

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No. **ICC-RoC46(3)-01/22**

Date: **22 July 2022**

**PRE-TRIAL CHAMBER I**

**Before:**                    **Judge Péter Kovács, Presiding Judge**  
                                  **Judge Reine Adélaïde Sophie Alapini-Gansou**  
                                  **Judge María del Socorro Flores Liera**

**REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE  
COURT**

**Public**

**Decision on the ‘Request for review of the Prosecutor’s decision of 28 October  
2021 to close the preliminary examination of the situation in Colombia’ and  
related requests**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Ms Nazhat Shameem Khan

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representative**

**Other**

Mr Emmanuel Daoud

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER I** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this ‘Decision on the “Request for review of the Prosecutor’s decision of 28 October 2021 to close the preliminary examination of the situation in Colombia” and related requests’.

1. On 27 April 2022, the International Federation for Human Rights (‘FIDH’) and the *Corporación Colectivo de Abogados José Alvear Restrepo* (‘CAJAR’) (jointly, the ‘Applicants’), both representing victims in Colombia, submitted the ‘Request for review of the Prosecutor’s decision of 28 October 2021 to close the preliminary examination of the situation in Colombia’<sup>1</sup> (the ‘Request’), requesting a Pre-Trial Chamber to review and ‘reverse’ the Prosecutor’s decision to close the preliminary examination in the situation of Colombia pursuant to article 53(3)(b) of the Rome Statute (the ‘Statute’).<sup>2</sup> In this regard, the Applicants submit that the aforementioned decision by the Prosecutor was ‘based solely on the interests of justice’<sup>3</sup> and ‘does not serve the interests of justice’.<sup>4</sup> Alternatively, the Applicants request that the Prosecutor provide a ‘rigorous and reasoned analysis’ of the reasons for his decision to the victims and the international community.<sup>5</sup>

2. On 6 May 2022, the President of the Pre-Trial Division, under regulation 46(3) of the Regulations of the Court, assigned the Request to the Chamber and ordered the Registrar to notify the Chamber of the Request, without any prejudice to the determination by the Chamber.<sup>6</sup>

3. On 25 May 2022, the Chamber received the ‘Request for a public hearing on “Request for review of the Prosecutor’s decision of 28 October 2021 to close the preliminary examination of the situation in Colombia” to Pre-Trial Chamber I’<sup>7</sup> (the ‘Second Request’), in which the Applicants submit that ‘[v]ictims should be allowed to provide additional information to the Chamber directly’ pursuant to article 68(3) of the Statute and request a public hearing on the matter in order to allow the Applicants to provide such additional information to the Chamber.<sup>8</sup>

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<sup>1</sup> ICC-RoC46(3)-01/22-1-Conf, with one confidential Annex (ICC-RoC46(3)-01/22-1-Conf-AnxA) (public redacted version notified on 6 May 2022, [ICC-RoC46\(3\)-01/22-1-Red](#), together with the public redacted version of Annex A ([ICC-RoC46\(3\)-01/22-1-AnxA-Red](#))).

<sup>2</sup> [Request](#), paras 6, 11-18, 85.

<sup>3</sup> [Request](#), paras 6, 19-47, 85.

<sup>4</sup> [Request](#), paras 6, 48-74, 85.

<sup>5</sup> [Request](#), paras 7, 75-84, 85.

<sup>6</sup> [Decision assigning the ‘Request for review of the Prosecutor’s decision of 28 October 2021 to close the preliminary examination of the situation in Colombia’ to Pre-Trial Chamber I](#), ICC-RoC46(3)-01/22-2.

<sup>7</sup> [ICC-RoC46\(3\)-01/22-3](#).

<sup>8</sup> [Second Request](#), paras 1, 4-6.

4. On 6 June 2022, the Prosecutor filed his response to the Request<sup>9</sup> (the ‘Response’), in which he submits that: (i) his decision was based on admissibility considerations;<sup>10</sup> (ii) ‘the Statute does not envisage judicial review of a Prosecutor’s decision not to proceed with an investigation in a *proprio motu* situation’;<sup>11</sup> and (iii) the Applicants have no legal standing to make the requests.<sup>12</sup> Accordingly, the Prosecutor requests the Chamber to summarily dismiss the Request and the Second Request due to the Applicants’ lack of standing and to instruct the Registrar not to file into the record further requests from the Applicants, or alternatively, seeks leave to provide further observations ‘should the Chamber decide to consider the requests’.<sup>13</sup> In addition, the Prosecutor submits that he is ‘not required to publish reports of his analysis’ and that he complied with his obligations under article 15(6) of the Statute and rule 49 of the Rules of Procedure and Evidence (the ‘Rules’) ‘by way of his [press] statement and the accompanying Cooperation Agreement’.<sup>14</sup>

