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THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public *with* Public Annex A

Prosecution Appeal Brief

Source: **Office of the Prosecutor**

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Introduction

1. Pre-Trial Chamber II has declined the Prosecutor's request to open an investigation into the situation in Afghanistan.[1] Notwithstanding its agreement that there is a reasonable basis to believe that crimes against humanity and war crimes have been committed in this situation,[2] and that various potential cases arising from these allegations (relating to three potential major lines of inquiry) would be admissible at this Court,[3] the Pre-Trial Chamber concluded that "there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice".[4] This was based on its view that "an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame",[5] and its assessment that "the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited."[6] Yet it made that assessment without hearing from the Prosecution, or anyone else, on the various factors relevant to assessing those prospects, and on the basis that the prospects in question were identical for each of three potential major lines of inquiry.

2. The Pre-Trial Chamber's conclusion would also appear to take insufficient account of its recognition of the "scale and magnitude" of the events relevant to the requested investigation, which saw more than 50,000 civilian casualties in a seven-year period,[7] and "brutal" and "gruesome" violence, and which resulted in "devastating and unfinished systemic consequences on the life of innocent people" as well as the "recurrent targeting of women, even very young, and vulnerable civilians."[8] The Pre-Trial Chamber agreed that "almost all of the information relied upon and provided by the Prosecution in support of the Request is based on authoritative, reliable and credible sources" and that these were, "to a significant extent", "corroborated by other likewise reliable ones."[9]

3. The Decision marks the first time in which a Pre-Trial Chamber has sought to conduct an "interests of justice" assessment under articles 15(4) and 53(1)(c) of the Rome Statute—a

[1] *See* Request. For full citations of all references, *see* Public Annex A.
[2] *See e.g.* Decision, paras. 60-66.
[3] Decision, paras. 72-86.
[4] Decision, para. 87 (emphasis added).
[5] Decision, para. 89. *See also* Separate Opinion, paras. 24-50.
[6] Decision, para. 96.
[7] Decision, para. 66.
[8] Decision, para. 84.
[9] Decision, para. 46.

concept which, as Judge Mindua readily acknowledged, is a "complex" one.[10] It did so unilaterally, without sharing its concerns with the Prosecution or publicly, and in circumstances when the Prosecution had stated its view that there were no substantial reasons to believe that opening an investigation in this situation would not serve the interests of justice, supported *inter alia* by representations from a large number of victims.[11] Moreover, the Pre-Trial Chamber's approach seems to depart from consistent judicial practice and the plain implication of article 53(1)(c) of the Statute (which is phrased negatively), insofar as it required a *positive ex ante* assessment that an investigation *would* be in the interests of justice, based on factors *beyond* the gravity of the identified crime(s) and the interests of the victims. It overlooks the selective mandate of the Court that is already given effect by the conditions in article 53(1)(a) (whether there is a reasonable basis to believe that at least one article 5 crime has been committed) and article 53(1)(b) (whether at least one potential case arising from the situation would be admissible, including that it is sufficiently grave).

4. For these reasons, the Decision is not only of decisive significance for this situation but for *all* situations. If correct, it would mark a radical reinterpretation of the law governing the opening of investigations. Such questions are of broad constitutional significance, and must be approached with considerable caution. Indeed, the drafters of the Statute ascribed great importance to striking the correct balance of interests in opening investigations of the Court, so that it could fulfil its mandate fairly and effectively. The novel approach adopted by the Pre-Trial Chamber in this situation could profoundly restrict the Court's activities around the globe, now and in the future.

Submissions

5. The Pre-Trial Chamber unanimously certified two issues arising from the Decision for appeal,[12] recognising the "novel and complex nature of the matter",[13] and that appellate intervention would benefit "legal certainty in matters concerning preliminary examinations".[14]

[10] Separate Opinion, para. 24. *See further* OTP Interests of Justice Policy, p. 2 (suggesting that this issue "represents one of the most complex aspects of the [Statute]").
[11] Decision, para. 87.
[12] Certification Decision, para. 39.
[13] Certification Decision, para. 33.
[14] Certification Decision, para. 38.

6. In its first ground of appeal, which addresses the first issue certified by the Pre-Trial Chamber,[15] the Prosecution submits that the Pre-Trial Chamber erred in law by conditioning its determination under article 15(4) on reaching a positive assessment of the interests of justice under article 53(1)(c). This materially affected the Decision because, if the Pre-Trial Chamber had not considered such a positive assessment to be required, it would have authorised the opening of the investigation.

7. Further or alternatively, in its second ground of appeal, which addresses the second issue certified by the Pre-Trial Chamber,[16] the Prosecution submits that the Pre-Trial Chamber abused its discretion when it assessed the interests of justice in this situation and concluded that there are substantial reasons to believe that opening an investigation would be contrary to these interests. The Pre-Trial Chamber's exercise of discretion was erroneous insofar as it misapprehended key legal and factual considerations which it identified as relevant, took into account considerations which were legally impermissible, and failed to give adequate weight to considerations which were legally required by article 53(1)(c). Since the Pre-Trial Chamber's assessment was based on the cumulative weighing of all these factors, any one of these errors is such as to have materially affected the Decision. Again, if the Pre-Trial Chamber had not abused its discretion in this fashion, it would have authorised the opening of the investigation.

8. A significant theme throughout the second ground of appeal is the Pre-Trial Chamber's misappreciation of the scope of the investigation which it was requested to authorise—which in turn tainted its assessment of the factors it took into consideration under articles 15(4) and 53(1)(c) of the Statute. This is manifest in three principal ways, specifically:

- in the erroneous view that the Prosecution could not be authorised to investigate incidents other than those expressly identified in the Request, including incidents occurring after the date of the Request (and thus, potentially, recent or future crimes allegedly committed in this situation);

[15] Certification Decision, paras. 34 ("Whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice"), 39.
[16] Certification Decision, paras. 34 ("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"), 39.

- in the erroneous view that certain incidents were outside the jurisdiction of the Court (*ratione loci* and/or *ratione materiae*); and

- in the unreasonable failure to take into account that the requested investigation encompassed *three* potential major lines of inquiry (concerning the Taliban and other anti-government armed groups, the Afghan government, and the United States government, respectively), manifest in the undue weight given to the Pre-Trial Chamber's views of the feasibility of just *one* of these lines of inquiry (concerning the United States government).

9. Given the general importance of the first of these errors in the context of articles 15 and 53, the Prosecution had specifically requested the Pre-Trial Chamber to certify it as an issue for appeal in its own right.[17] The Pre-Trial Chamber declined to do so, on the basis of its view that its "understanding of the scope of any investigation authorised" in this situation was "not essential to the decision, as [it] did not constitute the basis for the Chamber's determination".[18] Yet, in the Prosecution's respectful submission, the Pre-Trial Chamber could not possibly have assessed the 'feasibility' of the investigation[19] *without* taking into account precisely what the Prosecution would be investigating. Indeed, to any extent that the Pre-Trial Chamber had not taken this question into account, this would itself be a sufficiently serious error so as to materially affect the Pre-Trial Chamber's conclusion. Furthermore, the Pre-Trial Chamber did certify the second issue requested by the Prosecution, which expressly includes the issue whether the Pre-Trial Chamber "properly appreciated those factors" taken into account in assessing the interests of justice.

10. Accordingly, within the context of the second ground of appeal, the Prosecution will address matters pertaining to the scope of an authorised investigation only to the extent that

[17] *See* Certification Decision, paras. 34, 40-41. *See also* Certification Request, paras. 24-28. The Prosecution was frank in its submissions to the Pre-Trial Chamber that it considered the second issue for which it requested certification to encompass multiple errors: *see e.g.* Prosecution Observations, para. 26; Prosecution Response to *Amici Curiae*, paras. 8-13.
[18] Certification Decision, paras. 40-41.
[19] *See e.g.* Decision, paras. 89-90 (asserting that "[a]n investigation can hardly be said to be in the interests of justice if […] such investigation [is] not feasible"), 96 (concluding that "the prospects for a successful investigation and prosecution [are] extremely limited").

they are "inextricably" or "intrinsically linked" with those matters which it *did* certify. This is consistent with the established practice of the Appeals Chamber.[20]

11. For all these reasons, as explained more fully in the following paragraphs, the Prosecution submits that the Appeals Chamber should: reverse the Pre-Trial Chamber's decision insofar as it found that there are substantial reasons to believe that an investigation of this situation would not be in the interests of justice; confirm the law as set out by the Prosecution; and enter its own finding under article 83(2) confirming the Prosecutor's determination under articles 15(3) and 53(1)(c). Since the Pre-Trial Chamber has already made all the other requisite findings, the Appeals Chamber should therefore immediately authorise an investigation into the situation in Afghanistan, as required by article 15(4) of the Statute. Alternatively, the Appeals Chamber should remand the matter back to the Pre-Trial Chamber, with a direction for it to promptly authorise the opening of such an investigation.

I. THE PRE-TRIAL CHAMBER ERRED IN LAW BY SEEKING TO MAKE A POSITIVE DETERMINATION OF THE INTERESTS OF JUSTICE (FIRST GROUND OF APPEAL)

12. In its Decision, the Pre-Trial Chamber acknowledged that the only impediment to opening an investigation in this situation was its concern that there are substantial reasons to believe that this would not serve the interests of justice.[21]

13. Yet the Pre-Trial Chamber's understanding of the "interests of justice", and the nature and procedural requirements of this assessment, was based on its own view of the logic of the Statute, without seeking to interpret the relevant provisions systematically or analysing relevant judicial authorities of the Court. As the following paragraphs will show, the Pre-Trial Chamber's view led to a legally erroneous result. If it had interpreted articles 15(4) and 53(1)(c) correctly, it would not have found substantial reasons to believe that an investigation would not serve the interests of justice, and consequently it would have authorised such an investigation.

14. Specifically, the Pre-Trial Chamber reasoned that article 15(4) required it to assess the criterion in article 53(1)(c) with "the utmost care […] in light of the implications that a partial

[20] *See* *Comoros* Second Appeal Decision, para. 56; *Gbagbo* Rule 68 Appeal Decision, para. 13; *Gbagbo* Regulation 55 Appeal Decision, paras. 25-26; *Katanga* Redactions Appeal Decision, para. 37; *Lubanga* Article 54(3)(e) Appeal Decision, paras. 14, 17.
[21] *See* Decision, paras. 87, 96. *See also* Separate Opinion, paras. 1-2.

or inaccurate assessment might have for paramount objectives of the Statute and hence the overall credibility of the Court, as well as its organisation and financial stability."[22] Yet, in considering the concrete requirement of article 53(1)(c), the Pre-Trial Chamber appears to have relied on its view of the "overarching objectives" of the Statute to conclude that, "at the very minimum, an investigation would only be in the interests of justice if *prospectively it appears suitable* to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame",[23] and that this must be *positively* established. This conclusion seems to result from the Pre-Trial Chamber's opinion that the Statute is not only selective in requiring a threshold showing of jurisdiction and admissibility for the opening of investigations—a proposition with which the Prosecution agrees—but that an investigation must in some *further* way be shown to be "genuinely instrumental" to the objectives of the Statute, in order to satisfy the requirements of articles 15 and 53. This view, it is respectfully submitted, was in error.

