articles 56(2)(a) and (e) and

[58] *See e.g.* Statute, arts. 14(1), 15(3)-(5); 19(8)(c), 19(10), 41(1), 41(2)(b), 42(6), 42(8)(a), 50(3), 56(1)(b), 56(3)(a), 57(3)(a)-(b), 58(6)-(7), 60(3), 61(2) and (8), 75(1), 81(3)(c)(i), 82(3), 101(2), 108(1).
[59] *See* Statute, art. 53(3)(a) ("At the request of the State making a referral […] the Pre-Trial Chamber may […]"). It is manifest that the referring State, or Security Council, cannot *oblige* the Pre-Trial Chamber to conduct an article 53(3)(a) review: First Article 53(3)(a) Request – Judge Kovács' Opinion, paras. 2-3; Bergsmo et al, p. 1377 (mn. 37).
[60] This may only reflect formal considerations, including but not limited to those applicable in Part 9 matters: *see e.g.* Statute, arts. 16, 18(2) and (5), 19(11), 54(3)(b), 54(3)(f), 55(2), 57(3)(d), 58(5), 59(1) and (6), 65(4)(a), 69(3), 70(2), 70(4)(b), 72(2) and (5) and (7), 73, 76(2), 87, 89, 90, 91, 92, 93, 94, 95, 96, 97,98, 99, 100, 111.
[61] *Oxford English Dictionary*, "reconsider, v."
[62] *See furtber below* paras. 28-32 (concerning the distinct remedies in article 53(3)(a) and 53(3)(b)).
[63] *Contra* Decision, paras. 91-92.

article 59(5),[64] as well as article 61(7)(c). The Majority nonetheless failed to recognise the full implications of their observation—if the drafters could and did qualify the procedural effect of a judicial decision by describing it as a "recommendation", appropriate significance must *also* be afforded to the drafters' intention in describing other kinds of judicial decision as a "request". The term "request" is no less significant in its implications for the effects of a judicial decision than the term "recommendation". Indeed, commentators have identified just such a parallel between the terms employed in articles 59(5) and 53(3)(a).[65]

26. For all these reasons, the Majority should have taken into account the plain terms of article 53(3)(a) and rule 108(2), and especially the terms "request" and "reconsideration", at least to identify the possibility that, while the Prosecutor is obliged to carry out a reconsideration at the instance of the Pre-Trial Chamber, she may not be bound to accept the reasoning of the Pre-Trial Chamber in its article 53(3)(a) request, including particular conclusions of law or fact. To find otherwise would mean that the Prosecutor does not "reconsider" her initial article 53(1)(b) determination, and exercises none of the discretion which may be implied by the term "request", but instead simply implements the Pre-Trial Chamber's decision.

I.C. The context of the Statute and Rules confirms that an article 53(3)(a) "request" does not bind the Prosecutor to the Pre-Trial Chamber's reasoning

27. The broader context of the Statute and Rules further confirms that requests under article 53(3)(a) of the Statute do not bind the Prosecutor to adopt the Pre-Trial Chamber's reasoning, including any particular conclusions of law or fact. This follows from: the express distinction between the procedures in article 53(3)(a) and 53(3)(b); and the possibility for article 53(3)(a) proceedings, as in this case, to be conducted without access to the available information. The context of the Statute and Rules also demonstrates that other arguments claimed to support the binding nature of a "request" under article 53(3)(a) are misplaced, including: the requirement for reasoning under rule 108(1) and (3); the characteristics of a judicial 'decision', especially in the context of judicial review; the judicial power to sanction misconduct; and the suggestion that the Prosecutor might become an "appellate body" *vis-à-vis* the Pre-Trial Chamber.

[64] *See* Decision, para. 93.
[65] Bitti, p. 1214 ("*[l]'examen de la décision du Procureur par la Chambre préliminaire aboutit donc à une simple recommandation. On trouve un autre exemple de « recommandations » faites par la Chambre préliminaire, à l'intention cette fois des juridictions nationales, à l'article 59-5 du Statut*").

I.C.1. The Majority's approach eliminates the distinction between article 53(3)(a) and 53(3)(b)

28. To interpret article 53(3)(a) correctly, vital context is provided by article 53(3)(b), which provides for a distinct remedy when the Pre-Trial Chamber is reviewing a decision by the Prosecutor under article 53(1)(c), as opposed to article 53(1)(a) or (b). In short, while article 53(3)(a) empowers the Pre-Trial Chamber to require *the Prosecutor to reconsider* her former decision, article 53(3)(b) empowers the Pre-Trial Chamber to *substitute its own decision* for that of the Prosecutor. Any sound interpretation of article 53(3)(a) must therefore preserve a meaningful distinction from article 53(3)(b).

29. The Majority not only failed to take this important factor into account in interpreting article 53(3)(a)[66]—and especially the meaning of the word "request"—but also in practice abolished any meaningful distinction with article 53(3)(b). This leaves the Prosecutor, in reality, no less compelled to accept the Pre-Trial Chamber's conclusions under article 53(3)(a) than she is under article 53(3)(b). This cannot be correct.

30. Specifically, in article 53(3)(b) and rule 110, the drafters established a procedure for the review of prosecutorial decisions under article 53(1)(c), which provides that "the decision of the Prosecutor shall be effective only if *confirmed* by the Pre-Trial Chamber" (emphasis added). Rule 110(2) further makes explicit that "[w]hen the Pre-Trial Chamber does not confirm the decision by the Prosecutor […] he or she *shall proceed* with the investigation or prosecution" (emphasis added). This remedy means that, if the Pre-Trial Chamber disagrees with the Prosecutor's assessment whether opening an investigation will be contrary to the interests of justice, the Pre-Trial Chamber's view will prevail over that of the Prosecutor. Judge Kovács justified this highly intrusive remedy in light of the "high degree of subjectivity" inherent in the article 53(1)(c) test.[67]

31. This sensible justification does not apply, on the other hand, to prosecutorial determinations under article 53(1)(a) and (b)—where the assessment may turn to a considerable extent on deep acquaintance with the available information, in light of the applicable law.[68] It is thus unsurprising that in article 53(3)(a) and rule 108(2), the drafters only authorised the Pre-Trial Chamber to "request" the Prosecutor to reconsider her decision under article 53(1)(a) or (b), in the sense that while she may be obliged to undertake such a

[66] *See* Decision, para. 109 (fn. 147: noting without comment the distinction between article 53(3)(a) and (b)).
[67] Decision – Judge Kovács' Opinion, para. 13.
[68] *See further below* paras. 33-34.

process in good faith, she retains discretion as to her own conclusions and is not bound to conform her reasoning to that of the Pre-Trial Chamber's request.

32. Yet quite to the contrary, by requiring the Prosecutor to conform her reasoning to that of the Pre-Trial Chamber, including any particular conclusions of law or fact, the Majority ensured that the Pre-Trial Chamber's view *will* prevail over that of the Prosecutor, just as it would under article 53(3)(b). In other words, on the Majority's interpretation, the Pre-Trial Chamber's view is likewise substituted to replace that of the Prosecutor. If this is so, the only difference between the article 53(3)(a) procedure and the article 53(3)(b) procedure becomes entirely formalistic. This cannot have been intended. Indeed, the profound difficulty caused by such an interpretation has already been identified by the Appeals Chamber, which recalled:

> [H]ad the drafters intended to institute equivalent layers of judicial review and control over decisions not to investigate taken by the Prosecutor (and indirectly over determinations of admissibility made in this context), the Pre-Trial Chamber would have been given the power, under article 53(3)(a) of the Statute, to confirm or not to confirm the determination of the Prosecutor. However, such a power is absent from that article. Conversely, the Appeals Chamber notes that such power is reserved for the Pre-Trial Chamber under article 53(3)(b) […].
>
> In the Appeals Chamber's assessment, 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 […] article 53(1)(a) and (b) of the Statute. Indeed, 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.[69]

I.C.2. The Pre-Trial Chamber's power to issue requests under article 53(3)(a) without reviewing the available information is inconsistent with any binding effect of its reasoning

33. The Pre-Trial Chamber's ability to issue an article 53(3)(a) request without reviewing the available information supports the view that, while the Prosecutor is bound to carry out a reconsideration, she is not bound to conform her reasoning to that of the Pre-Trial Chamber, including any particular conclusions of law or fact.

[69] Appeal Admissibility Decision, paras. 58-59 (emphasis added).

34. Matters under article 53(1)(a) and (b), to which article 53(3)(a) applies, are highly fact-sensitive. Yet rule 107(2) states only that the Pre-Trial Chamber "may" request the Prosecutor to transmit the information or documents in her possession "or summaries thereof" for the purpose of the review. This step is not mandatory—significantly, at no point in this situation, for example, did the Pre-Trial Chamber ever take this procedural step. The fact that the drafters did not consider that the Pre-Trial Chamber would *necessarily* need to be as well acquainted with the information available as the Prosecutor, in order to deliver its "request" under article 53(3)(a) at all, strongly suggests the drafters' understanding that the Pre-Trial Chamber's reasoning in that request could not be substituted for that of the Prosecutor.

35. Indeed, in marked contrast, where the Pre-Trial Chamber is expected to make its *own* binding determination, such as under article 15(4) of the Statute, article 15(3) expressly requires that the Prosecutor *shall* submit to the Pre-Trial Chamber "any supporting material collected". In this respect, proceedings under article 53(3)(a) and article 15(3) are quite different.[70] Likewise, under article 53(3)(b), the Pre-Trial Chamber's determination under article 53(1)(c) will generally not be fact sensitive, and so does not require the same kind of acquaintance with the information made available to the Prosecutor.

I.C.3. The duty to give reasons in rule 108(1) and 108(3) does not justify the Majority's interpretation of article 53(3)(a)

36. Another justification given by the Majority to support its view that the Prosecutor must in her "final decision" under rule 108(3) accept the reasoning of the Pre-Trial Chamber in its article 53(3)(a) request, including particular conclusions of law or fact, is that rule 108(1) requires that an article 53(3)(a) request "'shall contain reasons', additionally emphasising its nature as a judicial decision."[71] However, this logic is problematic.

37. In particular, the language of rule 108 is entirely neutral as to the status of the Pre-Trial Chamber's reasons in the Prosecutor's reconsideration. There is no basis to assume that the duty of a decision-maker to give reasons necessarily binds a subsequent decision-maker to accept those reasons, or establishes a further procedural right to review the latter's decision.[72]

[70] *Contra* Schabas (2016), p. 841.
[71] Decision, para. 91.
[72] *See further below* para. 107.

Nor is such a conclusion entailed in the duty of the Prosecutor under rule 108(3) to give reasons for her final decision.[73]

38. Within the particular context of article 53(3)(a) and rule 108(1), it is entirely logical that the Pre-Trial Chamber's request to the Prosecutor must be reasoned, in order to ensure that the Prosecutor *understands* the basis for the Pre-Trial Chamber's concern. Indeed, clear and persuasive reasons will assist the Prosecutor more fully in her reconsideration, and may make it more likely that she will reach the same view as the Pre-Trial Chamber. But this does not mean that those reasons, including particular conclusions of law or fact, *necessarily* bind the Prosecutor to adopt them as her own—this is not only inconsistent with the plain wording of article 53(3)(a) and rule 108(2) (referring to a "request"), but also with the broader scheme of article 53, including the distinction between article 53(3)(a) and (b).

39. Moreover, if the drafters had intended the Pre-Trial Chamber's reasoning under rule 108(1) to bind the Prosecutor, then the requirement for the Prosecutor to give reasons under rule 108(3) would be entirely superfluous. If she merely gives effect to the Pre-Trial Chamber's own reasoning in its article 53(3)(a) request, why provide her own identical rationale?[74] By contrast, however, if the Prosecutor's reasons may permissibly differ from those of the Pre-Trial Chamber, they become far from being "meaningless".[75] Specifically, if the Prosecutor need not conform to the Pre-Trial Chamber's reasoning, it is appropriate she explains *why* in her "ultimate discretion" she did not reach that same conclusion.[76]

I.C.4. The Majority overlooked the nuanced procedural effects of 'decisions', especially in matters of judicial review

40. The Majority also emphasised what it saw as the inherently binding qualities of judicial decisions to support its view that the Prosecutor must be bound to accept the reasoning in the Pre-Trial Chamber's article 53(3)(a) request, including particular conclusions of law or fact.[77] In this context, it stressed that "parties to legal proceedings must comply with judicial decisions" and that this not only constitutes a "principle of law recognised in different legal

[73] *Contra* Decision, para. 113.
[74] *Contra* Decision, para. 113.
[75] *Contra* Decision, para. 113.
[76] *See further below* para. 107.
[77] Decision, para. 87 ("the Chamber must determine whether a 'request' within the meaning of article 53(3)(a) […] constitutes a binding judicial decision and, if so, what the legal consequences […] are"). *See also* paras. 90, 92-94 (noting, *inter alia*, that the First Article 53(3)(a) Request "acquired the authority of a final decision within the legal framework of the Court"), 95-96, 99, 107-112. *See also below* paras. 48-50, 54-56.

systems"[78] but also at this Court, citing *Lubanga*. Yet this does not go to the heart of the material question—which is whether the *reasoning* in a judicial decision necessarily has a binding quality, and particularly whether this is so in the context of judicial review over an administrative or executive decision.

