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No. ICC-02/17  
Date: 12 April 2019

**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an  
Investigation into the Situation in the Islamic Republic of Afghanistan

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis, Registrar

**Defence Support Section**

**Victims and Witnesses Section**

Nigel Verrill, Chief

**Detention Section**

**Victims Participation and Reparations  
Section**

Philipp Ambach, Chief

**Other**

**PRE-TRIAL CHAMBER II** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this Decision pursuant to article 15 of the Rome Statute (the ‘Statute’) on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (‘Afghanistan’).

## **I. PROCEDURAL HISTORY**

1. On 30 October 2017, the Prosecutor informed the Presidency of her decision to request judicial authorisation to commence an investigation into the situation in Afghanistan pursuant to regulation 45 of the Regulations of the Court.<sup>1</sup>
2. On 3 November 2017, the Presidency decided ‘to assign, with immediate effect, the situation in the Islamic Republic of Afghanistan to Pre-Trial Chamber III’.<sup>2</sup>
3. On 9 November 2017, the Judges of Pre-Trial Chamber III issued a decision indicating that Judge Antoine Kesia-Mbe Mindua would act as Presiding Judge of the Chamber in the situation in Afghanistan.<sup>3</sup>
4. On 9 November 2017, Pre-Trial Chamber III granted the request of the Prosecutor for an extension of the page limit for the request for authorisation of an investigation into the situation in Afghanistan<sup>4</sup> and issued an order to the Victims Participation and Reparation Section with a view to properly organising the process of victims’ representations.<sup>5</sup>
5. On 20 November 2017, the Prosecutor submitted the ‘Request for authorisation of an investigation pursuant to article 15’ (the ‘Request’), together with 14 annexes, in which the Pre-Trial Chamber is requested ‘to authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to

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<sup>1</sup> ICC-02/17-1-AnxI.

<sup>2</sup> The Presidency, Decision assigning the situation in the Islamic Republic of Afghanistan, 3 November 2017, ICC-02/17-1.

<sup>3</sup> Pre-Trial Chamber III, Decision on the Election of the Presiding Judge, ICC-02/17-4.

<sup>4</sup> Pre-Trial Chamber III, Decision on the Prosecutor’s Request for Extension of the Page Limit, ICC-02/17-5.

<sup>5</sup> Pre-Trial Chamber III, Order to the Victims Participation and Reparation Section Concerning Victims’ Representations, ICC-02/17-6.

the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002'.<sup>6</sup>

6. On 5 December 2017, Pre-Trial Chamber III ordered the Prosecutor to provide additional information concerning, *inter alia*, 'allegations attributed to special forces of a number of international forces operating in Afghanistan'.<sup>7</sup>

7. On 12 December 2017, the Prosecutor provided the additional information, as ordered on 5 December 2017.<sup>8</sup>

8. On 14 and 18 December 2017, the Prosecutor provided, as requested, further additional information regarding the national investigations and/or prosecutions in Afghanistan.<sup>9</sup>

9. Throughout the period 20 November 2017 to 31 January 2018, the Court received the representations of victims, which were transmitted to Pre-Trial Chamber III on a rolling basis, together with reports containing a preliminary assessment of the representations.<sup>10</sup>

10. On 5 February 2018, Pre-Trial Chamber III ordered the Prosecutor to provide additional information, *inter alia*, on the structure, organisation and conduct of the

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<sup>6</sup> ICC-02/17-7-Conf-Exp, and public redacted version ICC-02/17-7-Red, para. 376.

<sup>7</sup> Pre-Trial Chamber III, Order to the Prosecutor to Provide Additional Information ('Order of 5 December 2017') ICC-02/17-8, para. 5; *see also* Order to the Prosecutor to under Rule 50(4) of the Rules of Procedure and Evidence, 5 December 2017, ICC-02/17-9-Conf.

<sup>8</sup> ICC-02/17-12, with one confidential *ex parte* annex.

<sup>9</sup> ICC-02/17-13-Secret-Exp; ICC-02/17-14-Secret-Exp.

<sup>10</sup> **First Transmission and Report on 7 December 2017:** ICC-02/17-10 with five confidential *ex parte* annexes; ICC-02/17-11-Red with two confidential *ex parte* annexes; the Court received one individual and four collective representation forms; **Second Transmission and Report on 21 December 2017:** ICC-02/17-15 with seven confidential *ex parte* annexes; ICC-02/17-16-Red with one confidential *ex parte* annex; the Court received three individual and four collective representation forms; **Third Transmission and Report on 11 January 2018:** ICC-02/17-17 with 28 confidential *ex parte* annexes; ICC-02/17-18 with one confidential *ex parte* annex; the Court received five individual and 23 collective representation forms; **Fourth Transmission and Report on 25 January 2018:** ICC-02/17-19 with 47 confidential *ex parte* annexes; ICC-02/17-20-Red with 3 confidential *ex parte* annexes; the Court received 5 individual and 42 collective representation forms; **Fifth Transmission and Report on 2 February 2018:** ICC-02/17-21 with 138 confidential *ex parte* annexes; ICC-02/17-22-Red with 3 confidential *ex parte* annex; the Court received 58 individual and 80 collective representation forms; **Sixth Transmission and Report on 5 February 2018,** ICC-02/17-24 with 165 confidential *ex parte* annexes; ICC-02/17-25 with 2 confidential *ex parte* annexes; the Court received 29 individual and 136 collective representation forms; **Seventh Transmission and Report on 9 February 2018:** ICC-02/17-27 with 309 confidential *ex parte* annexes; ICC-02/17-28 with 2 confidential *ex parte* annexes; the Court received 72 individual and 237 collective representation forms.

Afghan Forces, the structure and organisation of the Islamic State operating in Afghanistan, and the structure and interrogation policies of the United States of America (the 'United States' or 'US') for specific time periods.<sup>11</sup>

11. On 9 February 2018, the Prosecutor provided additional information pursuant to the 5 February 2018 order.<sup>12</sup> In total, Pre-Trial Chamber III received from the Prosecutor 806 items of supporting material, amounting to 20,157 pages.

12. On 20 February 2018, the Registry submitted a final consolidated report summarising the process of collecting the victims' representations and the victims' views on whether or not they wish an investigation into the situation in Afghanistan to be authorised.<sup>13</sup>

13. On 16 March 2018, the Presidency recomposed the Chambers of this Court and assigned the situation in Afghanistan to the Chamber.<sup>14</sup>

14. On 22 March 2018, the Judges of this Chamber issued a decision indicating that Judge Antoine Kesia-Mbe Mindua would act as Presiding Judge of the Chamber.<sup>15</sup>

## II. PROSECUTOR'S SUBMISSIONS

15. The Prosecution submits - and it is indeed a matter of common knowledge - that, throughout the last four decades, the people of Afghanistan have suffered immensely, due to a series of armed conflicts and a succession of security crises. The Prosecution provides information as to the relevant historical background and recalls that since 1 May 2003 - date of the entrance into force of the Statute for Afghanistan - the conflict in the country has intensified, as an armed insurgency waged a widespread guerrilla-style war against the Government as well as international forces supporting it. The Prosecution submits that, according to statistical data collected since 2009, many thousands of civilians have been victims

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<sup>11</sup> Pre-Trial Chamber III, Second Order to the Prosecutor to Provide Additional Information, 5 February 2018, ICC-02/17-23.

<sup>12</sup> ICC-02/17-26 with 3 public annexes.

<sup>13</sup> ICC-02/17-29, with a confidential annex (a public redacted version is also available) and a confidential *ex parte* annex.

<sup>14</sup> The Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2018, ICC-02/17-30, p. 9.

<sup>15</sup> Pre-Trial Chamber II, Decision on the Election of the Presiding Judge, 22 March 2018, ICC-02/17-31.

to continuous acts of serious violence, some of which might constitute crimes within the jurisdiction of the Court.

16. The Prosecutor submits that, at least since 19 June 2002, a non-international armed conflict of a certain intensity has taken place between, on the one side, a number of organised armed groups and, on the other side, the Afghan Government as well as the international forces that have supported it.

17. The Prosecution also submits information as to the groups allegedly responsible for the crimes for which authorisation to investigate is sought. The Request classifies the facts into three 'categories', depending on the group allegedly responsible for the crimes. For the purposes of this decision, the Chamber will address each of these three categories separately.

### **1. Alleged Crimes by the Taliban and other armed groups**

18. According to the Request, since mid-2003 remnants of the Taliban formerly in power as well as other armed anti-government groups clashed with Afghan forces and the international forces supporting the government. The civilian population suffered greatly as the anti-government groups carried out attacks against persons perceived or believed to be associated with the Afghan government or related to the international community, as well as against other civilians. Annex 2A to the Request provides a non-exhaustive list and detailed description of several of the most serious incidents, which are said to have taken place in as many as 25 provinces of Afghanistan. These incidents are of different nature and include, without limitation, the following: attacks by gunmen, bombers and suicide bombers resulting in numerous murders and injuries of civilians gathered in public and private places - among which mosques, hospitals and schools - as well as foreigners regarded as supportive of the Afghan government; executions of alleged collaborators and spies of the government and foreign entities, sometimes followed by the gruesome display of mutilated bodies to which written messages threatening the population were attached; abductions of civilians; attacks against civil servants, police officers, judges and other officials of judicial authorities, governors, members of parliament and of district and provincial councils, religious, tribal and other local community leaders, teachers, health care providers, journalists, farmers and workers on de-mining or road construction sites; pupil girls and female officials. Other incidents

consist of attacks against personnel of the United Nations, NGOs and humanitarian institutions; suicide attacks resulting in the killing or in the wounding of members of Afghan forces and of soldiers of the International Security Assistance Force ('ISAF') established by a Resolution of the UN Security Council ('the Security Council'); and the use of child soldiers, in some cases in connection with suicide bombings. The Prosecution mainly relies on the findings of the United Nations Assistance Mission in Afghanistan ('UNAMA') and the Afghan Independent Human Rights Commission ('AIHRC').

19. The Prosecution alleges that the Taliban and other anti-governmental groups can be held responsible for these incidents. While making some submissions on the structure of the Taliban and other anti-governmental armed groups in Afghanistan, the Prosecution underlines that information available at this stage does not allow to reach any conclusive determination as to which specific groups, or association of groups, may have carried out the alleged crimes.

20. The Request submits that the conducts underlying the said incidents qualify as crimes against humanity under article 7 of the Statute and, more specifically, as the crimes of murder, imprisonment or other severe deprivation of physical liberty and persecution on political and gender grounds, committed since 1 May 2003 as part of a widespread and systematic attack against civilians perceived as supporting the Afghan government and foreign entities, or otherwise opposing their rule and ideology. It also submits that these conducts qualify as well as war crimes in the context of an armed conflict not of international character under article 8 of the Statute and, specifically, as the crimes of murder; intentionally directing attacks against the civilian population, humanitarian personnel and protected objects; conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities; and killing or wounding treacherously a combatant adversary.

## **2. Alleged Crimes by the Afghan Forces**

21. The Prosecution submits that, since 1 May 2003, members of the Afghan National Security Forces ('ANSF', including the Afghan National Army, the Afghan National Police, the Afghan Local Police, the Afghan National Border Police and the National Directorate for Security) committed crimes against persons placed *hors*

*de combat* by detention, or civilians who were not taking active part in the hostilities and were detained for security reasons to some extent related to the ongoing armed conflict. The Prosecutor mainly relies on the findings of UNAMA, AIHRC and an *ad hoc* UN fact finding delegation, according to all of whom torture was widely practiced in Afghan government detention facilities against any persons suspected to belong to anti-government armed groups, with a view either to forcing confessions or obtaining information, or as a form of punishment. Annex 2B to the Request lists and details a certain number of cases of infliction of severe physical and mental pain or suffering to detainees according to various modalities, some of which particularly brutal, cruel and hurtful and some resulting in the victims' death; cases of humiliating and degrading treatments or other inhumane treatments violating the victims' dignity, including by depriving them of fundamental material and spiritual needs, such as sleep, food and water, and praying; as well as cases of acts of sexual violence, at times resulting in the permanent impairment of the victims' sexual integrity.

