Partly Dissenting Opinion of Judge Eboe-Osuji

1. I concur with the disposition of the appeal. I fully associate myself with the overall sentiment of the Majority, to the extent that it seeks to render more meaningful the Pre-Trial Chamber's powers in the context of the regime of judicial review laid down in article 53(3) of the Rome Statute.

2. Regrettably, however, I am unable to subscribe fully to the reasoning of my highly esteemed colleagues—not only in what they said but also in what they left unsaid. In my respectful view, there is too much equivocation in what should be addressed as a straightforward plenary authority of the Pre-Trial Chamber in conducting the judicial review contemplated in article 53(3)(a). That equivocation comes in the manner of the Majority reasoning which holds, in one breath, that: (a) the Prosecutor must conduct herself (in many respects) according to the guidance that the Pre-Trial Chamber gives when requesting her to reconsider her decision not to investigate; while at the same time, (b) maintaining that the ultimate decision remains with the Prosecutor on whether or not to commence an investigation—even in those instances in which the Prosecutor must conduct herself according to the terms of the Pre-Trial Chamber's request for reconsideration. Such approbation and reprobation from the Appeals Chamber must make proper guidance difficult to discern and to follow.

3. I am also unable to share the reasoning which, by mere silence, carries a very high risk (in light of the prior decision of the Appeals Chamber in this same *Comoros* case[1]) of leaving the impression that the Prosecutor's ability to appeal the decision of the Pre-Trial Chamber, following the judicial review contemplated in article 53(3)(a), depends on grant of leave by the Pre-Trial Chamber. I explain myself below.

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4. Under pressure to make sense of the unordinary regime of article 53 of the Statute, it is very easy to lose sight of the trees for the forest, and end up with over-involved reasoning that betrays uncertainty in the chosen path of analysis. This need not be so. A simpler view

[1] *Re Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 'Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"', 6 November 2015, ICC-01/13-51.

that serves the purpose of the regime is entirely available and applicable. It should be espoused with confidence.

5. The perspective to that simpler view requires always keeping in mind the following overarching considerations. First, the regime of article 53(3) reflects the aptitude of the Rome Statute negotiators to subject the Prosecutor's investigating authority to judicial control (primarily through the Pre-Trial Chamber). Until now, the more storied aspect of that aptitude has been identified in the need to require the Prosecutor to obtain authorisation from the Pre-Trial Chamber before she can commence investigation on her own—notably under article 13(c) of the Statute, particularly read together with article 15(3). But the subject matter of the present appeal casts the other side of that coin in sharp relief. For, the appeal also brings into profile the keenness of the Rome Statute negotiators to ensure that the Prosecutor's disinclination to commence investigation will not always be left to her unreviewable discretion. This is specifically the case where a State Party or the Security Council has taken the trouble to refer to the Court a situation under their purview—under article 13(a) and article 13(b) of the Statute. That is to say, if it is important enough to give the Pre-Trial Chamber an oversight power in relation to the Prosecutor's ability to commence an investigation, it should be no less important to give the Pre-Trial Chamber an oversight power in relation to the Prosecutor's refusal to commence investigation into a situation that a State Party or the Security Council has referred to the Court.

6. Second, it is important to keep in mind the challenges that attended how to achieve such judicial control over the investigative authority of the Prosecutor. But, the essence of the challenges was more a matter of cultural instincts and predispositions towards such control than it was about the feasibility of laying down the scheme. On the one hand, the civil law systems were used to almost complete judicial oversight over criminal investigations; while the common law systems preferred leaving criminal investigations entirely in the hands of prosecutors, with judges playing no role at all. Caught between the two tendencies, the Rome Statute negotiators evidently chose a median path: in the form of the regime set out in article 53 of the Statute. But, the system need not be presented—through judicial interpretation and application—as a tentative, complicated regime that defies ready, objective understanding or easy application.

7. It is, indeed, possible to see that median path in a more straightforward manner. Perhaps, the starting point in appreciating the value of the regime is to see that article 53 is

primarily an enabling provision. In that regard, it is noted that article 53(1) is the provision that enables—i.e. authorises the Prosecutor—to commence an investigation. Without it, she is legally powerless to commence the contemplated investigation. In the event that she does commence such an investigation, article 53 would have served its enabling purpose to that extent. As a collateral consideration, she would bear the political and legal consequences of her decision to commence the investigation.