41. Thus, in *Lubanga*, the Appeals Chamber had endorsed the common sense view that a Trial Chamber's orders bind the Prosecutor as to the conduct of the trial.[79] This is necessarily so, since the Trial Chamber is "the ultimate guardian of a fair and expeditious trial", and its general competence to control trial proceedings is expressly mandated in the Statute.[80] Yet, as further explained below, the function of the Pre-Trial Chamber is not identical to the function of the Trial Chamber,[81] and consequently the powers of the Trial Chamber seised of a particular trial are not necessarily a precise analogy for the powers of the Pre-Trial Chamber seised of a situation—and most particularly at the article 53 stage.[82]

42. Moreover, and in any event, the Majority's emphasis on the 'binding' nature of a judicial decision may be misplaced. The various domestic authorities cited by the Majority stand only for the proposition that, in most jurisdictions, courts have the power to compel parties to litigation to comply with their final judgments or orders and any lawful remedies that they order.[83] The Prosecution, of course, agrees with this general point.

43. But this does not address the question relevant to this appeal, which is *what parts* of the decision are binding upon the parties? As a general rule, it is the disposition of a decision—specifying the relief or remedy that it grants—which is binding upon the Parties: typically, an order to do one thing, or to refrain from doing another thing. It is generally not the *reasoning* in the decision which binds the parties to the litigation as such, even though it may have binding procedural effects for subsequent litigation (for example, the principles of *res judicata* or, in common law, issue estoppel). Indeed, the Appeals Chamber has already drawn precisely this distinction, recognising that the import of the First Article 53(3)(a) Request was

[78] Decision, para. 107.
[79] *Lubanga* Disclosure Appeal Decision, para. 48.
[80] *Lubanga* Disclosure Appeal Decision, paras. 47-48 (also referring to "[t]he authority of the judges over the parties within the context of the trial"), 50 ("[T]he responsibility of the Trial Chamber under article 64(2) of the Statute explicitly encompasses ensuring not only that a trial is conducted fairly, expeditiously and with full respect for the rights of the accused, but also that the trial is conducted with 'due regard for the protection of victims and witnesses'"). *See also* Statute, art. 64(6), *especially* art. 64(6)(f).
[81] *See further below* paras. 108-113 (concerning the Majority's notion of judicial "oversight").
[82] *See below* paras. 54-65 (concerning the object and purpose of the Statute, and drafting history).
[83] *See* Decision, para. 107 (fn. 139).

in its disposition, which requests the Prosecutor to reconsider her Initial Decision, and not in its reasoning.[84]

44. It is particularly relevant also to consider the principles which regulate the granting of judicial remedies when reviewing executive or administrative actions (which in at least some jurisdictions may include investigative and prosecutorial decision-making).[85] After all, this is the essential character of the article 53(3)(a) process, which thus defines the nature of article 53(3)(a) decisions. For example, while it is true that some national jurisdictions such as the UK may allow prescriptive remedies in the context of judicial review—including quashing orders, mandatory orders, and declarations of the law[86]—it is important to note that grant of these remedies is wholly discretionary.[87] Specifically, this discretion is exercised in the context of the fundamental principle that judges must *refrain* from simply substituting their own view for the view of the decision-maker.[88] This holds true even when a court may consider that "it is in as good a position, as well qualified, as the original decision-maker".[89] And even greater caution still is required on matters related to criminal investigation and prosecution.[90] As one distinguished judge wryly observed, once legislators have entrusted a specific official or body with a particular power, they do "not expect, or intend, that the

[84] Appeal Admissibility Decision, para. 51 (distinguishing between the "operative part" of the First Article 53(3)(a) Request, which "requested 'the Prosecutor to reconsider […]'", and "the reasons for the Pre-Trial Chamber's request" otherwise set out, which did "not determine admissibility"). *See also* para. 53.
[85] *See e.g.* Wilson, pp. 10-12 (mns. 1-6, 1-7, 1-12), 24 (mn. 1-42).
[86] *See e.g.* Fordham, pp. 242-245, 249-251; Ball and von Berg, pp. 112-119; UK, *Senior Courts Act 1981*, s. 31, *including* 31(5)(a) (if the High Court quashes a decision, it may remit the matter to the original decision-maker "with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court"), 31(5)(b) and (5A) (limiting the High Court's power to "substitute its own decision for the decision in question" only to decisions by judicial decision-makers which are erroneous in law and can only be resolved in one way); UK, Courts and Tribunals: 'Judicial review' ("The court will not substitute what it think is the 'correct' decision. This *may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way*", emphasis added).
[87] *See e.g.* Fordham, pp. 245-246; Ball and von Berg, pp. 108-109.
[88] *See e.g.* Fordham, p. 146 (mn. 15.1: warning against the "substitutionary approach"—"[e]very public body has its own proper role and has matters which it is to be trusted to decide for itself. The Courts are careful to avoid usurping that role and interfering whenever they might disagree as to those matters. […] [H]owever it is expressed, the idea of a forbidden approach is essential in understanding and applying principles of judicial review"), 147-151, 254-255 (citing various cases disclaiming particular remedies in order to avoid encroaching upon the role of the primary decision-maker). *See also* Pakuscher, p. 465 (discussing German law, and observing that "the Judge does not exercise comprehensive control" insofar as they are "entitled to check the legality of administrative acts, but not their expediency"). *But see* Crossland, pp. 744-745 (discussing French law, and noting the unique constitutional status of the *Conseil d'État*, leading to a closer blending of judicial review and primary decision-making).
[89] UK, *WM (DRC)*, *per* Buxton LJ, at para. 16 (further observing that this is "not merely a pedantic but more importantly a constitutional issue").
[90] *See e.g.* UK, *Corner House Research v. SFO*, *per* Lord Bingham, at para. 30 ("authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator"); *see also* paras. 31-32; Australia, *Maxwell*, *per* Gaudron and Gummow, JJ., at para. 26. *See further* Wilson, pp. 13-14 (mns. 1-13, 1-16); Taylor and von Berg, pp. 143-146 (mns. 4-13 and 4-14); Von Berg, pp. 238 (mn. 5-1), 254-255 (mn. 5-27).

decision should be made by some judge who may think that he or she knows better."[91] To do so would be to deprive that delegation of power of its meaning and function.[92] The proper role of judges in this context is, instead, as "auditors of legality".[93]

45. Consequently, the judicial remedies which may be available in some domestic systems are closely circumscribed by respect for the distinct powers of the original decision-maker. In order to preserve this principle, the application of any such remedies in the judge's decision must be clear and express. For example, the High Court of Australia has warned that mere recommendations to decision-makers must not be confused with binding prescriptions because, otherwise, "a recommendation would be equivalent to a direction, and […] tantamount to the making of a decision in substitution for that under review".[94]

46. This practice illustrates that the Majority's general reference to judicial decision-making may be inapposite, since it does not reflect the particular considerations of domestic jurisdictions in the context of judicial review over administrative or executive decision-making—especially the essential importance of legal clarity as to the rights and obligations, checks and balances, which govern both the reviewing body and the decision-maker. In other words, this practice underlines the importance of considering the express terms of article 53(3)(a) itself. If the drafters of the Statute had intended that the Pre-Trial Chamber's article 53(3)(a) "request" would not only oblige the Prosecutor to carry out a reconsideration, but also to accept the Pre-Trial Chamber's reasoning including any particular conclusions of law or fact, then they would have provided for such a remedy expressly. This is what they did in article 53(3)(b). And this is what some national jurisdictions may in some circumstances do for the purpose of their own systems of judicial review. Yet the drafters made no such provision in article 53(3)(a), and this must be taken into account.

47. The Majority's further observation that "the authoritative interpretation of the applicable law is in the hands of the Chambers"—and that the Prosecutor's "discretionary powers" should be "especially" circumscribed "when it comes to questions of law"[95]—must also be

[91] Bingham, p. 61. *See also* p. 65. *See also e.g.* UK, *Laker Airways*, *per* Lawton LJ, at p. 724 ("I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play").
[92] Reitz, p. 297.
[93] Bingham, p. 61.
[94] Australia, *Pochi*, *per* Gibbs C.J., Mason, Aickin and Wilson JJ., para. 3 (concluding that a review body (the Migration Tribunal) may only affirm the decision under review or remand the matter back to the decision-maker for reconsideration with recommendations).
[95] Decision, para. 99.

approached with some degree of caution. Of course, the Prosecution treats all judicial pronouncements with respect. However, where the Pre-Trial Chamber is empowered to make a clear and express declaration as to the law, it usually follows that the Statute also ensures that such a declaration can be challenged by suitable procedures.[96] But where the Statute makes no such provision—and indeed its plain terms suggest instead that the reasoning in an article 53(3)(a) "request", including particular conclusions, do not bind the Prosecutor—then its legal pronouncements are not binding, exceptionally, even if they may carry great weight.[97] The Prosecution is aware of the delicacy of the position in which it is placed as a consequence of this logic, and for this reason previously sought the guidance of the Appeals Chamber.[98] Yet it confirmed that for the purpose of article 53(3)(a) and rule 108(3) the "ultimate decision" indeed remains with the Prosecutor, on matters of fact and law alike.[99]

I.C.5. The Court's power to issue sanctions is immaterial

48. The Majority likewise sought to rely on the Pre-Trial Chamber's general power under article 71 and rule 171 to assist in the interpretation of article 53(3)(a),[100] based on its view that a power to sanction deliberate refusal to comply with a written direction "necessarily presupposes that the parties to the proceedings are, in the first place, under an obligation to comply with instructions issued by a Chamber, including those contained in a decision issued by a Pre-Trial Chamber."[101] Yet this reasoning is erroneous in two respects.

49. First, not only are there many procedures under the Statute where the Court is empowered to issue binding decisions, but it is readily acknowledged that article 53(3)(a) itself is binding insofar as it obliges the Prosecutor to carry out a reconsideration.[102] Consequently, even if article 53(3)(a) does not bind the Prosecutor to conform to the Pre-Trial Chamber's reasoning in its article 53(3)(a) request, including any particular conclusions of law or fact, this does not deprive article 71 and rule 171 of their purpose and effect.

[96] *See e.g.* Statute, arts. 19(3), 82(1)(a).
[97] *See also below* para. 65 (concerning the drafting history on this point).
[98] *See e.g.* Prosecution Further Submissions on Admissibility, para. 27 (referring to the "natural authority" of the judicial function of the Pre-Trial Chamber). *See also* Appeal Admissibility Decision – Dissenting Opinion, para. 35.
[99] *See e.g.* Appeal Admissibility Decision, para. 50. *See also* paras. 56, 59, 64. *See further below* paras. 66-71.
[100] Decision, paras. 101-104.
[101] Decision, para. 104.
[102] *See above* para. 21.

Indeed, the Majority recognises that other types of decision by the Pre-Trial Chamber are similarly non-binding.[103]

50. Second, in any event, nothing in article 71 and rule 171 operates to alter the objective legal status of other provisions of the Statute or the Rules. Article 71 and rule 171 equip the Court with a coercive power to ensure compliance with its instructions in appropriate circumstances.[104] Hypothetically, even a judicial direction which was plainly *ultra vires* could still in principle be *enforced* by this means, but without prejudice to any subsequent assessment of the legality under the Statute of the original direction. Commentators thus agree that—perhaps somewhat counter-intuitively—the Court could seek to implement article 71 procedures even where the direction in question is *unlawful*.[105] This is simply to ensure that the Court remains in control of its own proceedings, and thus that persons appearing before the Court resolve any concerns by *engaging with the Court*, and not defying it. It is assumed that the procedural safeguards which apply to article 71 and rule 171 would nonetheless ensure that sanctions were not levied for an *ultra vires* direction.[106]

I.C.6. Comparing the Prosecutor with an "appellate body" is misplaced and immaterial

51. In interpreting article 53(3)(a), the Majority also considered that the Prosecutor must not be put in the position of "an appellate body reviewing the [Pre-Trial] Chamber's decision on the merits."[107] However, this line of reasoning appears to be based on a misapprehension.