22. The Prosecution submits that, in light of the information available, there is a reasonable basis to believe that since 1 May 2003 the war crimes of torture and cruel treatment, outrages upon personal dignity and sexual violence have been committed in the context of a non-international armed conflict against persons detained by and within the control of units of the ANSF.

### **3. Alleged Crimes by the US Forces and the CIA**

23. The Prosecution devotes a specific section of the Request to the policies allegedly pursued by US Armed Forces and the Central Intelligence Agency ('CIA') with regard to the interrogation of detainees. Annex 2C to the Request contains information to the effect that several individuals were captured, detained and transferred by US armed forces to specific US-controlled facilities (particularly, the airbases in Bagram and Kandahar), on the basis of suspicions either of being members or cooperators of Al-Qaeda, the Taliban or other associated armed groups; or of having knowledge of operations and planned attacks as well as information on these groups. Other individuals were also allegedly captured in various places and similarly mistreated inside or outside Afghanistan by the CIA, allegedly with a view to forcing confessions, obtaining information or retaliating for the attacks suffered on 11 September 2001 on US territory. The specific incidents described in Annex



2C comprise cases of infliction of severe physical and mental pain or suffering to *hors de combat* detainees or to other persons not taking active part in the hostilities in the non-international armed conflict, some of which extremely cruel, brutal and gruesome; cases of humiliating, degrading or inhumane treatments violating the victims' dignity, among which the deprivation of fundamental material and spiritual needs, such as sleep, food and water and praying, as well as acts implying offence, distress and shame, including acts of a sexual nature. The Prosecutor submits that 'although the existence of a plan, policy or large-scale commission is not a pre-requisite for the Court to exercise jurisdiction over war crimes, the information ... has assisted the Prosecution in determining that there is a reasonable basis to believe that the alleged crimes were committed and in assessing the gravity of the crimes'.

24. According to the Prosecution, there is a reasonable basis to believe that, since May 2003, members of the US armed forces and the CIA have committed the war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the US authorities. The Prosecution mainly relies on the findings of the US Senate Select Committee on Intelligence, the US Senate Armed Services Committee and the US Department of Defense.

#### **4. 'Other acts' by members of international armed forces**

25. The Prosecution further indicates that crimes other than those falling in the forementioned categories, which might have been committed by members of the other international forces deployed in Afghanistan (particularly in relation to complicity in the torture of detainees and to civilian casualties caused by military operations), have also come under its scrutiny. However, the Prosecution states that it has not reached 'a determination that there is a reasonable basis to believe, at this stage, that crimes within the jurisdiction of the Court have occurred', in particular because the information available was either insufficient or could not be analysed in time. Several victims' representations refer to incidents in which individuals not participating in hostilities as well as non-military buildings, including of protected nature, were indiscriminately or deliberately attacked by air strikes and drones by the US and other international forces, despite an apparent absence of a military target, and that such attacks resulted in the death of civilians.

26. The Prosecution is not requesting authorisation to investigate these alleged incidents and acknowledges not having yet reached a determination to the effect that the conditions under article 15 are met. The Prosecution notes, however, that the mentioned allegations ‘can be subjected to proper investigation and analysis if an investigation of the Situation is authorised’ and, further, that ‘should an investigation be opened, these and other alleged crimes that may occur after the commencement of the investigation [..] could be assessed within the scope of the authorised situation’.

### III. VICTIMS’ REPRESENTATIONS

27. A high number of victims of the situation have come forward to present their views on whether the Chamber should authorise the commencement of the Prosecutor’s investigation into the situation. Overall, the Court has received a total of 794 representations in Dari and Pashto, as well as Arabic, English and German of which 699 were transmitted to the Pre-Trial Chamber<sup>16</sup> on behalf of the following victims: 668 representations on behalf of 6,220 individuals; 17 representations on behalf of 1,690 families; 13 representations on behalf of several millions of victims, including 26 villages;<sup>17</sup> and 1 representation on behalf of an institution.

28. The Chamber notes that the victims’ representations usefully complement and supplement the information provided by the Prosecutor on the facts alleged in support of the Request.

### IV. ARTICLE 15 OF THE STATUTE

29. Under article 15(3) of the Statute, the Prosecution can initiate *proprio motu* investigations, within an ongoing preliminary examination, subject to obtaining the prior authorisation of the Pre-Trial Chamber<sup>18</sup>. The provision reads as follows: ‘If

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<sup>16</sup> Of the 794 representation forms, 41 forms were considered to be duplicates and 54 representations were assessed not to meet the rule 85 criteria. As a result, these victims’ representation forms were not transmitted to the Chamber.

<sup>17</sup> Twelve representation forms have been submitted by individuals and organisations on behalf of approximately 1.163,950 victims and 26 villages. One additional representation form was submitted by an organisation reportedly on behalf of approximately 7-9 million persons; *see* ICC-02/17-29-Anx1-Red, para. 29.

<sup>18</sup> Pre-Trial Chamber II, *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya* (‘Kenya Article 15 Decision’), 31 March 2010, ICC-01/09-19-Corr, paras 17-18; Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire, Decision Pursuant to Article 15 of the Rome*

the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected'. In determining whether there is a reasonable basis to proceed with an investigation, rule 48 of the Rules of Procedure and Evidence (the 'Rules') requires the Prosecutor to consider the factors set out in article 53 (1) (a) to (c). Article 15(4) provides additional details as to the scope and object of the scrutiny to be performed by the Pre-Trial Chamber, by stating that '[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'. Article 15(5) provides that 'The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation'.

30. Unlike in the scenario where the situation is referred to the Court by a State or by the Security Council, the Pre-Trial Chamber is vested with a specific, fundamental and decisive filtering role in the context of proceedings under article 15. The Pre-Trial Chamber must consider, on the exclusive basis of the information made available by the Prosecutor, whether the requirements set out in article 53(1)(a) to (c) are met.

31. The evidentiary standard applicable for the purposes of the proceedings under article 15 is the existence of a 'reasonable basis to proceed', the lowest in the Court's statutory framework. While the Statute does not elaborate on the precise significance of the standard, the Chambers have interpreted it as a 'sensible and reasonable justification for a belief that a crime falling within the jurisdiction of the

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Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire ('Côte d'Ivoire Article 15 Decision'), 15 November 2011, ICC-02/11-14-Corr, para. 21; Pre-Trial Chamber I, *Situation in Georgia, Decision on the Prosecutor's Request for Authorisation of an Investigation* ('Georgia Article 15 Decision'), 27 January 2016, ICC-01/15-12, para. 3; Pre-Trial Chamber III, Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017 ('Burundi Article 15 Decision'), ICC-01/17-9-Red, 9 November 2017, paras 27-28.

Court has been or is being committed’; to be ‘construed and applied against the underlying purpose of the procedure in article 15(4) which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility’<sup>19</sup>.

32. The need to compromise between two antithetical positions on prosecutorial discretion (one, radically in favour; the other, firmly opposed) led in Rome to a two-pronged system. If the jurisdiction is triggered by State or Security Council referrals, the Prosecution, after having analysed the information, can start investigations at any time, unless it determines that there is no reasonable basis to proceed under article 53 (1). Conversely, if the Prosecution intends to open an investigation in the absence of a referral and on its own initiative, in the context of one of the ‘situations’ it has been observing, it must seek prior authorisation of the Pre-Trial Chamber. The mechanism is designed to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments.

33. Also, and most critically, the mechanism makes it possible for the Court, through the filtering role of the Pre-Trial Chamber and the requirement to determine that the investigation would serve the interests of justice, to avoid engaging in investigations which are likely to ultimately remain inconclusive.

34. The importance to preserve the scrutiny of the Pre-Trial Chamber under article 15 is apparent when considering that what is at stake is much more than the Court’s credibility; it is its very function and legitimacy. Frivolous, ungrounded or otherwise predictably inconclusive investigations would unnecessarily infringe on fundamental individual rights without serving either the interests of justice or any of the universal values underlying the Statute, as spelt out in the Statute’s Preamble: ending impunity and preventing mass atrocities with a view to achieving peace, security and the well being of the people.

35. Accordingly, the scrutiny mandated to the Pre-Trial Chamber in the proceedings under article 15 is not limited to determining whether there is a reasonable basis to believe that crimes under the Court’s jurisdiction have been

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<sup>19</sup> Pre-Trial Chamber II, Decision in the *Situation in the Republic of Kenya*, para 32.

committed, but must include a positive determination to the effect that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation be feasible and meaningful under the relevant circumstances. Specific individual responsibilities, to the contrary, are, and should remain, outside the scope of the proceedings.

36. As regards the standard of the reasonable basis to believe that crimes within the jurisdiction of the Court have been committed, it should be borne in mind that proceedings under article 15, being instrumental to obtaining an authorisation to investigate, belong to the pre-investigative stage. This stage, which can be regarded as the earliest of the Court's work, remains under the exclusive responsibility of the Prosecution until a request under article 15 is filed. During this stage no evidence is yet available; accordingly, the standard to be met is low. Within the context of the Court's procedural framework, these are the only proceedings where judicial scrutiny bears on mere 'information', as opposed to 'evidence'. Judicial decisions infringing on individual rights (arrest warrants, confirmations of charges and decisions on the individual guilt of the defendant) must be based on evidence obtained and assessed according to the rules: increasingly stricter and higher standards of proof apply to each of these stages, in line with their respective impact on and interference with individual rights: 'reasonable basis to proceed with an investigation', in article 15; 'reasonable grounds to believe that the person has committed a crime', in article 58 (for the issuance of arrest warrants or summons to appear); 'substantial grounds to believe that the person committed each of the crimes charged', in article 61 (for the confirmation of the charges before trial); and 'beyond reasonable doubt, article 66 (for the conviction of the accused). The nature of the standard applicable for the purposes of article 15 proceedings results from their object and purpose: at this stage, what is at stake is not the individual criminal responsibility but the legality and appropriateness of investigations aimed at finding out whether crimes within the Court's jurisdiction have been committed. If the judicial authorisation is granted, the Prosecutor is required to investigate thoroughly and expeditiously; this may prove critically difficult in a complex situation like the one under scrutiny, which has been under preliminary examination for many years.

37. The ultimate aim of the investigation that the Chamber is asked to authorise is to shed light on allegedly criminal events, as it results from the Latin root of the verb ‘in-vestigare’, which literally means ‘to track back’. Accordingly, under the article 15 standard, the Chamber is only required to verify whether the *notitia criminis* (i.e., the information that a crime under the Court’s jurisdiction has been committed) is credible and deserves to be assessed and examined further through investigations.

38. In assessing the credibility of the available information, the Chamber must not only consider its inherent qualities (i.e., its completeness, relevance and consistency), but also the authoritativeness of its source: both these factors weigh significantly in determining the ‘reasonableness’ of the basis relied upon by the Prosecutor.

