

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/17**
Date: **7 June 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

Request for Leave to Appeal 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”

Source: Office of the Prosecutor

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

Introduction

1. On 12 April 2019, Pre-Trial Chamber II unanimously rejected the Prosecutor’s request under article 15(3) of the Statute, and decided that “an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.”¹ This is the first time that any Pre-Trial Chamber has held that there is a reasonable basis to believe that the “most serious crimes”² within the jurisdiction of the Court have been committed,³ and that potential cases concerning those crimes would be admissible,⁴ but *not* proceeded to authorise the opening of an investigation under article 15(4).

2. On 31 May 2019, Judge Mindua issued his concurring separate opinion, in which he likewise agreed that “the potential crimes arising from the incidents presented by the Prosecutor appear to be admissible” but differed from his colleagues by re-affirming the established principle that the scope of any authorised investigation would not be limited to those incidents.⁵ Nonetheless, in Judge Mindua’s view, the “formal investigation” into the situation could still not be initiated, “in the interests of justice”, because “the current circumstances of the situation in [Afghanistan] are such as to make the prospects of a successful investigation and prosecution extremely limited.”⁶

3. The Prosecution respectfully seeks leave to appeal three issues arising from the Decision, concerning:

- the Pre-Trial Chamber’s interpretation of articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice;
- the exercise of the Pre-Trial Chamber’s discretion under those provisions; and

¹ [ICC-02/17-33](#) (“Decision”), Disposition.

² See [Statute](#), Preamble (establishing that the Court will have jurisdiction over “the most serious crimes of concern to the international community as a whole”).

³ [Decision](#), paras. 64-66, 87.

⁴ [Decision](#), paras. 75-79, 84-87.

⁵ [ICC-02/17-33-Anx](#) (“Separate Opinion”), paras. 2-3. See further paras. 4-15 (observing that the purpose of the article 15 procedure was “not to organise a micro-management of the Prosecutor’s investigative work”).

⁶ [Separate Opinion](#), para. 3. See further paras. 16-53.

- the Pre-Trial Chamber's understanding of the scope of any investigation it may authorise, in light of article 15 and other material provisions of the Statute.

4. These issues significantly affect the fair and expeditious conduct of the proceedings. They also affect not only the outcome of any trial but also the very possibility of a trial occurring. Immediate resolution by the Appeals Chamber not only may but, in these circumstances, *will* materially advance the proceedings.

5. More generally, the Pre-Trial Chamber's reasoning is likely to affect *all* situations which the Prosecutor may consider bringing before the Court *proprio motu*. Similar to the issues recently certified for appeal in the *Comoros* situation by Pre-Trial Chamber I, the issues identified in the Decision are of constitutional importance. Nor indeed has the Prosecution or any other participant previously had opportunity to address the legal interpretation adopted in the Decision.

6. For these reasons, the Prosecution stresses its respectful view that clarifying the important issues raised by the Pre-Trial Chamber will, consequently, benefit the Court in its work as a whole, and that the appropriate forum for that clarification is the Appeals Chamber. By this means, the Court will further avail itself of a judicial process dedicated to the important issues which have arisen, and which may take further account of representations from participating victims, whose interests are directly affected by the Decision.⁷

7. As the Court has repeatedly held, confidence in the legal correctness of a decision is irrelevant for the purpose of deciding whether leave to appeal should be granted under article 82(1)(d) of the Statute. The sole question is whether the issues

⁷ See also [Statute](#), art. 53(1)(c) (requiring account to be taken of the interests of victims). See e.g. [Separate Opinion](#), para. 50.

involved in the Decision meet the criteria set out in that provision, such that those issues merit the scrutiny of the Appeals Chamber if requested by a Party.⁸

