Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza

I. KEY FINDINGS

i. The Rome Statute does not contain any express prohibition or limitation on the power of judges in the context of article 53(3)(a) and (b) of the Rome Statute. The powers conferred upon pre-trial chambers in the two sub-articles are different and apply in distinct and concrete situations. In criminal law it is not possible to infer prohibitions.

ii. In judicial proceedings, the Prosecutor does not have the last word when a party to proceedings and, as such, is subject to judges' exercise of their jurisdiction. This does not affect the autonomy and independence of the Prosecutor as an administrative entity.

iii. In the case at hand, the Prosecutor is obliged to carry out an effective reconsideration based on the Pre-Trial Chamber's legal interpretations and their application to the concrete facts.

II. INTRODUCTION

1. On 2 September 2019, the Appeals Chamber rendered its 'Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros"'[1] (the 'Majority Judgment'). While I agree with the Appeals Chamber's decision to confirm Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"'[2] (the 'Pre-Trial Chamber' and the 'Impugned Decision', respectively), I nevertheless disagree with some of the Majority's observations which were unnecessary to reach such an outcome. Moreover, I find they make their reasoning unclear. In addition, I have other points of view regarding the reasoning and some concrete findings of the Majority Judgment.

[1] 'Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros"', 2 September 2019, ICC-01/13-98 02-09-2019.
[2] ICC-01/13-68 (the 'Impugned Decision'). *See also*, 'Partly Dissenting Opinion of Judge Péter Kovács', ICC-01/13-68-Anx (hereinafter: 'Judge Kovács Partly Dissenting Opinion').

2. Furthermore, I find important reasons to depart from some of the Majority Judgment's arguments. In particular, mindful of the Rome Statute's object and purpose to put an end to impunity for atrocious crimes, I am unable to agree with imposing prohibitions and limitations on the power of judges when reviewing decisions where the Prosecutor decides not to investigate situations. The Rome Statute does not impose any express limitations on the power of judges under article 53(3)(a). On the contrary, its scope must be interpreted in light of the Rome Statute's object and purpose that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'.[3] This clear mandate to ensure effective prosecution and avoid heinous crimes going unprosecuted is what persuaded me to write this separate and partly dissenting opinion expressing my different points of view regarding (i) the incorrect idea that a Prosecutor can avoid compliance with an effective request for reconsideration in cases where Judges analyse and interpret facts in light of the law, and (ii) the wrong idea that the Prosecutor has the last word to conclude that no investigation is warranted under article 53(3)(a) of the Rome Statute. An administrative entity which is a party to judicial proceedings, such as the Prosecutor, cannot ignore the judges' will to provide access to justice and fail to effectively implement judicial reasoning just because she is in disagreement with the reasons given by the judges. This is against the essence of judges' jurisdictional prerogatives and against the Rome Statute's norms, objectives and purpose.

3. In particular, I have a different point of view regarding the Majority Judgment's findings: (i) that the power of the Pre-Trial Chamber under article 53(3)(a) is a limited power,[4] (ii) that the Prosecutor retains a margin of appreciation that the Pre-Trial Chamber is supposedly bound to respect in prosecutorial decisions not to open an investigation,[5] (iii) that the Pre-Trial Chamber cannot guide the Prosecutor regarding questions of fact,[6] and (iv) how to apply the law and how to address the errors in the case at hand.[7] Particularly, I am unable to sustain, as the majority did, that it was inappropriate for the Pre-Trial Chamber to assign specific weight to the factors

[3] Rome Statute, Preamble.
[4] Majority Judgment, para. 59.
[5] Majority Judgment, paras 58, 76, 79, 81.
[6] Majority Judgment, paras 80-81.
[7] Majority Judgment, paras 91-94.

concerning gravity identified in the Prosecutor's decision not to investigate.[8] These specific findings do not reflect the Rome Statute's object and purpose nor the applicable principles of law regarding the jurisdictional power of judges of this Court to ensure prosecution and access to justice in cases of mass atrocities.

4. This opinion will first summarise the background of this case in Chapter II, presenting the content of the *notitia criminis* that the Union of the Comoros ('Comoros'), in its capacity as State Party of the Rome Statute, referred the situation 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip'[9] ('Referral') to the Prosecutor. The background addresses the procedural history that followed the Comoros' Referral which finally led to this appellate stage in proceedings.

5. In presenting my views, this opinion will address three different issues that arise in light of the background of this case, and the grounds as applied. In particular, Chapter IV will address the scope of authority that the Rome Statute has granted the pre-trial chambers to ensure prosecution of heinous crimes in cases where the Prosecutor decides not to investigate information and the scope of this power includes the review mandate coming out of article 53(3)(a). Chapter V will explain that in the context of judicial review the Prosecutor's decisions not to open investigations, when challenged before the pre-trial chambers, cannot amount to the last word but, considering her role as a party to judicial proceedings, it is possible to correct the Prosecutor's decision in light of the errors or failures that the pre-trial chamber could identify. Chapter VI will provide clarity as to the Prosecutor's obligation to comply with the pre-trial chamber's determinations, and follow their reasoning as the necessary basis for a new decision. The focus will be on the Pre-Trial Chamber's findings and legal interpretations and conclusions regarding the five errors identified in the Prosecutor's decision not to open an investigation.

6. It is my hope to provide clarification on these issues regarding pre-trial chambers' powers in the scope of article 53(3)(a), the functions and duties of the

[8] Majority Judgment, paras 91-94.
[9] 'Annex 1: Decision assigning the situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I', ICC-01/13-1-Anx1 ('Referral'), p. 1.

Office of the Prosecutor when a party in the judicial process, and the scope of her powers in the circumstances of the present case. Beyond indicating points of disagreement with the Majority Judgment, this opinion aims to contribute to the development of the applicable law under the Rome Statute, further enhancing the proceedings at this Court. In particular, it is my hope that the Prosecutor will take these views into account in the reconsideration she has to present by 2 December 2019.

III. RELEVANT BACKGROUND

A. The Comoros' Referral

7. On 14 May 2013, Comoros referred the situation 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip' to the Prosecutor.[10] According to the Referral, in response to the military operation Cast Lead and blockade on the Gaza strip, a group of six international relief organisations collaborated in sending a flotilla to deliver humanitarian aid to the people of Gaza.[11] The Comoros submitted that the 'Gaza Freedom Flotilla' was initially composed of eight vessels carrying 748 humanitarian aid workers from 36 nationalities.[12] Altogether, according to the Comoros, the ships carried 10,000 tons of humanitarian assistance consisting of food, medicine, home construction supplies, pre-constructed children's playgrounds, woods, cement, power generators, hardware supplies, desalination units, and paper.[13] One of the vessels carrying passengers was owned by Foundation for Human Rights and Freedoms and Humanitarian Relief ('IHH') and registered in the Comoros under the name *Mavi Marmara*.[14]

[10] Referral, p. 1.
[11] Referral, paras 25, 30-32.
[12] Referral, para. 34.
[13] Referral, paras 32-33.
[14] Referral, para. 32.