39. The proceedings under article 15 are triggered by an entirely discretionary request of the Prosecution. It is therefore its sole responsibility to identify and select specific incidents and conducts in the context of ongoing preliminary examinations, pursuant to the conditions set forth in article 53. The scope of the Chamber’s scrutiny must remain confined to the incidents or category of incidents and, possibly, the groups of alleged offenders referred to by the Prosecution; at this stage it is not possible for the Pre-Trial Chamber to extend such scope by recommending further investigations, irrespective of the fact that these may emerge as appropriate on the basis of the materials under its scrutiny. The responsibility of the Pre-Trial Chamber is limited to determining whether, in light of the information made available by the Prosecution, the investigation should or should not be authorised, taking into account all the conditions set forth by the Statute including the interests of justice; in the event that the Pre-Trial Chamber determines that all relevant requirements are satisfied, the object and purpose of article 15 as a boundary to prosecutorial discretion require that the Pre-Trial Chamber also sets specific limits to the authorised investigation.

40. More specifically, the precise width and breadth of the Prosecutor’s power to investigate are to be determined on the basis of the scope of the Chamber’s authorisation: the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it.

41. In this respect, the Chamber does not share the views of the Prosecution, that it 'should be permitted to expand or modify its investigation with respect to the acts identified in this Request or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases brought forward for prosecution are *sufficiently linked* to the authorised situation (emphasis added)'. The need to preserve the filtering function of the authorisation under article 15 requires that the power to investigate beyond the incidents specifically mentioned therein only exist in respect of, and be limited to, those incidents which can be regarded as having a close link, rather than a simply 'sufficient' one, with one or more of the incidents specifically authorised by the Pre-Trial Chamber. The closeness of this link cannot be predefined once for all; it is to be assessed taking into account the temporal, territorial and material parameters of the authorisation as granted. Proximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme, are some among the factors allowing a Chamber to establish such connection.

42. The filtering and restrictive function of the proceedings under article 15 further implies that the Chamber's authorisation does not cover the situation as a whole, but rather only those events or categories of events that have been identified by the Prosecution. To conclude otherwise would be tantamount to equating the authorisation to a blank cheque, which would run against the very rationale of article 15 and thus defeat its underlying purpose. The authorisation sets the framework of the probe; investigation on incidents not closely related to those authorised would only be possible on the basis of a new request for authorisation under article 15, with a view to allowing the Chamber to conduct anew its judicial scrutiny on all relevant requirements, including jurisdiction, complementarity, gravity and interests of justice.

## **V. DETERMINATIONS BY THE CHAMBER ON THE EXISTENCE OF A REASONABLE BASIS TO PROCEED**

### **1. Basis for the Chamber's determinations**

43. The determinations of the Chamber are based on the information provided in the Request, in its annexes and supporting materials, in the victims' representations, and in the responses to orders issued by the Pre-Trial Chamber under Rule 50(4).

44. The Request is very wide in scope and encompasses a high number of alleged incidents having occurred over a long time period. The Prosecutor emphasises that the preliminary examination on Afghanistan opened in 2006<sup>20</sup> and has since been hampered by a number of severe constraints and challenges, resulting mainly from the lack of cooperation by various authorities. In this respect, the Chamber underlines that until the moment of an application under article 15, it is the Prosecution's sole responsibility to evaluate the prospective feasibility of a probe and its potential attitude to actually lead to the investigation and prosecution of cases, considering and balancing the realistic expectations for cooperation by the most relevant national authorities in the collection of evidence and in the surrender of potential suspects, on the one side, and the concrete interests of justice, included the interest of the victims, on the other. The Statute vests the Prosecutor with discretion in setting priorities and deciding if, when and how to file a request of authorisation to investigate. Once the mechanism under article 15 has been triggered, however, it is the Chamber's duty and responsibility to conduct a scrutiny on all of the evaluations that have led the Prosecutor to apply for an authorisation to investigate, including those pertinent to the prospects of an investigation.

### **2. Jurisdiction**

45. According to article 15 (4), the Chamber must determine whether the case 'appears to fall within the jurisdiction of the Court'. The wording and the overall rationale of the provision imply that the assessment of jurisdiction is provisional and without prejudice to further decisions on jurisdiction and admissibility that a Chamber may have to adopt at a later stage. Within these limitations, the

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<sup>20</sup> Office of the Prosecutor ('OTP'), Report on Preliminary Examination Activities, 13 December 2011 ('2011 Report on Preliminary Examinations'), para. 20.



authorisation can only be granted if the following jurisdictional criteria are satisfied: (i) one of the alternative requirements set forth in article 12(2) (jurisdiction *ratione loci* or *ratione personae*) must be met; (ii) the crime appears to fall within one of the categories set out in article 5 and defined in articles 6 to 8 (jurisdiction *ratione materiae*); (iii) the temporal conditions specified in article 11 must occur (jurisdiction *ratione temporis*).

46. The Chamber notes that almost all of the information relied upon and provided by the Prosecution in support of the Request is based on authoritative, reliable and credible sources, to a significant extent corroborated by other likewise reliable ones.

47. More specifically, the materials include a significant number of reports - many of which also available on open source – emanating from reliable bodies such as UN agencies, national organs and parliamentary inquiry committees, and contain detailed accounts of the events for which the Prosecutor requests authorisation to investigate. As regards the crimes allegedly committed by the Taliban and other armed groups, the Chamber notes that almost all of the information is based on the reports and internal records of UNAMA. With respect to the crimes allegedly committed by the ANSF, the sources of information include reports of UNAMA and of the AIHRC. As regards the crimes allegedly committed by the US armed forces and the CIA, sources include extensive reports authored by the US Senate Select Committee on Intelligence and the US Senate Armed Services Committee.

48. Upon consideration of the inherent qualities as well as the authoritativeness of the information, the Chamber is satisfied - at this stage - that there is a reasonable basis to believe that the incidents underlying the Request have occurred.

## **2.1 Jurisdiction *ratione loci***

49. The Prosecutor seeks authorisation to investigate alleged crimes committed on the territory of Afghanistan as well as ‘other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties’. Under article 12(2) of the Statute, in the cases of referral by a State Party or of proprio motu investigations, the Court may exercise its jurisdiction if the conduct has occurred in the territory of a State that is party to the Statute or has otherwise accepted the Court’s jurisdiction (i.e.

principle of territoriality), or, alternatively, if the offender is a national of one of those States (i.e. principle of nationality).

50. The first mechanism comes into play in this proceeding. The conducts that have allegedly occurred in full or in part on the territory of Afghanistan or of other State Parties fall under the Court's jurisdiction, irrespective of the nationality of the offender. The Court has jurisdiction if the conduct was either completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa.

51. The Prosecution asserts that the Court may, under certain circumstances, also exercise its jurisdiction over crimes committed against persons *hors de combat* either captured in Afghanistan and tortured or otherwise mistreated outside that country, or captured outside Afghanistan. More specifically, the Request makes specific reference to a 'detention programme allegedly carried out by the CIA' which 'was global in nature and included persons with no direct connection to the conflict in Afghanistan' such as individuals suspected to have links with or information about the 'core group' or 'central group' of Al Qaeda, at the time suspected for the terrorist attacks of 11 September 2001, or to have connections with the Taliban. The Prosecutor submits that the capture of persons 'undertaken in the context of or associated with the ongoing armed conflict in Afghanistan and their later alleged mistreatment on the territory of a State Party, combine to provide the requisite nexus' (emphasis added); otherwise stated, for the Prosecution, it would be sufficient that the capture *either* occurred in the context of the armed conflict, *or* was associated with it for such conduct to fall within the jurisdiction of the Court.

52. The Chamber finds it appropriate to clarify that the Prosecution's reading runs contrary to both the wording and the rationale of the provision. The two requirements 'in the context of' and 'associated with' are clearly not alternative but rather cumulative, as made apparent by the use of the word 'and' to connect them.

53. Accordingly, the Chamber notes that the relevant nexus between the conflict and the alleged criminal conducts required by the Statute is only satisfied when the victims were captured within the borders of Afghanistan. Both the wording and the spirit of common article 3 to the Geneva Conventions are univocal in confining its territorial scope within the borders of the State where the hostilities are actually

occurring: ‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [...]’. It is also worth recalling that the Appeals Chamber has rightly interpreted the nexus requirement with rigour, warning against ‘any undue expansion of the reach of the law of war crimes’.<sup>21</sup>

54. Furthermore, if the conducts of inflicting ‘severe physical or mental pain or suffering’ were to occur entirely on the territory of a non-State Party, the fact that the concerned person has been captured in Afghanistan within the context of the there ongoing non-international armed conflict - and is therefore entitled to the protection of international humanitarian law and international criminal law alike – would not constitute an adequate jurisdictional link for the purposes of establishing territorial jurisdiction. Otherwise stated, for the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of ‘inflicting severe physical or mental pain’ - not its mere antecedents (ie, the fact of having been captured and abducted) - takes place at least in part in the territory of a State Party; provided that the victims were captured in Afghanistan.

55. Accordingly, based on the information available at this stage, the Chamber finds that the extension of the scope of international humanitarian law beyond the territory of Afghanistan, where a non-international armed conflict was occurring at the time of the relevant conducts, as advocated by the Prosecutor, does not find adequate support in the relevant texts. The Chamber considers that the alleged war crimes whose victims were captured outside Afghanistan fall out of the Court’s jurisdiction due to the lack of the nexus with an internal armed conflict which is required to trigger the application of international humanitarian law as well as the Court’s jurisdiction.

56. These determinations have a direct and specific impact on the alleged incidents which the Office of the Prosecutor attribute to the CIA in Annex 2C: since

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<sup>21</sup> Appeals Chamber, *The Prosecutor v. Bosco Ntaganda, Judgment on the appeal of Mr Ntaganda against the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’*, ICC-01/04-02/06-1962, 15 June 2017, para. 68.

these are said to have occurred against persons captured elsewhere than Afghanistan, they fall outside the Court's jurisdiction.

57. The Chamber notes that, at this initial stage of the proceedings, which precedes investigations, it is to be expected that no specific information allowing the direct attribution of conducts for the purposes of determining individual criminal responsibilities is yet available to the Prosecutor. In this perspective, it is not necessary to identify at this stage the specific force or group to which those who have allegedly engaged in each of the criminal conducts would have belonged.

58. The fact that most of the alleged conducts took place within the territory of Afghanistan, a State Party, makes it also unnecessary at this stage to further address the issue of the alleged individual responsibility for the crimes with a view to determining whether there is a reasonable basis to believe that the alleged perpetrators, as identified by the Prosecutor, are nationals of a State Party.

59. Furthermore, as to the Agreement of 30 September 2014 between the United States and Afghanistan pursuant to article 98, requiring the consent of a sending State to surrender a national of that State to the Court, the Chamber concurs with the Prosecution that agreements entered into pursuant to article 98(2) of the Statute do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an exception to the obligation of States Parties to arrest and surrender individuals.

## **2.2. Jurisdiction *ratione materiae***

60. In light of the nature and content of the information made available by the Prosecutor, the Chamber is satisfied that there is a reasonable basis to believe that the incidents underlying the Request occurred and that they may constitute crimes within the jurisdiction of the Court.

61. More specifically, as submitted by the Prosecutor, such incidents may qualify either as crimes against humanity - namely murder, imprisonment or other severe deprivation of physical liberty and persecution on political and gender grounds; or as war crimes - namely murder, torture, killing or wounding treacherously a combatant adversary, conscripting or enlisting children under the age of 15 years or using them

to participate actively in hostilities, intentional attacks against the civilian population, humanitarian personnel and protected objects.

62. With respect to conducts allegedly qualifying as crimes against humanity, the Chamber reminds the contextual element set forth in and required by article 7, consisting of a ‘widespread or systematic attack directed against any civilian population’, which attack is defined as a ‘course of conduct involving the multiple commission of acts ... against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack’.