Submissions

8. Pre-Trial Chamber I recently affirmed that the prompt intervention of the Appeals Chamber may be particularly desirable in resolving issues which “strike at the core of the balance between the supervisory role of the Pre-Trial Chamber and the discretionary power of the Prosecutor during the early stages of the proceedings.”⁹ Likewise, Pre-Trial Chamber II (as it was then composed for the *Kenya* situation) recognised the “specific purpose” of article 15 in ensuring that proceedings at the Court may be initiated *proprio motu* by an independent Prosecutor, while ensuring an appropriate level of judicial scrutiny and oversight—and, consequently, the especially “sensitive nature” of questions as to its interpretation.¹⁰

9. For all these reasons, the *Afghanistan* Pre-Trial Chamber was right to state that “what is at stake” in considering the proper application of article 15 “is much more than the Court’s credibility” but indeed “its very function and legitimacy.”¹¹ It was perhaps in this context that Judge Mindua himself anticipated the possibility that the Prosecutor will seek to appeal the Decision,¹² as a means of ensuring that the Court follows the correct path in this crucial aspect of its functioning.

10. In the respectful view of the Prosecution, the three issues arising from the Decision—which are defined in the following paragraphs¹³—mark a departure from the established practice of the Court in interpreting articles 15(4) and 53(1)(c), as

⁸ See e.g. [ICC-02/04-01/05-20](#), para. 22.

⁹ [ICC-01/13-73](#) (“*Comoros* Decision”), para. 43.

¹⁰ See [ICC-01/09-19-Corr](#) (“*Kenya* Decision”), para. 18.

¹¹ [Decision](#), para. 34. See also para. 88.

¹² [Separate Opinion](#), para. 50.

¹³ See below paras. 15, 19, 24.

illustrated by the decisions opening investigations in *Kenya*,¹⁴ *Côte d’Ivoire*,¹⁵ *Georgia*,¹⁶ and *Burundi*.¹⁷ Judge Mindua seemed to acknowledge as much.¹⁸ Such important developments merit further consideration by the Appeals Chamber, so that they may be endorsed or clarified as may be required, including for the benefit of other future Chambers who may be called upon to consider the same questions. Likewise, given the importance of the principles to which the Decision relates, appellate intervention in this area is desirable to avoid the risk of diverging jurisprudence between different Chambers.

11. Furthermore, as a practical matter, there may always be a need for particular caution in concluding that it may *not* be in the interests of justice for this Court to open an investigation into substantiated allegations of the most serious crimes under international law. This is highlighted by the Statute itself, which provides—

¹⁴ Compare [Kenya Decision](#), paras. 20-25 (drawing parallels between the language of articles 15(3) and (4), and 53(1), and concluding that “it would be illogical to dissociate articles 15(3) and 53(1) from 15(4)”, and reasoning that the Pre-Trial Chamber cannot exercise “a supervisory role over the *proprio motu* initiative of the Prosecutor to proceed [...] unless the Chamber applies the exact standard on the basis of which the Prosecutor arrived at his [or her] conclusion”, such that “the Chamber must equally consider whether the requirements set out in article 53(1)(a)-(c) [...] are satisfied”), with para. 63 (noting that the Prosecutor need not “establish that an investigation is actually in the interests of justice”, nor “present reasons or supporting material in this respect”, and finding that “a review of this requirement is unwarranted, taking into consideration that the Prosecutor has not determined that an investigation ‘would not serve the interests of justice’”). See also Dissenting Opinion of Judge Kaul, para. 14 (concurring that “all requirements set out in article 53(1)(a) to (c) of the Statute fall squarely under judicial scrutiny of the Pre-Trial Chamber”).

