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Thank you very much. Good morning everyone, and also, I would like to begin with thanking both the organizers, but also all of you for what I think has been a very rich discussion so far and a very interesting discussion. And hopefully what we took out this morning will further inform some of those discussions today. As with everybody else: the usual disclaimer, I speak in my own capacity. I do not represent the Prosecutor or the Office. And really, this is to some extent also meant to be perhaps a bit of a counter-argument to some of the discussions that we have already had.

As you will see, I have subtitled my presentation, alternatively, ''what the drafters mandated'', because I think we have heard a lot of discussions so far about the outcomes of preliminary examinations, we have heard a lot of thought on whether or not we think the Office is successful in what it is trying to do, we have heard a lot of discussion about discretion. Of course, those are all important parts of the analysis; but there is also the other question, as Matilde mentioned yesterday, that preliminary examinations are fundamentally a legalistic, they are legal test, and therefore there is a certain element in which we are guided and have to be guided by what the drafters of the Rome Statute actually told us to do. So, if it is helpful I just wanted to take you through some of those aspects of the Statute this morning.

Yesterday, I think it was Sharon who mentioned the Cheshire Cat as a model by which you might think of the ICC and how the ICC works. I have as my alternative the elephant in the room. The elephant in the room is Article 53 of the Statute. It sounds like, you know, here is the governing provision: the Prosecutor shall, having evaluated the information made available, initiate an investigation unless he or she determines that there is no reasonable basis to proceed. Sounds straightforward, and the truth is there has not been a whole lot of discussion.

Certainly in terms of the case law of the Court, as to actually what this means. We have had the Article 15 decisions, of which there have been three. And we have had the Comoros decision requesting the Prosecutors to reconsider. And the interesting thing already is that even from that small number of decisions, the first two decisions – the Kenya Article 15 and the Côte d'Ivoire Article 15 – they give a quick summary of what the reasonable basis standard might be, but then

already Comoros and Georgia – which were both decided last year – have started to introduce some ambiguities. There are other signs that maybe this concept is not quite as straightforward as it seems. For example, if you look at those four decisions, each one of them has quite an extensively-reasoned separate opinion by one of the judges of the Pre-Trial Chamber. So, clearly even within the Pre-Trial Chamber there is some discussion about exactly what this concept might mean and how it should work.

I propose that we should consider this question through the lens of the Vienna Convention on the Law of Treaties, which is the normal interpretive methodology for the Rome Statute in particular, but also international treaties in general. That approach means not only looking at the ordinary meaning of the text, but then also the context of the text, and its object and purpose. That might itself be illuminating because it requires us then to consider what are some of the assumptions which underpin our expectations of preliminary examinations. What is the purpose of the Court, fundamentally? Is it like a national prosecutor's office, which is there to prosecute every crime and for which preliminary examination should be really a very low threshold indeed? Or if it is more selective, then on what basis should it be selective. And this is all important – back in the context of the theme of this conference in terms of quality control – because if you are looking at the quality of preliminary examinations, and if you are assessing what the Prosecutor is doing, it is both important in terms of transparency, but is also important to look at actually how she understands – or might understand – the requirements of the Statute itself.

So, one caveat, I suppose, when we are talking about standard of proof, because already as we discovered from our discussions yesterday, preliminary examinations have a number of different facets. The heart of preliminary examinations, I think in terms of the amount of work that the Office is generally doing and the content of the outcomes which the Office shares, both with the public and the Pre-Trial Chamber, is driven by facts and law. We look at the available information to determine applying the law, whether the threshold is met, and that is 53(1)(a) and 53(1)(b). It is my contention that they both come under the standard of proof whether or not there is a reasonable basis to proceed.

But as Amy told us yesterday, even before we get to that determination in the context of phase 2, as the Office calls it, we have the question for Article 15 communications, which are individual communications, as to whether or not to open a preliminary examination at all. And that, as Amy pointed out, is in part, has a discretionary flavour, which I suggest probably comes from 15(1).

Which says that the Prosecutor may start a *proprio motu* investigation, as opposed to 53, which says ''shall'' – when she is doing preliminary examination – start an investigation if the criteria are met. So maybe there is a difference there, and I am not talking about that phase 1 process this morning.

Nor am I talking about interests of justice. As we know, that is a separate consideration, and we had some discussion about that yesterday, and the Pre-Trial Chambers have all more or less consistently said: that is a separate matter, that is easy discretion in the sense that it is not straightforwardly capable of an objective determination, whether or not the discretion was rightly or wrongly exercised. By contrast with the standard proof, with A and B, it is a normal judicial function. It is facts and law, it is just the same as looking at the Trial Chamber's decision, or looking at any other kind of legal test: it is possible for the Pre-Trial Chamber to review it and to determine whether or not it is *reasonable* if it is a factual matter, or *correct* if it is a legal matter. And again, that is relevant to quality control.