63. With respect to conducts allegedly qualifying as war crimes, the Chamber recalls that the following conditions must be fulfilled: a) an armed conflict not of an international character must have occurred at the time of the conducts; b) the victim must be either *hors de combat* or otherwise a person not taking part in the hostilities; c) the conduct must have taken place in the context of the non-international conflict and be associated with it (emphasis added) .

64. The Chamber is satisfied that there is a reasonable basis to believe, on the basis of the available information, that the Taliban and other anti-governmental armed groups have pursued a plan of deliberate attacks against civilians believed to oppose their rule and ideology, or considered to support either the Afghan government or foreign entities. Alleged victims were representative of various social, professional and national backgrounds and included civil servants, judicial authorities’ officials, governors, members of parliament and of district and provincial councils, religious, tribal and other local community leaders, teachers, health care providers, journalists, personnel of the United Nations, of NGOs and humanitarian institutions, farmers and workers. The main source of information in this respect is UNAMA, whose detailed reports are deemed by the Chamber as authoritative, reliable and credible.

65. The Chamber is also satisfied that there is a reasonable basis to believe that the requirement under article 8(2)(c) and (e), namely the occurrence in Afghanistan of a conflict of non-international character at the time of the alleged criminal conducts, is met. The Chamber further notes that the conflict still ongoing consists - as a matter of common knowledge - of protracted armed hostilities between governmental authorities and organised groups and likewise of clashes between such groups to an

extent exceeding internal disturbances and tensions such as riots or isolated and sporadic acts of violence; and therefore qualifies as a non-international armed conflict under the meaning of the applicable law. The Chamber finds that there is a reasonable basis to believe that the different anti-governmental armed groups mentioned by the Prosecutor, irrespective of their denomination, qualify as organised armed groups within the meaning of article 8(2)(c), (e) and (f), namely in light of several objective features including their internal structure, fighting force, availability of weaponry and funding, as well as ability to plan and to conduct military operations, and the extent, the seriousness and intensity of their violent action. The Chamber notes that the term ‘in particular’ in article 8(1) implies that the existence of a plan, policy or large-scale commission is not a condition for the Court’s jurisdiction, contrary to what is provided for in article 7 with regard to crimes against humanity. It also points out that such a plan, policy or large-scale commission is unnecessary to establish the sufficient gravity in accordance with article 17(1)(d).

66. In light of the above, the Chamber is satisfied that there is a reasonable basis to believe that the contextual elements of both crimes against humanity and war crimes are satisfied in respect of the alleged events, in particular in light of their scale and magnitude. Suffice it to say, at this stage, that according to UNAMA, civilian casualties in the period 2009-2016, as witnessed throughout the Afghan territory, exceed 50.000, of which 17.700 deaths and over 33.000 injuries.

### **3. ‘Other acts’**

67. As regards the ‘other acts’ that might have been committed by members of international armed forces stationed in Afghanistan, the Prosecution seems to imply that an authorisation granted pursuant to article 15 would extend to any and all events falling within a given ‘situation’ and therefore cover it in its entirety.

68. The Chamber recalls that article 15 of the Statute is a provision aimed at restricting and ensuring judicial supervision of the prosecutorial discretion and that the purpose of a judicial authorisation granted under this provision consists in providing an impartial and independent safeguard against the risks entailed by vesting unlimited discretion in the Prosecution. In the view of the Chamber, following the Prosecution’s approach – and scrutinising acts for which the

Prosecution has not yet reached a determination under article 15, or even to ‘other alleged crimes that may occur after the commencement of the investigation’ - would plainly run contrary to the rationale underlying the provision and hence radically defeat its purpose. Accordingly, any and all conducts for which no authorisation to investigate is specifically requested fall outside the scope of the Chamber’s judicial scrutiny, which is and should remain confined to the incidents for which the judicial authorisation is explicitly sought in the Request. Otherwise stated, the scope of the authorised probe cannot be extended *proprio motu* by the Office of the Prosecutor.

69. As illustrated above, the Chamber is duty-bound to determine in concrete terms whether the investigation of the specific incidents for which the authorisation is sought, and those which are closely linked to the former, must be allowed, in light of its assessment as to the existence of a reasonable basis to believe that the relevant jurisdictional parameters are satisfied. Accordingly, the scope of the scrutiny could not encompass incidents and groups of offenders other than those for which the authorisation was specifically requested. Quite logically, the same applies for other alleged crimes that may have occurred after the date of the Request.

## **VI. DETERMINATIONS BY THE CHAMBER ON ISSUES OF ADMISSIBILITY**

### **1. Introduction**

70. In accordance with article 53(1)(b) the Chamber must also verify whether the case is or would be admissible under article 17 of the Statute. The admissibility assessment in the context of article 15 of the Statute is potential in nature, because it occurs before the investigation has started and must be conducted against the potential cases that may result out of the investigation for which the authorisation is sought by the Prosecution. Potential cases are to be identified by reference to those incidents or categories of incidents supporting the Request that may be considered to qualify as crimes under the Court’s jurisdiction; and by the groups of persons that are likely to be the focus of an investigation.

71. At this initial stage, the admissibility test calls for a twofold assessment: first, as to whether the relevant States are conducting or have conducted national proceedings in the same matter (complementarity); second, if the conclusion is in the negative, as to whether the gravity threshold is met (gravity). For the purpose of

this assessment, the Chamber must conduct a comparison between the potential cases that may arise out of the situation and the cases which have been or are being allegedly investigated or prosecuted by national authorities. This assessment is prognostic in nature and must be guided by the indicative lists of the most serious incidents and by the preliminary lists of persons or groups provided by the Prosecution. It is done without prejudice to determinations to be made at a later stage, where cases are actually brought before the Chamber and in light of any and all piece of relevant information which may become available.

## 2. Complementarity

72. Article 17(1)(a) and (b) provides that the Court shall determine inadmissibility either if the case is being investigated or prosecuted by a State which has jurisdiction on it, unless it is unwilling or unable genuinely to carry out the investigation or prosecution; or if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. The Appeals Chamber has clarified that, for the purpose of assessing admissibility in respect of specific cases, it must be verified whether there are ongoing investigations or prosecutions, or whether, after investigating, the State having jurisdiction has decided not to prosecute the concerned person. Only if the answers to these questions are in the affirmative does the issue of unwillingness and inability need to be examined.<sup>22</sup> It has also been clarified that for a case to be inadmissible the national investigation must be tangible, concrete and progressive and must cover the same individuals and substantially the same conducts as alleged in the proceedings before the Court.<sup>23 24</sup>

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<sup>22</sup> Appeals Chamber, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 September 2009, ICC-01/04-01/07-1497, para. 78.

<sup>23</sup> Appeals Chamber, *Prosecutor v Francis Muthaura et al, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'* ('Muthaura Appeal Judgment'), 30 August 2011, ICC-01/09-02/11-274 (OA), para. 39; Appeals Chamber, *Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'* (Ruto Appeal Judgment), ICC-01/09-01/11-307, para. 40.



73. The Chamber recalls that the complementarity assessment within the context of article 15 proceedings is provisional and preliminary in nature and must be carried out on the basis of the information available at the time of the Request. As clarified by the Appeals Chamber, admissibility is an ‘ambulatory’ process<sup>25</sup> and the Prosecutor will have to continue revisiting this issue at a later stage by keeping under review any progress made by national authorities.<sup>26</sup> Given the centrality of the complementarity principle in the overall design and rationale of the Court, it is indeed one of the most compelling duties of the Prosecution to continue verifying the progress of national proceedings during the course of investigations.

74. With reference to national proceedings in Afghanistan against the Taliban and other armed groups, the Prosecution asserts that the information available indicates that no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes under the Court’s jurisdiction allegedly committed by members of these groups; it also clarifies that those members of anti-government armed groups captured and detained in the context of the non-international armed conflict have principally been accused of crimes against the State under the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, and the 2008 Law on Combat against Terrorist Offences. Accordingly, the Prosecution concludes that the potential cases against members of the Taliban and other anti-governmental armed groups that could likely arise from an investigation would be currently admissible. The Prosecution also submits that the Afghan Parliament passed a general amnesty in 2007, which entered into force in 2009 and provides legal immunity to all belligerent parties, including those opposing the government, without temporal limitations or any exception for international crimes.

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<sup>24</sup> Pre-Trial Chamber I, *Prosecutor v Simone Gbagbo*, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47-Red, para. 65; Appeals Chamber, *Prosecutor v Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’, 27 May 2015, ICC-02/11-01/12-75-Red, para. 122.

<sup>25</sup> Appeals Chamber, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (‘Katanga Admissibility Judgment’), 25 September 2009, ICC-01/04-01/07-1497 (OA8), para. 56.

<sup>26</sup> See in this regard, Burundi Article 15 Decision, ICC-01/17-9-Red, para. 179.

75. In light of the foregoing, the Chamber is satisfied that, based on information available at this stage, potential cases arising from the authorised investigation would be admissible under article 17.

76. With respect to alleged crimes committed by the Afghan Forces, the Prosecution submits that at the stage of the Request no national investigations had been conducted or were ongoing against those who appear most responsible for the alleged crimes; the Afghan authorities appear to have opened a very limited number of proceedings relating to the torture or cruel treatment of conflict-related detainees which only target low to mid-level officials, and not those who may bear the greatest responsibility.

77. The Chamber notes that the Prosecution's submissions are mainly based on reports by UNAMA dating back to 2015 and 2017 and by the AIHRC dating back to 2012. The Chamber considers that the available information clearly indicates that the proceedings conducted so far in Afghanistan are limited in scope and did not target those who may bear the main responsibility for the incidents reflected in the annexes to the Request. The potential cases arising from those incidents are therefore deemed to be admissible.

78. As regards the crimes allegedly committed by the US Forces and the CIA, the Prosecution states that available information indicates that no national investigations have been conducted against those who may be most responsible for the incidents set out in the Request and in Annexes 2C and 3C. More specifically, the Prosecutor submits that, whilst most of the information appears to be presented in 'clusters of statistics', where more concrete information is somehow available investigations and prosecutions appear to have focussed exclusively on direct perpetrators and their immediate superiors. The Prosecutor also refers to a number of internal oversight reports, indicating that the reporting and investigation of detainee abuse has been both insufficient and inadequate.

79. As regards the information about investigation efforts at the domestic level in the US made available by the Prosecution, the Chamber notes that the information does not show that criminal investigations or prosecutions have been conducted on the incidents referred to and relied upon by the Prosecution, also bearing in mind that national proceedings designed to result in non-judicial and administrative

measures rather than criminal prosecutions do not result in inadmissibility under article 17. The Chamber, conclusively, finds that at this stage that the potential cases arising from the incidents presented by the Prosecution appear to be admissible.

### **3. Gravity**

80. Article 17(1)(d) states that a case may be inadmissible if it ‘is not of sufficient gravity to justify further action by the Court’. In proceedings under article 15, such an assessment is provisional in nature because it is conducted in abstract in a moment when investigations have not yet commenced. The Prosecution makes detailed submissions showing that all the crimes alleged in the Request in respect of various groups of perpetrators meet the threshold of sufficient gravity.

81. With reference to potential cases targeting members of the Taliban and other anti-governmental armed groups, the Prosecution refers to the categories of crimes, the level of responsibility of potential perpetrators, the high number of direct and indirect victims, the large-scale commission over a prolonged period of time, the manner in which the conducts were committed and their general impact.

82. With respect to potential cases concerning alleged crimes committed by the ANSF, the Prosecutor submits that the sufficient gravity that justifies further action by the Court can be drawn by the level of responsibility of potential offenders, the high number of victims, the nature of the crimes, the modalities of the conducts and their impact on the victims.