8. But, should the Prosecutor decline to commence investigation, motivated by a conscious decision not to do so in the prevailing circumstances, article 53 continues to retain its purpose as an enabling provision. It does so, this time, by way of the prospect of judicial intervention. The eventual outcome of that judicial intervention may be that, following a judicially-induced reconsideration, the Prosecutor may end up commencing an investigation that she may not have commenced had there not been the judicial intervention. From that perspective, article 53 still retains its value as an enabling provision for purposes of the Prosecutor's authority to commence the investigation that resulted from the judicial intervention. But, there is the collateral value for the Prosecutor in the manner of affording her both political and legal cover in the commencement of an investigation that may result from the judicial intervention. She has political cover, should the resulting investigation or trial prove politically controversial for any reason, including from the perspective of husbandry of resources in the Office of the Prosecutor; or should questions arise (before or after the fact) about the realistic likelihood of successful outcome of the consequent judicial process.[2] And she has legal protection against any complaint of frivolous or malicious prosecution that might later be made against her. On both counts, she can simply and quite rightly claim in her own defence that her initial decision was not to commence the investigation, but that she reconsidered that decision following the decision of the Pre-Trial Chamber requesting her so to do.

9. From the foregoing, it is thus easy to see the article 53 regime in the following way. According to the general rule indicated in article 53(1), the regime leaves it to the Prosecutor to decide when to commence an investigation. But, there is an exception to that general rule

[2] In this regard, I am constrained to observe, with the greatest respect, that there is a certain element of unfairness in the reasoning of the Appeals Chamber which seeks to present the decision to commence an investigation as 'ultimately for the Prosecutor', where she does commence the investigation following the Pre-Trial Chamber's request of her to reconsider her initial decision declining to commence investigation. The reasoning is unfair because it looks very much like what Pontius Pilate would do: wash the judicial hands of the political controversy of a decision for which the judiciary should take the responsibility.

when the Prosecutor's decision not to commence an investigation is snared by the two scenarios[3] contemplated in article 53(3). In those exceptional circumstances, the article 53 regime does not leave it to the discretion of the Prosecutor to decline to commence an investigation. Rather, the Prosecutor's decision must be reasonably guided by the outcome of the judicial intervention that article 53(3) contemplates. Whether or not the guidance is reasonable in the circumstances may fall for the Appeals Chamber's adjudication, as will be discussed later.

10. In my view, this is a more straightforward appreciation of the regime of article 53. That appreciation is underwritten by the following further considerations. First, it is important to keep in perspective what article 53 concerns—as a process of the rule of law. It concerns only the commencement of an investigation. It does not engage criminal conviction. Notably, the commencement of investigation involves at least three large and complex stages removed from the jeopardy of criminal conviction. For, following commencement of investigations, the route to criminal conviction must traverse the vast lands of an investigation, confirmation of charges, a trial and (often) an appeal. In context, an investigation—quite notably—is simply the process of pursuing, collecting and examining forensic information in order to consider whether criminal charges may be laid. That investigation process may well result, in the end, in a decision to lay no charges, because the forensic information obtained and examined did not justify the laying of charges. That being the case, it becomes difficult to understand the great anxiety—such as has been on display in this case—against even commencing an investigation.

11. A further consideration that gives confidence to the straightforward appreciation of the regime of article 53, as outlined above, is the feature of appellate review of the Pre-Trial Chamber's decision that requests the Prosecutor to reconsider her decision not to commence investigation. That appellate feature does not leave the Prosecutor at the mercy of the Pre-Trial Chamber, if the request for reconsideration is one with which the Prosecutor disagrees.

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[3] The first scenario is where the referring State or Security Council moves the Pre-Trial Chamber to review the Prosecutor's decision and request her to reconsider it [article 53(3)(a)]. The second scenario is where the Pre-Trial Chamber additionally conducts *suo motu* review and declines to confirm the decision that the Prosecutor purportedly made in the interest of justice [article 53(3)(b)].

12. On the subject of appeals: I am unable to share the view that the route to the Prosecutor's appeal goes through article 82(1)(d) of the Statute, requiring leave of the Pre-Trial Chamber.[4] Article 82(1)(d) provides that a party may appeal '[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance *the proceedings*.' [Emphasis added.]

13. Properly understood, article 82(1)(d) contemplates ongoing 'proceedings', amidst which the Trial Chamber or Pre-Trial Chamber feels a need for the guidance of the Appeals Chamber—in order to continue with 'the proceedings' in a manner that is legally efficient. The provision is inapposite in circumstances in which there are—or will be—no *proceeding*s in progress; such as where the Prosecutor has decided to commence no investigation—with the only issue being whether or not to maintain that decision. In the circumstances, I have some sympathy for the joint opinion of Judge Fernández and Judge Van den Wyngaert on the earlier occasion that this case [hereafter *Comoros No 1*] was before the Appeals Chamber under a different composition.[5] In their view, the more appropriate route for the Prosecutor's appeal is article 82(1)(a). I, too, am of the view that article 82(1)(a) is the more appropriate route for any appeal that arises from a judicial review conducted under article 53(3).