8. The Comoros submits that Israel planned its response to the flotilla months in advance.[15] According to the Referral, a military option was officially authorized by Defence Minister Barak on 26 May 2010 whereby the vessels would be commandeered and impounded, and the humanitarian aid workers would be detained.[16] Extensive training and planning commenced, and a processing centre for detainees was established at the Port of Ashdod.[17] The Comoros alleges that, prior to the operation, Israeli intelligence identified and surveiled humanitarian aid workers.[18]

9. The Comoros states that stringent security measures were taken prior to the *Mavi Marmara*'s departure from the Turkish port of Antalya on 28 May 2010.[19] It further submits that none of the vessels participating in the flotilla were armed.[20] There was nothing else on the vessels other than the humanitarian aid materials.[21] By 30 May 2010, the *Mavi Marmara* reached a rendezvous point in the Mediterranean Sea where it met the other vessels participating in the flotilla heading towards Gaza.[22]

10. According to the Referral, the Israeli Navy made its first attempt to board the *Mavi Marmara* around 04:30 on 31 May 2010.[23] The Comoros submits that zodiac boats approached the vessel as forces fired at the ship, but their attempt to board the *Mavi Marmara* was unsuccessful.[24] Shortly thereafter, according to the Referral, a helicopter approached the ship and hovered above the top deck where approximately 10 to 20 people were located;[25] smoke and stun grenades were used to clear the area for their landing.[26] The Referral states that live ammunition was also fired by forces in the helicopter at this time.[27] It further submits that the forces then lowered a rope for the first group of soldiers to descend from the helicopter onto the *Mavi Marmara*, but

[15] Referral, para. 38.
[16] Referral, para. 39.
[17] Referral, para. 39.
[18] Referral, para. 40.
[19] Referral, para. 37, fn. 31.
[20] Referral, para. 37.
[21] Referral, para. 37.
[22] Referral, para. 35.
[23] Referral, para. 36.
[24] Referral, para. 41.
[25] Referral, paras 41-42.
[26] Referral, para. 41.
[27] Referral, para. 42.

it was taken by the passengers atop the deck,[28] and that a second rope was lowered and the forces were successfully able to descend onto the vessel.[29]

11. According to the Comoros, at this point, the passengers were attacked by Israel Defence Forces ('IDF') armed with heavy machine guns and a range of smaller weapons. The Comoros states that no gunfire originated from the passengers,[30] and that some passengers armed themselves with metal rods and kitchen knives in an attempt to resist the soldiers. Dozens of passengers were injured, and hundreds were detained.[31] In total, the Referral lists nine humanitarian aid workers who lost their lives, including: Furkan Doğan, İbrahim Bilgen, Fahri Yaldiz, Ali Heyder Bengi, Cevdet Kiliçlar, Cengiz Akyüz, Cengiz Songür, Çetin Topçuoğlu, and Necdet Yildirim.[32]

12. The Referral further submits that the following war crimes were committed: wilful killing, torture or inhuman treatment, wilfully causing great suffering, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, unlawful deportation or transfer or unlawful confinement, and intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.[33] The Referral also submits that the following crimes against humanity were committed: murder, torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[34]

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[28] Referral, para. 42.
[29] Referral, para. 42.
[30] Referral, para. 43.
[31] Referral, para. 43.
[32] Referral, paras 12, 46-47; UNHRC Gaza Flotilla Report, pp. 29-30. *See also* Transcript of hearing, p. 112, lines 13-25 to p. 113, lines 1-3. As the counsel for Comoros and the victims submitted, one of the victims, Furkan Doğan, was a 19-year-old with dual Turkish and United States citizenship who had plans to study in the United States later. According to the submissions made at the hearing, Furkan's father, an indirect victim, travelled to The Hague to have a day in court. It is submitted that he and his wife, Furkan's mother and therefore another indirect victim, 'have tirelessly for almost ten years sought accountability and justice for the death of their son', Transcript of hearing, p. 113, lines 15-16.
[33] Referral, paras 59-60.
[34] Referral, para. 62.

B. Procedural history

13. On 6 November 2014, following a referral of the situation with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza strip by the Comoros,[35] the Prosecutor determined that there was 'no reasonable basis to proceed with an investigation' and decided to close the preliminary examination (the 'Decision not to Investigate').[36] The Prosecutor concluded that 'the alleged conduct of the IDF soldiers on board the *Mavi Marmara* took place in the context of Israel's occupation of the Gaza Strip and the naval blockade pertaining to it', thereby establishing a nexus between the armed conflict and the alleged conduct.[37] She maintained that it was not apparent that a widespread or systematic attack had been directed against civilians, and therefore concluded that there was not reasonable basis to believe that crimes against humanity had been committed.[38] The Prosecutor's entire analysis which concluded that there were no crimes against humanity committed was made in only three paragraphs. To reach that conclusion, she basically indicated what the contextual elements of crimes against humanity are and that 'it does not appear that the conduct of the IDF during the flotilla incident was committed as part of a widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population'.[39]

14. On the other hand, the Prosecutor concluded that there was a reasonable basis to believe that the war crimes of wilful killing, wilfully causing serious injury to body and health, and outrages upon personal dignity had been committed, but that the potential cases would not be of sufficient gravity.[40] She found no reasonable basis for the remaining crimes referred by the Comoros, namely: torture or inhuman treatment, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, unlawful deportation or transfer or unlawful

[35] Referral, p. 1.
[36] 'Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report', registered on 4 February 2015, ICC-01/13-6-AnxA (the 'Decision not to Investigate'), para. 151.
[37] Decision not to Investigate, para. 128.
[38] Decision not to Investigate, paras 129-131.
[39] Decision not to Investigate, paras 129-131.
[40] Decision not to Investigate, paras 149-150.

confinement, and intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

15. On 29 January 2015, the Comoros requested that Pre-Trial Chamber I (the 'Pre-Trial Chamber') review the Decision not to Investigate.[41] On 16 July 2015, the Pre-Trial Chamber, by majority, rendered a decision requesting the Prosecutor to reconsider her decision not to initiate an investigation (the '16 July 2015 Decision').[42] The Pre-Trial Chamber's reasoning identified five errors that impacted on the Prosecutor's Decision not to Investigate. First, the Pre-Trial Chamber noted that the Prosecutor did not provide a discrete analysis of the question whether the potential perpetrators of the identified crimes included persons who may bear the greatest responsibility.[43] Second, the Pre-Trial Chamber considered that the number of killings that could potentially be prosecuted in this situation exceeded the number of casualties in cases that the Prosecutor has previously investigated and prosecuted, namely, the *Abu Garda* and *Abdallah Banda* cases.[44] Third, in the Pre-Trial Chamber's view, the Prosecutor erred in concluding at the preliminary examination stage that the mistreatment and harassment of passengers by the IDF 'did not amount to the war crime of torture or inhuman treatment'.[45] Fourth, the Pre-Trial Chamber noted the Prosecutor's error 'in properly assessing the manner of commission of the identified crimes, in particular with respect to the question whether the identified crimes may have been "systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians"'.[46] Fifth, in the Pre-Trial Chamber's view, the Prosecutor failed to consider the impact of the alleged crimes on the victims.[47] The Pre-Trial Chamber requested that the reconsideration should be done on the basis of its analysis which identified five errors.

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[41] 'Public Redacted Version of Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation', ICC-01/13-3-Red, paras 60-135.
[42] 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC-01/13-34 (the '16 July 2015 Decision'). *See also* 'Partly Dissenting Opinion of Judge Péter Kovács', ICC-01/13-34-Anx-Corr.
[43] 16 July 2015 Decision, para. 22. The Pre-Trial Chamber particularly took issue with the Prosecutor's conclusion that 'there was not a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the identified crimes'. *See* para. 23.
[44] 16 July 2015 Decision, para. 26.
[45] 16 July 2015 Decision, para. 28.
[46] 16 July 2015 Decision, paras 31-45, 49.
[47] 16 July 2015 Decision, para. 48.