15. In other words, the Pre-Trial Chamber's logic led it to reverse the assessment required by article 53(1)(c) of the Statute (which is negative) and instead to look for external or extrinsic justifications for opening an investigation (a positive assessment), beyond the gravity of the identified crimes and the interests of the victims. This is further confirmed by another passage, which again links the Pre-Trial Chamber's view of its duty under article 15(4) with its assumption that it must make "a *positive* determination to the effect that investigations would be in the interests of justice."[24] By this means, the Pre-Trial Chamber set itself a task which was not only legally incorrect but also impossible to fulfil—to measure whether it agreed with the Prosecutor's *negative* assessment (based on her conclusion that there was no basis to disturb the presumption in favour of investigation) by conducting its own *positive* assessment (based on whether it could identify external factors in favour of investigation, such as the Pre-Trial Chamber's prognostication of its 'success'). The basic difference between these two questions precluded any realistic chance of agreement between the Pre-Trial Chamber and the Prosecutor, leading to the denial of the Request.

16. The conclusion that an investigation may only be authorised under article 15(4) if the Pre-Trial Chamber can—*ex ante* and in the abstract—positively determine the prospects for

[22] Decision, para. 88.
[23] Decision, para. 89 (emphasis added). *See also* para. 90 ("An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make an investigation not feasible and inevitably doomed to failure").
[24] Decision, para. 35 (emphasis added). *See also* para. 36.

success to be "serious and substantive" also raises a number of other problems,[25] which cast doubt on the correctness of the Pre-Trial Chamber's reasoning. If the Pre-Trial Chamber did indeed seek to promote a "utilitarian" view of the Court, in order to enhance its efficiency, this will not be achieved by the approach adopted in the Decision.[26]

- First, interpreting article 53(1)(c) to require a positively identified extrinsic justification for investigation (beyond the gravity of the identified crime(s) and the interests of victims) is inconsistent with the basic principle that the most serious crimes of international concern merit proper investigation *per se*, if there is a reasonable basis to believe that they have been committed within the Court's jurisdiction under article 53(1)(a) and at least one potential case would be admissible under article 53(1)(b).

- Second, the Pre-Trial Chamber's approach suggests that the Statute exhibits a marked preference for 'easier' investigations as opposed to 'harder' ones—which, in turn, may incentivise external actors to take early steps to frustrate the effectiveness of criminal investigations, in an effort to ward off any prospect of the Court's intervention. This would seem to entrench a culture of impunity, not contribute to its transformation.[27]

- Third, giving such central importance to speculation about future circumstances distorts what is otherwise a largely *objective* assessment under article 53(1) of the Statute, and relies instead (to a significant extent) on subjective prognostications and speculation. This would make the Court's intervention much less predictable, and therefore would diminish the possibility for the Court, by its mere existence, to deter the commission of serious international crimes within its jurisdiction. It would also reinvigorate the external narrative that the Court's intervention in any given situation represents a subjective exercise of discretion, rather than the neutral and consistent application of objective principles laid out by the international community in the Statute, based on a presumption of investigation.

[25] Decision, para. 90 (considering that investigations must be "successful and meaningful", and hence requiring a showing that the prospects of such an investigation are "serious and substantive").
[26] *See* Ambos (2019) (understanding the Pre-Trial Chamber to interpret article 53(1)(c) as "a utilitarian efficiency clause which is predicated on the possible success of the proceedings").
[27] *See also* OTP Preliminary Examination Policy, para. 70 (observing that, beyond article 53(1)(a) to (c), the anticipated "feasibility" of a potential investigation "is not a separate factor under the Statute […] when determining whether to open an investigation" and that such an approach "could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention").

- Fourth, notwithstanding the clear affirmation in the Statute that the conduct and management of investigations is a matter for the Prosecutor, the Pre-Trial Chamber's interpretation of article 53(1)(c) would effectively require the Prosecutor to address such matters when making a request of the Pre-Trial Chamber under article 15(3). This is likely to entail considerable additional efforts in preliminary examination—at a time when the Prosecutor, while mindful of her statutory obligations, has been urged by other Pre-Trial Chambers to expedite such matters.[28]

17. Furthermore, the Decision appears not to reflect the proper approach to interpreting articles 15(4) and 53(1)(c), according to the Vienna Convention on the Law of Treaties and the established practice of this Court.[29] This would have entailed considering the ordinary meaning of the terms of these provisions and their context, as well as the object and purpose of the Statute, with reference if necessary to the drafting history. Strict adherence to the Statute—especially on matters relating to the respective competences of the organs of the Court—is important in order to ensure that intention of the drafters is given due respect, as well as to promote legal certainty, consistency, and procedural economy including the proper use of limited resources.[30]

18. As the following paragraphs demonstrate, a correct interpretation of articles 15(4) and 53(1)(c) only requires or permits the Pre-Trial Chamber to determine whether it agrees with the Prosecutor that there are *no* substantial reasons to believe that an investigation would *not* serve the interests of justice. In such an assessment, the Pre-Trial Chamber must adhere to the framework of the assessment carried out by the Prosecutor. Informed by the representations of the victims, exceptionally, the Pre-Trial Chamber may if necessary inquire as to the Prosecutor's reasoning in assessing a particular consideration, and then decide whether or not

[28] *Comoros* Second Decision, para. 119; *Bangladesh* Article 19(3) Decision, para. 84.
[29] *See e.g. [Redacted]* Appeal Decision, para. 56; *Ruto* Summonses Appeal Decision, para. 105; *DRC* Extraordinary Review Appeal Decision, para. 33; *Lubanga* Appeal Judgment, para. 277. In the context of article 53(1)(c), *see also e.g.* De Souza Dias, pp. 733-734; Đukić, p. 696; Robinson, p. 488; HRW Policy Paper, pp. 2-3. Other commentators, who have reached broader conclusions concerning the desired scope of article 53(1)(c), either seem to have acknowledged that their views are *de lege ferenda*, or have not sought to interpret the text of the Statute according to the VCLT but rather to urge a consequentialist or "strategic" view of what might be desirable for the Prosecutor or the Court, based among other factors on theories of international relations: *see e.g.* Gallavin, pp. 179-180, 194-197; Rodman, pp. 101, 111, 121-123; Davis, pp. 172, 180, 183, 185. *Compare* Ambos (2016), pp. 388-389.
[30] *Cf. Comoros* Second Appeal Decision, Opinion of Judge Eboe-Osuji, para. 10 ("it becomes difficult to understand the great anxiety […] against even commencing an investigation"). *See also e.g.* para. 28. While the Prosecution of course values and respects the role of the Appeals Chamber as an ultimate means of recourse, it respectfully submits that this does not detract from the importance of a strict adherence to the terms of the Statute, which through their express provisions are intended to avoid the need for further litigation and thereby to facilitate the fair and expeditious functioning of the Court and all its organs.

to concur in that reasoning. But it may not simply replace the Prosecutor's limited exercise of discretion, according to the Statute, with an unlimited exercise of its own discretion.

I.A. The plain terms of the Statute establish a 'negative' test for article 53(1)(c), based on a narrow form of prosecutorial discretion, which conditions the scope of article 15(4)

19. Article 53(1)(c) requires that, "[i]n deciding whether to initiate an investigation", the Prosecutor shall consider whether:

> 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. [Emphasis added.]

20. These plain terms, accorded their ordinary meaning, strongly suggest that the Prosecutor is required to apply a *negative* test, taking into account the presumption that situations which have satisfied the conditions in article 53(1)(a) and (b) merit investigation. This is confirmed by the positive injunction in the *chapeau* of article 53(1) that the Prosecutor "s*hall* investigate" unless she determines that there is *no* reasonable basis to proceed under the Statute. In practice, as the following paragraphs explain, this means that:

- Only in exceptional circumstances, and in the exercise of her discretion, will the Prosecutor identify factors which might *potentially* constitute substantial reasons to believe that an investigation would not serve the interests of justice, and which might therefore potentially require express analysis in a request under article 15(3). To date, this has never occurred.

- In this exceptional circumstance, as a further exercise of prosecutorial discretion, the Prosecutor will weigh the relevant factor(s) against other relevant factors such as the gravity of the identified crime(s) and the interests of victims. Only where the Prosecutor is satisfied to a high threshold ("substantial reasons to believe") that an investigation will not serve the interests of justice may she decline to open an investigation based on article 53(1)(c).

21. This is the only reading of article 53(1)(c) which is consistent with its plain terms, in their ordinary meaning. Collapsing these steps together—and replacing them with an open-ended assessment of whether unspecified external factors *favour* investigation—would not

give effect to the presumption in favour of investigation, and impermissibly convert the Prosecutor's obligation to conduct a 'negative' assessment into a 'positive' assessment. Such an approach would make the opening of investigations highly subjective, and potentially arbitrary. It would turn an 'exception' into a 'rule'.

22. To the extent that the Pre-Trial Chamber is required or permitted by article 15(4) and rule 48 to determine whether it concurs in the Prosecutor's determination under article 53(1)(c), it is obliged to observe these same limitations. Otherwise, it will fail to give effect to the core principles reflected in article 53(1)(c), and deprive the Prosecutor of a core aspect of her discretion. If the Prosecutor has simply found no substantial reasons to believe an investigation would not serve the interests of justice, then the Pre-Trial Chamber's inquiry is limited to determining whether it assents to *that* determination. If, exceptionally, it identifies a factor that it considers to have demanded express reasoning, it is for the Prosecutor first to explain how that factor weighed in her assessment under articles 15(3) and 53(1)(c).

I.A.1. Article 53(1)(c) requires a presumption of investigation

23. Two of the terms of article 53(1)(c), in their ordinary meaning, compel the application of a *presumption that an investigation should be opened* if the conditions in article 53(1)(a) and (b) are met.[31] It is for this reason that the Prosecution has previously stated that any "decision not to proceed on the grounds of the interests of justice" should be "highly exceptional."[32]

24. This presumption is first suggested by the initial clause of article 53(1)(c), which predicates any substantive assessment on the conclusion that, "*[t]aking into account the gravity of the crime* and the interests of victims, there are *nonetheless* […]" (emphasis added). By use of the word "nonetheless", article 53(1)(c) makes clear that the gravity of the identified crime(s), as well as the interests of victims, are generally opposable to any countervailing factors which might be seen as militating against an investigation.[33] Since the operation of articles 53(1)(a) and (b) requires that the gravity of the identified crime(s) has already been established before questions under article 53(1)(c) arise, it follows that the

[31] *See also* De Souza Dias, p. 735; Akande and De Souza Dias. *Contra* Schabas, p. 835 (apparently overlooking the filtering effect of the requirements in article 53(1)(a) and (b)).
[32] OTP Preliminary Examination Policy, para. 71; OTP Interests of Justice Policy, pp. 1, 3-4, 9. *See also* Ambos (2016), p. 387.
[33] *See also* Hafner et al, p. 112.

Prosecutor must presume *ipso facto* that the interests of justice *favour* an investigation, unless there is a showing to the contrary.