14. I do, however, approach the applicability of article 82(1)(a) from a perspective that is normatively different (and materially so) to that of Judge Fernández and Judge Van den Wyngaert. This is in the sense that my own specific focus is on 'jurisdiction', whereas theirs was on 'admissibility'. Here, it may be noted that article 82(1)(a) entitles a party to appeal '[a] decision with respect to jurisdiction or admissibility.' Apart from the word 'decision', the keywords and phrases in the provision are 'with respect to' and 'jurisdiction'. I discuss them next.

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[4] *Re Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 'Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"', 6 November 2015, ICC-01/13-51, para 66.
[5] *Ibid*, Joint Dissenting Opinion of Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert, 6 November 2015, ICC-01/13-51-Anx.

15. Plain English language usage tells us that when one thing is said to be 'with respect to' another, it means that the one thing has a 'relation', 'connection', 'reference', or 'regard' to the other.[6] And the synonyms of the word 'respect' in that context include 'advertence', 'affect', 'angle', 'appertain to', 'applicability', 'appositeness', 'aspect', 'bearing', 'concern', 'connect', 'connection', 'deal with', 'effect', 'facet', 'germaneness', 'gestalt', 'incidental', 'involve', 'link with', 'materiality', 'pertain to', 'pertinence', 'reference', 'regard', 'relatedness', 'relate to', 'relation', 'relevance', 'sight', 'tie in with', 'total effect', 'touch', 'touch upon', and 'trait.'[7]

16. That is to say, all the foregoing are the different ways in which a 'decision', as an idea, bears association with the idea of 'jurisdiction', within the meaning of article 82(1)(a)—in the sense of the first idea being 'with respect to' the second. But, it is not necessary to insist here on the finer point of such possibilities. For present purposes, it is enough to say that whenever the decision of the Pre-Trial Chamber under article 53(3) has, as its outcome, an equal potential than not that the Court may not 'exercise jurisdiction'—as the concerned State Party or the Security Council may have hoped when making the referral under article 13 (which specifically deals with the 'exercise of jurisdiction' and says so in so many words) — it should then be beyond dispute that such a decision of the Pre-Trial Chamber is a 'decision with respect to jurisdiction', within the meaning of article 82(1)(a).

17. And that test—of equal potential than not that the Court may not 'exercise jurisdiction'—is directly engaged in an article 53(3)(a) dispute. This is because the ethos of judicial impartiality requires that any dispute that falls for resolution under article 53(3)(a) requires the possibility to be left open that the Pre-Trial Chamber (following the envisaged judicial review) or the Appeals Chamber (following an appeal) may sustain or decline to sustain the Prosecutor's decision not to commence investigation. And therein lies the equal potential that the Court may not exercise its jurisdiction, contrary to the expectations of the State Party or the Security Council that had referred a situation to the Court pursuant to article 13. And it is precisely that failure of expectations (that the Court would exercise its jurisdiction) that would have motivated the State Party or the Security Council to seek the judicial review contemplated in article 53(3)(a).

[6] See Shorter Oxford English Dictionary.
[7] See *Roget's II: The New Thesaurus*, Third Edition.

18. It should be strange to think that a decision may not be considered as being 'with respect to jurisdiction', unless the deciding Chamber has specifically said so in the decision. Such a proposition can only mean that if the provision of the Statute specifically concerns the 'exercise of jurisdiction'—as article 13 obviously does—the decision of the Chamber (which fails, for whatever reason, to acknowledge that reality) must control the Appeals Chamber's ability to consider that decision as really being 'with respect to jurisdiction'. That cannot be right.

19. All this is to say that, by general linguistic usage, the term 'jurisdiction' would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court, as a matter of its mandate. In this regard, the following definitions of 'jurisdiction' may be noted in both general and technical dictionaries: 'Administration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power';[8] 'The power of a court to hear and decide a case or make a certain order';[9] and 'A court's power to decide a case or issue a decree'.[10]