52. Acknowledging that the reasoning in the Pre-Trial Chamber's article 53(3)(a) request, including particular considerations of law or fact, is not binding upon the Prosecutor does not mean that the Prosecutor's "final decision", in her turn, constitutes a judgment on the merits of the Pre-Trial Chamber's reasoning. While the Prosecutor may disagree with the Pre-Trial Chamber's views when expressed under article 53(3)(a)—and, as a matter of respect and professionalism, is *likely* to express her reasons for that disagreement in some detail, precisely because of the natural authority in which a judicial "request" will be cloaked[108]—

[103] Decision, para. 93 (citing Statute, arts. 56(2)(a) and (e), 59(5)). *See further above* para. 25.
[104] *See also* Regulations of the Court, reg. 29(1).
[105] Triffterer and Burchard, p. 1770 (mn. 22).
[106] In particular, the Court must supplement any direction to which article 71 and rule 171 might apply with a "warning of sanctions in case of breach", and must give the person concerned in any possible sanctions "an opportunity to be heard" before such a sanction is imposed: rule 171(1) and (5).
[107] Decision, para. 98.
[108] *See above* fn. 98. *See also* Prosecutor's Final Decision, para. 4 (referring to "the general interest, wherever possible, in respecting the legal reasoning of judicial orders and decisions of the Court, notwithstanding the unique circumstances of article 53(3)(a)").

her "final decision" has no procedural effect *vis-à-vis* the reasoning in the Pre-Trial Chamber's "request". The only procedural effect of the "final decision" is to terminate the preliminary examination. In all other respects, any difference of opinion between the Pre-Trial Chamber and the Prosecutor remains as nothing more, and nothing less, than that.

53. Likewise, the Majority's concern that it would be "unsustainable" for the Prosecutor "to reconsider her decision not to proceed […] on the basis of submissions provided in the context of proceedings to which she herself was a party" is also misplaced.[109] It is inherent in the notion of "reconsideration" that this is a mechanism by which the *same* decision-maker contemplates their own prior reasoning and determines whether it should be altered. Furthermore, to say that the Prosecutor is not competent to take into account *both* the Pre-Trial Chamber's reasoning and, in her discretion, other relevant submissions which she may have received (including from the referring State and any participating victims) would undermine the clear intent behind article 53(3)(a), and the object of the review and reconsideration process.

I.D. The object and purpose of the Statute confirms that an article 53(3)(a) "request" does not bind the Prosecutor to the Pre-Trial Chamber's reasoning

54. The Majority relied heavily on its view of the "object and purpose of *article 53(3)(a)*" in interpreting this provision.[110] Yet while such a consideration is not necessarily irrelevant, it must be treated with caution—to focus too much on what is presumed to be the intention of a particular treaty provision can potentially lead to 'tunnel vision', ignoring the context of other relevant provisions and indeed the object and purpose of the treaty as a whole.[111]

55. Similar considerations apply with regard to the Majority's reliance on the "principle of effectiveness" in interpreting article 53(3)(a).[112] This interpretive notion is contained *within* the general rule of interpretation in article 31 of the VCLT, especially in the notions of "good faith" and the need to consider not only the terms of a particular provision but the object and purpose of the treaty as a whole.[113] The consensus among the drafters of the VCLT themselves was that applying the general rule properly "would always necessarily seek to give a meaning to the text."[114] Consequently, applying the principle of effectiveness does not

[109] *Contra* Decision, para. 111.
[110] *See e.g.* Decision, para. 97 (emphasis added).
[111] *See* Gardiner, pp. 211-215, *especially* pp. 214-215.
[112] *See* Decision, para. 105.
[113] *See e.g.* Gardiner, pp. 169-170, 179-181.
[114] Gardiner, p. 170 (text accompanying fn. 32).

give licence to disapply the other integral aspects of the general rule of interpretation, or to advance one subjective view of the purpose of a particular provision while disregarding other contrasting views which would nevertheless give effect to that provision in a different way.

56. Accordingly, the Majority erred when reasoning that its view of the object and purpose of article 53(3)(a), and the principle of effectiveness, demands the conclusion that the Pre-Trial Chamber's reasoning in its "request", including particular conclusions of law or fact, must be binding upon the Prosecutor.[115] This gives too much weight to one theoretical reading of the purpose of article 53(3)(a), disregarding other tenable readings, and does not seek to reconcile it with the broader interests reflected in the Statute as a whole.

57. In particular, the Majority's analysis overlooks critical aspects of the object and purpose of the Statute itself[116]—which included enabling the existence of a permanent international criminal court by 'triangulating' between three different actors in determining the delicate question of when investigations should be opened: a referring entity, if applicable (a State Party or the UN Security Council); an independent Prosecutor; and the Pre-Trial Chamber. The mandate of the Court to put an end to impunity cannot be separated from this procedural compromise, which was essential to the diplomatic consensus achieved between States at Rome. The object and purpose of the Statute is thus to investigate and prosecute crimes *in those circumstances when* the States at Rome expressly authorised the Court to do so, according to the Statute.

58. Within this intricate and carefully balanced scheme, the Prosecutor's assent that the legal conditions in article 53(1)(a) and (b) are met—based upon her assessment of the available information—is indispensable for the initiation of any investigation.[117] That assent must be combined, *either*, with:

- the assent of the Pre-Trial Chamber that the criteria in article 53(1) are satisfied, if the Prosecutor has sought to open an investigation *proprio motu*, *or*;
- the prior assent of a State Party or the UN Security Council to the opening of an investigation (resulting from their own internal determination), in the form of an initial referral of a situation to the Court.

[115] *See e.g.* Decision, paras. 96-97, 100, 105-106.
[116] *Cf.* Decision, paras. 98-99.
[117] *See also* Prosecutor's Final Decision, para. 49.

59. Notably, the Statute does *not* allow an investigation to be opened if the Prosecutor does *not* assent that the conditions in article 53(1)(a) and (b) are met. This is demonstrated by the absence of any power for a referring entity to bypass the Prosecutor and refer a situation directly to the Pre-Trial Chamber, and by the express distinction between the Pre-Trial Chamber's powers in article 53(3)(a) and (b), which preclude it from substituting its own decision for that of the Prosecutor under article 53(1)(a) or (b), unlike article 53(1)(c).

60. In this light, the Majority's apparent view—that a referring State must be able to obtain, through article 53(3)(a), a decision which in its reasoning, including particular conclusions of law or fact, binds the Prosecutor to adopt those same conclusions—is inconsistent with the object and purpose of the Statute. Referring entities play an important role in opening investigations under the Statute, but not a *dispositive* one. Nor is article 53(3)(a) made ineffective if the reasoning contained in the Pre-Trial Chamber's "request" is not binding upon the Prosecutor. To the contrary, article 53(3)(a) gives a referring entity an "opportunity" to seek a review of the Prosecutor's determination under article 53(1) and rule 105—but the fact that the drafters conferred no more than an "opportunity" on the referring entity is illustrated by the Pre-Trial Chamber's discretion in whether to conduct such a review at all,[118] as well as the limitation upon the remedy ultimately provided to the Pre-Trial Chamber (a "request"). Academic commentators have recognised that, if the Pre-Trial Chamber could simply "replace the Prosecutor's decision […], the very principle of prosecutorial independence enshrined in the Statute would be at stake".[119] Consequently:

> [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 […], he or she would not, strictly speaking, be obliged to come to 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.[120]

[118] *See above* fn. 59.
[119] Bergsmo et al, p. 1378 (mn. 38).
[120] Bergsmo et al, p. 1378 (mn. 39). *See further* mn. 40 (noting that, while the Prosecutor's reconsideration would be guided by article 53(1), her subsequent decision could not be said to be an article 53(1) decision, and would not be subject to a further review under article 53(3)(a)).

I.E. The drafting history of the Statute confirms that an article 53(3)(a) "request" does not bind the Prosecutor to the Pre-Trial Chamber's reasoning

61. Reference to the drafting history is also particularly "instructive" in interpreting article 53.[121] Indeed, commentators such as Bitti and Schabas have not only recognised that the Pre-Trial Chamber's power under article 53(3)(a) is limited, but that this limitation originated in the ILC's draft statute of 1994—and was established quite intentionally.[122] Notably, again, the Majority made no reference to this history at any point in the Decision.

62. Thus, an ILC working group in 1993 had initially proposed that, "[i]n the case of a decision by the Prosecutor not to proceed, the Bureau"—which was conceived as the reviewing body, a forerunner of the Pre-Trial Chamber—"shall have the power to review the decision and if it finds that there is sufficient basis, *direct* the Prosecutor to commence a prosecution".[123] Even then, however, it was expressly noted that some members of the working group considered this approach to be "inconsistent with the independence and discretion of the Prosecutor" as well as raising "practical questions" as to its effectiveness.[124]

63. By the following year, the ILC had amended this provision to limit the power of the reviewing body (now the Presidency, rather than the Bureau) to "*request* the Prosecutor to reconsider the decision".[125] Again, it was expressly recorded that this amendment was implemented to strike a balance between the view that "there should be some possibility of judicial review of the Prosecutor's decision not to proceed" with the view that a judicial power "to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties". Consequently, the ILC stated, while the Prosecutor may be "request[ed] […] to reconsider the matter", the "ultimate decision" was left to her.[126]

64. While subsequent amendments were made to what would become article 53 in later drafts of the Statute, including creating the institution of the Pre-Trial Chamber, the drafting history reflects no discontent with the express limitation imposed upon the *remedy* resulting

[121] Appeal Admissibility Decision, para. 61. *See also* Bitti, p. 1174.
[122] Bitti, 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! […] Cette limitation du pouvoir de la Chambre préliminaire était déjà présente, en ce qui concerne la Présidence de la CPI, dans le projet initial de la CDI*", citing ILC Draft Statute (1994)); Schabas (2016), pp. 830-832.
[123] ILC Draft Statute (1993), p. 112 (draft article 30(1), emphasis added). *See also* Appeal Admissibility Decision, para. 61.
[124] ILC Draft Statute (1993), p. 113 (commentary, para. (5)).
[125] ILC Draft Statute (1994), pp. 90-91 (draft article 26(5), emphasis added). *See also* Appeal Admissibility Decision, para. 62.
[126] ILC Draft Statute (1994), p. 93 (commentary, para. (7)). *See also* Appeal Admissibility Decision, para. 62; Bitti, p. 1215 (text accompanying fn. 97).

from a judicial review of a decision not to investigate.[127] Indeed, while some national delegations attending the 1995 *ad hoc* committee meetings had apparently considered any framework of judicial review to be "overly broad",[128] and various other matters remained in contention, the Preparatory Committee seems to have refrained from placing the "request" language in square brackets (indicating alternative views) at any point in 1996, 1997, or 1998.[129] Nor was any demur recorded at the diplomatic conference in Rome. To the contrary, all the indications are that the drafters regarded the particular matter of the remedy to be settled from early on, even if matters concerning the wider balance between the powers of the Prosecutor and the Pre-Trial Chamber remained subject to vigorous debate until diplomatic consensus was achieved.[130]

65. The drafting history also confirms that, for the purpose of deciding whether to open an investigation, the decision to confer ultimate discretion on the Prosecutor with regard to matters of fact and law alike was consciously taken.[131] In particular, the ILC had foreseen this possible distinction, and while some members would have preferred that the reviewing body had "the power to annul a decision of the Prosecutor not to proceed to an investigation […] in cases where it is clear that the Prosecutor has made an error of law",[132] this remained a minority view and was not adopted.

I.F. The Appeals Chamber has already ruled that an article 53(3)(a) "request" does not bind the Prosecutor to the Pre-Trial Chamber's reasoning

66. In the Decision, the Majority referred to the Appeals Chamber's previous ruling in this situation,[133] but seemed to regard it as more significant for its procedural effect (declaring the Prosecution's prior appeal to be inadmissible) than for its reasoning in determining *why* the Prosecution's prior appeal was inadmissible.[134]

67. The Majority did correctly recognise three key aspects of the Appeals Chamber's decision, including that it had: (i) "set out the statutory scheme for review of prosecutorial decisions not to investigate"; (ii) "held that while '[t]he Prosecutor is *obliged to reconsider*

[127] *See* Appeal Admissibility Decision, para. 63
[128] Bassiouni, p. 362 (quoting observations concerning draft article 26(5) of the ILC Draft Statute (1994)).
[129] *See* Bassiouni, pp. 341 (1998 draft), 350 (1997 draft), 355 (1996 draft). *See also* pp. 343- 348 (Zutphen Draft); Schabas (2016), pp. 831-832.
[130] *See* Guariglia, p. 230; Bitti, pp. 1175-1178; Bergsmo et al, p. 1367 (mn. 3); Schabas (2016), p. 832. *See also below* fn. 239.
[131] *See further above* para. 47.
[132] ILC Draft Statute (1994), p. 93 (commentary para. (8))
[133] *See* Appeal Admissibility Decision.
[134] *See* Decision, paras. 84, 94, 108-109.

her decision not to investigate, […] [she] retains ultimate discretion over how to proceed'";[135] and, (iii) consequently, established that "the Prosecutor's obligation to comply with the [First Article 53(3)(a) Request] does not entail an obligation as to the result of the reconsideration".[136]

68. But, in contrast, the Majority nonetheless then asserted that "on any intelligible reading of the references to 'obliged to reconsider' and 'properly applied his or her mind', […] the Prosecutor is under an obligation to reconsider the decision […] *in accordance with the decision issued by the Pre-Trial Chamber under article 53(3)(a)*".[137] This further conclusion was unsupported by the Appeals Chamber's reasoning and *ratio decidendi*, and is incorrect.