¹⁵ Compare [ICC-02/11-14-Corr](#), para. 21 (“[i]n accordance with [r]ule 48”, determining that the Pre-Trial Chamber “will examine whether there is ‘a reasonable basis to proceed’ taking into account the factors set out in Article 53(1)(a) to (c)”), with paras. 207-208 (noting that, while the Pre-Trial Chamber may in principle be “called upon to review” matters under article 53(1)(c), “the Prosecutor does not have to present reasons or supporting material in that respect”, and confining its determination only to an assessment of the Prosecutor’s submissions in this regard and the existence of any relevant “indication[s] in the victims’ representations”). See also [ICC-02/11-15-Corr](#) (partially dissenting opinion of Judge Fernández de Gurmendi), para. 13 (“the Chamber must first consider whether the requirements set out in Article 53(1)(a)-(c) of the Statute are satisfied”).

¹⁶ Compare [ICC-01/15-12](#) (“*Georgia Decision*”), para. 4 (“the criteria of article 53(1) of the Statute [...] equally inform the analysis under article 15(3) and (4) of the Statute”), with para. 58 (noting that the Prosecutor need not “demonstrate that initiating an investigation is in the interests of justice”, and taking account only of the Prosecutor’s submissions and the victims’ representations). See also [ICC-01/15-12-Anx-Corr](#) (separate opinion of Judge Kovács), para. 6 (calling for “a full and proper examination of the supporting material relied upon by the Prosecutor for the purpose of satisfying the elements of article 15(4) in conjunction with article 53(1)(a)-(c) of the Statute, as well as the victims’ representations”).

¹⁷ Compare [ICC-01/17-9-Red](#) (“*Burundi Decision*”), para. 28 (“like the Prosecutor’s article 15(3) determination, the article 15(4) decision of the Pre-Trial Chamber is based on the criteria enumerated in article 53(1)(a)-(c)”), with para. 190 (noting that the Prosecutor need not “demonstrate that initiating an investigation *is* in the interests of justice”, emphasis supplied, and taking account only of the Prosecutor’s submissions and the victims’ representations).

¹⁸ [Separate Opinion](#), paras. 19, 23 (considering the Court’s jurisprudence not to be “entirely clear on this issue” and “not uniform”).

uniquely – that, if the Prosecutor determines that an investigation may be contrary to the interests of justice, the Pre-Trial Chamber may intervene *proprio motu* and reverse her decision, if necessary.¹⁹ As Judge Kovács has previously observed, this safeguard is appropriate because the concept of the “interests of justice” is “not defined in the Statute and involves a high degree of subjectivity in its assessment.”²⁰ For possibly similar reasons, this Pre-Trial Chamber has also recognised the need for this assessment to be “conducted with the utmost care”.²¹

12. Accordingly, certifying the proposed issues for appeal equips the Court with the greatest possible degree of legal assurance as to the proper interpretation and application of articles 15(4) and 53(1)(c). This is appropriate given the magnitude of the implications of the Decision, both in Afghanistan and for the international community more generally, and in order to provide appropriate guidance both for the Court and the Prosecutor in their separate functions.

13. For all these reasons, and those expressed in more detail in the following paragraphs, the Prosecution requests the Pre-Trial Chamber to certify the proposed issues in the Decision for the further consideration of the Appeals Chamber.

Three issues arise from the Decision, and should be certified for appeal

14. The Prosecution identifies three issues arising from the Decision, for which it seeks certification to appeal. As the Court has consistently required, “an appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”²² The proposed issues each satisfy this requirement.

¹⁹ See [Statute](#), art. 53(3)(b); [rule](#) 110(2).

²⁰ [ICC-01/13-68-Anx](#), para. 13.

²¹ [Decision](#), para. 88. The Pre-Trial Chamber continued to note the “implications that a partial or inaccurate assessment might have for paramount objective of the Statute and hence the overall credibility of the Court”.

²² See e.g. [ICC-01/04-168 OA3](#), para. 9.

First proposed issue: the assessment of the interests of justice

15. The first proposed issue is:

Whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice.