83. In relation to potential cases concerning alleged crimes committed by the US forces and the CIA, the Prosecutor submits that the gravity is demonstrated by the level of responsibility of potential offenders, the number and the seriousness of the crimes, the possible responsibilities within the command structure, and the impact on the victims.

84. With reference to the crimes allegedly committed by the Taliban and other anti-governmental armed groups, the Chamber specifically highlights the devastating and unfinished systemic consequences on the life of innocent people of the brutal violence inflicted upon civilians and other protected persons in Afghanistan for a prolonged period of time; the gruesome public display of violence aimed at instilling fear and inspiring subjugation in the population as well as the recurrent targeting of women, even very young, and vulnerable civilians.

85. In relation to the crimes allegedly committed by the ANSF, the US forces and CIA, the Chamber notes the gravity per se of the crime of torture, which is radically banned by international law, and the circumstance that the conducts have allegedly been committed by public officials in their functions.

86. Conclusively, the Chamber finds that the gravity threshold under article 17(1)(d) is met in respect of all the 'categories' of crimes for which the Prosecution requests authorisation to investigate.

## **VII. DETERMINATIONS BY THE CHAMBER ON THE INTERESTS OF JUSTICE**

87. Having determined that both the jurisdiction and the admissibility requirements are satisfied, it remains for the Chamber to determine, in accordance with article 53(1)(c) of the Statute, whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. The Prosecution, consistently with the approach taken in previous cases, does not engage in detailed submissions on the matter and simply states that it has not identified any reason which would make an investigation contrary to the interests of justice. As for the victims, 680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth.

88. As highlighted by the 2007 OTP Policy paper on the interests of justice, '[t]he interests of justice tests need only be considered where positive determinations have been made on both jurisdiction and admissibility'.<sup>27</sup> Article 53 of the Statute makes the investigation's consistency with the interests of justice a statutory legal parameter governing the exercise of the prosecutorial discretion; as such, it follows that it also falls within the scope of the scrutiny mandated to the Chamber over that discretion for the purposes of the determinations under article 15. In the view of the Chamber, the assessment of this requirement is necessary and must be conducted with the utmost care, in particular in light of the implications that a partial or inaccurate assessment might have for paramount objectives of the Statute and hence

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<sup>27</sup> OTP Policy paper on the interests of justice (<https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>)

the overall credibility of the Court, as well as its organisational and financial sustainability.

89. In the absence of a definition or other guidance in the statutory texts, the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.

90. The Chamber must therefore analyse whether, in light of the specific features of the situation in Afghanistan, it is likely, or at all possible, that authorising an investigation would result in favouring those objectives. An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure. In making any investigation or prosecution only worth doing if and to the extent that it can be considered as genuinely instrumental to those objectives, the Statute reiterates the idea that the Court is not meant – or equipped – to address any and all scenarios where the most serious international crimes might have been committed; therefore, focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success.

91. The following factors appear to be particularly relevant: (i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage.

92. The Chamber notes that, even by international criminal justice standards, the preliminary examination in the situation in Afghanistan was particularly long. As many as about eleven years (which were marked by heightened political instability, in Afghanistan and elsewhere) elapsed between the start of the preliminary

examination and the filing of the Request. The Chamber is fully conscious that – for the purposes of timing, type of activities or resources - one thing is a preliminary examination and another one a proper investigation which has been authorised; however, some of the circumstances at the origin of the difficulties having marred the preliminary examination, and of its length, either remain unchanged or have rather changed for the worse; as such, they are also likely to impact any forthcoming investigation which might be authorised.

93. First, most of the incidents referred to in the Request allegedly occurred between 2005 and 2015; most of them date back to the early part of that decade. During this period, by its own admission, the Prosecution was not in a position to meaningfully act for the purposes of preserving evidence, or for the protection of witnesses. The very availability of evidence for crimes dating back so long in time is also far from being likely. The Chamber notes that, during the eleven-year-long preliminary examination, no request was filed under article 57(3)(c) of the Statute and rule 47 of the Rules in order to preserve evidence.

94. Second, subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted. Indeed, the Prosecution acknowledges the difficulties in securing albeit minimal cooperation from the relevant authorities as one of the reasons explaining the unusual duration of the preliminary examination. The Chamber has noted the Prosecution's submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper.

95. Furthermore, the Chamber notes that, in light of the nature of the crimes and the context where they are alleged to have occurred, pursuing an investigation would inevitably require a significant amount of resources. In the foreseeable absence of additional resources for the coming years in the Court's budget, authorising the investigation would therefore result in the Prosecution having to reallocate its

financial and human resources; in light of the limited amount of such resources, this will go to the detriment of other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice, possibly compromising their chances for success.

96. In summary, the Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it. It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.

**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **DECIDES** that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice and, accordingly, **REJECTS THE REQUEST**;
- b) **ORDERS** the Victims Participation and Reparations Section of the Registry to notify the present Decision to the victims who have made representations to the Chamber in relation to the situation in Afghanistan.

Judge Mindua will append a concurring separate opinion in due course.

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



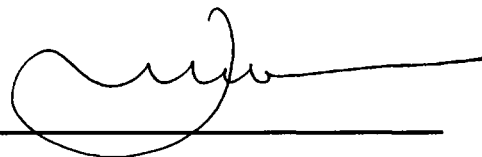

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**Judge Antoine Kesia Mbe Mindua,  
Presiding Judge**




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**Judge Tomoko Akane**




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**Judge Rosario Salvatore Aitala**

Dated this Friday 12 April 2019

At The Hague, Netherlands



**CONCURRING AND SEPARATE OPINION OF  
JUDGE ANTOINE KESIA-MBE MINDUA**

**I. INTRODUCTION**

1. I fully concur with my learned two colleagues in rejecting the Prosecutor’s ‘Request for authorisation of an investigation pursuant to article 15’ of 20 November 2017 (the ‘Request’)<sup>1</sup> in the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ of 12 April 2019 (‘Afghanistan’ and the ‘Unanimous Decision’).<sup>2</sup> However, I would like to clarify my opinion regarding two issues: the scope of a Pre-Trial Chamber’s authorisation of an investigation and the meaning of the expression ‘interests of justice’.

2. According to article 15(4) of the Rome Statute (the ‘Statute’), the Pre-Trial Chamber must determine whether the case ‘appears to fall within the jurisdiction of the Court’.<sup>3</sup> Upon consideration of the inherent qualities as well as of the authoritativeness of the information received from the Prosecutor and the victims, the Chamber is satisfied -at this stage- that there is a reasonable basis to believe that the incidents underlying the Request have occurred.<sup>4</sup> Those incidents may constitute crimes within the Court’s jurisdiction *ratione loci, materiae* and *personae*. I share my colleagues’ view that the result of the twofold assessment of the admissibility test (complementarity and gravity) is that the potential cases arising from the incidents presented by the Prosecutor appear to be admissible.<sup>5</sup>

3. However, while I agree with the outcome of the Unanimous Decision, I respectfully do not share my colleagues’ views that when the opening of an investigation is authorised, the scope of this authorisation is so limited. I concur with my colleagues that, notwithstanding the fact that both the jurisdiction and admissibility relevant requirements are met, the current circumstances of the situation in the Islamic Republic of Afghanistan (‘Afghanistan’) are such as to make the prospects of a successful investigation and

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<sup>1</sup> ICC-02/17-7-Conf-Exp. A public redacted version is also available; see [ICC-02/17-7-Red](#).

<sup>2</sup> [ICC-02/17-33](#).

<sup>3</sup> [Unanimous Decision](#), ICC-02/17-33, para. 45.

<sup>4</sup> [Unanimous Decision](#), ICC-02/17-33, para. 48.

<sup>5</sup> Articles 17(1) and 53(1) of the Statute.

prosecution extremely limited.<sup>6</sup> Accordingly, in the interests of justice, the formal investigation into the situation in Afghanistan was not authorised by the Chamber. Therefore, in the present opinion, I would like to set out my understanding of the scope of a possible authorisation as well as the notion of ‘interests of justice’.

## II. SCOPE OF THE PRE-TRIAL CHAMBER’S AUTHORISATION

4. At the outset, I would like to mention that, since in the Unanimous Decision the Chamber did not grant the Prosecutor’s Request, this Concurring and Separate Opinion only aims at clarifying, on the principles, my thoughts on this issue. In the Unanimous Decision it is stated that the scope of the Chamber’s scrutiny and, consequently, of the authorisation must remain confined to the incidents or category of incidents and, possibly, the groups of alleged offenders referred to by the Prosecutor.<sup>7</sup> Thus, for the Chamber, at this stage, it is not possible to extend such scope by recommending further investigation, irrespective of the fact that these may emerge as appropriate on the basis of the materials under its scrutiny.<sup>8</sup>

5. I must confess that I do not share completely this point of view. I respectfully disagree with my learned colleagues, although, like them, I am of the opinion that the object and purpose of article 15 of the Statute as a boundary to prosecutorial discretion require that the Pre-Trial Chamber also sets specific limits to the authorised investigation. I find the approach adopted in the Unanimous Decision too restrictive.

6. A review of the *travaux préparatoires* shows that the drafters of the Rome Statute were particularly concerned with limiting the discretion of the Prosecutor. In reality, article 15(3) of the Statute is the compromise reached to accommodate two positions. On the one hand, some States expressed concerns about the possibility of politically motivated prosecutions, and therefore adopted the position that the Prosecutor should not be allowed at all to initiate investigations *proprio motu*. On the other hand, other States were adamant on the necessity for the Prosecutor to do so. Article 15(3) is the result of a compromise between these two positions: it allows the Prosecutor to initiate investigations *proprio motu*, but he or she can do so only under the scrutiny and with the

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<sup>6</sup> [Unanimous Decision](#), ICC-02/17-33, para. 96.

<sup>7</sup> [Unanimous Decision](#), ICC-02/17-33, para. 39.

<sup>8</sup> [Unanimous Decision](#), ICC-02/17-33, para. 39.

authorisation of a Pre-Trial Chamber. It is therefore apparent that the rationale behind article 15(3) is merely to limit extravagant politically motivated investigations, and in no way to require the Prosecutor to revert to a Pre-Trial Chamber each time his or her investigation uncovers new incidents.

7. Pursuant to article 15(3), the Prosecutor must assess whether there is a ‘reasonable basis to proceed with an investigation’. In my view, the Pre-Trial Chamber has the duty to apply the same reasonability test under article 15(4) of the Statute. And the content of reasonable basis is the same under articles 15(3) and (4) and 53(1) of the Statute, which is again repeated in rule 48 of the Rules of Procedure and Evidence of the Court (the ‘Rules’).<sup>9</sup>

8. Thus, if the Pre-Trial Chamber authorises the Prosecutor to investigate into a situation, he or she is required to investigate thoroughly and expeditiously.<sup>10</sup> In doing so, it is possible that the Prosecutor will discover new incidents. That is why I respectfully disagree that the Prosecutor can only investigate into the incidents that are ‘specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it’.<sup>11</sup> Such an approach is too restrictive, in my humble opinion.

9. It means that if during the authorised investigation different or new incidents were to be discovered, the Prosecutor is obliged to come back to the Pre-Trial Chamber and to request a new authorisation. This restrictive approach would render the investigative proceedings unduly cumbersome as the Prosecutor would have to seize the Pre-Trial Chamber of a multitude of mini-requests, and in turn the Pre-Trial Chamber will rule on them. Such an approach will prolong unnecessarily the pre-trial procedures. The purpose of article 15 of the Statute was to avoid politically motivated prosecutions and not to organise a micro-management of the Prosecutor’s investigative work. Such a restrictive approach defeats the purpose and objective of the Chamber’s authorisation as a judicial check.