69. The Prosecution had sought to appeal the First Article 53(3)(a) Request directly under article 82(1)(a) of the Statute, as a ruling on admissibility. By majority, the Appeals Chamber concluded that the First Article 53(3)(a) Request was *not* an appealable ruling on admissibility,[138] because it was "a request to the Prosecutor to reconsider her decision […]— and […] *the ultimate decision as to whether to do so is for her*."[139] At most, in the Appeals Chamber's view, the First Article 53(3)(a) Request "*might*" have an effect "in that it *could* potentially lead to the Prosecutor coming to a different conclusion in relation to admissibility (pursuant to article 53(1)(b)) at the time she reconsiders".[140] Such a conclusion is plainly inconsistent with the notion that the Pre-Trial Chamber's reasoning in its article 53(3)(a) "request", including particular conclusions of law or fact, are binding on the Prosecutor. To confirm this point, furthermore, the Appeals Chamber also:

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[135] Decision, para. 109 (quoting Appeal Admissibility Decision, para. 59, emphasis added by the Pre-Trial Chamber).
[136] Decision, para. 109.
[137] Decision, para. 109 (emphasis supplied). In the final sentences of this paragraph, the Majority also seemed to confuse the Prosecution's recognition before the Appeals Chamber of the potentially *influential* nature of the First Article 53(3)(a) Request (*see also above* paras. 47, 52) for a stipulation to its binding qualities, and to overlook the express contrary disclaimer in the Prosecution's submission: Prosecution Further Submissions on Admissibility, para. 27 ("the Prosecutor retains discretion in deciding *how* further to proceed under rule 108", emphasis added). *See also* Appeal Admissibility Decision – Dissenting Opinion, para. 35 (recognising the nuance of the Prosecution's position: "the fact that […] article 53 leaves the 'final decision' […] to the Prosecutor does not detract from the *influence* that the findings of the Pre-Trial Chamber […] *may* have", emphasis added).
[138] Appeal Admissibility Decision, para. 50. *See also* Appeal Admissibility Decision – Dissenting Opinion (concurring with the majority in the analysis of the scheme of article 53 and rule 108, but disagreeing whether in the circumstances this precluded an appeal under article 82(1)(a)), *especially* paras. 34-35, 37 (not disputing the "emphasis" placed by the majority "on prosecutorial discretion in the context of article 53 […] and its drafting history").
[139] Appeal Admissibility Decision, para. 50 (emphasis added).
[140] Appeal Admissibility Decision, para. 50 (emphasis added).

- distinguished the Former Majority's "reasons" from the "operative part" of the First Article 53(3)(a) Request, which was a mere "request[]";[141]

- recalled that rule 108(3) "provides that the 'final decision' is for the Prosecutor";[142]

- recalled the "higher degree of prosecutorial discretion" relating to determinations under article 53(1)(a) and (b), and stated that "the Prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed";[143] and

- re-emphasised, in light of the drafting history, that "the Pre-Trial Chamber's review" under article 53(3)(a) "cannot lead to a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation, the final decision in this regard being reserved for the Prosecutor."[144]

70. In this context, to conclude that the Appeals Chamber endorsed the view that the Prosecutor is obliged to accept the reasoning in the First Article 53(3)(a) Request, including particular conclusions of law and fact—and thus that the Prosecutor would effectively be *required* to determine that a potential case is sufficiently grave so as to be admissible—would seem to defeat the logic of the Appeals Chamber's decision entirely. It would mean that the First Article 53(3)(a) Request in fact *did* make a binding ruling on admissibility, and thus should have been susceptible to appeal under article 82(1)(a).

71. Judge Kovács was thus entirely correct, both in understanding that the Appeals Chamber affirmed that the Prosecutor is not obliged to accept the reasoning in the First Article 53(3)(a) Request, and indeed that the Prosecutor's First Decision was "guided by the relevant findings of the Appeals Chamber" and "complied" with the requirements of article 53(3)(a) and rule 108(3).[145]

I.G. The Pre-Trial Chamber's error materially affects the Decision

72. The Pre-Trial Chamber's error materially affects the Decision in two distinct ways. First, its erroneous conclusion that the Prosecutor is *obliged* to accept the Pre-Trial

[141] Appeal Admissibility Decision, para. 51.
[142] Appeal Admissibility Decision, para. 56.
[143] Appeal Admissibility Decision, para. 59. *See also* para. 60 (treating the First Article 53(3)(a) Request as an appealable ruling on admissibility would "fail to respect the discretion that has been granted to the Prosecutor").
[144] Appeal Admissibility Decision, para. 64 (also observing that "requests by the Pre-Trial Chamber under article 53(3)(a) of the Statute are not, by their nature, either final decisions on, or determinations of, admissibility […] at the time they are issued" but rather constitute a "request […] to be acted upon by the Prosecutor").
[145] Decision – Judge Kovács' Opinion, paras. 20-22. *Contra* Decision, para. 108.

Chamber's conclusions of law and fact in the First Article 53(3)(a) Request clearly influenced its erroneous conclusion that it was competent to determine the validity of the Prosecutor's final decision under rule 108(3).[146] Second, its erroneous conclusion that the Prosecutor is *obliged* to accept the Pre-Trial Chamber's conclusions of law and fact in the First Article 53(3)(a) Request directly led to its view that the Prosecutor's Final Decision should be set aside, and that the Prosecutor should be required to conduct a further reconsideration "according to" the terms of the First Article 53(3)(a) Request. Accordingly, but for its erroneous view of the Prosecutor's duty to accept the reasoning contained in an article 53(3)(a) "request", the Pre-Trial Chamber would not have ruled as it did.

II. THE PRE-TRIAL CHAMBER ERRED IN INVALIDATING THE PROSECUTOR'S FINAL DECISION AND REQUIRING THE PROSECUTOR TO FURTHER RECONSIDER HER INITIAL DECISION (SECOND GROUND OF APPEAL)

73. Rule 108(3) states that the "Prosecutor" is vested with the "final decision" concerning the outcome of any "request" for reconsideration made by the Pre-Trial Chamber under article 53(3)(a) of the Statute. Yet according to the Majority's analysis, the Prosecutor's decision under rule 108(3) would seem not to be "final" at all but instead contingent upon the Pre-Trial Chamber *agreeing* its validity, based on an assessment of its content.

74. This conclusion—plainly counter to the express wording of rule 108(3)—appears to have been reached without systematic effort to interpret the meaning of the relevant legal texts, and notwithstanding the specific arguments of the Parties.[147] Instead, the Majority adopted a narrowly purposive approach, framing the legal question around its view of the propriety of the Prosecutor's Final Decision,[148] and its view of the proper "distribution of authority".[149] By declaring that "the primary question […] is whether the Prosecutor is under an obligation to abide by the [First Article 53(3)(a) Request] or whether she is free to

[146] *See further below* paras. 73-116 (Second Ground of Appeal).
[147] *See e.g.* Prosecution Response (Lack of Jurisdiction), paras. 8 (asserting that the request for review "misinterpret[s] the Statute and Rules"), 13 (referring to the VCLT as the "proper interpretive lens"), 15 ("underscor[ing] the importance of closely adhering to the Court's legal texts, correctly interpreted"), 21-25 (addressing the plain terms, context, and object and purpose of relevant provisions of the legal texts, including article 53 and rule 108).
[148] *See e.g.* Decision, paras. 82-83. The Prosecution has already communicated to the Pre-Trial Chamber its concern, and regret, that its efforts in the Prosecutor's Final Decision to explain clearly and transparently why the Prosecution could not concur in the reasoning of the previous majority of the Pre-Trial Chamber gave rise to any perception that it was acting inappropriately: Certification Request, para. 3.
[149] Decision, para. 86.

disregard it",[150] the Majority thus misdirected itself, and premised its analysis on the wrong question.[151] Accordingly, the Decision must be reversed because it is *ultra vires*—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.

II.A. The Pre-Trial Chamber asserted a power to determine the validity of a "final decision" under rule 108(3)

75. The Pre-Trial Chamber seems to disclaim that the Majority sought to exercise any power of judicial review *stricto sensu* over a valid rule 108(3) decision under article 53(3)(a) of the Statute.[152] Yet there can be no doubt that the Majority asserted *some* kind of power in the Decision to determine whether the Prosecutor's Final Decision was valid or invalid, based on an assessment of its content.[153]

76. While it is perhaps significant that the Majority did not feel able to treat its review of the Prosecutor's Final Decision simply as a second exercise of article 53(3)(a), as the Comoros had invited,[154] any dispute that the power exercised by the Pre-Trial Chamber was not some form of judicial review is merely semantic. Describing the Pre-Trial Chamber's exercise of power as a power instead to 'enforce' its First Article 53(3)(a) Request, by examining the substance of the Prosecutor's Final Decision in order to uphold its validity or not, comes to very much the same thing (and indeed precisely the same remedy). The Pre-Trial Chamber seems to have recognised as much, in describing the issue for appeal as "whether a reconsideration decision can be considered as 'final' in the sense of rule 108 […], and when it cannot be considered as final *and may thus be subject to review*."[155] In any event, whatever the terminology used, it is the origin and nature of the power claimed by the Pre-

[150] Decision, para. 87. *See also* Certification Decision, para. 39 (reformulating the issue proposed for appeal to characterise the circumstances as those "in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the [First Article 53(3)(a) Request]").
[151] *See* Decision – Judge Kovács' Opinion, paras. 21-22 (determining not only that the Pre-Trial Chamber lacks jurisdiction to review a final decision under rule 108(3), but also that in any event "the Prosecutor [had] complied and carried out her reconsideration mandate, being guided by the relevant findings of the Appeals Chamber").
[152] Certification Decision, para. 35. *See also above* para. 9.
[153] *See e.g.* Decision, paras. 81-83, 111, 113, 114.
[154] *See* Comoros' Second Application, paras. 11 (recognising that the Prosecution would "likely" contest the Comoros' standing to make the application, and the Pre-Trial Chamber's competence to rule on the merits), 23 (relying on article 53(3)(a)), 29 (arguing that the Prosecutor's Final Decision was a decision under article 53(1)); Prosecution Response (Lack of Jurisdiction), para. 11 (arguing that the Comoros' Second Application should be dismissed because, *inter alia*, it "treats a rule 108(3) decision as if it were simply a new article 53(1) decision (*i.e.*, a decision under rule 105)" rather than recognising that "rule 108(3) is *lex specialis*, and clearly distinct from article 53(1) and rule 105)").
[155] Certification Decision, para. 41 (emphasis added). The Pre-Trial Chamber also re-formulated the proposed issue for appeal to emphasise this same idea: paras. 38-39.

Trial Chamber following the formal notification of the Prosecutor's Final Decision under rule 108(3), and its contours if it exists, which the Prosecution challenges in this appeal.