5. On 8 June 2022, the Applicants filed the ‘Request for leave to reply to the “Prosecution response to FIDH and CAJAR requests ICC-RoC46(3)-01/22-3 and ICC-RoC46(3)-01/22-1-Red” of 6 June 2022’ (the ‘Request for Leave to Reply’),<sup>15</sup> in which they seek leave to reply on: (i) their legal standing; and (ii) whether the Prosecutor’s press release and the accompanying Cooperation Agreement are ‘sufficient to notify those who provided information during the preliminary examination’.<sup>16</sup>

6. With regard to the Request, the Chamber notes that the Appeals Chamber drew a clear distinction between article 53 of the Statute, governing situations that are referred to the Prosecutor by a State Party or the Security Council, on the one hand, and article 15 of the Statute, which deals with *proprio motu* investigations, on the other hand.<sup>17</sup> More specifically,

<sup>9</sup> [Prosecution response to FIDH and CAJAR requests to ICC-RoC46\(3\)-01/22-3 and ICC-RoC46\(3\)-01/22-1-Red, ICC-RoC46\(3\)-01/22-4.](#)

<sup>10</sup> [Response](#), paras 9-13.

<sup>11</sup> [Response](#), para. 7. *See also* paras 14-20.

<sup>12</sup> [Response](#), paras 8, 21-22, 27.

<sup>13</sup> [Response](#), paras 3, 5, 27.

<sup>14</sup> [Response](#), paras 23-26. *See also* Office of the Prosecutor, Press release of 28 October 2021, [ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice](#), (the ‘Press Release’); and Office of the Prosecutor and the Republic of Colombia, [Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia](#), 28 October 2021 (the ‘Cooperation Agreement’).

<sup>15</sup> [ICC-RoC46\(3\)-01/22-5.](#)

<sup>16</sup> [Request for Leave to Reply](#), para. 8.

<sup>17</sup> Appeals Chamber, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 March 2020, ICC-02/17-138 (the ‘Afghanistan Appeal Judgment’), paras 26-33.

the Appeals Chamber found, with regard to *proprio motu* investigations, that ‘[i]f the Prosecutor concludes that there is no reasonable basis to proceed [...], the legal framework does *not* envisage judicial review of the Prosecutor’s conclusion’.<sup>18</sup> In this regard, the Appeals Chamber further held that ‘it would be contrary to the very concept [of the discretionary nature of the Prosecutor’s power under article 15 of the Statute] 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’.<sup>19</sup>

7. In light of this, and considering that the situation in Colombia was neither referred to the Prosecutor by a State Party nor the Security Council, the Chamber finds that article 53 of the Statute is not applicable to this situation, and that this Chamber does not have the power to review the Prosecutor’s decision to close the preliminary examination in the situation of Colombia.

8. Accordingly, the Request is rejected. Considering that the Second Request and the Request for Leave to Reply are intrinsically linked to the Request, the Chamber therefore does not deem it necessary to separately address these requests.

9. Nonetheless, the Chamber notes that, pursuant to article 15(6) of the Statute and rule 49 of the Rules, when the Prosecutor concludes after a preliminary examination that ‘the information provided [to his Office] does not constitute a reasonable basis for an investigation’, he is under an obligation to promptly inform those who have provided this information of such, including the reasons for his decision.<sup>20</sup>

10. In this regard, the Chamber has taken note of the Prosecutor’s Press Release<sup>21</sup> and of the Cooperation Agreement<sup>22</sup>, as well as his further communications since. However, in the view of the Chamber, the information contained in the aforementioned documents and communications does not constitute sufficient information with respect to article 15(6) of the Statute, particularly in light of the length of the preliminary examination and the expectations it may have raised for those who provided information prior to, or during the preliminary examination. The Chamber further notes that, although the Prosecutor refers to an ‘abundance of reporting’ done by his Office concerning the situation in Colombia, this reporting was

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<sup>18</sup> [Afghanistan Appeal Judgment](#), para. 30 (emphasis added).

<sup>19</sup> [Afghanistan Appeal Judgment](#), para. 31.

<sup>20</sup> See also [Afghanistan Appeal Judgment](#), ICC-02/17-138, para. 30, n. 50.

<sup>21</sup> See para. 4, n. 14 above.

<sup>22</sup> See para. 4, n. 14 above.

undertaken mostly *during* the preliminary examination.<sup>23</sup> On this basis, this reporting is not apt to constitute, by itself and without more, the reasons for his determination that there is no ‘reasonable basis for an investigation’ as required by article 15(6) of the Statute and rule 49 of the Rules.

11. Accordingly, the Prosecutor is urged to promptly provide additional information to any relevant actors who have provided his Office with information, of the grounds for his decision to close the preliminary examination in Colombia as envisaged by article 15(6) of the Statute and rule 49 of the Rules.

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<sup>23</sup> See [Response](#), para. 24, n. 50.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request; and

**URGES** the Prosecutor to promptly provide additional information, according to article 15(6) of the Statute, to those who have provided information to him.

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



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**Judge Péter Kovács**  
**Presiding Judge**



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**Judge Reine Adélaïde Sophie**  
**Alapini-Gansou**



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**Judge María del Socorro**  
**Flores Liera**

Dated this Friday, 22 July 2022  
At The Hague, The Netherlands