16. This issue arises directly from the conclusion in the Decision that the Pre-Trial Chamber is “mandated” not only to determine “whether there is a reasonable basis to believe that crimes under the Court’s jurisdiction have been committed” but also to make “a positive determination to the effect that investigations would be in the interests of justice”.²³ The Pre-Trial Chamber appears to have considered this interpretation is necessary in order “to avoid engaging in investigations which are likely to ultimately remain inconclusive.”²⁴

17. The first proposed issue is plainly an identifiable subject or topic requiring a decision for its resolution, since it raises for the first time the possibility that the Pre-Trial Chamber (and, by implication, the Prosecutor) must substantiate *why* an investigation *would* be in the interests of justice. In seeming to depart from the practice of the Court,²⁵ this also contrasts with the apparent emphasis of article 53(1)(c), which stresses whether there are “substantial reasons to believe that an investigation would *not* serve the interests of justice.”²⁶ It further goes to the interpretation of the general principle that “the aim of the Rome Statute is to ‘put an

²³ [Decision](#), para. 35. *See also* para. 88 (“the assessment of this requirement is necessary”). *See further* [Separate Opinion](#), paras. 22-23.

²⁴ [Decision](#), para. 33. *See also* para. 34 (reasoning that “[f]rivolous, 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”).

²⁵ *See above* fns. 14-17 (recalling the approach in the *Kenya*, *Côte d’Ivoire*, *Georgia*, and *Burundi* situations). *Cf.* [Separate Opinion](#), paras. 19, 23.

²⁶ [Statute](#), art. 53(1)(c). *See also* art. 15(4). *See further* ICC Office of the Prosecutor, [Policy Paper on the Interests of Justice](#), September 2007 (“OTP Policy Paper on the Interests of Justice”), p. 2. *See also* pp. 1 (referring to “a presumption in favour of investigation [...] wherever the criteria established in Article 53(1)(a) and (b) [...] have been met”), 3 (“it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation [...] may not serve the interests of justice”).

end to impunity’ and to ensure that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’.”²⁷

18. Consequently, the first proposed issue cannot be described as a mere disagreement with the Decision, but rather represents a legal issue of constitutional importance for the continued practice of the Court as a whole. While the Prosecution underlines its respect for the judicial functions of the Pre-Trial Chamber, it notes that this question directly engages its own internal practice under articles 15 and 53,²⁸ as well as the conduct of the judicial proceedings of the Court under article 15(4).

Second proposed issue: the Pre-Trial Chamber’s exercise of discretion

19. The second proposed issue is:

Whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors.

20. This issue arises from the reasoning in the Decision that “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”,²⁹ and that consequently it was necessary to “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.”³⁰ The Pre-Trial Chamber expressly recognised, in turn, that this depends on an assessment of the “relevant circumstances”.³¹ Judge Mindua, in his separate

²⁷ [ICC-01/04-01/07-1497 OAG](#), para. 79.

²⁸ See e.g. [Separate Opinion](#), para. 23 (“it seems clear that in his or her determination, the Prosecutor should proceed first with an affirmative test and see first, the other way round whether the investigation or prosecution will be positively in the interests of justice”). *But see* para. 24.

²⁹ [Decision](#), para. 89.

³⁰ [Decision](#), para. 90.

³¹ [Decision](#), para. 90 (“An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make an investigation not feasible and inevitably doomed to failure”).

opinion, also explored what he considered might constitute the “interests of justice”, and therefore which factors might permissibly be taken into account.³²

21. Consequently, assuming that the Pre-Trial Chamber must assess positively whether an investigation of this situation is in the interests of justice, its determination rested on, first, the circumstances which it considered to be “relevant”,³³ and second, its accurate appreciation of those circumstances.³⁴

22. The second proposed issue is plainly an identifiable subject or topic requiring a decision for its resolution. Since neither the Prosecution nor the Pre-Trial Chamber has ever previously determined that an investigation by the Court might be contrary to the interests of justice, there is no settled authority as to the factors which may properly be taken into account in that assessment. This is reflected in the Pre-Trial Chamber’s reasoning.³⁵ Moreover, not only is the scope of the discretion in article 53(1)(c) a matter of first impression before the Court, but again it is a question of

³² See e.g. [Separate Opinion](#), paras. 33-49.