77. Indeed, by confirming that it "*reject[ed]* the [Prosecution Response (Lack of Jurisdiction)] in so far as it requests the Chamber to dismiss the [Comoros' Second Application] *in limine*" and "*grant[ed]* the [Comoros' Second Application] in so far as it is based on article 53(3)(a) of the Statute",[156] the Majority clearly decided that it has some sort of power after the Prosecutor has formally notified the Pre-Trial Chamber of her decision under rule 108(3), and that this power emanates from article 53(3)(a), irrespective of whether it was triggered in the Comoros' First Application or the Comoros' Second Application. The Majority explained this power simply on the basis that:

> [T]he [Prosecutor's Final Decision] 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 [First Article 53(3)(a) Request]. The Chamber therefore *necessarily* retains jurisdiction until the Prosecutor has complied with the [First Article 53(3)(a) Request].[157]

78. Asserting the 'necessity' of the Pre-Trial Chamber's jurisdiction makes plain the purposive nature of the Majority's reasoning. Its logic is circular, and depends on conducting the very assessment of the content of the Prosecutor's Final Decision for which its jurisdiction is in dispute.[158] While seeming to accept that a determination by the Prosecutor conforming to rule 108(3) would be a "final decision",[159] the Majority conditioned this status on substantive compliance *in its view* with the Pre-Trial Chamber's original request. In this regard, it did not take note simply of the formal notification of the Prosecutor's Final Decision in accordance with rule 108(3), but instead *itself* examined the *content* of the Prosecutor's Final Decision. In particular, it based its assessment of the Prosecutor's Final Decision—and thus, its competence—on its view that "the Prosecutor […] manifestly

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[156] Decision, Disposition.
[157] Decision, para. 114 (emphasis added). *See also* para. 116 ("the Chamber *necessarily* continues to be vested with the power to ensure that the Prosecutor reconsiders [the Prosecutor's Initial Decision] in accordance with the [First Article 53(3)(a) Request]", emphasis added), Disposition.
[158] *See* Decision - Judge Kovács' Opinion, para. 21 (expressly noting that his jurisdictional concerns "stand[] despite the Majority's argument that the [Prosecutor's Final Decision] is not a 'final decision' within the meaning of rule 108(3)").
[159] Notably, however, the Pre-Trial Chamber still refrained from taking a position on what a valid "final decision" would mean in principle for any competence of the Pre-Trial Chamber to conduct a second review under article 53(3)(a) *stricto sensu*: *see above* para. 9 (referring to Certification Decision, para. 35). This was the original basis of the Comoros' application, and the Prosecution's objection: *see above* fn. 154.

disregarded the [First Article 53(3)(a) Request]" and that the Prosecutor's Final Decision was "not the result of a proper exercise of reconsideration".[160]

79. Likewise, in the Certification Decision, the Pre-Trial Chamber observed that "the core part of the Chamber's conclusion on the [Prosecutor's Final Decision] was, *inter alia*, based on the consequences of the Prosecutor's failure to properly reconsider her decision pursuant to article 53(3)(a) of the Statute."[161]

II.B. The plain terms of the Statute and Rules, in their ordinary meaning, do not permit the Pre-Trial Chamber to determine the validity of a "final decision" under rule 108(3)

80. The plain terms of the Statute and Rules, in their ordinary meaning, represent the natural starting point for any systematic interpretation of the Court's powers. This is not only appropriate in light of article 31(1) of the VCLT, but is particularly apt in the circumstances of these proceedings, insofar as they relate both to the permissible scope of judicial review (which is quintessentially a matter of legislative policy)[162] and to the procedures for opening investigations at this Court (a matter known to be of particular sensitivity to the drafters of the Statute).[163] The absence of any provision *expressly* supporting the power claimed by the Majority to review and invalidate a "final decision", once formally notified to the Pre-Trial Chamber, must therefore be a significant obstacle to this conclusion. The Majority's failure to acknowledge this concern, or to address these arguments, likewise undermines its reasoning.

81. While the Decision does not expressly attribute the power exercised by the Majority to any particular provision of the Statute or the Rules, it must be assumed to be derived from article 53(3)(a) or rule 108. Indeed, this is apparently acknowledged in the Disposition of the Decision, which "grant[ed] the [Comoros' Second Application] in so far as it is based on *article 53(3)(a)* of the Statute."[164]

82. The plain terms of these provisions—particularly rule 108(3), but also article 53(3)(a)—simply make no provision at all for the Pre-Trial Chamber's power to determine the validity

[160] Decision, para. 115. *See also* paras. 83-84. The Prosecutor did not "freely admit" that she "disregarded" the First Article 53(3)(a) Request but rather explained why, in the course of carrying out the reconsideration requested by the Pre-Trial Chamber, she respectfully disagreed with certain conclusions of law and fact: *see further above* para. 18 (concerning the content of the Prosecutor's Final Decision). *See also* Decision – Judge Kovács' Opinion, para. 22.
[161] Certification Decision, para. 40.
[162] *See below* paras. 93-95.
[163] *See above* paras. 54-65; *below* para. 101.
[164] Decision, Disposition (emphasis added).

of the decision of the Prosecutor following a request under article 53(3)(a). In this context, what is *not* said is arguably as important as what *is* said. For these reasons alone, adopting its approach in other contexts, the Appeals Chamber should determine that the wording of article 53 and rule 108(3) is explicit and as such the sole guide to the identification of the decisions reviewable under its provisions.[165] It contains no ambiguity as to its meaning, its ambit or range of application and confers exclusively a right to seek review of decisions under rule 105, and not those under rule 108(3).[166]

83. Most saliently, rule 108(3) unequivocally characterises the determination of the Prosecutor, following an article 53(3)(a) request, as a "final decision". This means, as Judge Kovács observed, "that the decision becomes final", in the sense that it is the "'[…] last action that settles the rights of the parties and disposes of all issues in controversy'" and "'precludes any further action', namely a further review or reconsideration".[167]

84. Nor can the use of the term "final" be regarded as "arbitrary"; indeed, it is highly significant.[168] This is further confirmed by the inclusion of similar adjectives in the five other authoritative linguistic versions of the Rules: Arabic ("النهائي"), Chinese ("最终"), French ("*sa décision définitive*"), Russian ("окончательное решение"), and Spanish ("*una decisión definitiva*"). There is no doubt that the drafters intended decisions under rule 108(3) to have a particular 'conclusive' quality—and a quality which, moreover, is not ascribed to decisions by the Prosecutor when taken under rule 105 (and which, indisputably, can be reviewed under article 53(3)(a)). The obvious implication is that, while 'non-final' decisions by the Prosecutor under rule 105 can be reviewed, the Prosecutor's "final" decisions under rule 108(3) cannot.

85. The Appeals Chamber appears to interpret the term "final decision" in the same way. Thus, previously in this situation, it cited rule 108(3) as "provid[ing] that the 'final decision' is for the Prosecutor", and quoted one commentator's observation that "if, after reconsidering the issue, the Prosecutor *still* decides not to investigate or prosecute, that is the end of the

[165] *See* *Lubanga* Appeal Decision (Admissibility), para. 16.
[166] *See* *Lubanga* Appeal Decision (Admissibility), para. 16.
[167] Decision - Judge Kovács' Opinion, para. 19 (citing *Black's Law Dictionary*, p. 847). *See also* Prosecution Response (Lack of Jurisdiction), para. 23 (second bullet, third sub-bullet, citing *Oxford English Dictionary*, "final, *adj.*").
[168] Decision - Judge Kovács' Opinion, para. 19. *See also below* para. 106 (other uses of the word "final").

matter".[169] The *ratio* of its previous decision—concluding that the First Article 53(3)(a) Request was *not* a "ruling" on admissibility for the purpose of article 82(1)(a)[170]—would be entirely defeated if the Prosecutor's decision under rule 108(3) is not final, and the Pre-Trial Chamber could require its reasoning to be accepted after all.[171]

86. The Majority appeared to take none of these considerations into account, except to assert simply that the Prosecutor's Final Decision is not "final" for the purpose of rule 108(3). But, again, it neglected to address the requirements expressly set out in rule 108(3) for a decision to qualify as a "final decision". These requirements are exclusively formal in character, requiring only that the Pre-Trial Chamber and other participants are notified in writing, and that the notification shall contain the Prosecutor's "conclusion" and "reasons". Accordingly, any decision by the Prosecutor meeting these requirements *ipso facto* qualifies as a "final decision". Nothing in rule 108(3) contains any statement to the contrary, implying that the Pre-Trial Chamber plays any role once the Prosecutor has met these requirements, or indeed that the Pre-Trial Chamber plays any role in determining whether these requirements are met. The obligation is upon the Prosecutor alone, acting in good faith.[172] And it is perhaps difficult to argue that the Prosecutor did not act in good faith in the circumstances of this appeal where, having obtained the guidance of the Appeals Chamber, she then set out the conclusion and reasons required by rule 108(3) in some detail.[173]

87. More broadly, when the drafters intended the Prosecutor's determination under article 53 to be subject to judicial review, they plainly said so. Thus, in article 53(3), they set out two forms of judicial review: review of a "decision of the Prosecutor under [article 53] paragraph 1 or 2 not to proceed",[174] and review of "a decision of the Prosecutor not to proceed if it is based solely on [article 53] paragraph 1(c) or 2 (c)".[175] Decisions under article 53(2) are irrelevant to this appeal. Nor does anything in article 53, or in the Statute more widely, state that any decision under article 53(3) may itself be subject to judicial review. Nothing in these provisions is ambiguous, and this should have informed the Majority's reasoning.

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[169] Appeal Admissibility Decision, para. 56 (in fn. 131, quoting Brady, p. 579, emphasis supplied). *See also* Decision - Judge Kovács' Opinion, para. 20. The Majority omitted to refer to this observation: *see* Decision, para. 109. While Ms Brady is currently a member of the Prosecution, this commentary was published in 2001, prior to her employment at the Court and based on her participation in the drafting of the Statute.
[170] *See* Appeal Admissibility Decision, paras. 50-51, 53, 57-60, 64, 66.
[171] *See above* paras. 66-71.
[172] *See also below* paras. 103-105 (concerning a similar duty on the Prosecutor under article 53(4)).
[173] *See above* paras. 4, 18.
[174] Statute, art. 53(3)(a).
[175] Statute, art. 53(3)(b). *See also above* paras. 28-32.

88. The material scope of judicial review thus turns on *which* decisions by the Prosecutor qualify as decisions under article 53(1), and which may consequently be reviewed by the Pre-Trial Chamber under article 53(3)(a). For this reason, before the Pre-Trial Chamber, the Comoros had asserted that the Prosecutor's Final Decision is a decision under article 53(1)[176]—but this is contradicted by the Rules, which are both unambiguous and authoritative, since they also constitute a primary source of law at this Court and were drafted by States.[177] In the specific context of article 53, the drafters were well aware that "the Rules could not contradict the Statute", but also that certain issues arising from article 53 were apparently "not addressed at all in the Statute" or "allowed different interpretations."[178] In this context, the rules which were elaborated to give effect to article 53 consciously aimed at clarification of the statutory framework, within its proper limits, and were informed not only by considerations of the "issues that the Statute indicates as a subject matter for the Rules" (the Australian proposal) but also by an "all-encompassing" assessment of the necessary regulation of pre-trial proceedings (the French proposal).[179] It follows from this that the Rules should be regarded as an exhaustive indication of the contours of judicial review permitted within the framework of article 53 of the Statute.

89. The Rules are clear that decisions under article 53(1)—and, thus, decisions which are materially subject to judicial review under article 53(3)(a)—are exclusively decisions made under rule 105.[180] This is supported by the plain terms of rule 107.[181]

90. Rule 108, by contrast, is expressly described as relating to the consequences of a "Decision of the Pre-Trial Chamber under article 53, paragraph 3 (a)". In particular, rule 108(3) provides the procedural framework for the Prosecutor's subsequent determination. If a rule 108(3) decision was simply intended to be a new rule 105 decision, *arguendo*, then the conditions imposed in rule 108(3) would be unnecessary. Consequently, the very existence of rule 108(3) suggests that the drafters recognised a material distinction between these two procedural stages. Likewise, if the drafters had intended the Pre-Trial Chamber to have some

[176] *See e.g.* Comoros' Second Application, para. 28 ("Article 53(1) is the only provision the Prosecutor could base her [Prosecutor's Final Decision] on as it sets out the specific requirements to open an investigation"). *But see* Prosecution Response (Lack of Jurisdiction), paras. 19-20.
[177] Statute, arts. 21(1)(a), 51(1), 52(1). *See also* Fernández, p. 239.
[178] Friman, pp. 493-494.
[179] Friman, pp. 493-494. *See also* Fernández, p. 235.
[180] *See e.g.* rule 105(1) (beginning: "When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall…").
[181] Rule 107(1) (providing that requests under article 53(3)(a) must be made "within 90 days following the notification *given under rule 105 or rule 106*", emphasis added).

kind of function in examining the validity of final decisions by the Prosecutor under rule 108(3), they would have made express provision for such a procedure, as they did in rule 107. They did not. For these reasons, rule 108(3) decisions cannot be considered to be decisions under article 53(1), and therefore do not fall within the judicial review provided for in article 53(3)(a). Nor is their finality conditional upon any further intervention by the Pre-Trial Chamber, including any form of substantive review or confirmation.

II.C. The context of the Statute and Rules confirms that the Pre-Trial Chamber has no power to determine the validity of a "final decision" under rule 108(3)

91. Ample support for the absence of any power by the Pre-Trial Chamber to determine the validity of "final decisions" under rule 108(3) can be drawn from the broader context of the Statute and the Rules. In particular, the Majority's approach: overlooks that judicial review, where applicable, is granted expressly in the Statute, and that article 53(3) is *lex specialis* for all judicial review of decisions on whether to investigate; eliminates the distinction between article 53(3)(a) and 53(3)(b); fails to acknowledge the apparent inconsistency with its own approach to article 53(4); and fails to consider the general practice of the Statute and the Rules in using the term "final" to signify the restriction of further procedural remedies.