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20. Against the foregoing background, how then do we see an appeal that results from an article 53(3)(a) review, as falling properly within the context of 'jurisdiction'? The answer is simple enough. All it takes is an appreciation of the direct link—already alluded to—between article 13 and article 53(3). In both the heading and the content, article 13 speaks clearly in the language of 'jurisdiction' of the Court. Beyond the heading clearly titled 'exercise of jurisdiction', as indicated earlier, the text of the provision also clearly contemplates that a State Party may refer a situation to the Court, so that '[t]he *Court may exercise its jurisdiction* with respect to a crime referred to in article 5' [emphasis added]. Similarly, the provision contemplates asyndetically that the Security Council may refer a situation to the Court, so that '[t]he *Court may exercise its jurisdiction* with respect to a crime referred to in article 5' [emphasis added]. Article 53(3), for its part, deals with the scenario in which the Prosecutor declines to investigate a situation that a State Party or the Security Council has referred to the Court—pursuant to article 13. It is quite clear, then, that the Prosecutor's decision declining

[8] *Oxford English Dictionary*.
[9] *Oxford Dictionary of Law*.
[10] *Black's Law Dictionary*, 7th edn.

to investigate is a decision that would prevent the Court from *exercising* the 'jurisdiction' that is *specifically* contemplated in article 13. Therefore, the Pre-Trial Chamber's subsequent decision under article 53(3)(a), requesting the Prosecutor to reconsider her underlying decision not to investigate the situation, is, for purposes of article 82(1)(a), a 'decision with respect to jurisdiction'.

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21. Now, about 'decision'. There should be no reasonable dispute that the Prosecutor's 'decision' not to investigate—if unchallenged or unsuccessfully challenged—would indeed be a decision that would prevent the Court from exercising its jurisdiction. *Ceteris paribus* to that extent, such a decision of the Prosecutor would be a decision 'with respect to jurisdiction'. But, there is much confusion of thought in any reasoning that comprises the following frames: (i) article 82(1)(a) contemplates only an appeal from a judicial decision; (ii) the Prosecutor's decision not to commence investigation is not the subject of appeal under article 82(1)(a), because it is not a judicial decision; and, (iii) the Pre-Trial Chamber's decision requesting the Prosecutor to reconsider her decision will not result in the Court not exercising jurisdiction; for it only requests the Prosecutor to reconsider her decision not to investigate (which may then result in an eventual decision of the Prosecutor to investigate). This chain of reasoning—particularly on account of the third frame—may induce some hesitation in seeing the Pre-Trial Chamber's decision as a decision 'with respect to jurisdiction', for purposes of article 82(1)(a).

22. With respect, it is incorrect to adopt such a blinkered view of the Prosecutor's decision alone (as the decision that has the potential to prevent the Court from exercising jurisdiction) while refusing to see the decision of the Pre-Trial Chamber in the same light. It is not necessary to underscore the incorrectness of that approach, merely by pointing to the effect of the Majority reasoning that ultimately leaves with the Prosecutor the 'final' decision to investigate or not, notwithstanding the Pre-Trial Chamber's directions—especially as regards the assessment of gravity (as the basis of the decision not to investigate). It goes without saying, of course, that the said theory of the Majority would only ensure that the Prosecutor's decision not to investigate remains the ultimate determiner of the Court's ability to exercise its jurisdiction.

23. But, the more fundamental consideration hinges upon the normative reality that without the decision of the Prosecutor, there would be no decision of the Pre-Trial Chamber under article 53(3)(a) requesting the Prosecutor to reconsider her own decision. That is to say, the Prosecutor's decision is the substratum upon which the decision of the Pre-Trial Chamber rests as the superstructure that exerts juristic pressure upon the Prosecutor's decision. The Pre-Trial Chamber's decision has no essence or existence without the Prosecutor's decision. It is that consideration that should guide the assessment of whether the decision of the Pre-Trial Chamber taken under article 53(3)(a) is a decision 'with respect to jurisdiction', for purposes of article 82(1)(a). And, it is so.

24. Indeed, there is an obvious absurdity in the view that the Pre-Trial Chamber's decision is 'with respect to jurisdiction' *only* when it agrees with the Prosecutor's decision not to investigate; but that it is not a decision with respect to jurisdiction when it requests the Prosecutor to reconsider her decision not to investigate. This will mean that different regimes—either article 82(1)(a) or article 82(1)(d)—will guide appeals that arise from an article 53(3)(a) review, depending on the outcome (and inevitably the appellant) of the Pre-Trial Chamber's decision. The following examples may illustrate the absurdity. In *Scenario I*, a State Party requests the Pre-Trial Chamber to review the Prosecutor's decision not to investigate and to request her to reconsider. Upon the review, the Pre-Trial Chamber finds no fault with the Prosecutor's decision and does not to request her to reconsider. The result is that the Court does not exercise jurisdiction. The State Party appeals and successfully argues that since the result of the Pre-Trial Chamber's decision is that the Court does not exercise *jurisdiction*, the appeal of the Pre-Trial Chamber's decision lies as of right under article 82(1)(a)—because the decision of the Pre-Trial Chamber is 'with respect to *jurisdiction'*.

