

## Chapter 14, Problem I: Update on The Changing Roles of International Courts and the Limits of International Adjudication

Shortly after the textbook went to press, the ICC Appeals Chamber reversed the Pre-Trial Chamber. An edited version of the Appeals Chamber opinion follows.

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-02/17 OA4  
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### **THE APPEALS CHAMBER**

#### **SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

##### **II. INTRODUCTION**

3. Pursuant to article 15 of the Statute, the Prosecutor may initiate an investigation *proprio motu* (on her own motion), without having received a referral from a State Party to the Rome Statute or the Security Council of the United Nations. However, in such a case, the investigation must be authorised by a pre-trial chamber. The present appeal concerns a situation where the Prosecutor's request for authorisation was rejected on the ground that an investigation would not serve the interests of justice.

4. On 20 November 2017, the Prosecutor filed a request for authorisation of an investigation into crimes allegedly committed in the Islamic Republic of Afghanistan (hereinafter: 'Afghanistan') since 1 May 2003, as well as related crimes allegedly committed in other States Parties since 1 July 2002 (the 'Request'). The Request involved: (i) the Taliban and affiliated groups for crimes against humanity and war crimes; (ii) the Afghan National Security Forces for war crimes; and (iii) the armed forces of the United States of America (the 'United States') and its Central

Intelligence Agency (the ‘CIA’) for war crimes.

5. On 12 April 2019, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) decided to reject the Prosecutor’s Request and not to authorise an investigation by the Prosecutor into the situation in Afghanistan (hereinafter: ‘Impugned Decision’). Pursuant to article 15(4) of the Statute, the Pre-Trial Chamber was required to determine whether there was a reasonable basis to proceed with an investigation, and whether the case appeared to fall within the jurisdiction of the Court, in deciding whether to authorise the commencement of the investigation. In the Impugned Decision, the Pre-Trial Chamber concluded that, ‘notwithstanding the fact that all the relevant requirements are met as regards both jurisdiction and admissibility, an investigation into the situation in Afghanistan would not serve the interests of justice.’

#### IV. MERITS

##### **A. First ground of appeal: Whether the Pre-Trial Chamber erred in law by seeking to make a positive determination of the interests of justice**

###### *1. Relevant part of the Impugned Decision*

20. In the Impugned Decision, the Pre-Trial Chamber found that it ‘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’. It found that it was required not only to determine that ‘there is a reasonable basis to believe that crimes under the Court’s jurisdiction have been committed’, but also to positively determine ‘that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts [*sic*], the potential victims’ interests and the likelihood that investigation [*sic*] be [*sic*] feasible and meaningful under the relevant circumstances’. It is primarily this finding that the Prosecutor impugns in her first ground of appeal.

###### *3. Determination by the Appeals Chamber*

23. The Appeals Chamber notes that the Prosecutor’s arguments under her first ground of appeal are predicated on the assumption that a pre-trial chamber’s decision pursuant to article 15(4) of the Statute should take into account the ‘interests of justice’ factor of article 53(1)(c) of the Statute, but that the manner in which the Pre-Trial Chamber considered this factor in the present case was wrong. In contrast, the victims and certain *amici curiae* argue that the Pre-Trial Chamber should not have

addressed the ‘interests of justice’ at all. Therefore, the first issue for the Appeals Chamber to determine is whether the ‘interests of justice’ factor under article 53(1)(c) of the Statute should be assessed in determining whether ‘there is a reasonable basis to proceed’ with an investigation under article 15(4) of the Statute.

26. The starting point for the Appeals Chamber’s analysis is a consideration of the function of articles 15 and 53 of the Statute and the relationship between these provisions. During the drafting of the Rome Statute, these provisions were the subject of lengthy debate and the final text reflects a delicate balance regarding the Prosecutor’s discretionary power to initiate investigations and the extent to which judicial review of these powers would be permitted.

27. Article 15 appears within Part 2 of the Rome Statute titled ‘Jurisdiction, Admissibility and Applicable Law’. It builds upon article 13, which prescribes the three circumstances in which the Court may exercise its jurisdiction with respect to an article 5 crime, namely when: (i) a situation is referred to the Prosecutor by a State Party in accordance with article 14; (ii) a situation is referred to the Prosecutor by the Security Council; or (iii) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

28. If a situation is referred by a State Party or the Security Council, article 53(1) of the Statute places, in principle, an obligation on the Prosecutor to open an investigation, by providing that ‘[t]he Prosecutor *shall* [...] initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute’ (emphasis added). The Prosecutor is obliged to evaluate the seriousness of the information received and may seek additional information for this purpose. In deciding whether to initiate an investigation, article 53(1) obliges the Prosecutor to consider three factors: (i) whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) whether the case is or would be admissible; and (iii) 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’.

29. Article 53(1) of the Statute thus reflects an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor *not* to proceed in the limited circumstances set out in article 53(1)(a) to (c) of the Statute. If

the Prosecutor decides *not* to initiate an investigation under article 53(1) of the Statute, her decision is subject to certain notification requirements. Article 53(3) of the Statute envisages judicial control over the Prosecutor's decision not to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations.