16. On 29 November 2017, the Prosecutor filed her final decision (the 'Prosecutor's 29 November 2017 Decision')[48] concluding as before that she remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute',[49] and that 'the preliminary examination must be closed'.[50]

17. On 15 November 2018, following a request by the Comoros for judicial review of the Prosecutor's 29 November 2017 Decision,[51] the Pre-Trial Chamber issued the 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"' (the 'Impugned Decision'),[52] in which it requested the Prosecutor to reconsider the Decision not to Investigate in accordance with the 16 July 2015 Decision.[53] The Pre-Trial Chamber considered it 'indisputable' that a request for reconsideration under article 53(3)(a) of the Statute 'constitutes a judicial decision which must form the basis for the Prosecutor's reconsideration'.[54] It also found that the 16 July 2015 Decision amounted to a judicial decision that is no longer subject to appellate review.[55] Consequently, the Pre-Trial Chamber noted that: (i) the Prosecutor is obliged to comply with the decision at hand, (ii) the 16 July 2015 Decision should be the basis for the Prosecutor's reconsideration and (iii) the Prosecutor's 29 November 2017 Decision was not final and, as such, the Chamber 'retains jurisdiction to ensure that the Prosecutor complies with the 16 July 2015 Decision'.[56]

18. On 21 November 2018, the Prosecutor sought leave.[57] On 18 January 2019, the Pre-Trial Chamber granted leave to appeal the Impugned Decision on two issues.[58]

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[48] 'Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), date 6 November 2014', ICC-01/13-57-Anx1 (the 'Prosecutor's 29 November 2017 Decision').
[49] Prosecutor's 29 November 2017 Decision, para. 2.
[50] Prosecutor's 29 November 2017 Decision, para. 2.
[51] 'Application for Judicial Review by the Government of the Union of the Comoros', ICC-01/13-58-Red.
[52] ICC-01/13-68 (the 'Impugned Decision'). *See also*, 'Partly Dissenting Opinion of Judge Péter Kovács', ICC-01/13-68-Anx (hereinafter: 'Judge Kovács Partly Dissenting Opinion').
[53] Impugned Decision, para. 121.
[54] Impugned Decision, para. 90.
[55] Impugned Decision, para. 95.
[56] Impugned Decision, paras 95, 96.
[57] 'Request for Leave to Appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"', 21 November 2018, ICC-01/13-69.
[58] The two issues read as follows: 'Whether the Pre-Trial Chamber may find that a decision by the Prosecutor further to a request for reconsideration pursuant to article 53(3)(a) of the Statute cannot be considered to be final within the meaning of rule 108(3) of the Rules of Procedure and Evidence in circumstances in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the aforementioned request' and '[w]hether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept

The Prosecutor filed her appeal on 11 February 2019, [59] arguing that the Pre-Trial Chamber erred by requiring her to accept particular conclusions of law and fact,[60] and that the Pre-Trial Chamber erred by invalidating and setting aside the Prosecutor's 29 November 2017 Decision, thereby requiring her to conduct a further reconsideration of her decision not to investigate.[61]

19. On 2 September 2019, the Appeals Chamber rendered the Majority Judgment, whereby it confirmed the Impugned Decision. The Prosecutor was instructed to reconsider her decision not to open an investigation into the situation with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza strip, and to do so in accordance with the Pre-Trial Chamber's 16 July 2015 Decision.

20. The Majority found that a request for reconsideration by the Pre-Trial Chamber under article 53(3)(a) of the Statute amounted to a judicial decision, which imbued the Pre-Trial Chamber with power to review the Prosecutor's reconsideration.[62] However, the Majority considered that the Pre-Trial Chamber's power of review is limited to assessing whether the Prosecutor carried out her reconsideration in accordance with the Pre-Trial Chamber's initial request.[63] Furthermore, the Majority maintained that the Pre-Trial Chamber cannot direct the Prosecutor as to the result of her reconsideration and that only the Prosecutor may evaluate the relevant information and apply the law to the facts.[64] The Majority thus observed that the Prosecutor enjoys a margin of appreciation and is not bound by determinations of the Pre-Trial Chamber that appear to direct her factual findings or gravity assessments.[65] According to the Majority, in the context of judicial proceedings, once the Prosecutor conducts her

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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'. 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"', 18 January 2019, ICC-01/13-73, paras 39, 46.

[59] 'Prosecutor's Appeal Brief', ICC-01/13-85 (the 'Prosecutor's Appeal Brief').

[60] Prosecutor's Appeal Brief, paras 15 et seq.

[61] Prosecutor's Appeal Brief, paras 75 *et seq*.

[62] Majority Judgment, para. 60.

[63] Majority Judgment, para. 60.

[64] Majority Judgment, para. 76.

[65] Majority Judgment, paras 78, 81.

reconsideration, she ultimately makes the final decision to investigate a situation or not.[66]

C. Issues

21. For the reasons expressed above, I feel compelled to address the following issues in this opinion:

i. In light of the Rome Statute's object and purpose to ensure prosecution of atrocious crimes so that they do not go unpunished, what is the scope of the pre-trial chambers' powers to review the Prosecutor's decision not to open an investigation under article 53(3)(a)?

ii. In the context of a judicial review process, is it correct to say that the Prosecutor enjoys the final word considering her role as a party to judicial proceedings?

iii. Whether the Prosecutor in the case at hand is bound to comply with the decisions of the Pre-Trial Chamber and follow their *ratio decidendi*?

IV. FIRST ISSUE: IN LIGHT OF THE ROME STATUTE'S OBJECT AND PURPOSE TO ENSURE PROSECUTION OF ATROCIOUS CRIMES SO THAT THEY DO NOT GO UNPUNISHED, WHAT IS THE SCOPE OF THE PRE-TRIAL CHAMBERS' POWERS TO REVIEW THE PROSECUTOR'S DECISION NOT TO OPEN AN INVESTIGATION UNDER ARTICLE 53(3)(A)?

22. The Majority Judgment considered that 'the pre-trial chamber, in requesting reconsideration, cannot direct the Prosecutor as to the *result* of her reconsideration' as she supposedly 'retains ultimate discretion over how to proceed'.[67] It went on to say

[66] Majority Judgment, paras 58, 79.
[67] Majority Judgment, para. 76.

that 'the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor's decision' and, quite regretfully, 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 or what weight she should assign to the individual factors'.[68] I consider that the Majority interpreted article 53(3)(a) of the Rome Statute incorrectly, by imposing limitations on the pre-trial chambers which are not expressly provided in the statutory framework and, worse yet, which contradict the Rome Statute's object and purpose of ensuring prosecution of atrocious crimes so that their perpetrators do not go unpunished.

A. Plain reading of article 53(3)(a) of the Rome Statute, in light of its ordinary meaning and context

23. Under the clear wording of article 53(3) of the Rome Statute, judges in the pre-trial chamber enjoy two specific powers besides their inherent powers. Under article 53(3)(a) they have the power to review a decision issued by the Prosecutor to not investigate and as a result, if necessary, to request that he or she reconsider his or her decision. This requires the judiciary to clearly set out its reasons explaining why the reconsideration is being requested. The pre-trial chamber retains its inherent power to enforce its decision. The effect of this revision is of an administrative character because it permits the Prosecutor, as an administrative organ, to self-correct. This review can be characterised as an *ex parte* review. Under article 53(3)(b), however, the pre-trial chamber has the power to *propio motu* review a decision not to investigate; the decision of the Prosecutor not to investigate would only be effective if confirmed by the pre-trial chamber. This power can be characterised as a second instance review.

24. In sum, the scope of the pre-trial chamber's powers under each provision is different. The powers are however sufficiently broad and apply to specific factual scenarios. They are based on the two functions that the Rome Statute has entrusted to pre-trial chamber judges in article 53(3). According to the plain wording of this provision, there are no express limitations on the pre-trial chamber's powers. It should

[68] Majority Judgment, para. 81.

be recalled that any prohibitions or limitations in criminal law must be expressly provided for.

25. The rules of interpretation of treaties can be found in the Vienna Convention on the Law of Treaties. Its article 31 codifies a basic principle of treaty interpretation: '[a] treaty 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'.[69] This is the starting point in order to correctly interpret the relevant parts of article 53 of the Rome Statute.

26. Article 53(1) of the Rome Statute provides that the Prosecutor shall initiate an investigation unless she determines that there is no reasonable basis to proceed. A decision by the Prosecutor not to proceed with an investigation is subject to review by the pre-trial chamber, pursuant to article 53(3) of the Rome Statute. This provision establishes two avenues for the pre-trial chamber's judicial review of the Prosecutor's decision not to investigate or prosecute. I will only address the avenue provided by article 53(3)(a) the Rome Statute in this opinion.