25. In *Scenario II*, a State Party successfully requests the Pre-Trial Chamber to review the Prosecutor's decision not to investigate and to request her to reconsider. Upon the Prosecutor's appeal of the Pre-Trial Chamber's decision, it would be starkly absurd to conceive of her route of appeal differently from *Scenario I*, by insisting that her appeal must come by way of article 82(1)(d), on the reasoning that the Pre-Trial Chamber's decision was not 'with respect to jurisdiction', because the decision of the Pre-Trial Chamber did not agree with the Prosecutor's decision not to investigate.

26. It is for the foregoing reasons and more that the route of any appeal of the Pre-Trial Chamber's decision is most appositely to be considered under article 82(1)(a) that deals with 'a decision with respect to *jurisdiction* or admissibility' [emphasis added].

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27. As an essential part of its functions, the Appeals Chamber is called upon to give clear guidance and direction in this regard. After so much deliberation on this matter, it is unhelpful to leave the direction in an ambiguous way, by saying: 'In this regard, the Appeals Chamber observes that, where the Prosecutor disagrees with the pre-trial chamber's interpretation of the applicable law, she may avail herself of *any available avenues to appeal the ruling*.'[11] To say vaguely that 'she may avail herself of any available avenues to appeal the ruling' engages the direct question as to what such 'available avenues to appeal' really are. Why is it so difficult for the Majority to say clearly now what those appellate avenues are, especially following the debate and the ensuing decision in *Comoros No 1*? If, in the light of the deliberation on that point in this particular appeal, the Majority is confident in the correctness of the position taken earlier by a narrow majority in *Comoros No 1* (under a different composition of the Appeals Chamber), then they should say so explicitly and confirm that reasoning. But, if it is the case that the current debate may have exposed critical fault lines (not adverted to on the earlier occasion) in the position taken by the narrow majority in *Comoros No 1*, then the correct approach would be for the current composition of the Appeals Chamber to acknowledge that eventuality—and rightly take refuge in the distinguishing fact that the debate that divided the Appeals Chamber of the day in *Comoros No 1* had its focus on the notion of 'admissibility' and not on that of 'jurisdiction'. And, here, it needs reiterating that the appositeness of 'jurisdiction', within the meaning of article 82(1)(a), as the proper route of appeals arising from judicial reviews under article 53(3)(a), takes its bearing from the very *direct* link between article 13 (under which a State Party or the Security Council may refer a case to the Court so that it 'may exercise its jurisdiction') and article 53(3) (under which the State Party or the Security Council that refers a case to the Court may challenge the Prosecutor's decision not to investigate thereby preventing the Court from exercising its jurisdiction). There is also the undesirable risk that failing to acknowledge clearly that the majority reasoning in *Comoros No 1* may be flawed from the point of view of 'jurisdiction': as that would mean that stakeholders may continue to view *Comoros No 1* as

[11] Appeals Chamber Judgment, para 78 (emphasis added).

sound jurisprudence on the point, when it is not. The silence of the Appeals Chamber is not ideal in the circumstances.

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28. I do not subscribe to the view that the 'ultimate decision' or 'final decision' (on whether or not to investigate) belongs to the Prosecutor[12]—in any situation in which the Pre-Trial Chamber has agreed to intervene, pursuant to article 53(3) of the Statute, to request the Prosecutor to reconsider her decision not to commence investigation. That acceptation produces the awkward circumstance in which the Prosecutor is required to comply with judicial direction on a matter considered important enough for judicial intervention; yet, it is still said that the ultimate decision on the matter belongs to the Prosecutor. The solution does not lie in a course of judicial reasoning, which either rests on mere wordplay such as to question whether the 'final decision' of the Prosecutor may indeed be seen as a '*proper* "final decision"' of the Prosecutor;[13] or which generally leaves the impression that knowing what to do in a given case depends on an ability to navigate wry fine lines on the edge of understanding, such as I fear, with respect, to be the case with the reasoning of the Majority.

29. The confusion in this regard results apparently—at least in part if not in large measure—from the occurrence of the adjective 'final' in rule 108(3) of the Rules of Procedure and Evidence, to describe the Prosecutor's 'decision' following the Pre-Trial Chamber's initial request to the Prosecutor to reconsider her original decision declining to investigate.