30. In contrast, article 15 of the Statute, titled 'Prosecutor', sets out the procedure for the triggering of an investigation by the Prosecutor *proprio motu*, that is, on her own motion when a situation has not been referred to her. Article 15 recognises the discretionary nature of this power, providing in paragraph 1 that 'the Prosecutor *may* initiate investigations *proprio motu*' (emphasis added). In this context, it is for the Prosecutor to determine whether there is a reasonable basis to initiate an investigation *proprio motu*. If the Prosecutor concludes that there is no reasonable basis to proceed (a scenario not arising in this appeal), article 15(6) of the Statute requires her to inform those who provided the information of her conclusion. They may provide additional information to the Prosecutor who may reconsider the matter; however, the legal framework does not envisage judicial review of the Prosecutor's conclusion.

31. In the view of the Appeals Chamber, this is consistent with the discretionary nature of the power accorded to the Prosecutor under article 15 of the Statute. Indeed, it would be contrary to the very concept to suggest that a duty to investigate could be imposed by the pre-trial chamber in the absence of a request for authorisation of an investigation by the Prosecutor. The Appeals Chamber notes, in this regard, that a proposal to allow for notification to the pre-trial chamber and judicial review of decisions of the Prosecutor not to request authorisation of an investigation under article 15(6) of the Statute was rejected by the drafters. Indeed, the right vested in all States Parties and in the Security Council to refer situations would provide the appropriate remedy in such circumstance.

32. Therefore, under the procedure set out in article 15 of the Statute, the pre-trial chamber has a role in respect of the Prosecutor's exercise of discretionary power only if she determines that there *is* a basis to initiate an investigation.<sup>54</sup> If the Prosecutor

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<sup>54</sup> The concern of the drafters was to ensure that a Prosecutor vested with *proprio motu* powers would not be able to pursue frivolous or politically motivated investigations in an unchecked manner. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), 25 March-12 April 1996, A/AC.249/1, pp. 43-44.

wishes to investigate a situation in the absence of a referral, the pre-trial chamber's authorisation is required, in accordance with article 15(4) of the Statute. If authorisation is granted, the Prosecutor may initiate an investigation directly. . . .

33. On the basis of the foregoing, the Appeals Chamber considers that the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council.

34. The Appeals Chamber notes that article 15 of the Statute does not refer to the interests of justice or to article 53 of the Statute. Article 15(4) of the Statute requires a pre-trial chamber to determine only whether 'there is a reasonable basis to proceed with an investigation', and whether 'the case appears to fall within the jurisdiction of the Court'. This provision does not identify additional considerations that the pre-trial chamber must take into account for the purpose of this determination. A plain reading of the provisions, therefore, indicates that, for the purposes of exercising judicial control at this early stage of the proceeding, the pre-trial chamber need only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction. This interpretation fully reflects the concern of the drafters in terms of the exercise of the *proprio motu* power noted above.

35. While rule 48 of the Rules requires the *Prosecutor* to consider all the factors under article 53(1) of the Statute, including the interests of justice, in deciding whether to request authorisation of an investigation under article 15(3), there is no equivalent rule that would import these considerations for the purposes of a pre-trial chamber's determination under article 15(4) of the Statute. The rule was adopted after the Statute and, had the drafters intended to import these considerations into the pre-trial chamber authorisation process they would have included such a requirement in the rule. In the Appeals Chamber's view, this shows that the factors under article 53(1)(a) to (c) are *not* relevant for the purposes of the pre-trial chamber's decision.

37. In light of the above, the Appeals Chamber considers that the 'interests of justice'

factor set out in article 53(1)(c) of the Statute, while part of the Prosecutor's consideration under article 15(3) of the Statute as per rule 48 of the Rules, is not part of the pre-trial chamber's decision under article 15(4) of the Statute.

38. The Appeals Chamber considers that this interpretation of article 15(4) of the Statute is further supported by reference to the information that the Prosecutor is required to include in her request for authorisation of an investigation before the pre-trial chamber. Regulation 49(1) of the Regulations of the Court (the 'Regulations') provides that the Prosecutor must refer to the crimes committed and provide a statement of the facts alleged to provide a reasonable basis to believe that the crimes are being or have been committed, as well as a reasoned declaration that the listed crimes fall within the Court's jurisdiction. According to regulation 49(2) of the Regulations, the statement of facts must include the location of the crimes as precisely as possible, the time or time period of their commission and the persons involved or a description of the persons involved. Regulation 49(3) of the Regulations indicates that the Prosecutor must, if possible, append to the request a chronology of relevant events, maps showing relevant information and a glossary of relevant names of persons, places and institutions.