25. The next phrase of article 53(1)(c) reinforces this understanding by requiring any such showing to the contrary to amount to "*substantial reasons to believe*" (emphasis added). Comparing this (relatively high) threshold with the (relatively low) threshold otherwise required for article 53(1)(a) and (b)—a "reasonable basis"—again demonstrates that the Statute presumes the opening of an investigation. Thus, having established only a reasonable basis to believe that sufficiently grave crimes have been committed, the Prosecutor may only decline to proceed with an investigation if there are *substantial* reasons to believe that this would be contrary to the interests of justice. By this means, the Statute requires the Prosecutor to proceed with an investigation by default—even if she might have some concern about the interests of justice, this would not necessarily be sufficient to justify the weighty determination not to proceed with her statutory duty to conduct investigations.

I.A.2. Article 53(1)(c) requires a negative, not positive, assessment

26. Consistent with the presumption of investigation, but crucial in explaining the particular nature of the Prosecutor's duty under article 53(1)(c), is the *negative formulation* of the provision. Specifically, the Prosecutor is not required to determine (at whatever standard) that an investigation *would* be in the interests of justice. If the drafters had wished to impose such a requirement, they could and would have said so—indeed, just such a proposal was considered and consciously *rejected* by the drafters.[34] Rather, the Prosecutor is required to proceed *unless* she finds there are "substantial reasons to believe that an investigation would *not* serve the interests of justice" (emphasis added). This distinction is not inconsequential; indeed, negative and positive assessments in this context are fundamentally different.

27. By definition, a negative assessment of this kind will very often not require the Prosecutor to provide any detailed reasons to the Pre-Trial Chamber,[35] because it is not possible to 'prove a negative'. If there are *no* substantial reasons which, in the view of the Prosecutor, could potentially weigh in the interests of justice against opening an investigation, this cannot be demonstrated by simply reciting other factors which independently *favour*

[34] *See further below* paras. 51-57.
[35] *See* Regulations of the Court, reg. 49(1); Bitti (2019b). *See also* Bergsmo et al (2016b), p. 1374 (mn. 25: stating only that "the Prosecutor must […] be able to substantiate a decision *not* to proceed", emphasis added); Schabas, p. 834 ("The Prosecutor is not required to make an affirmative finding about the interests of justice, and she may remain entirely silent on the subject").

investigation.[36] For this reason, the negative assessment expressly required by article 53(1)(c) tends by definition to preclude the view that the Prosecutor should nonetheless, tacitly, undertake a 'positive' assessment to determine what factors *favour* an investigation, even in the absence of any countervailing concerns.[37]

28. Exceptionally, the Prosecutor may provide a reasoned basis for her negative assessment concerning the interests of justice (*i.e.*, the absence of substantial reasons to believe that an investigation would not serve the interests of justice). Such reasons might be required, for example, if the Prosecutor identified a consideration reasonably suggesting that the interests of justice might not be served by an investigation, and consequently it became necessary to set out expressly her substantive weighing of relevant factors to demonstrate that the high threshold in article 53(1)(c) is not met.[38] But this would still remain a negative assessment, in the sense that the Prosecutor would not be seeking abstract justifications for the investigation, but merely attempting to discern the concrete significance of the potential countervailing factor that she had identified. Such an occasion has not yet arisen in the practice of the Court.

29. That the Prosecutor is *never* obliged to undertake a 'positive' assessment of the interests of justice—in the sense of looking for external justifications for investigation, *beyond* the gravity of the identified crimes and the interests of the victims—is further confirmed by the apparent contradiction with the presumption of investigation which is otherwise expressed in article 53(1)(c).[39] Adopting such an approach would negate the important principle that adequately substantiated allegations of sufficiently grave crimes within the jurisdiction of the Court, which are admissible, warrant investigation *per se*.[40]

30. Consequently, once she is satisfied that the conditions in article 53(1)(a) and (b) have been met, the Prosecutor has neither the obligation nor the power to decide "*if*" she will make an application under article 15(3) on the basis of a *positive* assessment of external justifications such as the "prospective feasibility" of an investigation.[41] This mistakes the negative assessment required by article 53(1)(c), and the particular form of prosecutorial discretion that it embodies. While the Pre-Trial Chamber correctly recognised that the

[36] *See e.g.* *Kenya* Article 15(3) Request, paras. 60-61; *Côte d'Ivoire* Article 15(3) Request, paras. 59-60.
[37] *See* Bitti (2019b). *See also* OTP Interests of Justice Policy, pp. 2-3. *Cf.* Akande and De Souza Dias. *See also* De Souza Dias, p. 735. *Cf.* Webb, p. 319 (apparently omitting any reference to the negative formulation, in the context of article 53(1)(c), but recalling it in the context of article 53(2)(c)).
[38] *See further below* para. 37.
[39] *See above* paras. 23-25.
[40] *See further below* paras. 48-50.
[41] *Contra* Decision, para. 44.

Prosecutor was entirely "consistent[]" with previous cases in simply stating that she had not identified "any reason which would make an investigation contrary to the interests of justice",[42] and it duly recited the proper test (in its negative formulation),[43] it erred in considering that it was required or permitted to adopt a different approach.[44]

I.A.3. Article 53(1)(c) only permits a particular form of prosecutorial discretion

31. By referring to the "interests of justice" as such, the plain terms of article 53(1)(c) likewise demonstrate that the content of the required analysis is discretionary.[45] The significance of this provision within the procedural scheme of the Statute—relating to the opening or otherwise of an investigation (in which the Prosecutor is the prime actor and decision-maker)—further suggests that the discretion in question is primarily vested in the Prosecutor.[46] This is consistent with the recognition of article 53(1)(c) as one of the key areas in which the discretion intrinsically associated with the Prosecutor's statutory independence and expertise is expressed.[47]

32. The discretionary nature of any inquiry under article 53(1)(c) is necessarily implied by the protean meaning of the "interests of justice".[48] Beyond the two mandatory considerations expressly identified in article 53(1)(c) (relating to the gravity of the identified crime(s) and the interests of victims), views have varied as to the breadth of considerations which might be

[42] Decision, para. 87.
[43] Decision, para. 87.
[44] *Contra* Decision, paras. 35, 89.
[45] Webb, p. 320.
[46] *See* Bitti (2019b); Gallavin, p. 184; Ambos (2016), p. 388. *See also* Robinson, p. 487.
[47] *Comoros* Decision, para. 14; Cross, pp. 218, 238, 251. *See further e.g.* Knoops and Zwart, p. 1073 ("[a]n integral part of an independent prosecutorial office is prosecutorial discretion"); Brubacher, p. 76 ("prosecutorial discretion […] forms the cornerstone of prosecutorial independence"); Jallow, p. 146 ("[prosecutorial] discretion is an indispensable element of prosecutorial independence"). In addition to article 53(1)(c), there are at least two other substantive areas in which prosecutorial discretion primarily vests. The first of these is the selection of communications received under article 15(1) for *proprio motu* preliminary examination under article 53(1), as illustrated by the fact that the Prosecutor is not *obliged* to apply the criteria in article 53(1) to each and every article 15(1) communication which is not manifestly outside the Court's jurisdiction. In this regard, the reference to "investigation" in article 15(1) must mean "preliminary examination". *See* Khojasteh, pp. 238-241, 252-253; Cross, p. 239 (fn. 103); Đukić, p. 711; Bergsmo *et al* (2016b), p. 1368 (mn. 5). *Contra Bangladesh* Article 19(3) Decision, para. 82. The second of these is the conduct of investigations and the selection of cases for prosecution under articles 54 and 58: Statute, arts. 53(2), 54, 58(1) (requiring "the application of the Prosecutor"); Certification Decision, para. 24 (characterising the Prosecutor as "the driving engine of the investigations"); *Kenya* Investigation Decision, para. 13 (agreeing that the Pre-Trial Chamber is "not competent to intervene in the Prosecutor's activities carried out within the ambit of article 54(1) of the Statute"); *Sudan* Decision, paras. 12-14, 18; Cross, pp. 225-226 (fn. 39); Ohlin, pp. 190-191. In addition, the Prosecutor has considerable discretion in matters of methodology, including in the conduct and timing of preliminary examinations: Decision, para. 44; HRW Policy Paper, pp. 5, 21-22; Cross, p. 239-243. On the allocation of resources, *see further below* paras. 141-149.
[48] *See e.g.* Ohlin, p. 188 (continuing: "it is difficult to think of a factor that would *not* be relevant under the banner of the 'interests of justice'", emphasis supplied).

permissible.[49] For its own part, in its *Policy Paper on the Interests of Justice*, the Prosecution has recognised in principle that "[o]ther potential considerations" might be relevant beyond the gravity of the crime and the interests of victims,[50] but stressed that the materiality of any such additional considerations would "depend on the facts and circumstances of each case or situation."[51] Material considerations would, of course, have to be amenable for assessment within the context of the "interests of justice".[52] It is the Prosecutor's primary responsibility, if she considers that there is a consideration reasonably suggesting that the interests of justice might not favour an investigation, to identify the other factors relevant in the circumstances to the assessment of the interests of justice.

33. Given the presumption of investigation and the negative assessment which is required, article 53(1)(c) cannot be properly understood as a condition "potentially *precluding* the exercise of the prosecutorial discretion".[53] To the contrary, article 53(1)(c) *embodies* one of the principal elements of prosecutorial discretion granted by the drafters to the Prosecutor. This is not a discretion to determine which situations among those meeting the criteria in article 53(1)(a) and (b) merit investigation (a 'positive' assessment), but rather a discretion to determine exceptionally which situations *should not be investigated* (a 'negative' assessment).[54] The circumscribed nature of this discretion has significant procedural implications for the manner in which it is scrutinised by the Pre-Trial Chamber.

I.A.4. Article 15(4) requires, at most, that the Pre-Trial Chamber considers the determination made by the Prosecutor, but may not exceed it

34. Article 15(4) makes no direct reference to the Pre-Trial Chamber's own consideration of the interests of justice, but simply requires the authorisation of an investigation if, "upon examination of the [Prosecutor's] request and the supporting material, [it] considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court".

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[49] For narrow views, *see e.g.* HRW Policy Paper, pp. 2, 20; AI Comments, pp. 1, 8. *See also* Ohlin, pp. 198-201, 208; Đukić, pp. 697, 715-718. For broad views, *see e.g.* Akande and De Souza Dias; De Souza Dias, pp. 737, 739, 743-744, 747-748, 751; Ambos (2016), p. 387; Robinson, p. 488; Schabas, pp. 836-837, 839; Webb, pp. 326, 335-340.
[50] OTP Interests of Justice Policy, p. 7 (sub-title 6).
[51] OTP Interests of Justice Policy, fn. 9. *See also* Ambos (2016), p. 390 (requiring a case-by-case assessment). *But see further* OTP Preliminary Examination Policy, para. 69; OTP Interests of Justice Policy, pp. 4-9, *especially* p. 8 (noting that this discretion is not unlimited, and is not so broad "as to embrace all issues related to peace and security").
[52] *See also* HRW Policy Paper, p. 6; Ambos (2016), p. 388.
[53] *Contra* Decision, para. 89 (emphasis added).
[54] *Cf.* Ambos (2016), pp. 389-390.