92. This same context also reveals that other arguments claimed to support any power of judicial review over the Prosecutor's "final decision" under rule 108(3) are unconvincing, and cannot assist in the proper interpretation of rule 108(3) and article 53 more broadly. In particular, the requirement in rule 108(3) for the Prosecutor to give "reasons" does not imply any power by the Pre-Trial Chamber to determine the 'adequacy' of those reasons as a condition of the decision's validity. Nor does the Statute grant the Pre-Trial Chamber the general power of "oversight" upon which the Majority otherwise seemed to rely to support its analysis.

II.C.1. Jurisdiction for judicial review is only granted expressly in the Statute, and article 53(3) is lex specialis

93. While the vast majority of procedural remedies at this Court are granted expressly,[182] this is particularly and exclusively so for judicial review of prosecutorial powers, both

[182] *See e.g.* Statute, arts. 18(3) (Prosecution deferral to State investigations); 18(4), 19(1), 19(2), 19(3), 19(4), 82(1)(a), 90(3) (rulings on jurisdiction or admissibility); 54, 57 (investigative measures); 56, 82(1)(c) (unique investigative opportunities); 58, 60(2), 60(3), 60(4), 82(1)(b), 91(4) (arrest and remand in custody); 72(4) (protection of national security information); 81 (appeal against conviction or sentence); 82(1)(d) (interlocutory appeals with leave); 84 (revision); 87(7) (non-cooperation by States Parties); 96(3), 97 (requests for assistance); 104, 105(2), 106(1), 108(2) (sentence enforcement); 110(2) (sentence reduction).

because of the great importance and sensitivity of this concept, and in light of the Prosecutor's obligation of independence.[183] The absence of an express grant of power cannot lightly be dismissed as a drafting oversight, much less a gap which must be filled.[184] To the contrary, without the clearest countervailing evidence, the absence of an express grant reflects the drafters' intention to establish the finality of a particular legal process, and hence to *exclude* the possibility of judicial review. This is especially so where it is apparent that the drafters have already established a *lex specialis*, as they did with article 53(3). This context supports the ordinary meaning of the term "final" in rule 108(3), and the absence of any further power for the Pre-Trial Chamber to determine the validity of a "final decision" once it has been formally notified.

94. The general interest in the express regulation of judicial review stems from the very nature of judicial proceedings. All justice systems are obliged to balance competing interests in the legal procedures that they ordain. On the one hand, the party affected by a decision has an interest in challenging decisions that they consider to be unfavourable or incorrect. But, on the other hand, not only do *all* parties to that legal process have an interest in the reasonable finality of decision-making (so as to avoid paralysis in the conduct of their affairs),[185] but so too does society at large—if cases are not declared to be settled at a certain (and predictable) point, the justice system as a whole will become incapable of functioning.[186]

95. Accordingly, the decision as to precisely where to establish a point of reasonable finality is ultimately a matter of public policy.[187] While the initial evolution of such principles may have differed in different jurisdictions, it is now generally recognised that the final

[183] Statute, art. 42(1) ("The Office of the Prosecutor shall act independently as a separate organ of the Court").
[184] *See also below* paras. 121-122 (concerning implied or inherent powers).
[185] *See e.g.* UK, *The Ampthill Peerage*, *per* Lord Simon of Glaisdale, at p. 575 ("The picture drawn by Charles Dickens in *Bleak House* of the long-drawn-out and ruinous lawsuit, *Jarndyce v. Jarndyce*, […] was based on fact. The law itself is fully conscious of the evil of protracted litigation. […] [T]he law recognises that the process cannot go on indefinitely. There is a fundamental principle […] which can be translated: 'It is in the interest of society that there should be some end to litigation.'").
[186] Gleeson, p. 41 (referring to "the public interest in a manageable system by which disputes, once raised, may be put to rest" and observing that this "reasonable finality" is "closely related to accessibility. Without it, the system would collapse under its own weight"). *See also* p. 36; *Katanga* Reparations Decision, para. 32; Certification Decision, para. 41.
[187] *See e.g.* UK, *Ex Parte TSW Broadcasting*, *per* Lord Templeman, at p. 424 (reported on p. 191 of linked case report: "Parliament may by statute confer powers and discretions and impose duties on a decision maker […] Where Parliament has not provided for an appeal from a decision maker *the courts must not invent an appeal machinery* […] The courts have invented the remedies of judicial review not to provide an appeal machinery but to ensure that the decision maker does not exceed or abuse his powers", emphasis added).

determination is best made by society's representatives, through legislation.[188] International law, in the form of international human rights law, tacitly recognises a similar balance. While guaranteeing review by a higher tribunal for anyone convicted of a crime,[189] and judicial review of certain other discrete matters such as detention,[190] the extent to which other kinds of administrative or judicial decision-making may be subject to challenge is largely left to national policy.[191] Furthermore, the principle of legal certainty (*res judicata*) has also been recognised as an aspect of the right to a fair hearing.[192]

96. The strict approach to the scope of appellate review is a good example of the application of these principles at this Court, especially since the review of decisions directly affecting core rights of specific individuals (such as personal liberty) is where the law may be "*least* ready to treat the book as permanently closed".[193] Based on careful interpretation of the Court's legal texts,[194] the Appeals Chamber has consistently affirmed that "the Statute defines exhaustively the right to appeal", and rejected arguments that any lacuna exists.[195] It has therefore consistently rejected invitations to venture beyond what the Statute "explicit[ly]" provides,[196] and instead endorsed the view that, had the drafters "intended to make [particular] decisions […] the subject of a distinct right of appeal, […] they would have done so expressly, as they did with other decisions".[197] It has been willing to declare *ultra vires* efforts by other chambers of the Court to establish new opportunities for appellate review, even if they may be seen as "desirable or even necessary".[198]

97. In the same way that article 82 is *lex specialis* for the right of appeal, article 53(3) is *lex specialis* for the review of the Prosecutor's decisions concerning the initiation of

[188] *See e.g.* Gleeson, p. 35. While common law judges have also evolved doctrines such as *res judicata*, issue estoppel, and abuse of process to reflect a similar balance between the public and private interests involved in these matters, they have generally preferred to avoid "too dogmatic an approach": *see e.g.* UK, *Johnson v. Gore Wood*, *per* Lord Bingham of Cornhill, at p. 31. Furthermore, it is uncontested that common law principles apply only in the absence of a statutory prescription: *see e.g.* Bingham, p. 167.
[189] *See e.g.* ICCPR, art. 14(5).
[190] *See e.g.* ICCPR, art. 9(4); *Lubanga* Appeal Decision (Admissibility), para. 13.
[191] *See e.g.* UN Human Rights Committee, General Comment 35, para. 48; General Comment 32, paras. 12, 45-46. *See also CAR Article 70* Assets Appeal Decision, para. 15.
[192] *See e.g.* ECtHR, *Brumarescu*, para. 61; *Driza*, paras. 63-64. *See also Katanga* Reparations Decision, para. 32 (fn. 44: citing *Brumarescu*).
[193] Gleeson, p. 37 (emphasis added).
[194] *See e.g. DRC* Appeal Decision, paras. 35, 40-41.
[195] *DRC* Appeal Decision, para. 39. On lacunae, *see also below* para. 121.
[196] *Lubanga* Appeal Decision (Admissibility), paras. 15-16. *See further e.g. Lubanga* Legal Assistance Appeal Decision, para. 14; *Gaddafi* Appeal Decision (Admissibility), para. 10; *Kenya* Appeal Decision (Admissibility), paras. 15-16; *Katanga* Appeal Decision (Admissibility), paras. 34, 37-39.
[197] *Lubanga* Appeal Decision (Admissibility), para. 11.
[198] *Lubanga* Directions Appeal Decision, para. 8. *But see also CAR Article 70* Assets Appeal Decision, paras. 16-17; *CAR Article 70* Compensation Appeal Decision, paras. 15-17.

investigations. This is appropriate not only as a general matter of statutory interpretation, but also to reflect that the public policy interests at stake are especially acute. Common understanding of the point of 'reasonable finality' not only affects the immediate interests of those concerned in this situation, but affects the broader question—fundamental to this Court's mandate—of when situations may become subject to criminal investigation, and the basis upon which this is decided.[199] Introducing novel forms of judicial review, which were not contemplated (or were even rejected) by the drafters, changes the balance of interests controlling the opening of investigations—an approach which runs counter to the drafters' clear intent in regulating this crucial question expressly, on the basis of the "different compromises obtained throughout the Preparatory Committee stage and at the Rome Conference".[200]

98. With the exception of the Majority's reasoning in the Decision, this Court has consistently recognised that article 53 is *lex specialis*, and therefore declined to depart either from its express provisions or to allow those provisions (and their natural limitations) to be circumvented by recourse to legal provisions intended to regulate other matters.

99. For example, while Pre-Trial Chamber II did observe in its *'Morsi'* ruling that "the power of the Prosecutor to initiate investigations […] and the potential review of her decisions are *mainly* governed by the Statute and the Rules",[201] it subsequently emphasised that requests for review *must* "accord[] to certain conditions referred to in article 53(3) of the Statute" by holding that it "cannot but dismiss *in limine*" requests failing these conditions.[202] Subsequently, the same Pre-Trial Chamber also effectively rejected the argument that it could resort to "'inherent' and 'implied' powers […] to review [the Prosecutor's] decision."[203] While it ultimately did not "find it necessary to entertain" this assertion expressly,[204] its rationale for denying the relief sought (reconsideration) was based on the similar underlying premise that "the Court's statutory documents make clear that review of the Court's decisions are permitted *only in limited circumstances specified in the Statute and the Rules*."[205]

[199] *See* Decision – Judge Kovács' Opinion, para. 10.
[200] Guariglia, p. 229. *See also* pp. 230-231. *See further above* paras. 54-65; *below* fn. 239.
[201] *Egypt* Decision, para. 6 (emphasis added).
[202] *Egypt* Decision, paras. 7, 9. *See also* para. 11 (rejecting the possibility of any other basis for review).
[203] *Egypt* Reconsideration Decision, para. 4.
[204] *Egypt* Reconsideration Decision, para. 6.
[205] *Egypt* Reconsideration Decision, para. 5 (emphasis added).

100. In a different composition, in the *Kenya* situation, Pre-Trial Chamber II likewise stated that "judicial review of the Prosecutor's decisions not to investigate […] is governed by article 53(3) of the Statute", and recognised that it was necessary therefore to "examine whether a review *under article 53(3) of the Statute* is possible" in order to rule on a request with regard to the subject matter of article 53.[206]

101. Finally, in this very situation, the Appeals Chamber has already noted that "the Pre-Trial Chamber's review of the Prosecutor's decision [under article 53(1)] *must* be triggered by a request", as required by article 53(3)(a).[207] "In the absence of such a request," it noted, "the Pre-Trial Chamber *has no power to enter into a review of the Prosecutor's decision* not to proceed with an investigation on its own motion".[208] Manifestly, the Appeals Chamber did not previously contemplate the possibility of judicial review in the context of article 53, except as provided for in the Statute and the Rules.

II.C.2. The Majority's approach eliminates the distinction between article 53(3)(a) and 53(3)(b)

102. The express distinction in the Statute between the procedures in article 53(3)(a) and article 53(3)(b) has already been described.[209] This context likewise supports the ordinary meaning of the term "final decision" in rule 108(3). In contrast to article 53(3)(b), where the 'last word' on matters concerning article 53(1)(c) is given to the Pre-Trial Chamber, the 'last word' on matters concerning article 53(1)(a) and (b) is given to the Prosecutor. In the same way that this distinction would collapse if the Prosecutor was required simply to adopt the Pre-Trial Chamber's reasoning in an article 53(3)(a) "request", so too would it collapse if the Pre-Trial Chamber were empowered to determine the validity of the Prosecutor's "final decision" under rule 108(3). Indeed, to say that the Pre-Trial Chamber has the power to determine the validity of the Prosecutor's final decision under rule 108(3) is equivalent to saying—in the language of article 53(3)(b) and rule 110—that the Pre-Trial Chamber has the power to "confirm" that decision. If the drafters had intended the article 53(3)(b) procedure subsequently to apply once an article 53(3)(a) "request" has been issued, and a final decision by the Prosecutor had been made, they would have said so. Manifestly, they did not.

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[206] *Kenya* Investigation Decision, para. 19 (emphasis added).
[207] Appeal Admissibility Decision, para. 56 (emphasis added).
[208] Appeal Admissibility Decision, para. 56 (emphasis added).
[209] *See above* paras. 28-32.