39. The Appeals Chamber notes that the information that the Prosecutor must provide at this stage is of a limited and very general nature. This is consistent with the preliminary stage of proceedings when the Prosecutor has not had the opportunity to gather evidence and ascertain the facts in the course of an investigation. The Prosecutor is not required to present evidence to support her request and is not required to present information regarding her assessment of complementarity with respect to the cases or potential cases. Similarly, the Prosecutor is not required to provide her reasoning (if any) or justify her conclusion regarding the interests of justice under article 53(1)(c) of the Statute. Indeed, according to regulation 49 of the Regulations, the Prosecutor is required only to provide a factual description of the crimes allegedly committed and a declaration that they fall within the jurisdiction of the Court. This further supports the finding that the pre-trial chamber, under article 15(4) of the Statute, is limited to determining whether there is a reasonable factual basis to proceed with an investigation and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction.

40. Additionally, the Appeals Chamber notes that, if a pre-trial chamber were expected to apply all the factors under article 53(1)(a) to (c) of the Statute, this would include an

assessment of the admissibility of potential case(s) under article 53(1)(b) of the Statute. In the Appeals Chamber's view, the value of a judicial assessment of admissibility at this stage would be limited. The Appeals Chamber notes that, in the context of article 15 proceedings, there is no obligation for the Prosecutor to notify States of her intention to seek authorisation for an investigation and the participation of States is not provided for in the applicable procedural framework. This means that the pre-trial chamber would have to rely on the Prosecutor, who considers that the case(s) would be admissible, to provide information that would allow it to form a view on issues of admissibility. Therefore, in the view of the Appeals Chamber, it is sufficient for the purposes of the article 15 procedure that the Prosecutor considers the admissibility of potential cases in determining whether she should request authorisation for an investigation under article 15(3) of the Statute; there is no basis for the pre-trial chamber to consider that question as well.

41. The Appeals Chamber considers that the drafting history supports its view that the pre-trial chamber's determination under article 15(4) should not incorporate issues of admissibility. In this regard, it notes that, during the Rome Conference, a provision was deleted from draft article 15 that would have expressly required the pre-trial chamber to take issues of admissibility into account in determining whether to authorise an investigation. Similarly, a proposal during the drafting of the Rules to incorporate admissibility and jurisdictional challenges into the authorization procedure was rejected by the drafters, *inter alia*, due to concerns that it would exceed the oversight role of the pre-trial chamber under article 15 and that it would not be feasible to resolve these issues at such an early stage of proceedings.

42. The Appeals Chamber considers that specific procedural mechanisms based on the full participation of relevant parties, participants and States are provided for elsewhere in the legal framework ensuring that the Court pursues investigations and prosecutions only in relation to admissible cases. In particular, under article 18, as soon as the Prosecutor initiates an investigation pursuant to article 15 of the Statute, she must notify all States Parties and States which, based on available information, would normally exercise jurisdiction over the crimes concerned. Pursuant to that article, within one month of receipt of notification a State may inform the Court of its own investigations and, at the request of the State, the Prosecutor must defer to the State's investigation 'unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation'. As highlighted by the Prosecutor, in this context, an interested State may

present detailed information with respect to any question of admissibility allowing for an informed and meaningful assessment by a pre-trial chamber at this stage. The existence of this procedure, which allows the pre-trial chamber to consider admissibility at a stage designed specifically for that purpose immediately following upon the authorisation of an investigation, further supports the Appeals Chamber's interpretation of article 15(4) of the Statute.

**B. Second ground of appeal: Whether the Pre-Trial Chamber abused its discretion in assessing the interests of justice**

48. Having determined in relation to the Prosecutor's first ground of appeal that the Pre-Trial Chamber erred in considering the 'interests of justice' when deciding on the Prosecutor's Request, the Appeals Chamber sees no need to address the Prosecutor's second ground of appeal. However, the interpretation given to the term 'interests of justice' as it appears in article 53(1)(c) of the Statute by the Pre-Trial Chamber has been the subject of extensive submissions before the Appeals Chamber and has provoked much commentary from the academic community and civil society. The concept of the 'interests of justice' is of significance under the Statute, particularly for the Prosecutor who remains obliged to consider it in her assessment under articles 15(3) and 53(1) of the Statute. For this reason, the Appeals Chamber is of the view that it is appropriate to provide some observations on the Pre-Trial Chamber's approach to this concept.

49. First, the Appeals Chamber underlines that article 53(1) of the Statute is formulated in the negative – the Prosecutor must consider whether there are 'reasons to believe that an investigation would not serve the interests of justice' and need not affirmatively determine that an investigation would be in the interests of justice, as suggested by the Pre-Trial Chamber. Second, the Appeals Chamber notes that the Pre-Trial Chamber's reasoning in support of its conclusion regarding the 'interests of justice' was cursory, speculative and did not refer to information capable of supporting it. Third, there is no indication that the Pre-Trial Chamber considered the gravity of the crimes and the interests of victims as articulated by the victims themselves in conducting this assessment. In these circumstances, the Appeals Chamber is of the view that the Pre-Trial Chamber did not properly assess the interests of justice.