³³ See e.g. [Decision](#), paras. 91 (identifying as “particularly relevant” factors: “(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time [...]; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available”), 95 (noting also that “pursuing an investigation would inevitably require a significant amount of resources”, “the foreseeable absence of additional resources for the coming years in the Court’s budget”, and the Pre-Trial Chamber’s view that expending resources on this situation “will go to the detriment of other scenarios”, unspecified, “which appear to have more realistic prospects to lead to trials”), 96 (noting the Pre-Trial Chamber’s view that, “in the absence of any such cases” brought before the Court, a “meaningful role” for victims “will never materialise in spite of the investigation having been authorised”). See also para. 88 (stating that it is necessary to assess the interests of justice “in particular in light of the implications” of a partial or inaccurate assessment for the “overall credibility of the Court, as well as its organisational and financial sustainability”); [Separate Opinion](#), paras. 31-32 (summarising “[s]ome of” the factors considered by the Pre-Trial Chamber). See further below paras. 24-28.

³⁴ See e.g. [Decision](#), paras. 92 (considering the duration of the preliminary examination, and considering that “some of the circumstances” leading to the length of the preliminary examination “either remain unchanged or have rather changed for the worse” and opining that, “as such, they are also likely to impact any forthcoming investigation which might be authorised”), 93 (considering that “most of the incidents referred to in the Request allegedly occurred between 2005 and 2015” and that “most of them date back to the early part of that decade”), 94 (noting the “complexity and volatility of the political climate” and considering that it is “extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities” and considering that “it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper”), 96 (considering the interests of the victims). But see also paras. 40-42, 50-55, 68 (taking a narrow approach—in contrast to the “views of the Prosecution”—to the geographic, temporal, contextual, and material factors, including identified perpetrator groups, which define the parameters of the requested investigation).

³⁵ See [Decision](#), paras. 87-96 (citing as a single authority the [OTP Policy Paper on the Interests of Justice](#) for the proposition that “the interests of justice need only be considered where positive determinations have been made on both jurisdiction and admissibility”). See also [Separate Opinion](#), paras. 24 (noting that this is a “complex concept”), 29 (suggesting that the Statute is “silent” on the meaning of “interests of justice”).

constitutional importance. For example, the Decision raises such fundamental questions as whether any assessment of the interests of justice by the Pre-Trial Chamber can take account of factors such as the Pre-Trial Chamber's own assessment of the possibilities of future State cooperation or its views as to how the Prosecutor may allocate her resources.

23. Nor, again, can the second proposed issue be considered a mere disagreement with the Pre-Trial Chamber. To the contrary, in circumstances in which neither the Prosecution nor any other participant have had an opportunity to address the Court on the factors which the Pre-Trial Chamber identified, or their appropriate interpretation, it may not be said that this application merely seeks to defend a position which the Pre-Trial Chamber has considered and, on a reasoned basis, rejected.

Third proposed issue: the Pre-Trial Chamber's understanding of the scope of any authorised investigation

24. The third proposed issue is:

Whether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents.

25. This issue arises from the reasoning in the Decision, which sought to analyse whether "authorising an investigation" would be "in the interests of justice" based exclusively on the "incidents referred to in the [Prosecutor's] Request".³⁶ As such, the Pre-Trial Chamber's understanding of the scope of any authorised investigation

³⁶ [Decision](#), paras. 90, 93. *See also* para. 68 ("any and all conduct[] for which no authorisation to investigate is specifically requested fall[s] 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").

materially affected its assessment of the interests of justice, which was the basis for the Decision.