II.C.3. Prosecutorial decisions under article 53(4) are not subject to judicial review

103. Prosecutorial decisions under article 53(4) of the Statute—specifically, by which the Prosecutor "may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information"—are not subject to judicial review.[210] This was affirmed unanimously in the Decision,[211] and is useful context in interpreting rule 108(3) since it recognises other relevant circumstances in which the drafters vested the Prosecutor with the 'last word'. The Majority's recognition of this limit—at least at the instance of a referring entity[212]—also highlights the flaws in its analysis of rule 108(3). In particular, the Majority noted that:

> Article 53(3)(a) of the Statute explicitly specifies that the right of the referring entity to challenge the Prosecutor's decision […] is limited to 'a decision of the Prosecutor under paragraph 1 or 2 […]'." Article 53(4) of the Statute does not contain an analogous clause. Moreover, while the procedure under article 53(3) of the Statute is regulated in rules 107 to 110 of the Rules, the Rules do not provide for such a procedure in relation to reconsideration pursuant to article 53(4) […].[213]

104. The Majority failed to explain the inconsistency between this reasoning—which (rightly) treated the drafter's failure to provide expressly for a mechanism of review as significant—with its approach to rule 108(3), where it failed to address the absence of any express authorising provision.[214] Indeed, this objection should have applied *a fortiori* in the context of rule 108(3), where the drafters expressly characterised the decision as being "final".

105. Furthermore, both the Majority and Judge Kovács stressed (rightly) that the Prosecutor's decision under article 53(4) must be taken in good faith.[215] The Prosecution

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[210] *See also* Prosecution Response (Lack of Jurisdiction), paras. 35-41.
[211] Decision, para. 55 (dismissing the Comoros' request to review the article 53(4) component of the Prosecutor's Final Decision *in limine*); Decision - Judge Kovács' Opinion, paras. 27-30. *But see below* fn. 212.
[212] Decision, para. 54. The Majority appeared to leave open the possibility that the Prosecutor's decision under article 53(4) might be reviewable *proprio motu* by the Pre-Trial Chamber: para. 53; Decision - Judge Kovács' Opinion, paras. 29-30 (concluding that article 53(4) decisions are not subject to judicial review, while noting that his "opinion is not identical to that of the Majority"). While the Prosecution does not agree with the Majority's possible implication concerning *proprio motu* review of article 53(4) decisions, which would be *ultra vires*, it did not seek certification of this issue for appeal because the Majority nonetheless granted the correct remedy—dismissing the Comoros' Second Application *in limine* insofar as it related to the Prosecutor's article 53(4) decision—and hence the error in its reasoning would not materially affect the Decision.
[213] Decision, para. 54.
[214] *See above* paras. 80-90.
[215] *See* Decision, para. 53; Decision - Judge Kovács' Opinion, para. 31.

agrees, having previously noted that the Prosecutor and her Deputy are mindful of the high moral character required of their offices, similar to the Judges of this Court, which they in turn demand of the staff members of the Office of the Prosecutor.[216] The fact that the drafters of the Statute were content to allow article 53(4) decisions by the Prosecutor—which may likewise concern the opening (or not) of investigations—to rest upon her own discretion, taken in good faith, underlines that they did not consider all such decisions to require judicial review, much less confirmation. This supports the implication of the plain terms of rule 108(3).

II.C.4. The term "final" in the Statute and the Rules is used to restrict further procedural remedies

106. Further confirming its ordinary meaning in rule 108(3), the Statute and the Rules reflect that the term "final" is used only rarely, where the proceedings at issue are deemed in one way or another to be complete, without further ordinary recourse by the Parties.[217] Thus, but for reference to the "Final Act" of the States creating the Court[218] and Part 13 ("Final Clauses"), the Statute only uses the term "final" to describe the "final judgment",[219] "the final decision [of conviction]",[220] and the "final decision of acquittal".[221] The Rules reflect a similar approach, relating to a somewhat wider range of proceedings.[222]

II.C.5. The duty to give reasons in rule 108(3) is immaterial

107. Similar to its analysis in interpreting article 53(3)(a), so as to require the Prosecutor to accept the reasons contained in the Pre-Trial Chamber's article 53(3)(a) "request",[223] the Majority again referred to the Prosecutor's duty to give reasons as supporting the power of

[216] *See* Statute, art. 42(3); Prosecution Response (Lack of Jurisdiction), para. 25.
[217] With regard to convicted persons, this does remain subject to the exceptional possibility of revision: *see* Statute, art. 84. However, given its nature as "an extraordinary remedy that is seldom successfully invoked", and as an acknowledged exception to the principle of *res judicata* in light of the fundamental interests of justice (an innocent person should not be punished), the theoretical possibility of revision does not preclude the sense in which the decision is "final" for the habitual purposes of the Court. *See* Staker and Nerlich, pp. 1987-1988 (mn. 4). The concept of revision cannot be analogised to any concept of judicial review, nor are the two concepts animated by similar interests, and hence the degree to which revision may qualify the concept of "finality" is not relevant for the purpose of these proceedings.
[218] Statute, art. 112(1).
[219] Statute, arts. 24(2), 84(1)
[220] Statute, art. 85(2).
[221] Statute, art. 85(3).
[222] *See* rule 21(3) (a "final" decision of the Presidency concerning assignment of counsel); rule 28 (a "final decision" concerning misconduct); rule 122(8) ("final observations" of the Prosecutor and the suspect at the confirmation hearing); rule 150(4) (the "final" decision, sentence, or reparation order issued by the Trial Chamber if an appeal is not filed); rule 164(3) (the date on which a sanction for an article 70 offence becomes "final" for the purpose of the period of limitation); rules 202, 204(b), 207(2) (referring to the "final" decision on conviction and sentence leading to the transfer of a sentenced person to the State of enforcement).
[223] *See above* paras. 36-39.

the Pre-Trial Chamber to determine the validity of the Prosecutor's "final decision" under rule 108(3).[224] Yet this is equally inapposite. The requirement for a decision-maker to give reasons does not necessarily imply a further procedural right for the decision in question to be reviewed. Reasoned opinions serve legitimate public interests beyond what might be termed the "review rationale" to include also, for example, the "accuracy rationale" (helping decision-makers to make better decisions by requiring them to set out their analysis in a systematic manner) and the "respect rationale" (treating the subjects of decision-making with appropriate respect by explaining why decisions about them have been made).[225] That these broader interests apply to this Court is immediately apparent—a judgment of the Appeals Chamber must be reasoned,[226] for example, but there is no suggestion that it may necessarily be challenged further before the Court, or that its reasons are somehow meaningless as a result of this limitation.

II.C.6. The Statute does not grant the Pre-Trial Chamber any general power of "oversight"

108. Finally, the general power of "oversight"[227] claimed by the Majority in support of its analysis is contrary to the scheme of the Statute, and appears to confuse the general motivation ascribed by some to the drafters in creating the Pre-Trial Chamber for the concrete functions that the drafters instituted for the Pre-Trial Chamber to undertake.[228] In striking contrast, previous Pre-Trial Chambers have "recall[ed] that the Statute clearly delimits the roles and the functions of the different organs of the Court"[229] and stressed that they are "*not* competent" to act beyond those express provisions, for example by "interven[ing] in the Prosecutor's activities carried out within the ambit of article 54(1) of the Statute."[230] Accordingly, recourse to a vague concept of "oversight" cannot justify the Majority's interpretation of article 53 and rule 108(3).

109. Precisely contrary to the Majority's view that "article 53(3)(a) of the Statute concerns a specific aspect of this judicial oversight role",[231] article 57(1) establishes the opposite approach by specifically limiting the powers of the Pre-Trial Chamber to those contained in

[224] Decision, para. 116.
[225] *See* Hepburn, p. 644. *See also* pp. 661-663.
[226] *See* Statute, art. 83(4).
[227] Decision, paras. 93, 98-99, 112, 116.
[228] *See* Decision, para. 93 (referring in fn. 128 to the opinion of one commentator, and excerpts from statements by representatives for Norway, the Philippines, and Brunei Darussalam).
[229] *Kenyatta* Confirmation Decision, para. 63.
[230] *Kenya* Investigation Decision, para. 13 (emphasis added).
[231] Decision, paras. 93, 98.

article 57 "[u]nless otherwise provided in this Statute".[232] Article 57(3) does not provide for any general oversight mechanism, but instead only for the Pre-Trial Chamber to address *specific* matters when seised in *specific* circumstances.[233] Nor does any other relevant statutory provision establish any general power.[234] Indeed, the Pre-Trial Chamber has very few *proprio motu* or *sua sponte* powers, and those which exist are expressly set out and defined.[235]

110. In particular, there is no analogue for the Pre-Trial Chamber to the general authority granted to the Trial Chamber and the Appeals Chamber with regard to the cases of which they may be seised.[236] Hence the Majority's apparent understanding that it may enjoy broader powers later in the proceedings is again unfounded.[237] While regulation 46(2) states that "[t]he Pre-Trial Chamber shall be responsible for any matter, request, or information arising out of the situation assigned to it", this cannot confer *additional* powers on the Pre-Trial Chamber beyond those contained in the Statute and the Rules.[238] This would contradict article 57(1). It would also overlook the function of regulation 46 in allocating the competence of particular Pre-Trial Chambers between given "situations", and matters not falling within any given "situation", rather than the scope of the Pre-Trial Chamber's powers over those matters of which they are seised. Indeed, the Regulations cannot confer upon the Pre-Trial Chamber powers which are inconsistent with the scheme of the Statute. For example, regulation 48(1) supports this principle in referring to specific functions of the Pre-Trial Chamber established under the Statute.

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[232] Statute, art. 57(1) (reading in full: "Unless otherwise provided for in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.").
[233] Statute, art. 57(3)(a)-(e).
[234] Again, the Pre-Trial Chamber is consistently granted specific enumerated powers: *see e.g.* Statute, arts. 15(4), 18(2), 18(6), 19 (*see especially* art. 19(6)), 53(3), 56, 57(3), 58, 59(5), 59(6), 60, 61, 64(4) (if issues are referred by a Trial Chamber), 70, 71, 72(5), 72(7), 82(1)(d), 87, 89, 90(2)(b), 90(8), 91(1), 91(4), 92, 93, 95, 96(3), 96(4), 97, 98, 99(2), 101(2)). *See also e.g.* rules 47(2), 50, 55(1), 56(1), 57, 99(1), 107(2), 107(3), 107(4), 109(1), 112(5), 113-119, 121-127, 128(2), 165(2), 165(3); Regulations of the Court, regs. 46(2), 48(1), 51, 53, 66*bis*(1). Concerning the Pre-Trial Division *en banc*, *see also* Statute, art. 15*bis*(8).
[235] *See e.g.* Statute, art. 53(3)(b), 56(3)(a), 57(3)(c), 57(3)(e), 59(5)-(6), 60(1), 60(4), 61.
[236] *See e.g.* Statute, art. 64(6)(f) ("In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: […] Rule on any other relevant matters"). The Appeals Chamber is likewise granted a similar plenary power: Statute, art. 83(1). *See also* *Kenyatta* Counsel Appeal Decision, para. 46 (noting that "article 64 […] does not expressly apply to the Pre-Trial Chamber").
[237] *See* Decision, para. 99 ("The Chamber further considers that the phase of the proceedings does not affect the distribution of authority under the Statute. There is no indication in the Statute that the oversight role of the Pre-Trial Chamber over the parties to the proceedings, including the Prosecutor, is in any way reduced at the early stages of the proceedings"). *See also* para. 103 (referring to the "broad discretionary power" under article 64 of the Statute, which belongs to the Trial Chamber).
[238] *See e.g.* Statute, art. 52(1).

111. It is no accident that the powers of the Pre-Trial Chamber are so carefully defined, and expressly set out. As one commentator has recalled:

> The negotiations and discussions relating to Part 5 of the Rome Statute were extremely complex and exhausting as a result of the different political positions concerning the Court and the differing legal traditions represented in the negotiation process. At the same time, the process was a fascinating and stimulating exercise in combining various legal systems and ultimately, in creating a *new set of legal rules and principles for a new institution*. The articles of the Statute dealing with investigation and prosecution are *not only a constructive merger of distinct legal traditions, they are also a surprisingly clear and straightforward set of rules* […].[239]

112. In developing a genuinely international criminal procedural law for this Court, which does not simply represent any one national tradition, it stands to reason that the rules to be applied were expressly and comprehensively set out. To re-write those specific rules to create an open-ended and vague general rule would be to defeat the scrupulous intentions of the drafters, as well as to introduce uncertainty into an area which is presently clear. For the same reason, vague resort to a general inherent power would also be inappropriate in this particular context.[240]

113. The Majority's reference to the "distribution" or "division of authority" at the Court is also immaterial to these proceedings.[241] There can be no doubt as to the judicial authority of the Pre-Trial Chamber, nor has the Prosecution ever sought to call this into question. But it is neither disrespectful nor inappropriate for the Prosecution, or any Party to these proceedings, to express its understanding of the applicable law, including as it relates to the competences of the Court and its constituent bodies. Acknowledging and respecting the judicial authority of the Pre-Trial Chamber does not—and cannot—answer the question whether the drafters of

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[239] Guariglia, p. 238 (emphasis added). While Mr Guariglia is currently a member of the Prosecution, this commentary was published in 1999, prior to his employment at the Court and based on his participation in the drafting of the Statute.

