

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*No.: ICC-02/17*  
Date: 13 June 2019

**PRE-TRIAL CHAMBER III**

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

**SITUATION IN ISLAMIC REPUBLIC OF AFGHANISTAN**

**IN THE CASE OF  
*THE PROSECUTOR v.***

**Public Document**

**RESPONSE TO OFFICE OF THE PROSECUTOR'S:  
'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:** Reprieve/Foundation for Fundamental Rights Pakistan

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

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## **INTRODUCTION**

1. These submissions are made<sup>1</sup> on behalf of a group of victims (“**the Cross-border Victims**”), located in Pakistan, setting out their views (and providing supporting information) in response to the Prosecutor’s 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” (“**the Request**”).
2. The Cross-border victims refer to their “Submission on Behalf of Victims of Cross Border Aerial Bombardment in the Afghan Conflict,” filed on 31 January 2018.
3. On 20 November 2017 the Prosecutor submitted its Request for Authorisation for an Investigation Pursuant to Article 15 (“**the Article 15 Request**”).
4. On 12 April 2019, Pre Trial Chamber II issued its “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (“**the Article 15 Decision**”). By that Decision, it refused the Prosecutor’s request to investigate the situation in Afghanistan, holding that it would not be in the interests of justice to do so.
5. On 4 June 2019, Judge Antoine Kesia-Mbe Mindua issued his Concurring and Separate Opinion.
6. On 10 June 2019, the Prosecutor filed its Request. The Cross-border Victims respond to Issues 2 and 3 raised by the Prosecutor’s Request: <sup>2</sup>
  - a. Scope. The Cross-border Victims submit that the Pre-Trial Chamber fell into legal error by considering its determination limited to the incidents referred to in the Prosecutor’s Article 15 Request. The Prosecutor’s current Request makes no reference to the relevance of victim representations in delineating the scope of an investigation. The Cross-border Victims’ Response seeks to correct this gap.
  - b. Interests of Justice. The Cross-border Victims submit that the Pre-Trial Chamber erred in law in exercising its discretion under Article 15, because it failed to give due

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<sup>1</sup> These submissions are made by Reprieve and the Foundation for Fundamental Rights on behalf of victims and do not necessarily represent Reprieve’s or the Foundation for Fundamental Rights’ own positions in respect of any of the matters addressed.

<sup>2</sup> Issue 2 (§ 19, Request): 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.

Issue 3 (§ 24, Request): 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.

consideration to the Cross-border Victims' submissions, a relevant consideration. The Prosecutor's current Request makes no reference to the relevance of victim representations to the interests of justice determination. The Cross-border victims' response seeks to address this gap.

7. The submissions will take the following structure:
  - a. Standing and time limit;
  - b. Background;
  - c. Response to Issue 3: Scope;
  - d. Response to Issue 2: Interests of Justice.

### **STANDING AND TIME LIMIT**

8. Regulation 65(3) of the Rome Statute ("the Statute") provides: "Participants may file a response within three days of notification of the application described in sub-regulation 1 [Application for leave to appeal], unless the Pre-Trial or Trial Chamber concerned orders an immediate hearing of the application. In the latter case, the participants shall be afforded an opportunity to be heard orally."
9. The Cross-border Victims are participants with standing to file a response. Notification of the Prosecutor's Request was given on 10 June 2019. The Cross-border Victim's response, filed on 13 June 2019, is therefore in time.

### **BACKGROUND**

10. A list of the victims on behalf of whom these submissions are made is set out in Annex 1. These victims are representative of many hundreds of other civilians based in Pakistan who have been killed or injured (or who are close family members of persons killed or injured) in cross-border air strikes launched into Pakistan from Afghan territory in connection with the Afghan conflict.
11. These submissions relate to (and rely on) a set of submissions (on jurisdiction) and a large body of evidence provided to the Prosecutor in February 2014, set out in Annex II and annexed originally to the Cross-border Victims' submissions dated 31 January 2018.
12. The very detailed evidence provided to the Prosecutor in February 2014 alleged that the ongoing aerial bombardment of areas of Pakistan in connection with the Afghan conflict, in strikes launched from Afghanistan, involved serious crimes within the jurisdiction of



the Court. The evidence submitted ran to approximately 300 pages and consisted of witness statements, NGO reports, press reports from reputable agencies, government documents (including statistics prepared by the Government of Pakistan) and a range of other evidence. Detailed submissions on jurisdiction were also filed, submitting that territorial jurisdiction under the Rome Statute – as in international law more generally – is both objective and subjective, meaning that the Court has jurisdiction where the elements of a crime occur in a State Party but are completed in another state (or vice versa).