27. Pursuant to this provision, the pre-trial chamber, at the request of the referring State or the Security Council, may review the Prosecutor's decision not to open an investigation and 'request the Prosecutor to reconsider that decision'. It is thus key to understand the meaning of the word 'reconsider' in this provision, as it is the main action that the Prosecutor is tasked with. In this provision, the two main usages of the word are the following:

> a. To consider (a matter or thing) again.
>
> b. To consider (a decision, conclusion, opinion, or proposal) a second time, with a view to changing or amending it; to rescind, alter.[70]

28. This leads to the re-examination of the matter in light of new circumstances, facts and legal interpretations that were not available prior to the Prosecutor rendering her first decision not to investigate. If such a re-examination is not carried out in this manner, there is no proper or effective reconsideration: there is merely a reiteration of the original determination by the Prosecutor not to investigate.

[69] Vienna Convention on the Law of Treaties, 1155 UNTS 18232, 23 May 1969, art. 31.
[70] 'Reconsider' in Oxford English Dictionary.

29. In order for a reconsideration to occur, it is essential to undergo a new round of analysis in light of new legal interpretations and considerations and to do so with the purpose of changing the original decision. That is the ordinary meaning of the action that the Prosecutor was tasked with in the case at hand. This is yet to be done by the Prosecutor.

B. Interpretation in light of the object and purpose of the Rome Statute

30. Most importantly, article 53(3)(a) must be interpreted in light of the Rome Statute's object and purpose to ensure prosecution of atrocious crimes so that their perpetrators do not go unpunished. Paragraph 2 of article 31 of the Vienna Convention on the Law of Treaties stipulates that the context shall comprise the text of the treaty, including its preamble.[71] In this connection, the Appeals Chamber has held in one of its first judgments that

> The rule governing the interpretation of a section of the law is its wording read in context and in light of it object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.[72]

31. The Preamble of the Rome Statute clearly states that when signing it, the State Parties were, *inter alia*, '**[a]ffirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'.[73] The State Parties were, moreover, '**[d]etermined** to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus contribute to the prevention of such crimes'.[74]

32. Consequently, the Pre-Trial Chamber's revision powers must be interpreted in light of the object and purpose of the Rome Statute, particularly in relation to all

[71] Vienna Convention on the Law of Treaties, 1155 UNTS 18232, 23 May 1969, art. 31.
[72] 'Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', 13 July 2006, ICC-01/04-168, para. 33.
[73] Rome Statute, Preamble.
[74] Rome Statute, Preamble.

relevant aspects contained in the decision which are the object of review (applicable law, interpretation of the law and application of the law to the facts).

33. This means that any provision in the Rome Statute must be interpreted in a way that aligns with the context, object and purposes of the Rome Statute as set out in its Preamble, that is to put an end to impunity for the most serious crimes that affect the international community as a whole and ensure the investigation and prosecution for those most responsible for the commission of those atrocities. This applies particularly when interpreting the framework for the initiation of an investigation under article 53. This is the meaning of reconsideration in terms of article 53(3)(a).

C. Interpretation consistent with internationally recognised human rights

34. According to article 21(3) of the Rome Statute, '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. Given that it is an essential feature of the Court's legal framework regulating the initiation of an investigation, the power to review a decision of the Prosecutor not to initiate an investigation under article 53(3) of the Statute is a provision that must be applied and interpreted in keeping with internationally recognised human rights.

35. The right of access to justice is an internationally recognised human right.[75] A decision of the Prosecutor not to investigate effectively denies victims the right to justice. In particular, the victims' human right of access to justice is compromised. Under article 21(3), all the organs of the Court – particularly judges and the

[75] Principle VII United Nations 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – Resolution 147 provides for the right to 'equal and effective access to justice' following gross violations of International Human Rights Law, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006), ('Basic Principles'). Further, Principle III explains that the right to justice also concerns the prosecution of those responsible for a violation: 'States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.' Basic Principles, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006). The Inter-American Court of Human Rights has underscored that in the prosecution of human rights violations, victims – like the accused – have the right to a fair trial (IACtHR, *Blake v. Guatemala*, 'Judgment', 24 January 1998, Series C, no 36, paras 96-97). Finally, it should be noted that article 21(3) of the Rome Statute stipulates that the Court must act consistently with internationally recognised human rights.

Prosecutor – are obliged to act in accordance with this specific, clear victims' human right.

36. In addition, I am of the opinion that the right to have an administrative decision reviewed is one of the expressions of the internationally recognised human right to access to justice as encapsulated in article 8 of the Universal Declaration of Human Rights, article 2(3) of the International Covenant on Civil and Political Rights, and article 25 of the American Convention on Human Rights.[76]

37. In this regard, the European Parliament's directive on 'minimum standards on the rights, support and protection of victims of crime' provides, in its relevant parts, that

> Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute.[77]

38. Furthermore, the European Court of Human Rights has found that the right to a fair trial is violated due to 'the insufficiency of the judicial review' and 'the lack of a hearing'.[78] Similarly, the Inter-American Commission on Human Rights has found that the right to judicial review of administrative decisions is one element of the right

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[76] United Nations, General Assembly, Universal Declaration of Human Rights, 10 December 1948, U.N. Doc A/810, article 8 ('[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'); United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, articles 2(3)(a)-(c) ('[…]any person whose rights or freedoms as herein recognized are violated shall have an effective remedy […]'; 'any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'; 'competent authorities shall enforce such remedies when granted'); Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955, article 25 ('[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties').

[77] European Parliament, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 25 October 2012, 2012/29/EU, article 11(1).

[78] *See e.g.* European Court of Human Rights, Grand Chamber, *Ramos Nunes de Carvalho e SÁ v. Portugal*, Judgment, 6 November 2018, Application Nos. 55391/13, 57728/13 and 74041/13, para. 214. *See also* ECtHR, *Ramos Nunes de Carvalho e SÁ v. Portugal*, Joint Concurring Opinion of Judges Raimondi, Nussberger, Jäderblom, Møse, Poláčková and Koskelo, Applications nos. 55391/13, 57728/13 and 74041/13, para. 13.

to a fair trial in administrative proceedings.[79] Moreover, the Inter-American Commission has expressed that '[j]udges should maintain at least baseline oversight of the legality and reasonableness of administrative law decisions in order to comply with the guarantees provided for in Articles XVIII and XXIV of the American Declaration and Articles 1(1) and 25 of the American Convention'.[80]

39. In light of the foregoing, these internationally recognised human rights ought to be guaranteed by ensuring that a decision of the Prosecutor not to initiate an investigation is subject to judicial review and may, where necessary, be the object of a proper reconsideration by the Prosecutor.

D. The Rome Statute imposes no express prohibitions on the pre-trial chamber's power to review a decision not to open an investigation

40. All prohibitions and limitations in law must be specific and expressed. One fundamental aspect of the principle of legality is the requirement that the applicable law is laid down in written form. The principle of legality also contains the rule of strict construction, which demands that the norms of the Statute be interpreted restrictively and not extended by analogy.

41. The principle of legality is a core principle of criminal law. It states 'that criminal offences should be clearly defined to enable people who wish to be law-abiding to live their lives confident that they will not be breaking the law'.[81] Under

[79] Inter-American Court of Human Rights, 'Access to justice as a guarantee of economic, social, and cultural rights', 7 September 2007, OEA/Ser.L/V/II.129, para. 178.
[80] Inter-American Commission on Human Rights, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights, 7 September 2007, OAE/Ser.L/V/II.129, para. 194, referring to Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116.
[81] J. Herring, *Criminal Law: texts, cases and materials* (2018), p. 9 ('Herring'). This principle is confirmed in International Human Rights Law in Article 7(1) of the European Convention of Human Rights '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'. Council of Europe, article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889 ('ECHR'). Also, the American Convention on Human Rights in its article 9 establishes that '[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. Organization of American States, article 9 of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955 ('ACHR'). *See also* European Court of Human Rights, Court (Chamber), *Kokkinakis v. Greece*, Judgment, 25 May 1993, Application No. 14307/88, para. 52.

this principle, 'the law must be clear'[82], 'capable of being obeyed'[83], and 'readily available to the public'.[84] An implication of this principle is that every prohibition must be expressly stated and interpretation by analogy is prohibited. As clearly stated by the French Court of Cassation, 'a criminal court does not have the authority to use analogy or induction to remedy silences and shortcomings in a law'.[85] Consequently, as a general principle, prohibitions and limitations must be expressly provided under law.