So, the ordinary meaning of the text, Kenya Article 15 decision tells us that ''reasonable'' means fair and sensible, fair enough, supported on information available, fair enough, or a sensible justification for belief. That all sounds straightforward. Comoros and Georgia, on the other hand, have started to introduce the idea that maybe the Prosecutor should accept any information unless it is manifestly false, and there is a question about how that articulates with this statement. And in Georgia as well, there was a question about some reference to reasonable doubt about different allegations. And Comoros also says, you know, preliminary examinations should not be a complex or extended process of analysis. And therefore, if that is the case, then the question is: well, really, are we looking at the evidence and are we looking at the information? Or is it much more of a paper exercise in just looking at, well, do these allegations add up to a crime?

So, given the ambiguity, it is worth moving on to look at context and object and purpose. Context. In looking at the standards of proof in the Statute, most of the time, most chambers have tried to define what a standard of proof is by reference to what it is not. Set in the context, for example, of arrest warrants, the Article 58 stage, the *Lubanga* Appeals Chamber said: while we know that the standard of proof for arrest warrants is less than 66(3) – which is the beyond reasonable doubt standard – and less than 61(7) – which is the confirmation standard – and so, therefore, the Article 58 standard should be less than that.

Now, we have a question if we are looking at what the preliminary examination standard is, which is: where does that fit in this hierarchy. We have the Chambers consistently telling us that it is the lowest standard of proof in the Statute, so we know it is somewhere at the bottom. And we are also told that it does not require that the conclusions reached by the Prosecutor are the only reasonable inference.

Which is not really surprising when you think about it, because the only reasonable-inference standard is the top – that is the beyond reasonable doubt test. So, it is definitely less than the standard for conviction at trial.

But then the question is: is the preliminary examination standard so much lower than the Article 58 standard? The Kenya decision suggested it is, but it does not really say why, it just says it is lower. On the other hand – and here I have to acknowledge a very good paper by Manuel Ventura back from 2013 – there is an argument to say: well, really, Article 58 – which is looking at whether or not there is reasonable grounds to believe a specific individual committed a crime within the Statute – and Article 53 – which is whether there is a reasonable basis to believe that somebody committed a crime in the situation – are looking at different questions. But it is not that clear that they are applying a different standard. I mean textually – ''reasonable grounds'', ''reasonable basis'' – they sound like they are pretty much the similar or same standard, but they are looking at different questions. The 58 standard is asking a much more difficult question; is asking: can you prove what we often term linkage evidence? Can you show that this individual is associated with the crime? Whereas 53 is saying: somewhere in this situation, can you find that the crime actually was committed.

So, myself I am not so convinced that you have to put 53 so much lower than 58. And that is also important because we have already got at least three standards of proof. The more standards of proof that you have, the more difficult it starts to be to differentiate between them in a meaningful way, and the harder it is, really, to say there is anything substantive about 53 if it is at the bottom of this very long pile of different standards. Whereas actually if you question that assumption, then you start recognizing that maybe 53 can be something meaningful.

Moving on to object and purpose. Again, we have a few small clues. Judge Kaul in the Kenya decision recognized that the ICC Prosecutor is not like national prosecutors. So, probably that is a recognition that there is some aspect of selectivity in terms of the statutory mandate that we work under.

Likewise, the Côte d'Ivoire Article 15 decision said that the purpose – and there they are talking about Article 15, but I think it applies equally to the Prosecutor under Article 53 – the purpose of preliminary examinations is to filter out unwarranted, frivolous or politically motivated investigations. Now, ''frivolous'' and ''politically motivated'': probably we know what that means. ''Unwarranted'' is an interesting question because that again begs the question about what is a warranted investigation. We also know from the Statute itself that we have the idea of complementarity. So not all cases come before the Court, but only admissible cases. And we have gravity: not all violations of Article 5 crimes – which are themselves the most serious crimes of international concern – nonetheless warrant coming before the International Court.

It is also notable that what the Statute does not mention in terms of opening investigations, is the question of resources, and how the Prosecutor is going to cope with her finite resources, and how the Court will cope with its finite resources in processing multiple investigations. And it does not mention questions about looking at the adequacy of the evidence that the Prosecutor might be able to uncover in order to take the process forward.