13. Furthermore, the Cross-border Victims formally offered to provide further information to the Prosecutor by way of witness evidence from many individuals or by giving evidence at the Seat of the Court as provided by Article 15 (1), if desired. The Prosecutor has not availed of this offer, nor has the OTP responded substantively to this evidence. Furthermore, the Prosecutor has not sought to take any protective steps pursuant to Article 15 (2) and Rule 47 in respect of the evidence provided by witnesses, despite a number of the victims being elderly or suffering from illness which may preclude the possibility of evidence being given in the event proceedings were to be brought in respect of the cross-border aerial bombardment.
14. Rather, notwithstanding the comprehensive body of evidence provided by the Cross-border Victims to the Prosecutor, the Prosecutor's Article 15 Request made no reference to the crimes alleged by such victims or any of the allegations and evidence they have made.
15. The Cross-border Victims' submissions were not considered in the Article 15 Decision. Nor do they figure in the Prosecutor's current Request. The following submissions respond to the Prosecutor's Request, focusing on (1) its submissions on scope and (2) its submissions on the interests of justice standard (issues 3 and 2 in the Request).

## **SCOPE**

16. As noted by the Prosecutor (Request, § 27), the Majority in the Article 15 Decision concluded that any authorised investigation must comprise *exclusively* of the *specific incidents* identified by the Prosecutor, plus any "closely linked" incidents. The Prosecutor refers to Judge Mindua's separate opinion, and indicates that the "third proposed issue is plainly an identifiable subject or topic requiring a decision for resolution." (§ 28).
17. The Cross-border Victims respectfully submit that the Court erred in law in concluding that the scope of an investigation is limited to the specific incidents identified by the Prosecutor. It is respectfully submitted that the Court was under an obligation to consider the incidents raised by victims, including the Cross-border Victims, particularly where

those incidents were not duly considered by the Prosecutor in line with its obligations under Article 15(2) of the Statute to “analyse the seriousness of the information received.”

18. Article 53 of the Statute expressly refers to the interests of victims:

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:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

19. Per Rule 50 of the Court’s Rules of Procedure and Evidence (“RPE”),

(1) When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses.

...

(3) Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations.

(4) The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing. (*emphasis added*)

20. The interests of victims are central to the Court’s Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation. Victims are granted a legal right to participate, in writing and, if necessary, by oral hearing. Failure to consider the submissions of Victims relating to the scope of a proposed investigation risks making the rights of victims under Article 15 and Rule 50 nugatory.
21. The Pre-Trial Chamber acknowledged the fundamental rights of participation of victims at the authorisation stage in its ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi’:

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 speak in favour of commencing an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice. (§ 190)

22. In their Submissions dated 31 January 2018, the Cross-border Victims expressed grave concern that the Prosecutor’s Article 15 Request made no mention of the aerial bombardment of Pakistan launched by international forces from Afghanistan, suggesting that it may have concluded that the crimes alleged by the Cross-border Victims do not fall within the jurisdiction of the Court or are not otherwise relevant to her investigation.
23. It remains unclear whether this material has been considered by the Prosecutor’s office. Since submitting the material to OTP the Cross-border Victims have received no substantive communication from the Prosecutor indicating what (if anything) had been made of the material submitted or what view (if any) the Prosecutor had formed of it.
24. As noted in their Submissions dated 31 January 2018, § 21, Article 15 of the Statute imposes an obligation on the Prosecutor to:
  - a. form a view as to whether the crimes alleged by the Cross-border Victims may fall within the jurisdiction of the Court; and
  - b. form a view as to whether the evidence provided by the Cross-border Victims (taken with any other evidence in the possession of the Prosecutor) provides a “reasonable basis to proceed with an investigation” in respect of the alleged crimes.
25. Where the Prosecutor fails to do so, it is incumbent on the Court to exercise its own power to make observations on the Court’s own jurisdiction to correct any error of law on the part of the Prosecutor as may have arisen and/or to clarify whether, if proven, the allegations made by the Cross-border Victims are such as to potentially fall within the scope of the Court’s jurisdiction. In other words, on the basis of the evidence available, to determine whether there is “a reasonable basis to believe” that the crimes alleged by the Cross-border Victims may fall within the jurisdiction of the Court, “without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case” (see Article 15 (4)). As such, the Court is, of course, not being invited to make a final determination on the question of jurisdiction.
26. The Court’s power to comment on, or make findings with regard to, the scope of its own jurisdiction is an aspect of the inherent powers of the Court. It is well-established that international courts and tribunals (including international criminal courts) possess certain