26. The Pre-Trial Chamber’s exclusive consideration of the incidents originally identified by the Prosecution was not inadvertent—the Majority expressly stated its view that “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.”³⁷

27. While this statement may initially suggest that the Pre-Trial Chamber merely took issue with the degree of link required (a “close” link rather than a “sufficient” link),³⁸ other passages of the Decision nonetheless make clear that the Majority understood the scope of any authorised investigation to comprise *exclusively* the *specific incidents* identified by the Prosecutor, plus any “closely linked” incidents.³⁹ This differs from the previous consistent practice of the Court, in which Pre-Trial Chambers have understood the scope of any authorised investigation to comprise defined geographic, temporal, and contextual parameters—of which the specific incidents identified by the Prosecutor may be illustrative but not exhaustive *examples*—plus any additional incidents which are “sufficiently linked” to the parameters of the investigation.⁴⁰ In his separate opinion, Judge Mindua likewise made clear that this is his understanding of the Majority’s approach, which he explained as saying “the scope of the Chamber’s scrutiny *and consequently, of the*

³⁷ [Decision](#), para. 40 (emphasis added).

³⁸ See also [Decision](#), para. 41.

³⁹ [Decision](#), para. 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 that have been identified by the Prosecution*”, emphasis added). See also para. 68 (“the scope of the authorised probe cannot be extended *proprio motu* by the Office of the Prosecutor”).

⁴⁰ See e.g. [Georgia Decision](#), paras. 63-64 (concluding that “an authorization to investigate [...] is only limited by the parameters of the situation” rather than particular incidents identified by the Prosecutor, and providing that further “events which did not occur in [defined geographic, temporal or contextual parameters] would not fall into the parameters of the present situation unless they are sufficiently linked thereto”); [Burundi Decision](#), paras. 191-194 (defining the authorised investigation by reference to geographic, temporal, and contextual parameters rather than particular incidents identified by the Prosecutor).

authorisation, must remain confined to the incidents or category of incidents and, possibly, the groups of alleged offenders referred to by the Prosecutor.”⁴¹

28. The third proposed issue is plainly an identifiable subject or topic requiring a decision for its resolution. Not only is the scope of any investigation authorised by the Pre-Trial Chamber a matter of vital practical interest for the Prosecution in executing its mandate—as well as for the economy of the Court’s proceedings, and the interests of victims⁴²—but it is also a matter of differing opinion between the Judges of the Pre-Trial Chamber. The reasoning of the Decision also represents, again, an apparent and largely unexplained departure from the approach of previous Pre-Trial Chambers. For all these reasons, and in these circumstances, the third proposed issue cannot be regarded as a mere disagreement with the Decision.

All three proposed issues should be certified for appeal

29. The Prosecution submits that it is necessary to certify for appeal *all three* of the proposed issues, in light of their different scope. The first issue asks whether it is necessary or even permissible for the Pre-Trial Chamber to make a positive determination, on the concrete facts of a situation, that the interests of justice favour an investigation. The second issue inquires into the factors which a Pre-Trial Chamber can properly consider to be relevant to this analysis, if it is required, as well as to whether the Pre-Trial Chamber in this particular situation erred in its appreciation of those factors it took into account. And the third issue examines the scope of any investigation which is authorised by the Pre-Trial Chamber, which

⁴¹ [Separate Opinion](#), para. 4 (emphasis added). By the italicised passage, which was added to a quotation of paragraph 39 of the Decision, Judge Mindua is understood to have sought to paraphrase the subsequent discussion in the Decision. Judge Mindua considered the Majority’s approach to be “too restrictive”, and specifically stated that he “disagree[d] 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’”: paras. 5, 8. *See also* paras. 9-15.

⁴² In particular, the parameters of the situation/investigation may be linked to the potential activation of the assistance mandate of the Trust Fund for Victims: *see e.g.* [Statute](#), art. 79; [rules](#) 85, 98(5); [Regulations of the Trust Fund for Victims](#), para. 50(a). On the significance of the TFV’s assistance mandate, *see e.g.* TFV, [Report of the Board of Directors of the Trust Fund for Victims](#), 4 December 2017, pp. 6-7.

materially informed the Pre-Trial Chamber's assessment of the interests of justice in this situation.