35. To the extent that the term "reasonable basis to proceed" may refer to the *chapeau* of article 53(1), the Prosecution acknowledges that the Pre-Trial Chamber may be obliged to determine not only that it concurs with the Prosecutor's assessment under article 53(1)(a) and (b) but also under article 53(1)(c).[55] This would also be consistent with rule 48, which requires the Prosecution to address these criteria for the purpose of its request under article 15(3),[56] as well as the practice of previous Pre-Trial Chambers.[57]

36. But even recognising the possibility of the Pre-Trial Chamber's article 15(4) scrutiny of the Prosecutor's assessment of the interests of justice does not mean that the Pre-Trial Chamber may *exceed* the legal or factual scope of the Prosecutor's assessment, and on that basis unilaterally decline to authorise a requested investigation. To the contrary, "the limited purpose of the procedure under Article 15", and "the distinct mandates and competences of the Chamber and the Prosecutor respectively", mean that the Pre-Trial Chamber's task under article 15(4) "is solely a review of the request and material *presented by the Prosecutor*."[58] This caution should apply even more strongly with regard to matters concerning the interests of justice, since this "is an issue which goes to the heart of the division of functions and responsibilities between the Prosecution and the [Pre-Trial] Chamber pursuant to the Statute and the Rules."[59]

37. Mindful of these general considerations—as well as the particular characteristics of article 53(1)(c), including the presumption of investigation, the negative character of the assessment, and its function as one of the key repositories of prosecutorial discretion—the Pre-Trial Chamber should therefore confine its assessment of the interests of justice to the contours of the assessment *actually conducted by the Prosecutor*. In practice, this means that it can only arrive at one of two potential outcomes.

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[55] *Kenya* Decision, paras. 21-24. *See also* Akande and De Souza Dias; Heller. *But see* Bitti (2019b). The Prosecutor did not, however, address this question in her policy on the matter—the passage which Heller identifies refers to circumstances where the Prosecutor has determined *not* to proceed, based on articles 53(1)(c) or 53(2)(c) of the Statute: *see* OTP Interests of Justice Policy, p. 3 (text accompanying footnote 4, which cross-refers to footnote 2, which discusses the procedure under article 53(3)(b) of the Statute). *See also* p. 9.

[56] *But see* Regulations of the Court, reg. 49(1) (making no reference to the Prosecutor's reasoning under article 53(1)(c), notwithstanding rule 48).

[57] *See e.g.* *Côte d'Ivoire* Decision, para. 207; *Georgia* Decision, para. 58; *Burundi* Decision, para. 190. *Compare also* *Kenya* Decision, para. 63 (considering that "a review of [article 53(1)(c)] is unwarranted in the present decision", taking into account the Prosecutor's determination), *with* *Kenya* Decision, Dissenting Opinion of Judge Kaul, para. 14 ("concur[ring] with the majority that *all requirements* set out in article 53(1)(a) to (c) […] fall squarely under judicial scrutiny", emphasis added).

[58] *Côte d'Ivoire* Decision, Opinion of Judge Fernández, para. 16 (emphasis added). *See also* paras. 18, 21, 27-28.

[59] *Sudan* Decision, para. 11.

- If the Prosecutor has identified a specific circumstance[60] which sufficiently raises concern that opening an investigation would not serve the interests of justice—and has therefore explained how that factor is weighed against relevant factors such as the gravity of the identified crime(s) and the interests of the victims[61]—the Pre-Trial Chamber, acting under article 15(4), may determine whether it concurs with the Prosecutor's assessment. This scenario is exceptional—and indeed has never yet occurred in the practice of the Court.

- Alternatively, and more typically, if the Prosecutor has concluded that there is no specific circumstance which sufficiently raises concern that opening an investigation would not serve the interests of justice (as in this situation),[62] the Pre-Trial Chamber may determine whether it concurs in that same conclusion. Given the impossibility of the Prosecutor enumerating all those considerations which she does *not* consider to rise to the threshold, this means that the Pre-Trial Chamber may only consider whether in its view there is any *self-evident or ostensible concern*—primarily with reference to any representations of victims received under article 15(3)—that opening an investigation would not serve the interests of justice.[63] In this case, the Pre-Trial Chamber should revert to the Prosecutor, indicating the nature of its concern,[64] with a view to requesting additional information concerning the Prosecutor's assessment,[65] which the Pre-Trial Chamber may then consider in the manner previously described.

38. Nothing in article 15(4) therefore requires or permits a Pre-Trial Chamber to take into account considerations that were not raised before it by the Prosecutor,[66] much less to conclude that "proceedings under article 15 […] *must include a positive determination* to the effect that investigations would be in the interests of justice."[67] Such an approach exceeds the

[60] *See* OTP Interests of Justice Policy, p. 3; OTP Preliminary Examination Policy, para. 67.
[61] *See above* para. 28.
[62] *See above* para. 27.
[63] *But see also* Bitti (2019b) ("if the Prosecutor does not resort to the 'interests of justice' criterion, this closes the door on the use of this criterion").
[64] This is broadly consistent with the approach laid down by the Appeals Chamber concerning admissibility determinations in the course of deciding an application by the Prosecutor under article 58: *DRC* Warrants Appeal Decision, paras. 45, 52 (reasoning that, since article 58(2) of the Statute "does not impose an obligation on the Prosecutor to furnish evidence or information in relation to the admissibility of the case", the Pre-Trial Chamber would generally "have to request additional information from the Prosecutor" if it decided it was necessary to do so *proprio motu*).
[65] *See* rule 50(4). *See also* Certification Decision, para. 24 (recalling that "the Prosecutor is meant to act as the driving engine […] enjoying exclusive responsibility when it comes to assess the feasibility of the investigations").
[66] On the merits of this situation, *see further below* paras. 128, 136.
[67] Decision, para. 35 (emphasis added).

scope of the limited prosecutorial discretion which is afforded the Prosecutor under article 53(1)(c). It also exceeds the scope of article 15(4) since a Pre-Trial Chamber would thereby, as in this situation, not confine itself to considering whether it concurred in the Prosecutor's assessment but rather undertake an assessment all of its own.

39. The approach in the Decision is in marked contrast to the consistent practice of all other Pre-Trial Chambers in considering matters under article 15 of the Statute. Their reasoning supports the understanding that article 53(1)(c), by its plain terms, requires the Prosecutor only to conduct a negative assessment,[68] and that the Pre-Trial Chamber's duty under article 15(4) is typically limited to determining whether it concurs with the Prosecutor's assessment that there is no self-evident or ostensible concern that opening an investigation would not serve the interests of justice. Thus, in *Kenya*, the Pre-Trial Chamber recalled that:

> Unlike [article 53(1)] sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect.[69]

40. Consequently, the Pre-Trial Chamber in that situation did not find it necessary to engage in any kind of substantive review of the Prosecutor's determination under article 53(1)(c).[70] In *Côte d'Ivoire*, the Pre-Trial Chamber reasoned similarly,[71] and considered that the Prosecutor had discharged his function simply by his submission, "based on the available information, [that] he has no reasons to believe that the opening of an investigation […] would not be in the interests of justice."[72] The Pre-Trial Chamber also took into account that there was likewise no such "indication" from the victims' representations.[73] It reasoned very similarly in *Georgia* and *Burundi*.[74]

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[68] *See above* paras. 26-30.
[69] *Kenya* Decision, para. 63.
[70] *See Kenya* Decision, para. 63. *See also* Dissenting Opinion of Judge Kaul, para. 14 (concurring "with the majority that all requirements set out in article 53(1)(a) to (c) of the Statute fall squarely under judicial scrutiny of the Pre-Trial Chamber", under article 15(4)).
[71] *Côte d'Ivoire* Decision, para. 207 ("sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice").
[72] *Côte d'Ivoire* Decision, para. 208.
[73] *Côte d'Ivoire* Decision, para. 208. *See also Côte d'Ivoire* Decision, Opinion of Judge Fernández, paras. 13, 47 (noting that victims' representations in the context of article 15(3) might "assist in assessing issues that could arise" under article 53(1)(c)).
[74] *Georgia* Decision, para. 58; *Burundi* Decision, para. 190.

I.B. The context and object and purpose of the Statute, and its drafting history, confirm the implication of its plain terms

41. The context provided by other provisions of the Statute, as well as the overall object and purpose, and the drafting history, further support the implication of the plain terms of articles 15(4) and 53(1)(c)—specifically, that if the conditions in articles 53(1)(a) and (b) are met, the Court may only decline to proceed with an investigation if there are substantial reasons to believe that this would *not* serve the interests of justice. This is to be assessed negatively. Correspondingly, when acting under article 15(4), the Pre-Trial Chamber must match the contours of its own assessment to the contours of the assessment of the Prosecutor—whether it concurs that there are no specific circumstances beyond those specific in article 53(1)(c) which are even relevant to the interests of justice, or otherwise whether it concurs with the Prosecutor how she has weighed the factors which she expressly identified. In its article 15(4) assessment in this respect, the Pre-Trial Chamber should principally be guided by any representations it has received from victims under article 15(3).

42. Particular considerations confirming this interpretation include:

- the inclusion of a specific regime (applicable only to referred situations), under article 53(3)(b), to control the Prosecutor's reliance upon article 53(1)(c) to *terminate* otherwise meritorious investigations;

- the essential importance of investigating adequately substantiated allegations of article 5 crimes in giving effect to the object and purpose of the Court, as illustrated in the Preamble to the Statute; and

- the clear evidence in the drafting history that the negative formulation of article 53(1)(c) was the product of specific deliberation and was a critical aspect of the consensus around a primarily objective framework for the initiation of investigations, in which the Prosecutor would play the primary role. It was never intended to suggest that opening an investigation would be conditional on showing any extrinsic justification.

I.B.1. Article 53(3)(b) illustrates the presumption of investigation in article 53(1)(c), and the proper focus of article 15(4)

43. Although applicable only in the context of referred situations,[75] article 53(3)(b) of the Statute provides that "[t]he Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) […]" and that, "[i]n such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."[76] In other words, this provision "empowers the [Pre-Trial Chamber] to effectively override the Prosecutor's decision not to initiate an investigation, if that decision was based solely on the interests of justice."[77]

44. Manifestly—and within its limited scope of application—article 53(3)(b) *only* permits the Pre-Trial Chamber to directly substitute its appreciation of the interests of the justice for that of the Prosecutor when the Prosecutor has decided *not* to investigate.[78] The Pre-Trial Chamber is enabled to exercise this function by rule 105(4) and (5), which specifically requires the Prosecutor to notify referring entities and the Pre-Trial Chamber of the "reasons for [her] conclusion." This type of review contrasts markedly with the circumstances when the Prosecutor requests the opening of an investigation under article 15(3), where she need not provide reasoning in support of her conclusion that there is no obstacle under article 53(1)(c).[79] Where reasoning is neither needed nor provided, the Pre-Trial Chamber may not directly substitute its assessment of the interests of justice for that of the Prosecutor, since there is no common frame of reference for their analysis.