limited inherent powers. In *Nuclear Tests Case (Australia v. France)* ICJ Reports (1974) p. 253 the International Court of Justice held [§ 23]:

[I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons*, Judgment, I.C.J. Reports 1963, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

27. A range of international criminal courts and tribunals have confirmed the existence of such powers in similar terms. In *Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing*, 10 November 2010 ("**El Sayed Jurisdiction Decision**") [§45] the Appeals Chamber of the Special Court for Lebanon held:

[Inherent jurisdiction is] the power of a Chamber [ ... ] to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. [...] The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.

28. International criminal courts and tribunals have, on many other occasions, recognized the existence of their inherent powers.<sup>3</sup> Indeed, the ICC Pre-Trial Chamber has, in previous cases, recognized the existence of an inherent jurisdiction on the part of the Pre-Trial Chamber (see e.g. *Prosecutor v. Harun*, 25 May 2010, *Decision Informing the United Nations Security Council about Lack of Cooperation by the Republic of Sudan* ICC-02/05 -01/07).

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<sup>3</sup> *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić Jurisdiction Decision*"), paras 18-20; ICTY, *Prosecutor v. Blaskić*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber 11 of 18 July 1997, 29 October 1997, paras 25-26, 28; ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 45-47, 62; ICTR, *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 26; SCSL, *Prosecutor v. Norman et al.*, SCSL04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 32; ILOAT, *In re Vollering* (No. 15), Judgment No. 1884, 8 July 1999, para. 8.

29. If there is a lack of clarity in the scope of the Court's jurisdiction or, a fortiori, where the Prosecutor may have erred by excluding an important category of potential crimes from her investigation by misdirecting herself as to the scope of the Court's jurisdiction, the Pre-Trial Chamber has power to make observations to correct such an error (or to avert it if needs be by providing clarification as to an issue of jurisdiction).
30. The Cross-border Victims submit that the present case was a proper case for the exercise of such jurisdiction, particularly because the Prosecutor failed to satisfactorily clarify her position on jurisdiction. It is respectfully submitted that it would be impermissible under the scheme created by the Statute for the Prosecutor to side-step the question of any judicial oversight of her activities by simply failing to take any decision at all. Such an approach would not be in accordance with the scheme created by Article 15 and the duties it imposes on the Prosecutor, nor with the practice of Pre-Trial Chambers in overseeing the way in which the Prosecutor discharges her powers.
31. Regulation 65(3) expressly provides for the possibility of an oral hearing to hear representations made by victims, a method particularly suited to facilitate the Pre-Trial Chamber's exercise of its inherent jurisdiction to make findings related to incidents not referred to in the Prosecutor's Article 15 Request.
32. For the above reasons, the Cross-border Victims respectfully submit that it is of fundamental importance that the Pre-Trial Chamber *does not* consider itself limited to the incidents raised in the Prosecutor's Request when considering the scope of the authorisation request before it. The entire concept of victim participation at the authorisation stage, evidenced by the strong guarantees provided for by Rule 50, would be undermined were the Prosecutor to fail to respond to the evidence provided by victims. For these reasons, it is respectfully submitted that the Pre-Trial Chamber erred in considering itself limited to consideration of the incidents specified by the Prosecutor's Article 15 Request.