30. The worrying suggestion may be to this effect: if rule 108(3) describes the Prosecutor's decision as 'final', it thus imports a sense of *finality* even relative to the Pre-Trial Chamber, rendering it powerless to inquire into whether or not the Prosecutor's 'final' decision had been truly responsive to the initial request of the Pre-Trial Chamber.[14] With the greatest respect, I am unable to concur.

31. To begin with, I do not accept that the Majority is correct in saying that 'rule 108(3) … *provides* that the "final decision" *is for* the Prosecutor'.[15] Read in its own context, rule

[12] See Appeals Chamber Judgment (by majority as to that point), paras 58, 60, 79 and 81.
[13] *Ibid*, para 60 (emphasis added).
[14] See the Partly Dissenting Opinion of Judge Péter Kovács to that effect, 15 November 2018, ICC-01/13-68-Anx, para 10.
[15] See Appeals Chamber Judgment, para 76 (emphasis added).

108(3) provides no such thing. That context is this. First, the Prosecutor decides not to investigate. Next, the State Party or the Security Council, which had referred the situation to the Court, successfully moves the Pre-Trial Chamber to request the Prosecutor to reconsider her decision not to investigate the situation as referred. Then, the Prosecutor, following the intervention of the Pre-Trial Chamber, takes another decision—termed 'final decision'—on whether or not to investigate. Notably, rule 108(3) requires the Prosecutor to notify her 'final decision' to the Pre-Trial Chamber and to all those who took part in the judicial review. But, that requirement does not lead inevitably to the understanding that the so-called 'final decision' of the Prosecutor, which is so notified, is something that the Pre-Trial Chamber must defer to as such. The requirement serves no greater value, in my view, than to ensure that the Prosecutor informs all concerned that she has undertaken and completed the reconsideration that the Pre-Trial Chamber requested of her, so that the ordinary processes of the system may be followed thenceforth as the circumstances recommend to those concerned.

32. In my view, then, the adjective 'final', as employed in rule 108(3), serves no greater purpose—in the context of usage of language—than to distinguish between the *eventual* decision of the Prosecutor made after the Pre-Trial Chamber's original request to reconsider, as contrasted with any earlier decision of the Prosecutor not to investigate. This does not mean that rule 108 '*provides* that the "final decision" is *for* the Prosecutor' despite the Pre-Trial Chamber's decision under article 53(3)(a)—in a manner that effectively *limits* the powers of the Pre-Trial Chamber in that regard, as the Majority reasons.[16]

33. In construing the meaning of the adjective 'final' as modulating the 'decision' of the Prosecutor, it may be observed that the Prosecutor's *decisions* remain a matter for her, for purposes of her actions and forbearances. The underlying decision—of the Prosecutor—may be *preliminary* (in the sense that the decision is open for reconsideration by the Prosecutor herself as the circumstances recommend, unprompted by judicial intervention); or it may be 'final' in relation to the Prosecutor (in the sense that the decision is not open for reconsideration by her, except when prompted by juridical intervention). It is, of course, often the case that the incidence of those actions and forbearances may travel beyond the boundaries of the Prosecutor's exclusive purview and emerge on the objective plane. There, the Court's legal framework or general principles of law may contemplate judicial intervention. In those circumstances, the Prosecutor's decision has no dominant value on that

[16] *Ibid*.

objective plane, beyond explaining the basis of the Prosecutor's actions or forbearances supported by law. As such, the Prosecutor's decision has no property of finality that enjoys cognisance in any way that may compete with—or enjoy immunity from—the judicial direction that results from the contemplated judicial intervention. This, in my view, is how rule 108(3) ought to be understood, in its service of the regime of judicial review laid down in article 53(3)(a).

34. It is particularly important to stress that nothing at all in the context of rule 108(3) ordains that the Pre-Trial Chamber has been rendered powerless—or been allowed only limited powers—to inquire into whether the Prosecutor's eventual or 'final' decision had been compliant with the initial request of the Pre-Trial Chamber. The contrary understanding will only render the system of judicial review for purposes of reconsideration wholly meaningless. For, the Prosecutor may choose, merely by virtue of her decision being considered or understood as 'final', to disregard completely the terms of the initial 'request' of the Pre-Trial Chamber.