45. Ensuring this kind of "robust" scrutiny[80] over the exercise of prosecutorial discretion to *preclude* an investigation illustrates the strong legal presumption in favour of investigation in article 53(1)(c). Thus, for situations which have been referred to the Prosecutor for preliminary examination, the Statute will only permit an investigation to be halted—once the conditions in article 53(1)(a) and (b) are satisfied[81]—if the Prosecutor and the Pre-Trial

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[75] *See* rule 105(2) (referring to rule 49). Rules 105(1) and (3)-(5) apply only to referred situations. *See further* Friman, pp. 496-498.
[76] *See also* rule 110(2).
[77] *Comoros* Second Appeal Decision, para. 75.
[78] *Sudan* Decision, para. 21.
[79] *See above* para. 27.
[80] *Comoros* Second Appeal Decision, para. 75.
[81] By contrast, if the Prosecutor determines that a situation referred to her by a State Party or the UN Security Council does not meet the conditions in article 53(1)(a) or (b), the Statute provides for greater deference to this assessment (based on its objective and non-discretionary nature) within the framework of article 53(3)(a): *see e.g. Comoros* First Appeal Decision, para. 59; *Comoros* Second Appeal Decision, paras. 76, 78, 80-82; *Comoros* Second Decision, Dissenting Opinion of Judge Kovács, paras. 12-14.

Chamber expressly or implicitly *agree* that this is appropriate,[82] when applying the same high threshold (substantial reasons to believe that an investigation would *not* serve the interests of justice).

46. The statutory scepticism about precluding otherwise meritorious investigations in the "interests of justice", evidenced by article 53(3)(b), informs the nature and degree of scrutiny required under article 15(4). As the Pre-Trial Chamber recalled, the article 15 procedure applies only when the Prosecutor has opened a preliminary examination *proprio motu* in order to create a safeguard against an *over zealous* Prosecutor.[83] Consequently, only limited deference is accorded to the determinations of the Prosecutor under articles 15(3) and 53(1)(a) and (b), and the Pre-Trial Chamber is required to ascertain for itself whether the information available provides a reasonable basis to believe that at least one crime within the jurisdiction of the Court has been committed, and there is at least one potential case which is admissible.[84] But this logic does not entail that article 53(1)(c) is treated with equal strictness.

47. To the contrary, by making a request under article 15(3), the Prosecutor has *declined* to exercise her discretion under article 53(1)(c).[85] While the Pre-Trial Chamber may verify that the Prosecutor acted properly in doing so, this exercise has limits.[86] Accordingly, if the Pre-Trial Chamber conditions its authorisation of an investigation on a *positive finding* of *extrinsic justifications*, it is no longer the Prosecutor which the Pre-Trial Chamber is subjecting to oversight.[87] Rather, it is challenging the very presumption of investigation in article 53(1)(c) itself. This is wholly inconsistent with the object and purpose of the Statute, and the manifest intentions of its drafters.

I.B.2. The presumption of investigation is inherent to the object and purpose of the Statute

48. It is well understood that the Statute is selective, insofar as the Court is mandated only to exercise its jurisdiction over the most serious crimes of concern to the international community as a whole, defined in article 5, which are also admissible before the Court, in the

[82] *See* Bitti (2019b).
[83] Decision, paras. 32, 44. *See also* para. 39. *See further e.g.* *Côte d'Ivoire* Decision, Opinion of Judge Fernández, para. 9.
[84] *See e.g.* *Kenya* Decision, paras. 21, 24, 68; *Georgia* Decision, paras. 3-4; *Burundi* Decision, para. 28. *See also* *Côte d'Ivoire* Decision, Opinion of Judge Fernández, paras. 12-16. *But see* *Comoros* Second Appeal Decision, para. 81. *Compare above* fn. 81.
[85] *See also* Schabas, p. 834 ("Only if [the Prosecutor] holds that prosecution would *not* be in the interests of justice […] does this subparagraph [article 53(1)(c)] become operational", emphasis added).
[86] *See above* paras. 37-38.
[87] *Contra* Decision, para. 88.

sense of article 17. This follows from article 53(1)(a) and (b). Article 14(1) further illustrates that the Prosecutor exercises discretion in selecting cases for prosecution once she has conducted an investigation.[88] However, within this context, the Preamble to the Statute affirms that such crimes "must not go unpunished and that their effective prosecution must be ensured" by measures at the national or (if necessary) international level. The Preamble further emphasises that the Statute seeks to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and resolves "to guarantee lasting respect for and the enforcement of international justice". These declarations are consistent with, and echoed by, States' legal duty under general international law to exercise their criminal jurisdiction over those responsible for the international crimes over which this Court has jurisdiction.[89]

49. In this context, any possibility for the Prosecutor *not* to investigate alleged crimes which would otherwise fall within the Court's jurisdiction, and which would be admissible within the context of a potential case, must be seen as an exception to the general approach of the Statute.[90] Such an apparent contradiction calls for a narrow interpretation of article 53(1)(c),[91] in which the Prosecutor is afforded a limited discretion not to open certain investigations, but with no need to identify extrinsic or external justifications *for* investigation. Any other reading would be inconsistent with the absolute commitment in the Preamble that crimes under the Statute "must" be appropriately adjudicated, whether in a national or international forum—and the primary vehicle for the Court to ensure that this occurs is by opening an investigation. For example, while preliminary examinations may well offer an opportunity for the Prosecutor to catalyse judicial measures at the national level,[92] investigations offer the most direct means for promoting the objectives of the Statute. This may in certain circumstances include ascertaining more concretely those allegations on which States must take action.

50. To suggest that only *some* situations satisfying articles 53(1)(a) and (b) merit investigation—which is the effect of the Pre-Trial Chamber's reasoning—is thus to contradict the absolute commitment in the Preamble that the international community, and the Court,

[88] *See also* OTP Case Selection and Prioritisation Policy.
[89] *See e.g.* Hafner et al, pp. 109-112; Webb, p. 308; AI Comments, pp. 9-12.
[90] *See e.g.* De Souza Dias, p. 746; Rodman, pp. 102-103; Webb, p. 307. *See also* Robinson, pp. 483, 485, 488-493; Bitti (2012), p. 1196.
[91] *See e.g.* HRW Policy Paper, pp. 9-11.
[92] *See e.g.* OTP Strategic Plan (2019-2021), para. 50.

should work to end impunity for *all* such crimes. Accordingly, interpreting article 53(1)(c) as requiring or permitting the Pre-Trial Chamber to condition the opening of an investigation on a positive showing of extrinsic justifications is inconsistent with the object and purpose of the Statute.

I.B.3. The drafters of the Statute never intended to make the opening of an investigation conditional on showing any extrinsic justification

51. The drafting history of the Statute likewise confirms that there was no common intention to require the Prosecutor, much less the Pre-Trial Chamber, to justify the opening of an otherwise meritorious investigation on the basis of factors *beyond* the gravity of the identified crime(s) and the interests of the victims. While States varied in their views of the "interests of justice",[93] the negative framing of article 53(1)(c) represented a deliberate procedural compromise, in order to allow a *limited exception* to the presumption of investigation when the necessity could be adequately substantiated. These circumstances strongly support the implication of the plain terms of article 53(1)(c), as previously described.

52. The original proposal for consideration of the "interests of justice" was first made by the United Kingdom, in 1996,[94] with the intention of affording "a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, eg if the suspected offender was very old or very ill or if, otherwise, there were good reasons to conclude that a prosecution would be counter-productive."[95] Although this proposal refers in passing to a decision "not to investigate", the factors identified relate to decisions not to *prosecute* an individual based on their specific circumstances.[96] This is significant insofar as the obvious tension between a presumption of investigation and a broad discretion *not* to initiate such an investigation is much weaker if the discretion is limited to whether or not to prosecute a specific individual.[97]

53. In the following two years, prior to the diplomatic conference at Rome, the UK proposal was modified in various ways, including to condition in express terms the opening of an

[93] *See e.g.* HRW Policy Paper, p. 4; De Souza Dias, p. 749; Schabas, p. 836.
[94] *See e.g.* Bitti (2019a); De Souza Dias, p. 748; Schabas, p. 836.
[95] UK Paper on Complementarity (1996), para. 30.
[96] *See also* UK Paper on Complementarity (1996), para. 14 ("the ICC prosecutor should have a discretion to refuse to prosecute even though a *prime facie* case against an accused has been established and that the court should not be obliged to go ahead with every case over which it has jurisdiction, or which is not inadmissible, just because there is a *prima facie* case"). *See further* Bitti (2019a).
[97] This favours a broader prosecutorial discretion with regard to the disposition of particular cases as opposed to whole investigations: *see e.g.* HRW Policy Paper, p. 19; Bitti (2019b); Webb, pp. 309-310. *Cf.* Gallavin, p. 179. *See further above* fn. 47.

investigation on the basis of a positive determination that it *would* be in the interests of justice.[98] Thus, by the start of the Rome conference, the proposal for substantive consideration by States read in material part:

> The Prosecutor shall initiate an investigation […] unless he or she determines there is no reasonable basis for a prosecution under this Statute. In making such a determination, the Prosecutor shall consider whether: […] *[(c) A prosecution under this Statute would be in the interests of justice, taking into account the interests of victims […]]*[99]

54. Yet the square brackets surrounding the italicised passage indicate, according to the conventions of the drafters, that this tentative qualification could be severed from the broader proposal, or otherwise amended, and was contingent upon the settlement of "larger issues".[100] And indeed the subsequent negotiations concerning the concept of the "interests of justice" proved to be "long and difficult",[101] but "substantially contributed to what was finally adopted in article 53."[102] States reached consensus only on the basis of an amended formulation which was a "*conditio sine qua non* for the adoption of the interests of justice criterion in the Statute".[103] In particular, as one member of a national delegation has recalled, "[t]he difference between positive and negative determinations" regarding the interests of justice "was a highly debated issue".[104]

55. This history underlines the importance of scrupulous attention to the precise phrasing of article 53(1)(c), and great caution in the process of interpreting the relevant provisions of the Statute.[105] In particular, the "radical changes" that were introduced at Rome—and which formed the basis for the Rome compromise—were the presumption of investigation, the negative assessment, and the high threshold for determinations not to proceed in the interests of justice.[106] These are precisely the considerations, arising from the plain terms of article

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[98] *See e.g.* Bitti (2019a).
[99] Working Paper on Article 54, p. 1 (emphasis added). *See also* Bitti (2019a).
[100] Schabas, p. 832.
[101] Bitti (2019a).
[102] Bergsmo *et al* (2016b), p. 1367 (mn. 3).
[103] Bitti (2019a).
[104] Bitti (2019b). *See also* Bitti (2019a).
[105] *Compare e.g.* *Comoros* Second Appeal Decision, Opinion of Judge Eboe-Osuji, para. 5 (relying on the intentions of the Rome Statute negotiators), *with* para. 35 (expressing caution about the significance of language derived from diplomatic negotiations).
[106] *See* Bitti (2019b) (referring to the adoption of "(i) a *negative* formulation […] whereas a positive determination was required from the Prosecutor at the beginning of the Rome Conference; (ii) the text of article 53(1)(c) was amended to start with the necessity to first consider factors militating in *favour* of an investigation

53(1)(c), that the Prosecution submits were overlooked by the Pre-Trial Chamber in the Decision.