42. *Contrario sensu*, it appears as a general principle that what is not prohibited expressly is permitted. This principle was applied in the *Lotus* case to hold that, unless otherwise provided under international law, a national court can exercise jurisdiction over crimes happening in the high seas.[86] The Permanent Court of International Justice noted that international law grants 'a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[87] It concluded that requiring a court to cite a rule of international law allowing it to exercise its jurisdiction would often 'result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction'.[88]

43. While the principle was applied in the context of a domestic court claiming jurisdiction over extraterritorial acts, commentators have cited it as an example of a wider principle indicating that what is not expressly prohibited is thus permitted.[89] In

[82] Herring, p. 9
[83] Herring, p. 9
[84] Herring, p. 9
[85] Cour de Cassation, chambre criminelle, No. 76-91999, 1 June 1977 ('que le juge repressif n'a pas le pouvoir de suppleer par analogie ou induction aux silences ou insuffisances de la loi, ni d'en etendre le champ d'application en dehors des cas limitativement prevus par les textes').
[86] *See, mutatis mutandis,* Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 7 September 1927, pp. 19-20.
[87] *See, mutatis mutandis,* Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 7 September 1927, pp. 19-20.
[88] *See, mutatis mutandis,* Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 7 September 1927, pp. 19-20.
[89] *See e.g.* H. Lauterpacht, The Development of International Law by the International Court (2nd ed. 1958), pp. 359-361; Leslie Green, *Legal Issues of the Eichmann Trial*, 37 *Tulane Law Review* 641, p. 642 ('Before considering the trial itself, it is therefore necessary to inquire whether Israel did break any rule of international law either with regard to the abduction or the mounting of the trial. In this regard the basic principle of international law is that what is not expressly forbidden is permitted. This was clearly laid down by the Permanent Court of International Justice in its judgment in the *S.S. Lotus*, which also concerned a problem of jurisdiction').

particular, Lauterpacht referred to it as the *principle of presumptive freedom of action*.[90]

44. From its literal wording, article 53(3)(a) of the Rome Statute is clear regarding the pre-trial chamber's power when requesting reconsideration. These provisions impose no express prohibitions nor limitations on the power of the pre-trial chamber in the context of reviewing decisions not to initiate an investigation. Therefore, the pre-trial chamber's powers must be interpreted with a view to guaranteeing the Rome Statute's object and purpose of ensuring investigation and prosecution of atrocious crimes and the internationally recognised human right to access to justice. This is materialised through the possibility of having administrative decisions reviewed by a judicial organ.

45. As explained above, reconsideration must be based on the Pre-Trial Chamber's analysis of the law as applied to the facts. The Impugned Decision is not itself a review. Rather, it is a decision aimed at enforcing the 16 July 2015 Decision in an effective manner and it was rendered in accordance with judges' inherent jurisdiction. It is clear that there was only one review by the Pre-Trial Chamber and that the judges retain the power to enforce their own decisions.

E. Conclusion

46. In light of the Rome Statute's object and purpose to ensure prosecution of atrocious crimes so that they do not go unpunished, it is incorrect to find limitations in the pre-trial chambers' powers when reviewing the Prosecutor's decision not to open an investigation of atrocious crimes under article 53(3)(a), where the plain wording of the provision does not express such limitations.

[90] Lauterpacht noted that 'only when all other rules of interpretation have failed will recourse be permitted to preparatory work or to restrictive interpretation of treaty obligations' and that '[i]nterpreted in that way, the principle of presumptive freedom of action appears to be almost a tautology'. H. Lauterpacht, The Development of International Law by the International Court (2nd ed. 1958), p. 361.

V. SECOND ISSUE: IN THE CONTEXT OF A JUDICIAL REVIEW PROCESS, IS IT CORRECT TO SAY THAT THE PROSECUTOR ENJOYS THE FINAL WORD CONSIDERING HER ROLE AS A PARTY TO JUDICIAL PROCEEDINGS?

47. The Majority Judgment adopted the 2015 Appeals Chamber's interpretation that 'the relevant drafting history of what eventually became article 53(3) of the Statute confirmed the view that, while judicial review of the Prosecutor's decision not to investigate should be possible, the "ultimate decision" as to whether to initiate an investigation is that of the Prosecutor'.[91] It further considered that 'rule 108(3) of the Rules provides that the "final decision" is for the Prosecutor'.[92] I consider that the Majority made an incorrect interpretation of both article 53(3)(a) of the Rome Statute and rule 108 of the Rules, by imposing on the pre-trial chambers limitations which are not expressly provided in the statutory framework and, worse yet, which are in contradiction with the Rome Statute's object and purpose of ensuring prosecution of atrocious crimes so that their perpetrators do not go unpunished.

A. The functions of the Prosecutor in the review process

48. Under Rome Statute norms, the Prosecutor enjoys autonomy and independence to investigate, present and sustain charges, participate in hearings and other judicial proceedings, and make submissions. It is an administrative organ and he or she has the final word concerning his or her administrative decisions. When those decisions are subject to a judicial process, the Prosecutor becomes a party to the proceedings. In judicial proceedings, the Prosecutor must effectively comply with judicial decisions and the reasoning underpinning them. That includes her participation under article 53(3)(a). This does not affect the Prosecutor's autonomy and independence.

[91] Majority Judgment, para. 60, referring to Decision on Admissibility 2015, para. 62 referring to the International Law Commission, Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994, General Assembly Official Records, Forty-ninth Session Supplement No. 10 (A/49/10), p. 93, para. 7.
[92] Majority Judgment, para. 76, referring to Decision on Admissibility 2015, para. 59.

B. The Majority Judgment made an unnecessary and incomplete reference to the *travaux preparatoires*

49. When the wording of a provision is clear, there is no need to seek resource in the *travaux preparatoires*. To maintain this view that the Prosecutor has the last word in declining to initiate an investigation, the Majority relied on an observation that the 2015 Appeals Chamber's Decision on Admissibility made by reference to part of the drafting history of article 53.

50. I find that this reference was unnecessary because that decision referred to the Prosecutor's appeal on admissibility. In that case, the Appeals Chamber rejected the Prosecutor's appeal *in limine*, without considering the substance or merits of the appeal. The Appeals Chamber did not have to entertain submissions and arguments regarding the functions of the Prosecutor in the context of article 53(3)(a). In any case, the incomplete mention of the *travaux preparatories* was only part of the *obiter dicta*. For the present case, which concerns the merits, such a reference was totally unnecessary.

51. Quoting just a part of the report of the International Law Commission (hereinafter 'ILC'), the Appeals Chamber in 2015 observed:

> The corresponding provision in the 1994 draft statute for an international criminal court prepared by the Working Group of the International Law Commission contained a key difference. Instead of the Bureau of the Court having the power to direct the Prosecutor to commence a prosecution, draft article 26 (5) provided that the Presidency, at the request of a complainant State or the Security Council, shall, *inter alia*, *review* a decision of the Prosecutor not to initiate an investigation, "*and may request the Prosecutor to reconsider the decision*" (emphasis added). The commentary to this provision stated, *inter alia*, as follows:
>
> > This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides

> that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor.[93]

52. The reference to the *travaux préparatoires* made in passing by the Appeals Chamber in 2015 does not completely reflect all the views at the ILC, as not all the views supported the assertion that the Prosecutor has the final decision after reconsideration.[94] The existence of opposing views is apparent when looking at the complete work of the ILC on the provision that would become article 53 of the Rome Statute.