35. It is unfortunate, of course, albeit unsurprising, that the decision of the Pre-Trial Chamber directing the Prosecutor to reconsider her resolve against investigation is described as a 'request' in article 53(3)(a), thus leading to much of the confusion in this matter.[17] Judicial notice may be taken that the Rome Statute is a product of diplomatic negotiation in which diplomats—regardless of training and experience as legal practitioners—played important roles. It is thus unsurprising that such diplomatic language as 'request' is occasionally seen in the Rome Statute, as a by-product of its negotiation, when 'order' or 'direction' might have signalled the more apposite idea. And, here, I need only reprise the eternally wise counsel of the editors of *Oppenheim's* that '[t]he circumstances in which treaties are drafted are … often such as to lead to lack of consistency in drafting and care must be taken in attributing significance to variations in terminology: "an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility".'[18] It is most unfortunate to express the directive outcome of a process of judicial 'review' in the terminology of a 'request' of the judge(s) giving that direction. In the administration of justice, judicial interventions—including through the process of judicial

[17] *Ibid*, paras 60 and 61.
[18] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, vol 1, 9th edn [London & New York: Longman, 1996] Parts 2 to 4, p 1273, fn 12, citing *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, p 418.

'reviews'—on important questions of law and fact (or a mixture of both) are made by judicial fiats, not by hortatory imprecations in the form of 'requests' that parties may feel free to ignore.

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36. It is for the foregoing reasons that I do not share the anxiety of my highly esteemed colleagues in the manner of drawing a distinction between directions as to the *law*, contrasted with those as to the *facts*. According to that distinction, the Prosecutor is to follow the Pre-Trial Chamber's directions as to the law, while the Pre-Trial Chamber is to refrain from giving the Prosecutor directions as to the facts.[19] With respect, the distinction is unsustainable—if not meretricious. It is in the nature of the proverbial judicial error of cutting the baby in half. It is unhelpful in the long run, because the law does not operate in a factual vacuum. In the administration of justice, it is facts that give value to the application of the law. The Appeals Chamber should not impose upon Pre-Trial Chambers a timorous regime of judicial review, in which Pre-Trial Chambers need constantly to worry about carrying out their functions of judicial review, out of concern that they may risk breaching the line between directions as to the law and those as to facts.

37. An example of the unsustainable nature of the distinction is evident in the view—which I do not share—that 'it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment'.[20] To begin with, for purposes of the Statute, 'gravity' is a legal characterisation of a given circumstance on the basis of a set of facts. The effectual result of my colleagues' reasoning will then be this: the Prosecutor's view as to that legal characterisation should prevail in any circumstance in which the Pre-Trial Chamber has a different view as to that legal characterisation.

38. The flaw in the law-*versus*-fact dichotomy enjoys no refuge in the unstated assumption beneath the Majority view: to the effect that all that the Pre-Trial Chamber needs do is to remain on its side of the divide (the law side), and from there hope to exert something of remote control on what the Prosecutor does in the outcome. And, the assumption continues, as for long as the Pre-Trial Chamber gives its directions as to the law in that way—and repeatedly does so, if need be—the system should work well enough. I am not

[19] Appeals Chamber Judgment, para 80.
[20] *Ibid*, para 81. See also para 82.

convinced that this is the right instinct. For, it is a system with a built-in flaw of an eventual stalemate: in the event that the Pre-Trial Chamber and the Prosecutor may find themselves locked in an interminable loop of disputes as to whether the Prosecutor's decisions had been compliant with the Pre-Trial Chamber's repeated requests for reconsideration. This is an undesirable prospect: made entirely unnecessary by the appellate facility.

28. And, here, it must be stressed that to say that the regime under article 53(3)(a) does not limit the judicial oversight of the Pre-Trial Chamber does not mean that the Prosecutor is left without recourse, where she disagrees with the decision of the Pre-Trial Chamber requesting her to reconsider. In the nature of the process, the recourse lies in the Prosecutor's right to resort to the appellate process. And I reiterate the view that the Prosecutor does have an automatic right of appeal in the circumstances—pursuant to article 82(1)(a)—both in relation to the Pre-Trial Chamber powers under both article 53(3)(a) and article 53(3)(b). The point is that when confronted with an arguably erroneous decision of the Pre-Trial Chamber, the Prosecutor's recourse does not correctly lie in the view that the 'ultimate decision' lies with her, such as makes the Prosecutor's decision—considered as 'final'—unreviewable by the Pre-Trial Chamber.

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29. I am also convinced that the pronouncements of the Appeals Chamber are not necessary in the direction of saying that the power of the Pre-Trial Chamber to review the decision of the Prosecutor 'is limited' following the reconsideration request.[21] The directions given to the Pre-Trial Chamber in a request for reconsideration under article 53(3)(a) may be as wide or narrow as the Pre-Trial Chamber sees fit—always subject to appeal. Whilst the Prosecutor is entitled to reach the same or a different conclusion upon a request for reconsideration by the Pre-Trial Chamber, the Prosecutor must follow the Pre-Trial Chamber's directions in good faith.