[240] *Contra* Decision, para. 103 (citing *Kenyatta* Ethics Decision, para. 15). *See further below* paras. 121-122 (concerning inherent powers). While the Appeals Chamber may have recognised that a Pre-Trial Chamber in one case was competent to issue a decision concerning the appointment of counsel, in order to protect the integrity of the Court's proceedings, this power can still be given a sound footing in the Court's legal texts, including rule 121 (governing pre-confirmation proceedings) read with regulation 76 (Chamber's power to appoint counsel, including "where the interests of justice so require"), and articles 60-61 and 67(1)(e) of the Statute. This is not inconsistent with the Appeals Chamber's reasoning. *See* *Kenyatta* Counsel Appeal Decision, para. 46.

[241] *See* Decision, paras. 86, 98-99, 112

the Statute *intended* to confer upon the Pre-Trial Chamber a power to determine the 'finality' of the Prosecutor's decision under rule 108(3), and indeed did so.

II.D. The object and purpose of the Statute confirms that the Pre-Trial Chamber has no power to determine the validity of a "final decision" under rule 108(3)

114. For all the reasons previously discussed, the Majority's over-emphasis on (its view of) the object and purpose of article 53(3)(a), without proper consideration of the object and purpose of the Statute as a whole, contributed to its erroneous interpretation not only of article 53(3)(a) but also rule 108(3).[242] The Majority's view that the Pre-Trial Chamber must necessarily have a power to determine the validity of a "final decision" under rule 108(3) appears to have been motivated principally by its erroneous view that the reasoning in an article 53(3)(a) must bind the Prosecutor.[243] Viewed properly, the object and purpose of the Statute, like the broader context, can only be said to support the ordinary meaning of the term "final decision" in rule 108(3).

II.E. The drafting history of the Statute confirms that the Pre-Trial Chamber has no power to determine the validity of a "final decision" under rule 108(3)

115. Likewise, the drafting history of the Statute also contradicts any view that the Pre-Trial Chamber is empowered to determine the validity of the Prosecutor's final decision under rule 108(3), once it has been formally notified.[244] In particular, the drafters' advertent choice to place the "ultimate decision" in the hands of the Prosecutor would be entirely defeated if the Pre-Trial Chamber could simply set that final decision aside when it chose to do so. In drawing the line where they did, the drafters cannot have failed to be aware that the Prosecutor's "final decision" might at times incur the disapproval of the Pre-Trial Chamber, since the Pre-Trial Chamber found reason to make the article 53(3)(a) "request" in the first place. The balance of power in such circumstances was thus precisely what the drafters chose to legislate. It is not the purpose of treaty interpretation, according to the VCLT, to amend such plain choices.

II.F. The Pre-Trial Chamber's error materially affects the Decision

116. The Decision is materially affected by the Pre-Trial Chamber's erroneous conclusion that it has the power to determine the validity of a "final decision" by the Prosecutor, which

[242] *See above* paras. 54-60.
[243] *See above* paras. 15-72 (First Ground of Appeal).
[244] *See above* paras. 61-65.

has been formally notified under rule 108(3). By so doing, and purporting to set aside the Prosecutor's Final Decision, the Pre-Trial Chamber acted *ultra vires*. Consequently, but for the Majority's error, the Pre-Trial Chamber would have dismissed the Comoros' Second Application *in limine*, and the Prosecutor's Final Decision would be effective in terminating the preliminary examination of this situation, absent any future determination by the Prosecutor in her discretion under article 53(4).

III. THIS APPEAL IS PROPERLY RESOLVED ON THE BASIS OF ARTICLE 21(1)(A) ALONE (FIRST AND SECOND GROUNDS OF APPEAL)

117. Finally, relevant to both the First and Second Grounds of Appeal, it is submitted that this appeal can and must be resolved on the basis of the correct interpretation of the Statute and the Rules alone, in accordance with article 21(1)(a). This is unsurprising, given the degree to which the drafters were conscious of the issues arising in this appeal, and the express regulation which they established as a consequence.[245] Neither the nature of the Pre-Trial Chamber's "request" under article 53(3)(a), nor the meaning of a "final decision" under rule 108(3), as previously interpreted in this brief, is inconsistent with internationally recognised human rights. Nor is there any lacuna in the statutory regime, warranting recourse to implied or inherent powers.

III.A. The nature of the Pre-Trial Chamber's "request" under article 53(3)(a), and the "finality" of the Prosecutor's decision under rule 108(3), is not inconsistent with internationally recognised human rights

118. Nothing in article 21(3), requiring the Statute to be interpreted "consistent with internationally recognized human rights", compels any different interpretation of article 53(3)(a) or rule 108(3).[246]

119. While individuals must have accessible and effective remedies to vindicate their rights, these remedies are primarily situated in *national* laws.[247] Accordingly, while this Court may

[245] *See above* paras. 54-65.
[246] *See also* *Lubanga* Jurisdiction Appeal Decision, para. 37; *Bangladesh* Decision, para. 87.
[247] *See e.g.* ICCPR, art. 2(3); UN Human Rights Committee, General Comment 31, para. 15. *See also* ACHR, art. 25 (guaranteeing "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection" against violations of fundamental rights, but further specifying that States shall undertake this guarantee by means of "the competent authority provided for by the legal system *of the state*", emphasis added); ACHPR, art. 7(1) (guaranteeing "the right to an appeal to competent *national organs*" against violations of fundamental rights, emphasis added); ECHR, art. 13 (guaranteeing "an effective remedy before a *national authority*", emphasis added). *See also* Harris et al, pp. 765 (citing *Kudla*, para. 152), 782; Burgorgue-Larsen and Ubeda de Torres, pp. 681-683 (mns. 26.12-26.14: referring to the "enormous variety of *national* situations", emphasis added, relevant to article 25 of the ACHR), 700 (mn. 27.05: describing how the Inter-

in suitable cases provide substantive remedies for victims—and, indeed, exists precisely in order to do so[248]—it is nonetheless not directly amenable to the *procedural* aspect of the right to an effective remedy for citizens of all States Parties.[249] This is expressly excluded by the Court's selective mandate under articles 13-15, 17, and 53 of the Statute, notwithstanding that any individual may submit a communication to the Court under article 15. Nor, regrettably, could the Court on anything like its current scale realistically be considered a means to discharge the procedural aspect of the right to an effective remedy for all of the more than 2 billion citizens of ICC States Parties.[250]

120. Consistent with these observations, there is no tension with internationally recognised human rights either in recognising: that the Pre-Trial Chamber's reasoning in its decision requesting the Prosecutor to reconsider under article 53(3)(a) does not bind the Prosecutor in her "final decision" under rule 108(3); or, that the Prosecutor's decision is indeed "final" once formally notified and not subject to the Pre-Trial Chamber's further validation. No right under international human rights law precludes such procedures, which are necessary to the continued function and accessibility of the Court as a whole. Nor in any event does a negative "final decision" under rule 108(3) extinguish all possibility of redress—victims maintain their right to seek redress under national laws, and the Prosecutor in any event continues to possess the power under article 53(4), in her discretion, to reopen the preliminary examination "based on new facts or information." She has previously demonstrated that she is willing to do so in appropriate circumstances.

American Court has conceptualised a 'right to the truth' within the context of articles 8 and 25 of the ACHR); Roht-Arriaza, pp. 48-50 (discussing the general obligations of States to take effective action to combat impunity); Schabas (2018), p. 219 (observing that "[i]t remains the rule that States have primary responsibility to exercise jurisdiction over serious crimes under international law" and that international tribunals may exercise "concurrent jurisdiction" with States "[i]n accordance with the terms of their statutes"). *See further* Statute, Preamble ("[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[e]mphasizing that the International Criminal Court […] shall be complementary to national criminal jurisdictions").

[248] *See* Statute, arts. 68, 75. *See also* Shelton, p. 432 (describing this Court as "an *additional* forum for sanctioning the most egregious breaches of human rights law" but observing that "it does not eliminate the need for civil remedies to redress the harm caused to the victims", emphasis added).

[249] *See* Shelton, pp. 16-18, 58.

[250] *See also* Decision, para. 120 (acknowledging that it is not a given "whether or not [victims] will be in a position to exercise their rights before *this* Court", emphasis added).

III.B. There is no lacuna in the statutory regime, and therefore no basis for resort to implied or inherent powers

121. Given the nature of the Statute as a multilateral treaty, and its object and purpose, resort to implied or inherent powers[251] must be strictly limited to those circumstances where it is truly appropriate.[252] In its previous decisions, the Appeals Chamber has consistently and authoritatively defined those circumstances. Resort to implied or inherent powers must be undertaken "in a very restrictive manner",[253] based on identifying a "lacuna in the primary sources of law" *after* they have been interpreted "in accordance with the applicable canon of interpretation" [254]—the VCLT—and mindful that "not every 'silence' in the legal framework of the Court constitutes a lacuna". In other words, resort to such powers can only be justified when "[a] gap is noticeable [in the primary sources of law] with regard to the power claimed *in the sense of an objective not being given effect to by [their] provisions*", and having regard to "[t]he nature and type of the concerned power, as well as of the matter to which it relates".[255] Put another way, those who would seek to wield an implied power "must remain conscious that it involves a dance in borrowed robes: one may not dance with vigour."[256]

122. As at least one Pre-Trial Chamber has already ruled, "the Statute, in article 53, regulates in detail the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution, *as well as the boundaries of the exercise of any such competence*" and consequently there exists no "lacuna in this respect which would need to be filled".[257] This is correct, for all the reasons stated elsewhere in these submissions.

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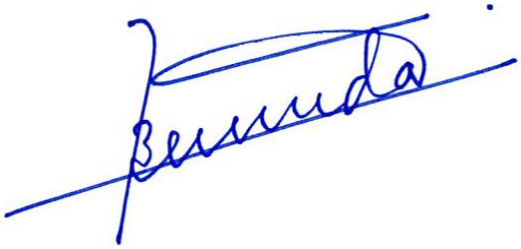
[251] *See* *CAR Article 70* SAJ, para. 75 (defining "the notion of 'inherent powers' – or 'incidental jurisdiction'" as "judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ('inherent to') other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments").
[252] *See also* *Banda* Decision, para. 78 (observing that "inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC" because, among other reasons, "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").
[253] *CAR Article 70* SAJ, para. 75.
[254] *CAR Article 70* SAJ, para. 76. *See also* *Ruto and Sang* Summons Appeal Decision, para. 105 (also citing *DRC* Appeal Decision, para. 23).
[255] *CAR Article 70* SAJ, para. 76 (emphasis added). *See also* *DRC* Appeal Decision, para. 39.
[256] *Banda* Decision, Concurring Opinion of Judge Eboe-Osuji, para. 106. *See also* paras. 116-117, 128-130, 133 (continuing to note that, with regard to "inherent" powers, the very concept may be "significantly […] troubling" for as "famously a statutory creature" as the ICC).
[257] *Kenya* Investigation Decision, para. 18 (emphasis added).

Conclusion

123. For all these reasons, the Appeals Chamber should quash the Decision insofar as it found that the Prosecutor was required to accept the Pre-Trial Chamber's reasoning, including particular conclusions of law and fact, and/or found that the Prosecutor's Final Decision was invalid despite having been formally notified according to rule 108(3). Further, the Appeals Chamber should reverse the Decision insofar as it:

- determined that the Prosecutor in the Prosecutor's Final Decision was required to adopt the Pre-Trial Chamber's reasoning in its First Article 53(3)(a) Request, including particular conclusions of law and fact;
- set aside the Prosecutor's Final Decision as invalid; and
- required the Prosecutor under article 53(3)(a) to conduct a further reconsideration of the Prosecutor's Initial Decision, according to the reasoning in the First Article 53(3)(a) Request.

124. Having reversed the Decision on one or both of these grounds, the Appeals Chamber should give effect to the principle of reasonable finality in rule 108(3), and exercise its own power under article 83(2)(a) to dismiss the Comoros' Second Application forthwith, in light of the applicable limits upon the Court's jurisdiction.



Fatou Bensouda, Prosecutor

Dated this 11th day of February 2019

At The Hague, The Netherlands