53. For example, there was a view that the Presidency had 'some possibility of judicial review of the Prosecutor's decision not to proceed with a case'.[95] On the other hand, there was a contrasting view that 'direct[ing] a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor'.[96] An intermediate, compromise view was that the Prosecutor would be independent on matters of fact and bound to judicial review on matters of law. The ILC continued:

> [s]ome members of the Commission would prefer that the Presidency also have the power to annul a decision of the Prosecutor not to proceed to an investigation or not to file an indictment in cases where it is clear that the Prosecutor has made an error of law in making that decision. Respect is due to decisions of the Prosecutor on issues of fact and evidence but like all other organs of the court the Prosecutor is bound by the Statute and the Presidency should, in this view, have the power to annul decisions shown to be contrary to law.[97]

54. The Decision on Admissibility 2015 failed to quote this portion of the ILC's report. Additionally, more recent views, ignored by the Majority, were received during the Rome Conference. The Irish delegation, for instance, supported the view that judicial review of the Prosecution's decision would provide safeguards, even in

[93] Decision on Admissibility 2015, para. 62, *quoting* Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994, General Assembly Official Records, Forty-ninth Session Supplement No. 10 (A/49/10), p. 93, para. 7.
[94] Decision on Admissibility 2015, paras 61-65.
[95] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, A/49/10, p. 93.
[96] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, A/49/10, p. 93.
[97] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, A/49/10, pp. 93-94.

relation to the Prosecutor's evaluation of the information received. In the delegate's words, 'if the Prosecutor was to have the competence to receive information from a wide range of sources, it would be too great a responsibility for the evaluation of that information to rest with that person alone'.[98] The delegate rather supported the proposal 'for a further safeguard in connection with the handling of such information, namely that it be subject to confirmation or rejection by a pre-trial chamber, was therefore a good one, and would make the Court more accessible and relevant to those affected by or concerned with violation of international humanitarian law'.[99]

55. No definitive conclusion can be drawn from the drafting history. The *travaux préparatoires* are not the only, nor the main, source of treaty interpretation. As indicated above, the pillar of interpretation is the context, object and purpose of the treaty. The next section will interpret rule 108 of the Rules in light of its plain reading.

C. Plain reading of rule 108 of the Rules, in light of its ordinary meaning and context, and the object and purpose of the Rome Statute

56. Now, in the event that the pre-trial chamber requests a reconsideration, rule 108(2) and (3) of the Rules provides that

> 2. […] the Prosecutor shall reconsider that decision as soon as possible.
>
> 3. Once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. This notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion. It shall be communicated to all those who participated in the review.

57. The word 'final' means 'coming to an end (of a word, a series)'.[100] The word final in rule 108(2) is used to qualify a particular moment where the Prosecutor's decision-making process ends. The word 'final' is used after having explained that the Prosecutor shall reconsider his or her initial decision as soon as the pre-trial chamber makes the request for the Prosecutor to reconsider. That is, rule 108(3) is simply using

[98] Summary record of the 9th meeting, held at the headquarters of the food and agriculture organization of the united nations on Monday, 22 June 1998, A/CONF-183/C-1/SR-9, 20 November 1998, para. 106.
[99] Summary record of the 9th meeting, held at the headquarters of the food and agriculture organization of the united nations on Monday, 22 June 1998, A/CONF-183/C-1/SR-9, 20 November 1998, para. 106.
[100] 'Final' in Oxford English Dictionary.

the adjective 'final' to differentiate 'a final decision' of the Prosecutor from his or her initial decision, after having conducted his or her reconsideration.

58. There is no express indication or prohibition, neither in the Statute nor the Rules, that no other entity of the Court can take further actions afterward, especially the judges adjudicating in the proceedings under which such a final action by the Prosecutor is made. This could not be otherwise because the review is a judicial process in which judges broadly exercise their jurisdictional powers. A request for reconsideration involves the exercise of these jurisdictional powers to review the administrative decision rendered by the Prosecutor. In the review decision, the pre-trial chamber requests a reconsideration which must be carried out by an administrative organ, namely the Prosecutor. The Prosecutor is then obliged to effectively comply with the judicial determination and follow its reasoning.

D. The Prosecutor's role as a party to judicial proceedings at this Court

59. As stated above, the Prosecutor is an administrative entity with powers and responsibilities expressly authorised in the Rome Statute. However, she is accountable to the decisions made by judges in light of the provisions of the Rome Statute. In that process, the judges have the power to interpret the law and their interpretations are not legal abstractions made in a vacuum, but they are made in light of the facts of each specific case. In complying with the pre-trial chamber's decisions, the Prosecutor is obliged to follow those interpretations because the content of the *ratio decidendi* is the *rationale* and the basis of the decision and one does not exist without the other. The outcome of the case depends on it.

60. At the preliminary examination stage the role of the Prosecutor is to evaluate the information made available to him or her with a view to assessing whether to initiate an investigation or not. Where the Prosecutor decides not to initiate an investigation, his or her decision under article 53(1) of the Statute is not a judicial decision as the Prosecutor is not a judicial body empowered to make judicial decisions. His or her role and decision at this stage is best described as administrative in nature. This is an administrative decision and can be challenged under article 53(3)(a) or 53(3)(b) of the Statute.

61. At this Court, the role of the Prosecutor is delineated by the relevant provisions of the Rome Statute and it is for the judges to make interpretations of such provisions. Under the content of jurisdiction (*ius dicere)*, judges have the exclusive power to dictate the law and adjudicate the matters submitted to the Court's jurisdiction. The Prosecutor does not make or dictate the law; he or she has only administrative powers. Under the Rome Statute framework, when the Prosecutor participates in judicial proceedings, he or she only has the power to make submissions or requests as a party, since in judicial proceedings the only one who decides or makes decisions and judgments are the judges.

62. This is so in the case at hand in which the Majority maintains that it is not possible for the pre-trial chamber to direct the prosecution to apply the law to the facts as determined by the pre-trial chamber.[101] It is noted that applying law to facts is purely a legal exercise. As such, it is a judicial prerogative.

63. As discussed above, a decision of the pre-trial chamber requesting the Prosecutor to reconsider his or her decision is a judicial decision with which the Prosecutor is bound to effectively comply when conducting his or her reconsideration. The Prosecutor is not entitled to say that she cannot comply with a judicial decision because she disagrees with it. Nevertheless, she can appeal the decision as set out in the Rome Statute. Once the judicial decision becomes final, it triggers a legal obligation on the Prosecutor to meaningfully and effectively comply with it and follow the *ratio decidendi.*

64. Nevertheless, I note that in complying with this decision, and having followed the *ratio decidendi*, the Prosecutor could reach a different conclusion, including, theoretically, a decision not to investigate, but this new decision and conclusions must be based on new and different reasons or facts that were not previously known. This is what makes article 53(3)(a) different in substance from article 53(3)(b). Under 53(3)(b) the pre-trial chamber has the power to directly confirm or not to confirm the Prosecutor's decision not to investigate. In the latter situation, the Prosecutor is obliged to immediately initiate the investigation.

[101] Majority Judgment, paras 78-80.

65. In the case at hand, the Prosecutor failed to successfully appeal the Pre-Trial Chamber's 16 July 2015 Decision. As a result, it became final and the Prosecutor must therefore comply with it and follows its reasons. This irrefutable truth was indeed confirmed in the Majority Judgment and I agree with that finding:

> 84. At the outset, the Appeals Chamber notes the finding of the Pre-Trial Chamber that the 16 July 2015 Decision had 'acquired the authority of a final decision'. In the view of the Appeals Chamber, this finding was correct. The Prosecutor had unsuccessfully tried to appeal that decision under article 82(1)(a) of the Statute, an appeal which the Appeals Chamber had dismissed in limine, and the time limits for any other potential avenues for appeal had expired. Therefore, the Prosecutor could no longer challenge the 16 July 2015 Decision, which had become final. Consequently, the Prosecutor had to conduct her reconsideration on the basis of the 16 July 2015 Decision.[102]

66. The Prosecutor had the procedural duty to comply with the 16 July 2015 Decision in accordance with the reasons and legal interpretations made by the Pre-Trial Chamber, but she did not. The Prosecutor still has to comply with the 16 July 2015 Decision, as indicated in the Impugned Decision.[103]

67. As a party, failure of the Prosecutor to abide by a judicial decision, particularly from the Court's understanding and application of the law, could amount to misconduct under article 71(1) of the Statute based on the Prosecutor's deliberate refusal to duly follow the Pre-Trial Chamber's orders and directions when she should have appropriately implemented a judicial decision.