30. For the reasons I have explained above, it is only necessary to say that the word 'final'—as it relevantly occurs in rule 108(3)—does not deny the Pre-Trial Chamber the power to inquire into whether the eventual decision of the Prosecutor had been compliant with the initial Pre-Trial Chamber request for reconsideration. It is enough that the Prosecutor

[21] See *ibid*, paras 60 and 61.

enjoys the right of recourse to the Appeals Chamber, if there remains a lingering disagreement as to whether or not the Prosecutor has complied with the initial request of the Pre-Trial Chamber.

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31. Similarly, I am unable to subscribe to any distinction between article 53(3)(a) and 53(3)(b), which betrays an understanding that article 53(3)(a) gives the Pre-Trial Chamber *more limited* powers than does article 53(3)(b). It should be emphasised, in particular, that there is difficulty in conceiving of the essence of that distinction as lying in the view of the Pre-Trial Chamber's powers under article 53(3)(b) as *larger*—or more 'robust', as the Majority put it[22]—in the following way: (i) that the Pre-Trial Chamber may conduct the review, *suo motu*, in order to decide whether or not to confirm the 'final' decision of the Prosecutor; and, (ii) that the Prosecutor has no other legal recourse than to follow the findings of the Pre-Trial Chamber peremptorily. Such a defining understanding of the larger powers of the Pre-Trial Chamber under article 53(3)(b) seems either, at best, to have ignored that an appeal may lie to the Appeals Chamber (and as of right); or, worse, that article 53(3)(b) powers recognise no appeal at all from the Prosecutor.

32. It is in those regards that the reasoning of the Majority in certain respects suggests that the Pre-Trial Chamber's powers under article 53(3)(a) are comparatively more limited than the Pre-Trial Chamber's powers under article 53(3)(b).[23] That distinction between article 53(3)(a) and article 53(3)(b) seems overworked to me.

33. I see no compelling reason to take the distinction between article 53(3)(a) and article 53(3)(b) any higher than simply this. To begin with, the review powers of the Pre-Trial Chamber under article 53(3)(a) leaves its trigger entirely in the hands of the referring State Party or the Security Council. Their failure to challenge the Prosecutor's decision not to investigate appears practically to bring the matter to an end. In contrast, for purposes of article 53(3)(b), the Pre-Trial Chamber is 'additionally' entitled to intervene regardless of what the referring State or the Security Council does. But, more fundamentally, the review powers under article 53(3)(b) appear largely to assume that there is no dispute as to the legal or factual matter—in the nature of the questions engaged in the associated article 53(1)(a) and

[22] See *ibid*, paras 75 and 76.
[23] See *ibid*.

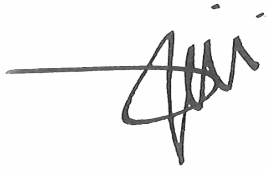
(b) and article 53(2)(a) and (b). In that regard, the only issue in relation to article 53(3)(b) is essentially whether or not it is in the *interests of justice* not to commence the investigation—that being the only question commonly engaged in article 53(1)(c) and article 53(2)(c). There is indeed much significance in that dimension of the matter. The understanding that what is at stake in article 53(3)(b) is only the question of the *interests of justice* does the following: (a) it amply explains why the decision of the Prosecutor can only stand if the Pre-Trial Chamber confirms it—since there is presumably no difficult issue of law or fact that stands in the way of commencing the investigation at issue; and, (b) it gives the system a more confident basis to leave with the Pre-Trial Chamber the power to require the Prosecutor to proceed with the investigation if the Pre-Trial Chamber takes the view—contradicting the Prosecutor's—that it is in the *interests of justice* so to proceed.

34. This is the operative difference between article 53(3)(a) and article 53(3)(b). It has less to do with the significance to be attached either to the idea (infelicitously expressed) in the former provision that the Pre-Trial Chamber's judicial *review* may result in its 'request' to the Prosecutor to reconsider her decision not to investigate; or with the idea (no better expressed) in rule 108(3) that once the Prosecutor has 'a final decision', following the Pre-Trial Chamber's request, she must inform the Pre-Trial Chamber and all the participants in the review.

35. In any event—operating under either article 53(3)(a) or article 53(3)(b)—the Prosecutor has the right to appeal the judgement of the Pre-Trial Chamber.

36. With the foregoing clarifications made, I concur with the outcome of the Appeals Chamber's judgment.

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



Judge Chile Eboe-Osuji

Dated this 2nd day of September 2019
At The Hague, The Netherlands