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')[1] 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')[2]. 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'.[3] Upon consideration of the inherent qualities as well 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.[4] 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.[5]

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

[1] ICC-02/17-7-Conf-Exp. A public redacted version is also available; *see* ICC-02/17-7-Red.
[2] ICC-02/17-33.
[3] Unanimous Decision, ICC-02/17-33, para. 45.
[4] Unanimous Decision, ICC-02/17-33, para. 48.
[5] Articles 17(1) and 53(1) of the Statute.

prospects of a successful investigation and prosecution extremely limited.[6] 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.[7] 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.[8]

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 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 inititiate investigations *proprio motu*, but he or she can do so only under the scrutiny

[6] Unanimous Decision, ICC-02/17-33, para. 96.
[7] Unanimous Decision, ICC-02/17-33, para. 39.
[8] Unanimous Decision, ICC-02/17-33, para. 39.

and with the 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').[9]

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.[10] 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'.[11] 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 seise 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 resctrictive approach defeats the purpose and objective of the Chamber's authorisation as a judicial check.

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[9] See I. Stegmiller, 'Article 15', in M. Klamberg (ed.) *Commentary on the Law of the International Criminal Court* (2016).
[10] Unanimous Decision, ICC-02/17-33, para. 36.
[11] 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 refence 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').[12] In her 'Request for authorisation of an investigation pursuant to article 15' in relation to that situation (the 'Burundi Request'),[13] 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[14] until 26 October 2017[15]. 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 continue after 26 October 2017. That is with regard to the temporal scope of the authorised investigation.[16]

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

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[12] 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.
[13] 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.
[14] Burundi Request, ICC-01/17-5-Red., para. 39.
[15] Burundi Request, ICC-01/17-5-Red., para. 39.
[16] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 192

investigation to other crimes, i.e. war crimes and genocide, as long as they remain within the parameters of the authorised investigation' in accordance with article 54(1)(a) of the Statute.[17] 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.[18]

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 details. I will address first the competence of the Pre-Trial Chamber to deal with the 'intersts 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

[17] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 193.
[18] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 194.

> proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the 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:
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> (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;
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> (b) The case is or would be admissible under article 17; and
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> (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.
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> 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.[19] In reality, in such instances, pre-trial Chambers merely indicated that there

[19] *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.

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.

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[20], 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'.[21] 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.[22]

26. In her 'Policy Paper on the Interests of Justice', the Prosecutor gave the 'interests of justice' a very narrow interpretation. For her, this notion can only be invoked in exceptional circumstances and very often only in order to open an investigation.[23] There is almost always a presumption of prosecution in the Prosecutor's understanding of article 53.

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[20] 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.
[21] 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.
[22] Paragraph 190 of the Burundi Article 15 Decision is the only one devoted to the 'interests of justice'.
[23] Office of the Prosecutor, *Policy Paper on the Interests of Justice* (2007).

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'.[24] 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'.[25] 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'.[26] 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:
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> […]
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> (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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> […]
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> (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

[24] Request, ICC-02/17-7-Red, para. 372.
[25] Unanimous Decision, ICC-02/17-33, para. 87.
[26] Office of the Prosecutor, *Policy Paper on the Interests of Justice* (2007), p. 2.

> 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.[27] However, we know that the Statute is just a treaty. For this reason, normally it produces its effects only on States Parties in accordance with the Latin principle '*Pacta tertiis nec nocent nec prosunt*'.[28] 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.[29] 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.

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 and the prevention of mass atrocities'.[30] 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.[31] In the particular situation

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[27] 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.

[28] A treaty binds the parties and only the parties; it does not create obligations for a third State.

[29] See 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.

[30] Unanimous Decision, ICC-02/17-33, para. 89.

[31] Unanimous Decision, ICC-02/17-33, para. 90.

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.[32]

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.[33] 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 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.[34]

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

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[32] Unanimous Decision, ICC-02/17-33, para. 91.
[33] Unanimous Decision, ICC-02/17-33, para. 95.
[34] 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.

gravity of the crime or with the interests of victims. Thus, factors which could be considered as interests of victims are different.[35]

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'. 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 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

[35] 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.

any other factor could represent the interests of justice. 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 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'[36] 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,[37] the necessity of peace negotiations or an alternative justice mechanism,[38] the limited availability of human and financial resources,[39] State cooperation constraints,[40] the complementarity and admissibility issues and the existence of a State duty to prosecute,[41] 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 welll as the meaning, the context of the words used and the *travaux preparatoires* of the Rome conference.[42] The only problem which remains is

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[36] Finally, justice refers to the attainment of what is just, fair or reasonable.
[37] ICTY, Trial Chamber II, *Prosecutor v. Nikolić*, Trial Judgement, 18 December 2003, IT-94-2-5, paras 31-32.
[38] 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.
[39] Office of the Prosecutor, Paper on Some Policy Issues before the Office of the Prosecutor (2003), p. 2.
[40] 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.
[41] 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 Practioners' Journal 317*, p. 328.
[42] 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.

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.[43] 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'.[44] As such the feasibility of an investigation is not a separate factor under the Statute when determining whether to open an investigation.[45]

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

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[43] Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (2016), p.18. Paragraph 51, p.17.
[44] 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 paragraph 70, p. 17.
[45] Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (2013), para. 70.

is in addition, at the mercy of the good will of States, through the cooperation[46] 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 stuborn 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-State Parties are very often reluctant to cooperate,[47] putting the Court in practical difficulties hampering its efficiency[48] 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 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.[49] Sometimes indeed, alternative mechanism such as Truth and

[46] C. Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court', in *15 International Criminal Law Review 170* (2015), p. 170.
[47] *See for instance* the referrals of the situations in the Sudan and Libya by the UNSC.
[48] Today, States refuse to execute the warrant of arrest against Mr Omar Al-Bashir for example.
[49] 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?', in *14 King's Law Journal 179* (2003), p. 196.

Reconciliation Commissions, amnesties, transitional justice and even Gacaca[50] are preferred to the international justice system. In other words, sometimes, the latter might jeopardize peace.[51]

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.[52]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[53] 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,[54] but also with regards to the 'interests of justice'.[55] To that 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.

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[50] Gacaca are a form of traditional jurisdictions used in Rwanda after the 1994 genocide to adjudicate criminal cases. *See* A.-M. de Brouwer and E. Ruvebana, 'The Legacy of Gacaca Courts in Rwanda. Survivors' Views', in *13 International Criminal Law Review 937* (2013), p. 938.
[51] 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.
[52] 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.
[53] 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.
[54] Article 53(1)(a), b) and 53(2)(b) of the Statute.
[55] Article 53(1)(c), (2)(c) of the Statute.

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.[56] 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 subject presently 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.[57]

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

[56] C. Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court', in *15 International Criminal Law Review 170* (2015), p. 171.
[57] Unanimous Decision, ICC-02/17-33, para. 95.

50. Futhermore, 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'.[58] Finally, the ICC which is a victim-centred court organises both reparations and assistance in favour of victims.[59] It goes without saying that the Chamber is very concerned about them. Thus, if for the moment, there is 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 it. 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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[58] Article 15(5) of the Statute.

[59] 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.[60] 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.

Judge Antoine Kesia-Mbe Mindua,
Presiding Judge

Dated this 31 May 2019

At The Hague, The Netherlands

[60] *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.