E. Binding nature of judicial decisions

68. In the situation at hand, the Prosecutor asserted that she will not comply with, nor does she agree with, the Pre-Trial Chamber's request for reconsideration. The Prosecutor stated that she 'cannot concur with the majority of the Pre-Trial Chamber' and that she 'respectfully disagrees with the legal reasoning in the [16 July 2015 Decision] concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under article 53(3), and the considerations relevant to the substantive analysis carried out by the majority'.[104] Her assertions are contrary to the role stipulated in the Statute for the Prosecutor when she

[102] Majority Judgment, para. 84.
[103] Impugned Decision, para. 117.
[104] Prosecutor's 29 November 2017 Decision, para. 13.

is a party to the proceedings. The logic behind the Prosecutor's statements thus misapprehends her role and, most importantly, the function of judges.

69. While independent, the Prosecutor is still a party to proceedings led by judges and is bound to follow their decisions, both in their outcome and their reasons. Nothing the Pre-Trial Chamber says in a judicial decision, under article 53(3) or otherwise, affects the Prosecutor's power. Regarding the Prosecutor's independence, article 42(1) of the Rome Statute notes:

> The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

70. The Prosecutor's independence as preserved under article 42(1) refers to any sources outside the Statute's mandate from whom she may seek guidance. The Prosecutor is no less independent when her actions are subject to judicial review pursuant to decisions of the Pre-Trial Chamber under article 53(3)(a) of the Rome Statute because she has the same substantive duty to comply with judicial decisions as any other party. As such, the Prosecutor must comply with the Chambers' orders and direction in terms of judicial decisions issued within the mandate of the Rome Statute. The Prosecutor cannot challenge, belittle, or gloss over the substance of final judicial decisions.

71. An order by the Court is inherently binding and imposes on parties a positive obligation recognised by international law.[105] In relation to the unanimous order issued by the International Court of Justice to prevent genocide in Bosnia, a judge

[105] International Court of Justice, *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Separate Opinion of Judge Weeramantry, 13 September 1993, I.C.J. Reports 1993 ('Separate Opinion of Judge Weeramantry), p. 374. *See also* A. von Bogandy and I. Venzke, 'On the Functions of International Courts: An appraisal in light of their burgeoning public authority' in Amsterdam Center for International Law (2012), Research Paper No. 2012-10, p. 5 (noting that 'we understand broadly [international courts] as institutions whose characteristic activity lies with making binding decisions by applying legal yardsticks according to ordered procedures'); O. Bekou and R. Cryer, 'The Statute of the International Criminal Court: Some preliminary reflections' in The International Criminal Court (2018), pp. 61-62 (explaining that, under the supra-state model for regulating the cooperation of states with an international criminal court, 'the international court is empowered to issue binding orders to states and, in case of non-compliance, may set in motion enforcement mechanisms'.).

explained that '[t]o view procedural measures as not binding on the parties is to enable the ground to be cut under the feet not only of the opposite party but also of the court itself'.[106] As such, a court's authority would be undermined should the binding power of its orders be negated by parties' disobedience of them.[107] I am of the view that the judges of the Court ought to acknowledge, recall and enforce this principle.

72. Regulation 29 of the Regulations of the Court ('Regulations') provides that '[i]n the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice'. Inherently, regulation 29 grants the Pre-Trial Chamber the power and responsibility to assess whether the Prosecutor, or any other party, appropriately and sufficiently complied with its orders, including a request for reconsideration.

73. As stated above, the nature of a reconsideration to be conducted by the Prosecutor is to seriously re-examine a matter in light of the *ratio decidendi* of a judicial decision. This reconsideration implies 'to consider (a decision, conclusion, opinion, or proposal) a second time, with a view to changing or amending it; to rescind, or alter'.[108] It is important to highlight that reconsideration is not a simple formality but must be done in light of the *ratio decidendi* or the judicial request for reconsideration.

74. It is on the basis of the general principle that judicial decisions are to be complied with, as expressed, *inter alia*, under regulation 29 of the Regulations, that the Pre-Trial Chamber had the power to issue the Impugned Decision requiring compliance of the 16 July 2015 Decision. The Prosecutor should have followed the Pre-Trial Chamber's judicial request bearing in mind the *ratio decidendi*, that is, the interpretation of the law and analysis of the factual information in light of its own interpretation of the law, as contained in its 16 July 2015 Decision.

[106] Separate Opinion of Judge Weeramantry, p. 376.
[107] Separate Opinion of Judge Weeramantry, p. 374.
[108] 'Reconsider' in Oxford English Dictionary.

F. Conclusion

75. In the context of article 53(3)(a) where there is a judicial determination from a pre-trial chamber regarding the Prosecutor's decision not to open an investigation, it is incorrect to say that the Prosecutor enjoys the final word considering his or her role as a party to judicial proceedings. The Prosecutor must comply with the decisions issued by the pre-trial chamber and follow the *ratio decidendi* in his or her reconsideration. The final word in matters of law and the interpretation of the law and its application to the facts of each specific case is a prerogative granted to the judges in the context of any judicial proceedings. It is important to highlight that reconsideration is not a simple formality but must be done in light of the *ratio decidendi* or the judicial request for reconsideration.

VI. THIRD ISSUE: WHETHER THE PROSECUTOR IN THE CASE AT HAND IS BOUND TO COMPLY WITH THE DECISIONS OF THE PRE-TRIAL CHAMBER AND FOLLOW THEIR *RATIO DECIDENDI*?

76. The Majority Opinion noted that it was supposedly 'inappropriate for the Pre-Trial Chamber to direct the Prosecutor as to how to apply its interpretation of the "reasonable basis to proceed" standard to the facts, what factual findings she should reach and to suggest the weight to be assigned to certain factors affecting the gravity assessment, as demonstrated above'.[109] It further considered that 'when reconsidering her decision not to initiate an investigation, the Prosecutor is not bound by these determinations of the Pre-Trial Chamber'.[110] I do not concur with this.

77. The legal interpretations that judges make are not only legal abstractions. They are not made in a vacuum. Judges interpret the law and apply it to the specific facts of a given case. This exercise is purely within judges' remit. Judges make these interpretations in light of the submissions of the parties regarding the facts. This is especially the case in the situation at hand where there is not even an investigation,

[109] Majority Judgment, para. 94.
[110] Majority Judgment, para. 94.

precisely because the Prosecutor has refrained from opening it. At this stage of the proceedings, the law ought to be applied to the information received as *notitia criminis* contained in the Referral and other preliminary information, without prejudice to the investigation that the Prosecutor may make afterwards to find the truth.

78. On appeal, the Prosecutor argues that '[a]s a general rule, it is the disposition of a decision - specifying the relief or remedy that it grants - which is binding upon the Parties […]. It is generally not the *reasoning* in the decision which binds the parties to the litigation […]'.[111] In my view, for the reasons discussed below, this argument is flawed. A judicial decision is one that consists of conclusions of either law or fact and the reasons that support those conclusions.[112] The reasoning of a decision or the *ratio decidendi* has been defined as: '[t]he principal proposition or propositions of law determining the outcome of a case, or necessary for the decision of a particular case'.[113] In other words, *ratio decidendi* are the reasons of law and fact that are necessary for the decision.

79. As noted above, in the context of a judicial review of a decision not to investigate under article 53(3) of the Rome Statute, the *ratio decidendi* is the essence of the analysis that leads judges to a decision. It is intrinsic to the request to conduct a reconsideration. Without reasons there is no decision. The authority of a decision comes from its being reasoned. The reasoning contains the conclusions of law on the facts. They require a concrete and thoughtful re-examination by the Prosecutor in light of the judges' legal interpretation. The Prosecutor is therefore not at liberty to ignore the *ratio decidendi* of the Pre-Trial Chamber's decision requesting reconsideration.