56. The drafters' understanding of the exceptional nature of the use of an "interests of justice" analysis to preclude an investigation is also consistent, among other factors, with the very open-ended definition of precisely what considerations the concept might encompass.[107] Had the drafters intended that the opening of any investigation would be routinely conditioned on a positive assessment of the interests of justice, they would not only have said so expressly, but it would also have been necessary to clarify this concept further[108]—otherwise, the operation of the Court would be highly unpredictable, which was the very opposite of their intention.[109]

57. Furthermore, the discretion established in article 53(1)(c) seems to have been conceived as belonging primarily to the Prosecutor,[110] subject to a check on its excessive use by the Pre-Trial Chamber.[111] In this respect, the concern was never that the discretion would be *under*-used but rather that its mere existence—departing from the otherwise objective standards established in article 53(1)(a) and (b)—may open the Prosecutor or the Court to external pressure or lead to unequal treatment of situations.[112] While this concern was addressed in the context of referred situations by devising the mechanism in article 53(3)(b), it also favours interpreting article 15(4) such that the Pre-Trial Chamber is obliged, at most, to determine whether it has cause to question or require additional information on the concrete article 53(1)(c) assessment performed by the Prosecutor.

I.C. The Pre-Trial Chamber's error materially affected the Decision

58. The Pre-Trial Chamber appears to have failed to take any of the foregoing considerations into account. It neither followed the consistent practice of all other Pre-Trial Chambers in ruling under article 15(4), nor sought additional information from the Prosecution to inform its legal analysis. In this context, it erroneously concluded that it was

('the gravity of the crime and the interests of victims'); and (iii) a high threshold was in relation to the 'interests of justice' criterion"). *See also* Bitti (2012), p. 1197.

[107] *See* Schabas, p. 836. *See also above* fn. 93.

[108] Bitti (2019b) (observing that "the absence of a specific definition in the Statute was 'compensated' by the procedural compromise […], which aimed to limit the use of [the] interests of justice criterion and prevent its abuse"). *See also* Bitti (2012), p. 1196.

[109] *See* Gallavin, p. 180 (referring to the intention of States "to introduce a high level of certainty into the international system").

[110] *See* Guariglia, pp. 230-231.

[111] *See* Bitti (2019b).

[112] *See* Bitti (2019a); Bitti (2012), p. 1196.

required or permitted to condition its authorisation of the requested investigation under article 15(4) on its own "positive determination" that the investigation "would be in the interests of justice", including in relation to the external justification "that [the] investigation [would] be feasible and meaningful under the relevant circumstances."[113] This materially affected the Decision.

59. If it had not made this error, and instead interpreted articles 15(4) and 53(1)(c) correctly and followed the consistent practice of the Court, it would merely have considered whether there was any cause to doubt the Prosecutor's determination that there were no substantial reasons to believe that an investigation would *not* be in the interests of justice. It would have been informed in this assessment principally by the representations of the victims under article 15(3). Applying this test, and in the manifest absence of any such cause,[114] the Pre-Trial Chamber would have assented to the Prosecutor's own assessment, and consequently would have authorised an investigation into this situation.

II. THE PRE-TRIAL CHAMBER ABUSED ITS DISCRETION IN ASSESSING THE INTERESTS OF JUSTICE (SECOND GROUND OF APPEAL)

60. Further or alternatively, even if the Pre-Trial Chamber was correct in determining that it was permitted to condition its article 15(4) decision on the basis of its own positive assessment of the interests of justice, the Prosecution submits that the Pre-Trial Chamber erred in conducting that assessment. As a result, its conclusion—that there are substantial reasons to believe that an investigation of the situation in Afghanistan would not serve the interests of justice—would again be invalidated. If the Pre-Trial Chamber had assessed the interests of justice properly, it would have authorised the opening of an investigation.

61. It is commonly accepted that the assessment of the interests of justice is discretionary.[115] Consequently, the Appeals Chamber will only interfere with the Pre-Trial Chamber's exercise of discretion where "(i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion", in the sense that "the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'", including with reference to the "nature of the decision in question" and "whether the first

[113] Decision, para. 35.
[114] *See e.g. below* paras. 60-166.
[115] *See e.g. Comoros* First Decision, para. 14. *See also above* paras. 31-33.

instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations".[116]

62. Article 53(1)(c) expressly refers to two factors which must be taken into account in assessing the interests of justice: "the gravity of the crime and the interests of victims." Other relevant factors may be ascertained on the facts of a given situation.[117] Yet, for the purpose of this appeal, it is not necessary to resolve the broader debate about the full range of factors which might or might not become pertinent in assessing the interests of justice in any given situation. What matters is whether the Pre-Trial Chamber properly exercised its discretion in assessing the material factors in *this* situation. The Prosecution submits that it did not,[118] for the following three reasons.

- First, even accepting for the sake of argument that the Pre-Trial Chamber was entitled to take into account the three factors that it principally identified (time, State cooperation, and access to evidence and suspects), the Prosecution submits that it failed properly to appreciate those factors, and in this regard reached incorrect or unreasonable conclusions as to the material circumstances which informed the exercise of its discretion.

- Second, at least one other factor taken into account by the Pre-Trial Chamber (the Prosecutor's allocation of resources) could not, as a matter of law, properly have been entertained by the Pre-Trial Chamber.

- Third, the Pre-Trial Chamber failed to give adequate consideration or weight to those factors which are statutorily required by article 53(1)(c) (the gravity of the identified crimes and the interests of victims), and thus reached a conclusion which was so unfair and unreasonable that the Pre-Trial Chamber can only be understood to have exercised its discretion injudiciously.

63. Moreover, as a preliminary matter, each of these errors—which are, in and of themselves, sufficient to materially affect the Decision, and indeed to invalidate it—was exacerbated (and possibly explained) by the Pre-Trial Chamber's procedural error in failing to seek additional information from the Prosecution on any of these matters. As a

[116] *Lubanga* Reparations Appeal Judgment, paras. 31-32; *Katanga* Reparations Appeal Judgment, paras. 43-44; *Kenyatta* Appeal Decision, paras. 22, 25. *See also e.g.* *Ongwen* Appeal Decision, para. 46; *Bemba et al.* Appeal Judgment, paras. 100-101.
[117] *See above* paras. 28, 32.
[118] *See also* Ambos (2019).

consequence, the Pre-Trial Chamber's assessment reflects a partial and subjective, and indeed apparently speculative, view of the situation.

II.A. The Pre-Trial Chamber failed to seek additional information from the Prosecution

64. The Prosecutor filed her Request on 20 November 2017.[119] Subsequently, the Pre-Trial Chamber sought further information from the Prosecutor, on matters relating to her analysis under articles 53(1)(a) and (b), on 5 December 2017,[120] and on 5 February 2018.[121] Representations of the victims were transmitted to the Pre-Trial Chamber in the period from 20 November 2017 to 31 January 2018.[122] From the period 20 February 2018 until 12 April 2019, the Pre-Trial Chamber neither sought nor received any additional information from the Prosecutor.

65. In the Decision, the Pre-Trial Chamber directed itself 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",[123] and stressed that its determinations "are based on the information provided in the Request, in its annexes and supporting materials, in the victims' representations, and in the responses to orders issued by the Pre-Trial Chamber under Rule 50(4)."[124] In its discussion of article 53(1)(c), the Pre-Trial Chamber also began by recalling that:

> The 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. As for the victims, 680 out of the 699 applicants welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth.[125]

66. Notwithstanding this acknowledgement that the Prosecution had taken the view that there was no substantial reason to believe that an investigation would be contrary to the

[119] Decision, para. 5.
[120] Decision, para. 6 (citing First Rule 50(4) Order; Second Rule 50(4) Order (*Ex Parte*)). This information was provided by the Prosecutor on 12 December 2017, and 14 and 18 December 2017: Decision, paras. 7-8.
[121] Decision, para. 10 (citing Third Rule 50(4) Order). This information was provided by the Prosecutor on 9 February 2018: Decision, para. 11.
[122] Decision, para. 9. *See also* paras. 12, 27-28.
[123] Decision, para. 30 (emphasis added).
[124] Decision, para. 43.
[125] Decision, para. 87.

interests of justice, and its commitment to basing its decision on the information provided by the Prosecution, the Pre-Trial Chamber nonetheless raised various *new* considerations *proprio motu* in its assessment of article 53(1)(c).[126] It did not exercise its discretion to seek further information or submissions in this respect from the Prosecution—or indeed from the victims—as it had previously done with regard to other matters relevant to its assessment. In the circumstances, this was unreasonable, and itself constituted a procedural error and abuse of discretion.[127]

67. This follows not only from the Pre-Trial Chamber's own principle (recognising that it was required to direct its mind to matters which had also been considered by the Prosecution),[128] but also from the basic impossibility of the Pre-Trial Chamber assessing certain factors (such as those pertaining to State cooperation, the availability of evidence, or prosecutorial resources) which were based on information exclusively in the possession of the Prosecution.[129] To the contrary, in the circumstances, the only reasonable procedural step would have been for the Pre-Trial Chamber to issue a further order under rule 50(4), indicating to the Prosecution the nature of its concerns with respect to article 53(1)(c), and seeking relevant submissions and information in this respect. Such a measure would also have been consistent with a correct understanding of the legal requirements of articles 15(4) and 53(1)(c), as previously described.[130]

68. The Pre-Trial Chamber's failure to seek further relevant information from the Prosecution concerning the interests of justice, despite apparently recognising that it should do so, meant that its assessment was necessarily speculative and that further errors leading to an abuse of its discretion were highly likely.

II.B. The Pre-Trial Chamber misapprehended the factors it took into account

69. The Appeals Chamber has previously affirmed that an exercise of judicial discretion will be erroneous if it is materially affected by an incorrect understanding of the law, or a patently incorrect—that is to say, unreasonable—conclusion of fact.[131] In that sense, if the Pre-Trial Chamber exercises its discretion on the basis of misapprehensions about relevant

[126] *See e.g.* Decision, para. 91.
[127] *See also* *Amicus Curiae* Declaration 3 (Confidential), para. 35.
[128] *See above* fn. 123.
[129] *See also* Certification Decision, para. 24 (referring to the "exclusive responsibility [of the Prosecution] when it comes to assess the feasibility of investigations").
[130] *See above* para. 37.
[131] *See above* para. 61.

factual considerations, or the legal framework relevant to those considerations, then its decision it must be set aside.

70. The Pre-Trial Chamber made just such a series of errors in this situation. Specifically, it made two legal errors concerning the scope of any authorised investigation—with respect to the procedural regime of the Statute, and the substantive test to show a nexus to an armed conflict, respectively—which distorted its understanding of the factors which it subjectively identified as relevant to the interests of justice assessment. By misapprehending the scope of the investigation that was lawfully requested and could be lawfully authorised, this necessarily led to further error (even on its own terms) in assessing the prospects of success for that investigation.

71. Furthermore, with respect to the three factors which the Pre-Trial Chamber expressly identified as relevant to its interests of justice assessment (elapsed time, prospects of cooperation, prospects of securing evidence and suspects),[132] it entered into additional error by misapprehending the material considerations.

72. These misapprehensions, whether cumulatively or individually, materially affected and indeed invalidated the Pre-Trial Chamber's ultimate conclusions.