### **INTERESTS OF JUSTICE**

33. The Cross-border Victims respectfully submit that the Pre-Trial Chamber fell in legal error when exercising its discretion in refusing to find that an investigation would be in the interests of justice. The Pre-Trial Chamber accepted that the interests of justice determination is guided by the overarching objective. The Cross-border Victims submissions are central to the overarching objective, and thus relevant to the interests of

justice determination. The Pre-Trial Chamber's failure to consider their relevance led it into legal error.

34. Article 15(4) provides for a supervisory role by the Pre-Trial Chamber. As part of its supervisory role, the Pre-Trial Chamber ought to have considered the Prosecutor's compliance with Article 15(2) of the Statute in light of its failure to respond to the repeated communications made by the Cross-border Victims.
35. As noted, the Cross-border Victims provided substantial evidence that the practices of aerial bombardment perpetuated from Afghanistan against Pakistani victims constituted sufficiently grave conduct as to fall within the jurisdiction of the Court. In particular, the Cross-border Victims highlighted, and repeat, that the evidence provided to the Prosecutor by the Cross-border Victims unquestionably satisfied the requirements of Article 53(1) of the Statute. The information provided makes clear that:
  - a. There was a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;
  - b. The case would be admissible under article 17; and
  - c. The gravity of the crimes and the interests of the victims are such that an investigation would be in the interests of justice.
36. Nonetheless, the Prosecutor failed to address such evidence in its Article 15 Request. The Pre-Trial Chamber's decision similarly makes no reference to the submissions and material provided, nor does it address the Prosecutor's failure to consider such material.
37. However, as noted in the Decision, § 89, "in the absence of a definition or other guidance in the statutory texts, the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities."
38. The material provided by the Cross-border Victims furthers the overarching objectives in the Statute. Investigation of the incidents referred to by the Cross-border Victims would without doubt further the objectives of effective prosecution and the fight against impunity. The crimes outlined in the Cross-border Victims' submissions and supporting material are ongoing. Importantly, the regulation of automated warfare, a practice in rapid growth, under international criminal law in order to prevent future mass atrocities is a matter of significant concern. Automated warfare has the potential to cause widespread future atrocities. Failure to make any reference to the Cross-border Victims'

submissions, which go to the core of the debate on the treatment of automated warfare under international criminal law, runs counter to the overarching objective to prevent future atrocities.

39. It is therefore respectfully submitted that, given the relevance of the Cross-border Victims' submissions to the overarching objective, and to the interests of justice determination, the Pre-Trial Chambers' failure to consider them led it into legal error.

## **CONCLUSION AND RELIEF**

40. In sum, the Cross-border Victims submit that the Pre-Trial Chamber erred in law in considering that it had no jurisdiction to consider incidents not referred to in the Prosecutor's Article 15 Request and in failing to consider a relevant factor (the Cross-border Victims' Submissions and supporting evidence) when determining whether an investigation would be in the interests of justice. The Prosecutor's failure to refer to these two matters in its current Request called for a response by the Cross-border Victims.
41. The Cross-border Victims repeat their requests for relief, as specified in their Submissions dated 31 January 2018. Namely, the Cross-border Victims respectfully invite the Court:
- a. First, to require the Prosecutor to provide further information clarifying her position with regard to crimes alleged by the Cross-border Victims, in particular, whether the Prosecutor accepts that such crimes may fall within the scope of the Court's jurisdiction; whether or not she accepts that there is a reasonable basis to proceed with an investigation in respect of the crimes alleged by these victims; and whether she intends to avail herself of their offer to provide further witness evidence or to offer testimony at the seat of the Court;
  - b. Second, further or alternatively, to make findings as to the scope of the Court's jurisdiction in the event the Prosecutor has erred in law in forming the view that the crimes alleged by the Cross-border Victims fall outside the scope of the Court's jurisdiction, precluding her from investigating the evidence provided by the Cross-border Victims. The exercise of such a power may, in some cases, be essential to prevent the Court from being precluded from exercising jurisdiction over a matter because of an error on the part of the Prosecutor as to the scope of the Court's jurisdiction.

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Dated this 13 June 2019

At London, Great Britain