30. Only by considering all three of these issues, therefore, can the Appeals Chamber engage with the full reasoning of the Pre-Trial Chamber in the Decision. Furthermore, the two legal issues are of general importance to the work of the Court as a whole, since they concern fundamental aspects of the statutory procedure applicable whenever the Pre-Trial Chamber is seised of matters under article 15.

The proposed issues each significantly affect the fair and expeditious conduct of the proceedings

31. Each of the proposed issues significantly affects the fair and expeditious conduct of the proceedings.

32. The proposed issues significantly affect the fair conduct of the proceedings because the Pre-Trial Chamber has acknowledged that there are potential cases of adequately substantiated crimes within the Court's jurisdiction which are admissible—yet, as a consequence of its approach to the proposed issues, it has precluded any possibility of any of the potential cases being investigated by the Court in the near future. Furthermore, it reached this determination without hearing from the Prosecution or any other participant on these matters.⁴³ While the Prosecution acknowledges and defers to the Pre-Trial Chamber's competence to issue its ruling under article 15(4), it nonetheless respectfully submits that considerations of both procedural and substantive fairness at least warrant an appellate procedure at this stage in order to give an adequate opportunity for alternative interpretations of the relevant law and facts to be heard and explored. This may be especially appropriate in circumstances when the decision in question appears to depart from the prior consistent jurisprudence of the Court.

⁴³ In the course of its deliberations, in its previous composition, the Pre-Trial Chamber ordered the Prosecutor to provide additional information on two occasions, but in neither instance did this relate to matters under article 53(1)(c) of the Statute: *see e.g. Decision*, paras. 6-8, 10, 11.

33. The proposed issues significantly affect the expeditious conduct of the proceedings because, to any extent the Prosecutor may in the future be able to renew its request to the Pre-Trial Chamber under article 15(5) of the Statute,⁴⁴ this will inevitably be subject to further delay. In circumstances in which the Pre-Trial Chamber has already noted with concern the time that has elapsed since some of the earliest substantiated criminal allegations in this situation,⁴⁵ the negative implications of the Decision for expeditiously advancing these proceedings—by concluding the preliminary examination, and opening an investigation of these allegations—are manifest and unavoidable.

34. In addition to these considerations, as set out in the preceding paragraphs, the proposed issues not only significantly affect the fair and expeditious conduct of *these* proceedings, but also—at least—*all* proceedings considered by the Prosecutor for the purpose of article 15(3). In particular, if the reasoning in the Decision is correct, the Prosecutor will need to spend additional time and resources in the conduct of preliminary examinations not only to justify *positively* why investigating substantiated allegations of crimes may be in the interests of justice but also, potentially, establishing to the requisite standard *all* the “events or categories of events” that may form part of any subsequent investigation.⁴⁶ Such an obligation may dramatically curtail the effectiveness of the Prosecutor’s investigation—creating, in Judge Mindua’s words, a “cumbersome” process⁴⁷—including by: requiring a prior showing of issues that may only be properly determined by means of investigation; contradicting the Prosecutor’s duty to investigate objectively under article 54(1)(a) of the Statute; and further decelerating the speed of the Prosecutor’s investigation.⁴⁸

⁴⁴ Cf. [Separate Opinion](#), para. 50. *But see further below* para. 36.

⁴⁵ [Decision](#), para. 93.

⁴⁶ *See e.g.* [Decision](#), para. 42. *See also* paras. 40-41, 68. *See above* paras. 24-28.

⁴⁷ [Separate Opinion](#), para. 9.