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<sup>9</sup> I. Stegmiller, ‘Article 15’, in M. Klamburg (ed.), *Commentary on the Law of the International Criminal Court* (2016).

<sup>10</sup> [Unanimous Decision](#), ICC-02/17-33, para. 36.

<sup>11</sup> [Unanimous Decision](#), ICC-02/17-33, para. 40.

10. In addition, if we consider article 53(1)(a) of the Statute, we can see that it refers to ‘a crime’ in singular. This means that, as soon as it has been determined that there is a reasonable basis to believe that one single crime within the Court’s jurisdiction has occurred, this requirement has been fulfilled. The reference to ‘a crime’ logically entails that the relevant crimes for the purpose of an article 15 decision do not have to be exhaustively defined. The purpose of an article 15 request, in my view, is to obtain authorisation for the ‘commencement’ of the investigation. The plain meaning of this word suggests that, once the investigation commences, it can more clearly determine which acts amount to crimes within the jurisdiction of the Court. The preceding assessment is, therefore, necessarily limited and cannot provide an exhaustive picture of the crimes committed.

11. My opinion is consistent with the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi’ (the ‘Burundi Article 15 Decision’).<sup>12</sup> In her ‘Request for authorisation of an investigation pursuant to article 15’ in relation to that situation (the ‘Burundi Request’),<sup>13</sup> the Prosecutor requested the commencement of the investigation into the crimes within the jurisdiction of the Court allegedly committed in Burundi from 26 April 2015<sup>14</sup> until 26 October 2017.<sup>15</sup> In this instance, Pre-Trial Chamber III, of which I was a member, decided that, in light of the continuous nature of certain crimes, the Prosecutor was authorised to extend her investigation to crimes even if they continued after 26 October 2017. That is with regard to the temporal scope of the authorised investigation.<sup>16</sup>

12. With regard to the material scope of the authorised investigation, the Chamber authorised the commencement of an investigation of any crime within the jurisdiction of the Court committed between 26 April 2015 and 26 October 2017, subject to the temporal jurisdiction. Thus, the Prosecutor was not restricted to ‘the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes, i.e. war crimes and genocide, as long as they remain within the parameters

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<sup>12</sup> Pre-Trial Chamber III, 25 October 2017, ICC-01/17-9-US-Exp. A public redacted version is also available; see [ICC-01/17-9-Red](#).

<sup>13</sup> Office of the Prosecutor, 5 September 2017, ICC-01/17-X-5-US-Exp. A public redacted version is also available; see [ICC-01/17-5-Red](#).

<sup>14</sup> [Burundi Request](#), ICC-01/17-5-Red., para. 39.

<sup>15</sup> [Burundi Request](#), ICC-01/17-5-Red., para. 39.

<sup>16</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 192.

of the authorised investigation’ in accordance with article 54(1)(a) of the Statute.<sup>17</sup> This latter provision requires an objective investigation in the pursuit of the truth.

13. Finally, with regard to the geographical scope of the authorised investigation, the Chamber decided to authorise the Prosecutor to extend her investigation to all crimes within the jurisdiction of the Court committed on the territory of Burundi (article 12(2)(a) of the Statute) or committed outside Burundi by nationals of Burundi (article 12(2)(b) of the Statute) if the legal requirements of the contextual elements of crimes against humanity are fulfilled.<sup>18</sup>

14. Indeed, in that case, it was explicitly held that the investigation was not restricted to the crimes identified in the authorisation decision, but that it might extend to other crimes within the Court’s jurisdiction, as long as they remain within the parameters of the authorisation. This is consistent with the Prosecutor’s duty to investigate thoroughly and objectively.

15. In light of the above, I am of the view that once the opening of an investigation is authorised, its scope should not be strictly limited. The interpretation should be broader here as it should be for the ‘interests of justice’.

### **III. THE ‘INTERESTS OF JUSTICE’**

16. In its Unanimous Decision, the Chamber rejected the Request on the ground that it would not serve the ‘interests of justice’. I totally agree with this ruling and I intend to articulate my position on this issue in more detail. I will address, first, the competence of the Pre-Trial Chamber to deal with the ‘interests of justice’ in the framework of article 15 of the Statute, and, secondly, I will then proceed to set out my position on this concept.

#### **A. The competence of the Pre-Trial Chamber**

17. According to article 15(4) of the Statute,

If the Pre-Trial Chamber upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the

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<sup>17</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 193.

<sup>18</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 194.

investigation, without prejudice to subsequent determination by the Court with regard to the jurisdiction and admissibility of a case.

This provision does not mention the ‘interests of justice’. Therefore, it is appropriate to ask why the Pre-Trial Chamber should examine this parameter. It is expected to see the Chamber discuss only the issues of jurisdiction and admissibility.

18. However, regarding the powers of the Prosecutor, article 53(1) of the Statute states:

1. The Prosecutor shall, having evaluated this information made available to him or her, initiate an investigation, unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber

19. Therefore, it appears clearly that the Pre-Trial Chamber has the power to be informed by the Prosecutor and to review his or her decision not to investigate. But, does the Pre-Trial Chamber have also the power to review his or her decision, on the basis of ‘interests of justice’, when the Prosecutor decides to investigate? I must say that the Court’s jurisprudence is not entirely clear on this issue. Indeed, in some situations, the Pre-Trial Chambers have not examined the ‘interests of justice’ in depth.<sup>19</sup> In reality, in such instances, Pre-Trial Chambers merely indicated that there was no reason to review this criterion as the Prosecutor did not make a determination that it would not be in the ‘interests of justice’ to proceed.

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<sup>19</sup> See for example Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#) (‘Kenya Article 15 Decision’), 31 March 2010, ICC-01/09-19-Corr, para. 63.

20. In addition, in my view, the fact that article 15(4) of the Statute does not envisage *expressis verbis* the ‘interests of justice’ does not imply that the Pre-Trial Chamber is left powerless to consider that parameter. In my humble opinion, this determination or scrutiny falls within the purview of the Pre-Trial Chamber. Indeed, rule 48 of the Rules provides that:

In determining whether there is a reasonable basis to proceed with an investigation, under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c).

21. We can see that the ‘reasonable basis to proceed’ mentioned in this rule is also present in article 53(1) of the Statute. It is clear that this language refers to the three parameters which are jurisdiction, admissibility and ‘interests of justice’ (after taking into account the gravity of the crime and the interests of victims). The reference to ‘jurisdiction and admissibility’ in the last part of article 15(4) of the Statute is only an unfortunate repetition, which happens in many documents negotiated and decided upon at the last minute by diplomats. We can also say that the absence of a reference to the ‘interests of justice’ is only an oversight. The wording of paragraph 4 does not mean that, at that stage, the Pre-Trial Chamber cannot review the ‘interests of justice’ test.

22. In sum, combined contextual reading of articles 15(4) and 53(1)(c) of the Statute and rule 48 of the Rules makes it clear that the ‘interests of justice’ test is mandatory to the Pre-Trial Chamber once the Prosecutor has submitted an application for an authorisation of a formal investigation.

23. Accordingly, in my view, the Pre-Trial Chamber has thus the power to examine the ‘interests of justice’ whether or not the Prosecutor has decided to investigate. Even though article 53(1)(c) and (2)(c) of the Statute only mentions the decision of the Prosecutor not to investigate if such an investigation will not be in the ‘interests of justice’, it seems clear that in his or her determination the Prosecutor should proceed with an affirmative test and see first, the other way round whether the investigation or the prosecution will be positively in the interests of justice. In other words, the Prosecutor must make a positive determination that there are no substantial grounds to believe that an investigation would not serve the interests of justice to proceed with a request for authorisation under article 15. The jurisprudence of the Court on the notion of ‘interests of justice’ is not uniform but it offers some instances where Pre-Trial Chambers have

authorised investigations because it was in the interests of justice,<sup>20</sup> even though there is still the need of an extended and in-depth determination of the scope of the ‘interests of justice’ as such.

## **B. The interpretation of the ‘interests of justice’**

24. Until today the criterion of the ‘interests of justice’ has not been extensively addressed by the Court’s Chambers. Indeed, ‘interests of justice’ is a complex concept. Hence, in the Kenya situation the Chamber said that, according to article 53(1)(c) of the Statute, the third criterion to be examined by the Chamber was ‘whether [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’.<sup>21</sup> Hence, for the Chamber, conversely to sub-paragraphs (a) and (b), which require a positive finding, subparagraph (c) does not require the Prosecutor to prove that initiating an investigation is actually in the interests of justice.

25. Similarly, since the Prosecutor has not determined that initiating an investigation in the Burundi situation ‘would not serve the interests of justice’ and, importantly, taking into account the views of the victims which overwhelmingly spoke in favour of commencing an investigation, the Chamber considered that there were indeed no substantial reasons to believe that an investigation would not serve the interests of justice.<sup>22</sup>

26. In her ‘Policy Paper on the Interests of Justice’, the Prosecutor gave the ‘interests of justice’ a very narrow interpretation.<sup>23</sup> For her, this notion can only be invoked in exceptional circumstances and very often only in order to open an investigation.<sup>24</sup> There

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<sup>20</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para 190; Pre-Trial Chamber I, *Situation in Georgia, Decision on the Prosecutor’s Request for Authorization of an Investigation* (‘Georgia Article 15 Decision’), 27 January 2016, ICC-01/15-12, para. 58.

<sup>21</sup> [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 63; *see also* Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire*, 15 November 2011, ICC-02/11-14-Corr, para. 207; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 58.

<sup>22</sup> Paragraph 190 of the Burundi Article 15 Decision is the only one devoted to the ‘interests of justice’.

<sup>23</sup> T. de Souza Dias, ‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court’, *Leiden Journal of International Law* (2017), pp 731-751, at 732.

<sup>24</sup> Office of the Prosecutor, [Policy Paper on the Interests of Justice](#) (2007).



is almost always a presumption of prosecution in the Prosecutor's understanding of article 53.

27. Thus, in her Request in the situation of Afghanistan, the Prosecutor has identified no substantial reasons to believe that the opening of an investigation into the situation would not serve the 'interests of justice'.<sup>25</sup> This attitude was almost expected from the Prosecutor. Indeed, as rightly observed by the Chamber, '[t]he Prosecution, consistently with the approach taken in previous cases, does not engage in detailed submissions on the matter and simply states that it has not identified any reason which would make an investigation contrary to the interests of justice'.<sup>26</sup> The Prosecutor was thus satisfied that '[t]he interests of justice test needs only be considered where positive determinations have been made on both jurisdiction and admissibility'.<sup>27</sup> It is therefore appropriate for me to analyse the phrase 'interests of justice' and to show that the Chamber was right to reject the Request to investigate in Afghanistan on this basis.

28. In the Statute, some provisions recognise the necessity not to investigate temporarily into a situation, or to put aside prosecutions, in the 'interests of justice'. Two provisions are particularly important: article 53(1)(c) and (2)(c) of the Statute. Article 53(1)(c) of the Statute reads as follows:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

[...]

(c) Taking into account the gravity of the crime and interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.

Article 53(2)(c) of the Statute reads as follows:

2. If, upon investigation, the Prosecutor concludes that there is no sufficient basis for a prosecution because:

[...]

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<sup>25</sup> [Request](#), ICC-02/17-7-Red, para. 372.

<sup>26</sup> [Unanimous Decision](#), ICC-02/17-33, para. 87.

<sup>27</sup> Office of the Prosecutor, [Policy Paper on the Interests of Justice](#) (2007), p. 2.

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime: the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion’.