II.B.1. The Pre-Trial Chamber erred in law by imposing an arbitrary limit on the scope of any authorised investigation

73. In the Request, the Prosecution provided details of 203 specific incidents which it considered to meet the requirements of article 53(1) of the Statute.[133] This "sample"[134] was selected from "the most prevalent and well-documented allegations",[135] in order "to reflect the gravest incidents and the main types of victimisation",[136] but was expressly stated to be "without prejudice to other possible crimes within the jurisdiction of the Court that may be identified during the course of an investigation".[137] It was never intended to represent an exhaustive summary of the potential criminality which might have occurred and which merits

[132] Decision, para. 91.
[133] *See* Request Annex 2A (*Ex Parte*); Request Annex 2B (*Ex Parte*); Request Annex 2C (*Ex Parte*).
[134] *See e.g.* Request, paras. 111, 139, 141, 144, 150, 153, 157, 265.
[135] Request, paras. 41, 265.
[136] Request, para. 41.
[137] Request, para. 42. *See also* Third Rule 50(4) Response, para. 3 (noting that the information in the Request "was not a comprehensive survey of all the potential crimes committed nor an exhaustive analysis of the structures, organisation and conduct of the possible perpetrators"); Decision, paras. 25-26 (recalling that the Prosecutor had specifically noted the possibility of other crimes, which were not yet established to the standard of proof under article 53(1), but which might be proved in the course of an investigation).

investigation, nor could it reasonably have been understood as such.[138] Indeed, the Prosecution made clear that, on the basis of this sample, it considered that there was a reasonable basis to proceed with an investigation into a situation defined by the following temporal, material, and geographic parameters:

> [I]n relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.[139]

74. However, by majority (Judge Mindua dissenting),[140] the Pre-Trial Chamber rejected this approach, and concluded that the "filtering and restrictive function of the proceedings under article 15 […] implies that the Chamber's authorisation does not cover the situation as a whole, but rather only those events or categories of events that have been identified by the Prosecution."[141] Notwithstanding certain remarks which appear to suggest a broader approach,[142] the majority evidently considered that any decision permitting an investigation would consequently relate to "incidents specifically authorised by the Pre-Trial Chamber", and potentially also "those incidents which can be regarded as having a close link".[143] This understanding of the restrictive analysis of the majority is confirmed by the separate opinion of Judge Mindua, who described the majority as finding that "the authorisation must remain confined to the incidents or category of incidents and, possibly, the groups of alleged offenders referred to by the Prosecutor".[144]

75. For these reasons, the Pre-Trial Chamber is understood to have excluded the possibility that an authorised investigation might encompass:

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[138] *See also* *Burundi* Article 15(3) Request, para. 30.
[139] Request, para. 376. *See also* Decision, para. 5. *See further* Request, paras. 2, 38 (referring to the ongoing nature of related criminal activity); UNAMA 2019 Press Statement ("[m]ore civilians were killed in the Afghan conflict [in 2018] than at any time since have been kept"). *See also below* fn. 263.
[140] *See* Separate Opinion, paras. 3-15, 51.
[141] Decision, para. 42.
[142] *See e.g.* Decision, para. 40 ("the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, *as well as those comprised within the authorisation's geographical, temporal, and contextual scope*, or closely linked to it", emphasis added).
[143] Decision, para. 41.
[144] Separate Opinion, para. 4. *See further* paras. 6, 9 (characterising the approach of the majority as requiring the Prosecutor to "request a new authorisation" from the Pre-Trial Chamber if "during the authorised investigation different or new incidents were to be discovered"). The ambiguity in the Decision is, however, also reflected at times in the Separate Opinion: *see e.g.* para. 8.

- any crime occurring after 20 November 2017;[145]

- any crime committed by perpetrator groups other than the Taliban, Haqqani Network, or State agents of Afghanistan or the United States[146]—such as, for example, Al Qaeda, Hezb-e-Islami Gulbuddin ("HIG"), Lashkar-i-Taiba, Tehrik-e-Taliban Pakistan, Daesh/Islamic State in Khorasan Province, or agents of any State other than Afghanistan or the United States;[147] and *potentially*, in any event,

- any crime other than those arising from the 203 incidents expressly identified in the Request, or potentially arising from incidents "closely linked" to the expressly identified incidents.[148]

76. This limited view of the *maximum* scope of any authorised investigation (no matter how the Decision is precisely interpreted) necessarily and materially affected the Pre-Trial Chamber's assessment of the various factors which it considered to be relevant to the interests of justice, such as the time which has elapsed since relevant events, the prospects for State cooperation, and the prospects for securing evidence and suspects. If the Pre-Trial Chamber had correctly interpreted the lawful scope of an authorised investigation, as the following paragraphs explain, it would have determined that any investigation authorised in this situation could be much broader,[149] and as such this would have affected its analysis of those factors which it considered to be relevant such as the amount of time which had lapsed, and the prospects for securing evidence and suspects, and for State cooperation.

[145] Decision, para. 69.
[146] Decision, para. 69 (excluding from consideration "groups of offenders other than those for which the authorisation was specifically requested"). *But see* para. 57 (recalling that "it is not necessary to identify at this stage the specific force or group to which those who have allegedly engaged in each of the criminal conducts would have belonged"). This apparent contradiction is not explained. The Prosecution was clear that it was only for the limited purpose of the Request that it relied only on incidents attributed to the Taliban, the Haqqani Network, and State agents of the Afghan Government (including members of the Afghan National Security Forces ("ANSF")) and the United States (including members of the US armed forces and the Central Intelligence Agency ("CIA")): *see* Request, paras. 53, 64, 68, 71. The Pre-Trial Chamber made findings under article 53(1)(a) and (b) with respect to at least one incident attributed to members of each of these groups: Decision, paras. 46-47, 60, 74, 76, 78,84-85. There is one incident attributed to members of the CIA which was not excluded by the Pre-Trial Chamber: *compare* Decision, para. 56, *with* Request Annex 2C (*Ex Parte*), #70.
[147] *See* Request, paras. 59-63, 68, 253.
[148] Decision, para. 69.
[149] *Cf.* Decision, para. 68 ("the scope of the Chamber's judicial scrutiny […] is and should remain confined to the incidents for which the judicial authorisation is explicitly sought in the Request. Otherwise stated, the scope of the authorised probe cannot be extended *proprio motu* by the Office of the Prosecutor").

II.B.1.a. The subject-matter of an investigation must be delimited by suitable parameters, but may not prescribe specific incidents for investigation

77. While the Statute does not expressly prescribe how an investigation must be defined, the effect of the various relevant statutory provisions, in combination, is that the scope of an investigation is delimited by suitable geographic, temporal, and other material parameters, which are reasonably derived from the circumstances suggested by the available information.[150] While some kind of parameters are necessary, none is a *sine qua non*,[151] and they must nonetheless be sufficiently broad so that they do not intrude into the Prosecutor's independent duty to conduct objective, evidence-led investigations, and to select cases for prosecution.[152] In practice, therefore:

- for situations referred to the Prosecutor by a State Party or the UN Security Council, the parameters defining the scope of an investigation will usually be indicated by the referring entity, and then confirmed by the Prosecutor and, if article 19 requires, even by a Pre-Trial Chamber;[153] and,

- for situations identified by the Prosecutor *proprio motu*, these parameters will be indicated by the Prosecutor, and then confirmed by the Pre-Trial Chamber.

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[150] *See e.g.* *DRC* Victims Decision, para. 65; *Mbarushimana* Warrant Decision, paras. 4-6; *Mbarushimana* Jurisdiction Decision, para. 21. *See also* WCRO Report, pp. 20-22. While some early decisions adopted the term "situation of crisis", this did not intend any further substantive test but merely referred to the situation which was to be investigated as defined by the relevant geographic, temporal, and other material parameters: *see e.g.* Rastan (2012), pp. 9-13, 29; Marchesi and Chaitidou, p. 717 (mn. 25: "the concept of a 'situation' must be understood in a generic and broad fashion: a description of facts, defined by space and time, which circumscribe the prevailing circumstances at the time"). *See also* Decision, para. 41 (referring in passing to "the temporal, territorial and material parame[]ters of the authorisation as granted").

[151] For example, in the *Burundi* situation, the Pre-Trial Chamber authorised an investigation of all conduct associated, among other considerations, with the alleged State policy, either on the territory of Burundi or committed elsewhere by a national of Burundi. Likewise, other Pre-Trial Chambers, including in the *Côte d'Ivoire* and *Georgia* situations, permitted the investigation to extend beyond a defined period, provided there was a sufficient link between the conduct under investigation and the parameters of the authorised investigation. *See further below* para. 87.

[152] *See e.g.* *Mbarushimana* Jurisdiction Decision, para. 27; *Uganda* Decision (opening a situation in "Uganda" based on the Prosecutor's report that, although Uganda had purported to refer to the Court the "situation concerning the Lord's Resistance Army", he had informed the Ugandan authorities that "we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed"). *See also* Marchesi and Chaitidou, pp. 716-717 (mn. 25).

[153] *See e.g.* *Mbarushimana* Warrant Decision, para. 5 (noting not only the parameters of the referral, but also the way in which "[t]he situation under investigation was […] defined by the Prosecutor"); *Mudacumura* Decision, para. 15. *See also* Marchesi and Chaitidou, pp. 715-716 (mn. 22: observing that, a referral "*prompts* the Prosecutor to look into a particular set of events", emphasis supplied, but that "[w]hether or not (or to what extent) the Prosecutor will investigate, is a question to be determined by the ICC Prosecutor", subject to article 53(3) of the Statute and the scope of the Court's jurisdiction), 717 (mn. 25, fn. 84: observing that, if the Prosecutor wished to investigate "beyond the factual boundaries of the scenario encompassed in the referral, he or she must invoke the *proprio motu* powers under article 15").

78. Neither the Prosecutor nor the Pre-Trial Chamber may delimit the parameters of an investigation so narrowly that it defeats other requirements of the Statute. In particular, this means that the parameters of a situation must be defined in a fashion which respects: the limited scope of the preliminary examination procedure; the distinction between "situations" and "cases"; the Prosecutor's duty of independent and objective investigation; and the practical realities of investigations under the Statute. It is further confirmed by the constant practice of Pre-Trial Chambers of this Court.