[111] Prosecutor's Appeal Brief, para. 43.
[112] 'Ratio Decidendi' in Oxford Dictionary of Law (2003).
[113] J.R. Crawford, 'Glossary' in (ed.) *Brownlie's Principles of Public International Law* (2012) ('Brownlie's Principles of Public International Law'); H. Thirlway, 'Glossary of Latin Phrases' in *The Sources of International Law* (2014) ('Glossary of Latin Phrases') (defining *ratio decidendi* as '[t]he legal considerations on which a judgment is based'); R. Y. Jennings, 'The Judiciary, International and National, and the Development of International Law' in *45 International & Comparative Law Quarterly 12* (1996) (Jennings), p. 11, referring to R. Cross and J.W. Harris, *Precedent in English Law* (1991), p. 178 (noting that the *ratio decidendi* is a rule of law expressly or impliedly treated by a court as a necessary step in reaching its conclusion). In contrast, *obiter dicta* in a decision refers to propositions of law that are not directed to the principal matters in issue. *See* Brownlie's Principles of Public International Law.

A. The five errors are the *ratio decidendi* in the case at hand

80. In the case at hand, the Pre-Trial Chamber interpreted the standard of 'reasonable basis to proceed' under article 53(1) of the Statute as follows:

> [i]n the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word "shall" in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts. […]. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome.[114]

81. The Pre-Trial Chamber applied this interpretation of the relevant standard of proof to the Prosecutor's assessment of gravity and found errors in relation to the nature of the crimes (third error) and the manner of commission of the crimes (fourth error) and by implication the potential perpetrators of the crimes (first error).

82. In relation to the third error, the Prosecutor characterised the alleged conduct perpetrated against the victims as outrages upon personal dignity rather than torture. The Pre-Trial Chamber reasoned that a proper differentiation between the two crimes 'involves the application of a threshold to the level of severity of the pain and suffering' and that such differentiation 'cannot credibly be attempted on the basis of the limited information available at this stage, *i.e. before the Prosecutor has even started an investigation*'.[115] Because of its interpretation of article 53(1), the Pre-Trial Chamber reasoned that '[a]t this stage, the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed'.[116] This application of the standard of proof by the Pre-Trial Chamber was appropriate and required the Prosecutor to reconsider her decision accordingly.

83. With respect to the fourth error, the Pre-Trial Chamber noted that the Prosecutor failed to consider whether live fire was used by the IDF prior to boarding the *Mavi Marmara* and that such assessment was material to the determination as to whether

[114] 16 July 2015 Decision, para. 13.
[115] 16 July 2015 Decision, para. 30 (emphasis added).
[116] 16 July 2015 Decision, para. 30.

the identified crimes followed some plan or policy to attack, kill or injure civilians.[117] The Prosecutor nevertheless submitted that evidence of live fire had to be treated with caution because of the 'significantly conflicting accounts' by witnesses.[118] The Pre-Trial Chamber reasoned that

> Contrary to what is implied by the Prosecutor, the availability of contradicting information should not mean that one version should be preferred over another, but both versions should be properly considered. Even more, if, as stated by the Prosecutor, the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded. For the purpose of her decision under article 53(1) of the Statute, the Prosecutor should have accepted that live fire may have been used prior to the boarding of the *Mavi Marmara*, and drawn the appropriate inferences.[119]

84. It appears that the Prosecutor's disagreement with the Pre-Trial Chamber's interpretation of the applicable standard of proof impacted her approach when reconsidering whether the conduct of the IDF soldiers followed a pre-existing plan. This further impacted the Prosecutor's conclusions as identified under the first error, regarding the possibility that persons other than IDF soldiers may have also participated in the commission of the alleged crimes. In my view, the Prosecutor was precluded from failing to comply on the basis of her disagreement with the Pre-Trial Chamber's interpretation and application of the standard of proof. Rather, she was required to reconsider her decision in an effective manner and in accordance with the Pre-Trial Chamber's reasoning, and she did not. Neither did she indicate new or different reasons for reaching a conclusion not to investigate.

85. With respect to the second and fifth errors, the Pre-Trial Chamber found no dispute as to the number of victims in the situation at hand.[120] The Pre-Trial Chamber noted that the Prosecutor had erred in considering that the scale of killings and injuries on board the *Mavi Marmara*, despite exceeding the number of killings in other cases she investigated and prosecuted, such as *Abu Garda*, was not grave enough.[121] Similarly, the Pre-Trial Chamber noted that the Prosecutor failed to consider that the crimes had an impact beyond the direct and indirect victims,

[117] 16 July 2015 Decision, para. 34.
[118] Prosecutor's 29 November 2017 Decision, para. 104.
[119] 16 July 2015 Decision, para. 36. *See also* paras 38, 41, 43.
[120] 16 July 2015 Decision, para. 26.
[121] 16 July 2015 Decision, para. 25.

particularly, the effect of the blockade on the delivery of humanitarian aid to people in Gaza.[122] I observe that the Pre-Trial Chamber, having stressed that there was no dispute as to the number of direct and indirect victims, concluded that the scale of crimes should have militated in favour of sufficient gravity, and that the impact on those direct and indirect victims itself was a sufficient indicator of gravity.[123] In my view, the Pre-Trial Chamber has the power to consider the specific weight of factors such as the scale and impact of the crimes on victims in applying the law to the factual submissions of the parties. Further, the Pre-Trial Chamber is entitled to consider the elements of crimes, contextual elements and other factors relevant for the correct application of the law to the facts in its legal reasoning.

86. As illustrated above, the Pre-Trial Chamber's *ratio decidendi* stemmed from the errors in the Prosecutor's decision not to initiate an investigation. This cannot be detached from its ultimate finding requiring the Prosecutor to reconsider her decision. As such, the Prosecutor was bound to follow both the conclusions of law on the facts, as well as the Pre-Trial Chamber's *ratio decidendi*. In order to properly realise the reconsideration, it should have been done in light of the Pre-Trial Chamber's thorough reasoning regarding the five errors.

B. Conclusion

87. The errors identified in the 16 July 2015 Decision are the *ratio decidendi* that led the Pre-Trial Chamber to its decision to request reconsideration. These errors are the basis on which it requested reconsideration. But for such errors, the Pre-Trial Chamber would not have requested reconsideration. Therefore, by 2 December 2019, the Prosecutor is obliged to make the reconsideration in light of the legal interpretations of the Pre-Trial Chamber.

[122] 16 July 2015 Decision, para. 48.
[123] 16 July 2015 Decision, para. 26, 46-47.

VII. FINAL CONCLUSIONS

88. In light of the foregoing, the following conclusions can be made:

i. Given the Rome Statute's object and purpose to ensure prosecution of atrocious crimes so that they do not go unpunished, it is incorrect to find limitations in the pre-trial chambers' powers when reviewing the Prosecutor's decision not to open an investigation under 53(3)(a). The plain wording of the provision does not express such limitations.

ii. The judges have the power to interpret the law and their interpretations are not legal abstractions made in a vacuum, but they are made in light of the facts of each specific case.

iii. In the context of article 53(3)(a) review proceedings by judges, the pre-trial chamber's decision obliges the Prosecutor to make an effective reconsideration. This must be done in light of the judges' *ratio decidendi.*

iv. Where a pre-trial chamber finds errors in the Prosecutor's decision not to open an investigation, in the context of review judicial proceedings, it is incorrect to say that the Prosecutor enjoys the final word considering his or her role as a party to judicial proceedings.

v. In the case at hand, the Prosecutor is bound to comply with the pre-trial chamber's decisions and follow the *ratio decidendi*, particularly the conclusions of law and its application to the facts regarding the five errors identified in the 16 July 2015 Decision.

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

Judge Luz del Carmen Ibáñez Carranza

Dated this 1 day of November 2019

At The Hague, The Netherlands