29. In reality, the Statute is not very useful if we are looking for a clear definition of the ‘interests of justice’. It is silent on this aspect.<sup>28</sup> Moreover, ‘[a]uthors have also voiced diverging interpretations on Article 53’.<sup>29</sup> However, we know that the Statute is just a treaty. For this reason, it normally produces its effects only on States Parties in accordance with the Latin principle ‘*Pacta tertiis nec nocent nec prosunt*’.<sup>30</sup> Similarly, to interpret the ‘interests of justice’ as contained in the Statute, I am going to use the interpretative tools suggested by articles 31 to 33 of the Vienna Convention on the Law of Treaties, as the general rules of treaty interpretation under customary international law.<sup>31</sup> Hence, I will consider the text and context of the relevant provisions of the Statute in connection with its object and purpose. In so doing, I will take into account, in good faith, the ordinary meaning of every word. If this exercise is not entirely satisfactory, I am not going to hesitate to recourse to supplementary tools of interpretation, such as the preparatory works (*travaux préparatoires*) of the Statute.<sup>32</sup>

30. For the Chamber, since there is no definition of the phrase ‘interests of justice’ in the Statute, its meaning ‘as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objective underlying the Statute: the effective prosecution of the most serious crimes, the fight against impunity

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<sup>28</sup> M. Brubacher, ‘The Development of Prosecutorial Discretion in International Criminal Courts’, in E. Hughes, W.A. Schabas and R. Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (2007), pp 149-150.

<sup>29</sup> D. Đukić, ‘Transitional justice and the International Criminal Court – in “the interests of justice”’, *IRRC*, Vol. 89, No. 867, September 2007, pp 691-718, at 697. Hence, some like Robinson, Stahn and Gavron, are in favour of a wider interpretation of this expression, while others like Đukić, Amnesty International and Human Rights Watch prefer a more restrictive interpretation; see Đukić, *op. cit.*, at 698.

<sup>30</sup> A treaty binds the parties and only the parties; it does not create obligations for a third State.

<sup>31</sup> International Court of Justice, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgement, 17 March 2016, I.C.J. Reports 2016, p. 3, para. 35.

<sup>32</sup> I adopt the same methodology as that followed by de Souza Dias and Đukić. However, like de Souza Dias, I am in favour of a wider interpretation, contrary to Đukić who prefers a more restrictive interpretation.

and the prevention of mass atrocities’.<sup>33</sup> Of course, I totally share this view, which is supported by the analysis of article 53(1)(c) and (2)(c) of the Statute.

31. Hence, for the Chamber, an investigation must result in achieving the objectives of the Statute. Consequently, an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation or prosecution not feasible and inevitably doomed to failure.<sup>34</sup> In the particular situation of Afghanistan, specific features militated against the possibility, for the moment, of a successful and conclusive investigation. Some of them are: (i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination; and (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available.<sup>35</sup>

32. In addition, the Chamber noted that the investigation in Afghanistan would inevitably require a significant amount of resources and, in the foreseeable absence of additional resources in the Court’s budget, such a stillborn investigation will result in the Prosecutor having to reallocate its financial and human resources, putting in jeopardy more realistic investigations and prosecutions.<sup>36</sup> Such an analysis may appear biased. One could think that the Chamber has favoured political factors instead of focusing on legal arguments. Naturally, I cannot admit such a negative and partial view of the issue at hand, when I consider the real meaning of the ‘interests of justice’.

33. The reading of article 53(1) of the Statute makes me think that there is here a presumption in favour of investigations, every time that the Prosecutor has sufficient information, unless there is no reasonable basis to proceed. However, if, taking into account the gravity of the crime and the interests of the victims, there are substantial reasons which show that an investigation would not serve the interests of justice, article 53(1)(c) of the Statute requires the Prosecutor not to proceed. Thus, subparagraph (c) implies a negative test: the Prosecutor may be persuaded that an investigation is not

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<sup>33</sup> [Unanimous Decision](#), ICC-02/17-33, para. 89.

<sup>34</sup> [Unanimous Decision](#), ICC-02/17-33, para. 90.

<sup>35</sup> [Unanimous Decision](#), ICC-02/17-33, para. 91.

<sup>36</sup> [Unanimous Decision](#), ICC-02/17-33, para. 95.

warranted because it is not in the ‘interests of justice’. Therefore, a decision not to investigate in the ‘interests of justice’ is normally an exceptional one.<sup>37</sup>

34. If I read the provisions of article 53(1)(c) of the Statute together with those of subparagraphs (1)(a) and (1)(b), it appears to me that the negative test of the ‘interests of justice’ can only be done after the jurisdiction and admissibility tests. But, I can also read article 53(1) of the Statute as a *chapeau*, coupled with sub-paragraph (c). As a result, we can see that the ‘interests of justice’ are not necessary together with the gravity of the crime or with the interests of victims. Thus, factors which could be considered as interests of victims are different.<sup>38</sup>

35. Moreover, if we consider the use of the adverb ‘nonetheless’ in subparagraph (c), there is another meaning to the ‘interests of justice’ when this subparagraph is read with subparagraph (a) and (b) of article 53(1) of the Statute. Thus, the fact that article 53(1)(c) is simply silent on other possible components of the ‘interests of justice’ unlike article 53(2)(c) does not necessarily imply a narrow interpretation of this expression. To the contrary, it appears now that the gravity of the crime and the interests of victims are not the only parameters that can be considered as the ‘interests of justice’.<sup>39</sup> Hence, there are many other factors that can justify a decision not to investigate. Finally, the ‘interests of justice’ consist of all those factors which can weigh for a negative decision not to proceed. I favour this interpretation of the provisions of article 53 of the Statute. The normal meaning of the words here are in accordance with the objectives and purposes of the Statute, as stated in the unanimous Decision of this Chamber.

36. Contrary to article 53(1) of the Statute, which covers the period before the commencement of any investigation proceedings, article 53(2) of the Statute refers to a situation unfolding after investigations have started. Indeed, article 53(2) of the Statute contemplates situations where, upon investigation, the Prosecutor has come to the conclusion that there is no sufficient basis for a prosecution for reasons invoked in subparagraphs (a), (b), and (c). While subparagraph (a) refers to the absence of a

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<sup>37</sup> J. Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’, in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 70.

<sup>38</sup> H. Hafner et al., ‘A Response to the American View as Presented by Ruth Wedgewood’, in *10 European Journal of International Law* 108 (1999), p. 112.

<sup>39</sup> T. de Souza Dias, *op. cit.*, p. 736.

sufficient legal or factual basis, subparagraph (b) mentions the (in)admissibility test of article 17 of the Statute. As to subparagraph (c), it refers to the ‘interests of justice’ or rather the absence of the ‘interests of justice’ in a possible prosecution.

37. According to subparagraph (c), a prosecution may not be in the ‘interests of justice’ if all the circumstances, including the gravity of the crime, the interests of victims and the age of infirmity of the alleged perpetrator, and his or her role in the alleged crime, are taken into account. The mention of ‘all the circumstances’ and the word ‘including’ show that the list of parameters given here is not exhaustive. It seems that the gravity of the crime, the interests of victims, the age of the offender or any other factor could represent the interests of justice.<sup>40</sup> The Prosecutor can take into account all these factors and conclude, under subparagraph (c), that a prosecution would not be in the interests of justice because there is no sufficient basis for a prosecution.

38. Hence, in my view, because article 53(1)(c) of the Statute considers that, in some instances, criminal prosecutions may not be in the interests of justice, it is therefore clear that the phrase ‘interests of justice’ must be broader than criminal justice *stricto sensu*. Consequently, it could be in the ‘interests of justice’<sup>41</sup> not to engage in prosecutions. Thus, this phrase cannot be understood exclusively as relating to prosecutions, criminal proceedings or retributive justice. It can precisely mean the absence of criminal justice as such.

39. Many other factors may weigh in favour of a decision not to prosecute on the basis of the ‘interests of justice’. Among them, we have procedural considerations such as the rights of the accused for a fair trial,<sup>42</sup> the necessity of peace negotiations or an alternative justice mechanism,<sup>43</sup> the limited availability of human and financial resources,<sup>44</sup> State cooperation constraints,<sup>45</sup> the complementarity and admissibility issues and the existence

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<sup>40</sup> C. Gallavin, ‘Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?’, in *14 King's Law Journal* 179 (2003), p. 186. See also T. de Souza Dias, *op. cit.*, p. 738 seq.

<sup>41</sup> Finally, justice refers to the attainment of what is just, fair or reasonable.

<sup>42</sup> ICTY, Trial Chamber II, *Prosecutor v. Nikolić*, Trial Judgement, 18 December 2003, IT-94-2-5, paras 31-32.

<sup>43</sup> D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, in *14 European Journal of International Law* 481 (2003), pp 493-498.

<sup>44</sup> Office of the Prosecutor, [\*Paper on Some Policy Issues before the Office of the Prosecutor\*](#) (2003), p. 2.

<sup>45</sup> P. Webb, ‘The ICC Prosecutor’s Discretion not to Proceed in the ‘Interests of Justice’, in *50 The Criminal Law Quarterly* 305, pp 336-338.

of a State duty to prosecute,<sup>46</sup> security concerns, etc. It is then obvious that the ‘interests of justice’ could not be confined only to legal considerations *stricto sensu*. This phrase refers to both legal and ‘non-legal’ factors. This is the only reasonable conclusion if we consider the structure of article 53(1)(c) and (2)(c) of the Statute as well as the meaning, the context of the words used and the *travaux préparatoires* of the Rome conference.<sup>47</sup> The only problem which remains is the threshold for invoking the ‘interests of justice’. In my view, this should be solved on a case by case basis.

40. Of course, one may ask whether a court of justice is allowed to take into account ‘non-legal’ factors in its decision-making process. Specifically, are the Judges of the Chamber authorised to integrate those parameters in their decision regarding the situation in Afghanistan? In my view, the answer is in the affirmative, as suggested by the analysis of article 53(1) and (2) of the Statute, even though in their decisions, in this situation or in another one, the Judges should show a significant degree of deference to the Prosecutor’s work since he or she may be sometimes in a better position than the Chamber to make such determinations before requesting an authorisation to investigate.

41. This idea of taking ‘extra-legal’ factors into account is also accepted by the ICC Prosecutor in her ‘Policy Paper on Case Selection and Prioritisation’, published on 15 September 2016. She said that she would take into account factors such as the availability of international cooperation and judicial assistance to support her activities, her Office’s capacity to effectively conduct the necessary investigations within a reasonable period of time, including the security situation in the area, and the potential to secure the appearance of suspects before the Court.<sup>48</sup> This means that ‘[t]he Office will also take into consideration the following operational case prioritisation criteria, to ensure that the Office focuses on cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable project of conviction’.<sup>49</sup> As such,

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<sup>46</sup> D. Jacobs, ‘A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase’, in 6 *The Law and Practice of International Courts and Tribunals: a Practitioners’ Journal* 317, p. 328.

<sup>47</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, *Official Records, Vol. II, Summary Records and of the Meetings of the Committee of Whole*, 15 June-17 July 1998, A/CONF-183/13 (VOL-11), paras 45, 63.

<sup>48</sup> Office of the Prosecutor, [Policy Paper on Case Selection and Prioritisation](#) (2016), p. 18 at para. 51, p. 17.

<sup>49</sup> Office of the Prosecutor, [Policy Paper on Case Selection and Prioritisation](#) (2016), para. 51. *See also* Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#) (2013), p. 25 at para. 70, p. 17.

the feasibility of an investigation is not a separate factor under the Statute when determining whether to open an investigation.<sup>50</sup>

42. The ICC is a Court of last resort. Its mission is not to adjudicate each and every heinous atrocity committed all over the world. The primary responsibility for that rests on States. The Court can only intervene when States cannot or are unwilling genuinely to prosecute. The ICC which is subject to the principle of complementarity is, in addition, at the mercy of the good will of States, through the cooperation<sup>51</sup> and the funding it receives from them. It is a matter of sincerity to say and acknowledge it. One may argue that taking into account practical issues such as States cooperation, security conditions on the ground or other concerns may contravene the principle of equal treatment in judicial assessments, and favour powerful or stubborn States to the detriment of small and obedient countries. This position is understandable, but it seems biased and is not fully supported by the States practice or by the Statute as explained above.