If you have, on the other hand, a meaningful standard of proof at the Article 53 stage, and if that is based on the evidence, and if that requires some greater process of evaluation and analysis – such that not all allegations which are presented to the Court necessarily lead to investigations – then to some extent that might make sense of the fact that he has not expressly taken into account resources or the adequacy of the evidence. Because at least then there is some filter in saying: okay, if there is evidence that there is a reasonable basis to believe crimes are committed, then it is worth expending resources regardless of the circumstances; but at the same time, if there is a mere allegation that crimes are committed that is not backed up to the necessary standard, then maybe resources should not be expended. So, maybe there is a clue there as well.

What do we take from this? Because I am aware that I have about 3-4 minutes left.

I think, first of all, we should recognize that the standard of proof, although it is a low standard of proof, it still has to be a meaningful standard of proof. And consistent with the approach of the Court as a whole, it applies to the essential findings for the procedure to go forward, and not just to look at individual pieces of evidence. In other words, it is not a question about whether or not in isolation we think a piece of evidence is reasonable. It is whether or not the questions which we have to answer – for example, is there a reasonable basis to believe a crime is committed, or is there a reasonable basis to believe that the particular fact which might be relevant to gravity is established – whether *that* it is a reasonable thing. And that means you have to look at the evidence as a whole. It means you have to look at the evidence in context. And it means you do need a process of analysis; it is not just looking at allegations themselves.

It is also implicit that, as we discussed, preliminary examinations are not done with the benefit of investigative measures. Therefore, you have to look at the open-source information. You have to look at information which is made available. And that means, again, then, maybe some limits in the findings that you make.

In terms of quality control, on the other hand, as I said, these are, it is a normal legal process, and it is susceptible to an objective review, and the Pre-Trial Chamber is entitled, if there is a trigger under 53(3), to look at what the Prosecutor has done. But the fact that it is an objective

process in that way, does not mean it is not entitled to deference. Any appellate process will still give the Trial Chamber, for example, some deference on matters of fact, not least because the Appeals Chamber does not have all of the information before it that the Trial Chamber had.

So, too, will usually be the case in terms of 53(3) reviews of preliminary examinations. The rule itself in the Rules says: the Pre-Trial Chamber *may* request summaries or some information which the Prosecutor relied upon. But they do not have to. They can do the review just on the basis of the Prosecutor's decision itself. And therefore, deference is more or less required as the consequence of that.

We talked about discretion yesterday. There is also this methodological discretion which informs how the Prosecutor allocates resources, which affects, for example, the prioritization of one preliminary examination over another. It may affect, under Rule 104, how much available information she seeks, or where she seeks it from, or who she considers a reasonable source to be. And, again, all of those factors will feed into this standard of proof that we are talking about.

One very final point. If we look at preliminary examination through the lens of the standard of proof, and if we treat it like, if you like, a normal legal exercise of taking law and facts and seeing whether a test is met, then it opens up the possibility that sometimes preliminary examinations are likely to be quite pragmatic. It means that – although all crimes under the Statute are equal, and you apply the standard of proof equally to all of them – it may be much more likely that some types of crimes are easier to establish at the preliminary examination stage, than other types of crimes. To put it at its simplest: the more elements the crime has, the harder it may be to establish at preliminary examination stage, because you need more information to satisfy those elements. Some elements may also be, frankly, more obscure than others. How do you look at some aspects of the mental intent of the perpetrator, for example, if you are going on the basis of open source information? Normally that is the kind of thing you would *investigate* to analyse, but here we can not investigate.

So, the consequence of that, is that preliminary examinations – although they are a legal standard, they are a legal way of moving to investigations – they may not be a very good guide to actually what the conduct of the investigation is. Some crimes may frankly be harder to establish at the preliminary examination stage, but nonetheless once you have investigated, you may well find good evidence for them. Preliminary examinations are not what the Prosecutor suspects or what the Prosecutor thinks, or what civil society and the rest of world suspects, but they are what can be established on the information that is available. And maybe that is an important thing to bear in mind.

Ironically, and this is the final note, it is really only when the Prosecutor closes a preliminary examination without taking it forward to the next step, that you may get a broader analysis of actually what happened in the situation, because, obviously, the Prosecutor is obliged to explain why the reasonable possibilities which might be raised by the allegations actually do not meet the legal standard, and therefore why she is not taking things forward.

So, you will get a more comprehensive form of reporting of a situation when the Prosecutor does not investigate. And when she does choose to investigate, conversely, you will get enough explanation to say the process should go forward, but it may not be complete, and it may not be ultimate. Well, I say complete: it is a complete analysis, but it is not the complete picture of the situation as a whole, as it may prove to be once an investigation has occurred.

And on that note, I think, given the time, I should stop there. Thank you very much.