⁴⁸ *See e.g.* [Georgia Decision](#), para. 63 (“for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor’s investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation. To impose such limitation would also be illogical, as an examination under

35. Moreover, another outcome of the apparent logic of the Decision may be to create the scenario in which investigations may only be authorised by the Pre-Trial Chamber in circumstances when national counterparts are willing and able to operate (and cooperate)—yet this is precisely counter to the objective of the Statute in mandating the Court’s engagement when national jurisdictions may be unwilling or unable genuinely to investigate and/or prosecute crimes within the Court’s jurisdiction. While the Prosecution is very mindful of the challenges in pursuing investigations or prosecutions in circumstances when cooperation is limited, and continues to explore ways in which it can better meet these challenges within the framework of the Statute, it remains the case that these challenges are part of its statutory responsibility.

The proposed issues significantly affect the outcome of any trial

36. Alternatively, the proposed issues also significantly affect the outcome of any trial in the sense that they effectively foreclose the possibility of such a trial even being initiated if the Pre-Trial Chamber remains of the opinion expressed in the Decision. As such, the preliminary examination of this situation may be effectively terminated, or at least placed in a procedural limbo from which there is no obvious means of resolution, even under article 15(5) of the Statute.

article 15(3) and (4) of the Statute is inherently based on limited information. It is precisely the purpose of the investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted. Binding the Prosecutor to the crimes mentioned in the decision authorizing investigation would also conflict with her duty to investigate objectively, in order to establish the truth (cf. article 54(1) of the Statute”); [Burundi Decision](#), para. 193 (referring to article 54(1)(a) of the Statute). *See also* M. Cross, ‘[The standard of proof in preliminary examinations](#),’ in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examinations: Volume 2* (Brussels: TOAEP, 2018) , pp. 247-249 (“Certain Article 5 crimes are, by their nature, more difficult to establish because they require a greater number of elements to be satisfied. Moreover, in the context of preliminary examinations, this logic applies even more strongly because some required elements, by their nature, may be difficult to establish to the standard of proof on the basis of the ‘information made available’. For example, certain ‘conduct of hostilities’ offences may be especially prone to this phenomenon. The extent to which inferences of these elements can reasonably be made from the general circumstances is an open, and difficult, question.[...] [I]t cannot be assumed that the ‘examples’ demonstrating that the Article 53(1) requirements are met will necessarily prove to be the ‘gravest’ types of criminality in the situation. Rather, although the Prosecutor can be expected to enumerate the gravest types which she finds to be established according to the Article 53(1) standard of proof, practical considerations will necessarily inform which crimes actually meet the test. [...] Inevitably, certain features, possibly key features, of the situation may well be suspected at the preliminary examination stage, but are only susceptible to proof by means of the investigation itself. This presents no legal problem as such, since the scope of the investigation once opened is not limited to the incidents discussed in any public outcomes of the preliminary examination”). *See above* fn. 42.

Immediate resolution of the proposed issues by the Appeals Chamber may materially advance the proceedings

37. For similar reasons, immediate resolution by the Appeals Chamber of the proposed issues is highly likely to materially advance the proceedings, in the sense that any determination that the Pre-Trial Chamber erred with respect to any of these issues would materially affect the Decision and thus might permit the immediate opening of an investigation. In this sense, notwithstanding the Prosecution's reliance on article 82(1)(d) for the purpose of this application, the Decision is much more similar in character to a 'final decision', where the benefits of appellate scrutiny are immediately apparent and widely accepted.

38. Finally, given the constitutional importance of the matters raised in the proposed issues not just for this situation but for *all* situations under consideration at the preliminary examination stage, including for the purpose of article 15(3) or (4), the Appeals Chamber's guidance will be immediately beneficial in guiding the Court's practice more broadly.

Conclusion

39. For the reasons above, the Pre-Trial Chamber is respectfully requested to certify the proposed issues for appeal.



Fatou Bensouda, Prosecutor

Dated this 7th day of June 2019

At The Hague, The Netherlands