43. It is worth recalling that the Statute is merely a treaty and, as such, the principle of relativity of treaties also applies to it. It produces its effects on State Parties only. Unlike the latter, non-States Parties can cooperate with the ICC only on a voluntary basis, unless obliged to do so by a referral of the Security Council ('UNSC'), adopted under Chapter VII of the UN Charter. However, even in the case of such a referral, both States Parties and non-States Parties are very often reluctant to cooperate,<sup>52</sup> putting the Court in practical difficulties hampering its efficiency<sup>53</sup> and undermining its legitimacy. Without an appropriate support from States, the ICC is almost toothless. Thus, States bear a heavy responsibility if the Court appears sometimes inefficient.

44. Hence, how can the ICC proceed smoothly if the Prosecutor cannot collect or preserve evidence, because of security problems? How can the Court go ahead with its investigations when key actors or stakeholders of a country torn in war for decades have finally decided through international mediation to recourse to political discussions to achieve peace and security? Very often those key actors are former warlords. We must

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<sup>50</sup> Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#) (2013), para. 70.

<sup>51</sup> C. Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court', in *15 International Criminal Law Review* 170 (2015), p. 170.

<sup>52</sup> See for instance the referrals of the situations in the Sudan and Libya by the UNSC.

<sup>53</sup> Today, States refuse to execute the warrant of arrest against Mr Omar Al-Bashir for example.

not forget that the ICC deals with war crimes, crimes against humanity and other crimes very often committed by individuals in position of State power or on behalf of the State. That is why the Rome Statute allows the UNSC to defer ICC cases for one year reviewable indefinitely, for international peace and security reasons.<sup>54</sup> Sometimes indeed, alternative mechanisms such as Truth and Reconciliation Commissions, amnesties, transitional justice and even Gacaca<sup>55</sup> are preferred to the international justice system. In other words, sometimes, the latter might jeopardize peace.<sup>56</sup>

45. Some have argued that if the UNSC can assess political factors, the ICC as a court of law is not the appropriate avenue to take into account this kind of ‘extra-legal’ factors of a situation.<sup>57</sup> I agree that the Prosecutor and the Judges are guided only by the law. They should not be engaged in political considerations. The political game is reserved to States and their leaders. However, in her prosecutorial discretion, as explained in her Policy Paper, in reality the ICC Prosecutor may take into account those ‘extra legal’ factors or those practical considerations when time comes to request an authorisation to investigate. The Statute recognizes such a power to the Prosecutor. As a consequence, the Pre-Trial Chamber which has the duty to review the work of the Prosecutor, first in the framework of article 53(1)(a) - (b) and 2(a) - (b) of the Statute and, secondly, of article 53(1)(c) and (2)(c) of the Statute with a higher degree of discretion and even of subjectivity,<sup>58</sup> must have the power to evaluate all these above-mentioned ‘extra-legal’ factors.

46. Therefore, it is the judicial task of the Pre-Trial Chamber to evaluate the determination made by the Prosecutor not only with regard to the jurisdiction and the admissibility of the situation,<sup>59</sup> but also with regards to the ‘interests of justice’.<sup>60</sup> To that

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<sup>54</sup> Article 16 of the Statute. *See also* C. Gallavin, ‘Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?’, *op. cit.*, p. 196.

<sup>55</sup> Gacaca are a form of traditional jurisdictions used in Rwanda after the 1994 genocide to adjudicate criminal cases. A.-M. de Brouwer and E. Ruwebana, ‘The Legacy of Gacaca Courts in Rwanda. Survivors’ Views’, in 13 *International Criminal Law Review* 937 (2013), p. 938.

<sup>56</sup> T.H. Clark, ‘The Prosecutor of the International Criminal Court, Amnesties, and the ‘Interests of Justice’: Striking a Delicate Balance’, in 4 *Washington University Global Studies Law Review* 389 (2005), at 390.

<sup>57</sup> Interestingly, that seems to be also the opinion of the Prosecutor, *see for example* K.A. Rodman, ‘Justice as a Dialogue Between Law and Politics’, in 12 *Journal of International Justice* 437 (2014), p. 438.

<sup>58</sup> P. Webb, ‘The ICC Prosecutor’s Discretion not to Proceed in the ‘Interests of Justice’’, in 50 *The Criminal Law Quarterly* 305, pp 320, 322.

<sup>59</sup> Article 53(1)(a), b) and 53(2)(b) of the Statute.

<sup>60</sup> Article 53(1)(c), (2)(c) of the Statute.



effect, the Pre-Trial Chamber is required to conduct a more holistic test. It must scrutinise all relevant circumstances, including ‘extra-legal’ factors. Hence, the Chamber may come up with a decision stating that ‘for the moment’ an investigation or a prosecution is not warranted.

47. Is it right to characterise these factors as ‘extra-legal’? For me the answer is in the negative, since the Statute envisages their existence. However, considerations pertaining to peace and security of nations may be labelled as political. In this case, is it appropriate for the ICC to take into account political issues in its judicial work? As an independent and impartial court of law, the ICC shall not be guided by politics. Its Judges must be persons of integrity. They are impartial and independent. But we know that, because of the cases the ICC is handling, it is at crossroads of law and politics, and its decisions impact the international community and international relations.<sup>61</sup> That is why sometimes States refuse to cooperate and investigations and prosecutions fail because of lack of evidence and witnesses, and the absence of the accused in the dock. This contributes, of course, to the perception that the Court is inefficient and consequently illegitimate.

48. Moreover, in terms of resources, the ICC is limited and presently subject to the Assembly of the States Parties’ policy of zero growth for its budget. In such a situation, should the Court really engage in investigations where there is no prospect of successful convictions, taking into account all above-mentioned circumstances? This would be a mismanagement of public funds if such investigations would result in the Prosecutor having to reallocate its financial and human resources to the detriment of investigations or cases which appear to have more realistic prospects.<sup>62</sup>

49. Deciding these kinds of investigations without taking into account all relevant factors is irresponsible and would only result in undermining the Court’s credibility in the long run, even though such authorisations may satisfy human rights activists and some victims at present. The latter would be frustrated and even hostile to the Court when they will realise that the said investigations or prosecutions cannot proceed as expected. Thus, the investigations should be feasible. Of course, feasibility is not considered here as a separate and self-standing factor warranting the rejection of an authorisation. It is taken

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<sup>61</sup> C. Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’, *op. cit.*, p. 171.

<sup>62</sup> [Unanimous Decision](#), ICC-02/17-33, para. 95.

into account together with all other relevant factors including the Court's limited resources and its full credibility.

50. Furthermore, when the Pre-Trial Chamber determines that, notwithstanding the fact that all the relevant requirements are met, the current circumstances of the situation in Afghanistan do not allow a fruitful investigation, victims are not left helpless. First of all, the Chamber has not ruled out the investigation for ever. Indeed, not only the Prosecutor may appeal, but also, in accordance with the Statute, '[t]he refusal of the Pre-Trial Chamber to authorise the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation'.<sup>63</sup> Finally, the ICC, which is a victim-centred court, organises both reparations and assistance in favour of victims.<sup>64</sup> It goes without saying that the Chamber is very concerned about them. Thus, if for the moment there are no reparations activities for the benefit of the victims of the violence in Afghanistan, the ICC Trust Funds for Victims can still put in place some assistance for them in the future and when legal conditions would be met for an investigation, upon a formal authorisation, if security conditions, for example, so allow. Therefore, the decision of the Chamber does not irreparably endanger the interests of victims who are fully recognised as such in the Unanimous Decision.

#### IV. CONCLUSION

51. The Judges of the Chamber have unanimously decided not to authorise the Prosecutor, for the moment, to investigate the situation in Afghanistan, although all the requirements relating to the jurisdiction and the admissibility tests have been met. Obviously, I share my colleagues' view. However, as a matter of principle, I respectfully disagree with them with regard to the scope of an authorisation a Pre-Trial Chamber may grant the Prosecutor to investigate. In my humble view, regarding a given situation clearly defined in the Prosecutor's request, once a judicial authorisation has been granted the Prosecutor may extend her investigation as necessary.

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<sup>63</sup> Article 15(5) of the Statute.

<sup>64</sup> Assembly of States Parties, Report to the Assembly of States Parties on the Projects and the Activities of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2016 to 30 June 2017, 21 August 2017, ICC-ASP/16/14; see also Trust Fund for Victims, [\*Statement by Trust Fund for Victims, Board of Directors: Under the Rome Statute, Reparative Justice Provides Undeniable Value to Victims\*](#), 14 September 2018; see also L. Moffett, 'Realising Justice for Victims before the International Criminal Court', in International Crimes Database Brief 6 (2014), p. 1.

52. In the decision-making process, the Judges have unanimously made their determination pursuant to article 53(1)(c) and (2)(c) of the Statute specifically on the basis of the ‘interests of justice’. In so doing, they have taken into account all relevant circumstances of the situation, both legal and ‘extra-legal’ or rather ‘practical’. Such an exercise is not illegal since it is precisely foreseen in the above-mentioned provisions of the Statute in their favour.

53. The Chamber, which is sensitive to the victims’ situation, has taken such a decision also in their interests, in preserving the Court’s credibility. The Judges’ decision is a legal determination, even though they have taken into account certain factors linked to the security on the ground and to the States cooperation or lack of cooperation. It should be stressed that the ICC Judges are not politicians and they are guided only by law even though the Court operates in a highly political environment.<sup>65</sup> To sum up, this decision not to authorise the investigation is a legal one and it is beneficial to international criminal justice.

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




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**Judge Antoine Kesia-Mbe Mindua,  
Presiding Judge**

Dated this 31 May 2019

At The Hague, The Netherlands

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<sup>65</sup> See for example M. de Hoon, ‘The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s legitimacy’, in *17 International Criminal Law Review* 591 (2017), pp 591, 597.

# ANNEX

## Explanatory Note

Following the detection of typographical errors, a corrected version has been registered with the necessary amendments. Moreover, the following additions have been operated:

- Paragraph 26: Footnote 23 has been added (*‘T. de Souza Dias, ‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court’, Leiden Journal of International Law (2017), pp 731-751, at 732.’*).
- Paragraph 29: The sentence *‘Moreover, [a]uthors have also voiced diverging interpretations on Article 53’*.<sup>29</sup> has been added.  
Footnotes 29 (*‘D. Đukic, ‘Transitional justice and the International Criminal Court – in “the interests of justice”’, IRRC, Vol. 89, No. 867, September 2007, pp 691-718, at 697. Hence, some like Robinson, Stahn and Gavron, are in favour of a wider interpretation of this expression, while others like Đukić, Amnesty International and Human Rights Watch prefer a more restrictive interpretation; see Đukić, op. cit., at 698.’*) and 32 (*‘I adopt the same methodology as that followed by de Souza Dias and Đukic. However, like de Souza Dias, I am in favour of a wider interpretation, contrary to Đukic who prefers a more restrictive interpretation.’*) have also been added.
- Paragraph 35: Footnote 39 has been added (*‘T. de Souza Dias, op. cit., p. 736.’*).
- Paragraph 37: Footnote 40 has been added (*‘C. Gallavin, ‘Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?’, in 14 King's Law Journal 179 (2003), p. 186. See also T. de Souza Dias, op. cit., p. 738 seq.’*).