79. First, and manifestly, the preliminary examination procedure under article 53(1) is not intended to identify exhaustively *every* crime which might form part of an investigation, if resolved positively.[154] Article 53(1)(a) requires the Prosecutor to establish a reasonable basis to believe that "*a* crime" within the jurisdiction of the Court has been committed. This formulation is understood to suggest that it suffices for the purpose of article 53(1)(a) to show to the requisite standard that "*at least one*" article 5 crime has been committed.[155] While the Prosecutor may choose to identify multiple "examples",[156] this is "merely illustrative of a threshold that has already been met",[157] and may be motivated by practical considerations or a desire for an appropriate degree of public transparency.[158] But such examples cannot, and do not, constitute the "outer parameters of the situation".[159]

80. Indeed, the identification of particular incidents may often not be for the purpose of enumerating the crimes within the Court's jurisdiction which may have been committed in the situation at hand, under article 53(3)(a), but instead for the purpose of article 53(3)(b) in showing that there is at least one potential case which would be admissible.[160]

81. These same considerations apply when the Pre-Trial Chamber considers an article 15(3) request. This follows from the plain terms of article 15(3) itself,[161] and is further reinforced

[154] An exhaustive analysis is necessary only if the Prosecutor *declines* to open an investigation into a situation which has been referred to her by a State Party or the UN Security Council: Cross, pp. 248-250.
[155] *Comoros* First Decision, para. 13 (emphasis added).
[156] *Côte d'Ivoire* Decision, Opinion of Judge Fernández, para. 32 (recalling that "the facts and incidents identified" in an article 15(3) application "are not and could not be expected to be exhaustive […], but are intended solely to give concrete examples to the Chamber"). *See also* para. 34 (referring to "this early and necessarily non-comprehensive identification of incidents").
[157] Rastan (2012), p. 27.
[158] *See* Cross, pp. 248-249.
[159] Rastan (2012), p. 27.
[160] *See* Rastan (2012), pp. 26-27.
[161] In particular, article 15(3) provides that the Prosecutor may request the Pre-Trial Chamber to authorise an investigation when she considers that there is "a reasonable basis to proceed", which echoes the language of

by rule 48, which requires the Prosecutor when acting under article 15(3) to "consider the factors set out in article 53, paragraph 1(a) to (c)." These may be taken to define what constitutes a "reasonable basis to proceed", which must be assessed by the Pre-Trial Chamber under article 15(4).

82. The majority was incorrect to presume that "[t]he filtering and restrictive functioning of the proceedings under article 15 further implies that the Chamber's interpretation does not cover the situation as a whole, but rather only those events or categories of events that have been identified by the Prosecution".[162] While it is certainly true that article 15 provides an important check on the Prosecutor when she acts *proprio motu*, without the referral of a State Party or the UN Security Council, this function does not however mean that each and every criminal allegation must be proven to the article 53(1) standard, in order to justify its investigation. The implication of the majority's reasoning is that the Pre-Trial Chamber under article 15(4) should interpret article 53(1)(a) *more strictly* than the Prosecutor need interpret this standard for the purpose of situations which have been referred to the Court. This is both unsupported by the terms of the Statute, and its object and purpose as a whole, which both strongly suggest the same substantive standards should be applied for opening investigations of all kinds. What differs is merely the combination of actors whose assent is required. As such, the Pre-Trial Chamber satisfies the requirement of article 15 by determining whether it agrees with the Prosecutor that the conditions in article 53(1) are met—this does not mean that it must go beyond the plain requirements of article 53(1)(a) in identifying "a" crime within the jurisdiction of the Court.

83. Second, in the practice of the Court, there is a settled distinction between a "situation" (whose parameters broadly define the maximum scope of an investigation) and a "case" (which generally implies the scope of a particular prosecution).[163] While cases must arise from situations, in the sense that a case cannot be validly brought *beyond* the parameters of a situation,[164] situations and cases are the result of distinct procedures. Opening an investigation within a situation requires the assent of two independent actors,[165] of which one must always be the Prosecutor who must apply the legal criteria in article 53(1) (preliminary

article 53(1) that "[t]he 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".

[162] Decision, para. 42.

[163] *See DRC* Victims Decision, para. 65.

[164] *See e.g. Mbarushimana* Warrant Decision, para. 6; *Mudacumura* Decision, para. 14.

[165] These are either the combination of a referring entity (a State Party or the UN Security Council) and the Prosecutor, or the Prosecutor acting *proprio motu* and the Pre-Trial Chamber.

examination) and may be subject to judicial review under article 53(3) if the situation had been referred to her.[166] Case selection, by contrast, is a prerogative of the Prosecutor, and potentially subject only to minimal judicial review (for referred situations) in order to ensure that investigations are not closed improperly without any prosecutorial action.[167]

84. Yet by requiring the Prosecutor to prove each incident to the article 53(1) standard, as a precondition to investigating that incident, the majority of the Pre-Trial Chamber effectively collapsed the distinction between situations and cases. Its approach means that the Pre-Trial Chamber not only plays a role in authorising the investigation of a situation, but also has the power to prevent the Prosecutor from selecting particular cases which may arise within the context of that situation, insofar as the Pre-Trial Chamber may decline to authorise the investigations necessary to pursue a given case, based solely on the very limited information which may be available at the preliminary examination stage. This approach is even more problematic when combined with the Pre-Trial Chamber's erroneous view of article 53(1)(c),[168] which—if correct—would imply that the Pre-Trial Chamber could decline to authorise the investigation of a particular incident because it is not satisfied that there are *extrinsic* justifications for investigating that incident beyond its gravity and the interests of the victims. This would amount to placing case selection power primarily in the hands of the Pre-Trial Chamber, contrary to the plain implications of the Statute.

85. Furthermore, contradicting the principle that all investigations conducted by the Court (whether for referred situations or *proprio motu* situations) should proceed according to the same principles, interpreting article 15 as empowering the Pre-Trial Chamber to circumscribe the Prosecutor's case selection would mean that *different* standards apply to referred situations and *proprio motu* situations. For the former, the Prosecutor's power to investigate allegations within the parameters of the investigation would be unrestricted. For the latter, the Prosecutor's power to investigate similar allegations would be subject to the approval of the Pre-Trial Chamber.

86. Third, under article 54(1)(a), the Prosecutor is obliged *inter alia* to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute". This implies not only that the Prosecutor is obliged

[166] When acting *proprio motu* under article 15, then both the Prosecutor and the Pre-Trial Chamber must apply the legal criteria in article 53(1): *see above* para. 81.
[167] Statute, art. 53(2). *See also* Sudan Decision, para. 21; *above* fn. 47.
[168] *See above* paras. 14-16.

to investigate incriminating and exonerating circumstances equally—which the plain terms of article 54(1)(a) suggest to be a *component part* of that broader obligation[169]—but also that the Prosecutor has an obligation to 'follow where the evidence leads'. While this unqualified imperative is necessarily subject to the scope of the Court's jurisdiction and the parameters defining the scope of an investigation, the absence of a similar obligation on the Pre-Trial Chamber strongly suggests that the drafters did not consider the Pre-Trial Chamber as having any power to direct the conduct of the Prosecutor's investigation.

87. Fourth, requiring the Prosecutor to establish that there is a reasonable basis to believe that an incident occurred, as a condition for investigating it, also raises a number of significant practical concerns. In particular:

- It may tend to impede the equal investigation (and thus prosecution) of all crimes under the Statute. For example, while the Prosecution considers all article 5 crimes in conducting preliminary examinations,[170] crimes with more complicated elements (and especially elements which turn more on questions of *mens rea*) often tend to be difficult to establish to the article 53(1) standard *without* the use of investigative methods.[171] Adhering to the accepted approach largely resolves this problem, in the sense that an investigation can be opened on the showing of a sample of criminality, and then investigative methods can be employed to detect and prove other types of related criminality.

- If investigative measures may only be used for the purpose of certain specific allegations approved by the Pre-Trial Chamber, this will very much increase the chance that, in carrying out its investigation, the Prosecutor will *inadvertently* discover evidence related to a crime within the jurisdiction of the Court but beyond the limited scope of its authorisation. This will place the Prosecutor in an invidious position, and will require the Prosecutor to revert to the Pre-Trial Chamber frequently in light of new developments in her investigation. The drafters expressly declined to grant such a role to the Pre-Trial Chamber in supervising investigations in this way.[172] The flaw in this approach is further illustrated by the conclusion that the Pre-Trial Chamber could in this way supervise

[169] *See* Statute, art. 54(1)(a) ("and, *in doing so*, investigate incriminating and exonerating circumstances equally", emphasis added).
[170] *See also* *Georgia* Decision, Opinion of Judge Kovács, para. 23.
[171] *See* Cross, pp. 247-248.
[172] *See e.g.* *Côte d'Ivoire* Decision, Opinion of Judge Fernández, paras. 9-10, 34, 45.

investigations under article 15, but not with respect to referred situations, contradicting the otherwise consistent approach to all investigations under the Statute.

88. Until the current Decision, moreover, all Pre-Trial Chambers of this Court have applied similar principles in defining the scope of an investigation when acting under article 15(4). While they initially varied in some details, recent decisions have reflected a striking judicial emphasis on the use of definitional parameters which are appropriate in light of the material facts, and the importance of permitting the Prosecutor to investigate all alleged conduct within the Court's jurisdiction which is sufficiently linked to the defined parameters. Thus, for example:

- In *Kenya*, the Pre-Trial Chamber authorised an investigation into crimes against humanity committed in Kenya in a defined time period.[173] In this context, it noted that, while the incidents identified for the purpose of preliminary examination may be "subjectively selected"—understood in the sense that the Prosecutor may choose which incidents to put forward to show that the requirements of articles 15(3) and 53(1) are met—the Statute subsequently requires the investigation of the "*entire situation*".[174] It considered this to be consistent with the Prosecutor's duty of objective investigation under article 54(1) of the Statute.[175] As such, it acknowledged that the Prosecutor was authorised to investigate alleged crimes which had *not* been identified in the available information.[176] In this context, the Pre-Trial Chamber authorised a greater temporal scope of investigation than that clearly requested by the Prosecutor,[177] even though it considered it necessary to terminate this period as of the date of the Prosecutor's request.[178]

- In *Côte d'Ivoire*, the Pre-Trial Chamber authorised an investigation into "crimes within the jurisdiction of the Court" committed in Côte d'Ivoire in a defined time period, but also included "continuing crimes" that may be committed after that period and "in the

[173] *Kenya* Decision, paras. 207, 209, 211. Although the *Kenya* Pre-Trial Chamber reasoned to this conclusion along different lines, restricting the Prosecution to the investigation of crimes against humanity remains consistent with the "sufficient link" approach, insofar as the contextual elements of the alleged crimes against humanity in that situation constituted a material parameter of the investigation.
[174] *Kenya* Decision, para. 205 (emphasis added).
[175] *Kenya* Decision, para. 205.
[176] *See* *Kenya* Decision, para. 205 (authorising the investigation to include "events prior to December 2007 in relation to crimes against humanity allegedly committed […], *some of which are referred to in the available information*", emphasis added).
[177] *Kenya* Decision, paras. 201-202, 204-205, 207.
[178] *Kenya* Decision, para. 206. This approach, which was also adopted in the Decision, has not been followed in subsequent article 15 decisions: *see below* fn. 268. *Cf.* Decision, para. 69.

future […] insofar as they are part of the context of the ongoing situation".[179] By majority, and despite agreeing that a "similar analysis should apply" to any alleged crimes committed *before* the relevant period,[180] the Pre-Trial Chamber declined to provide a similar authorisation without "sufficient information on specific events" occurring in an earlier time period.[181] Writing separately, Judge Fernández observed that she did not consider such information to be "at all necessary."[182]

- In *Georgia*, the Pre-Trial Chamber expressly agreed that, "for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor's investigation to the crimes which are mentioned by the Chamber in its decision authori[s]ing investigation."[183] In its view, such an approach would be "illogical" since the Prosecutor's preliminary examination—and the Pre-Trial Chamber's decision under article 15(4)—is "inherently based on limited information", whereas the process of investigation itself is the proper means to discover "evidence to enable a determination which crimes, if any, may be prosecuted."[184] The Pre-Trial Chamber also considered that limiting the Prosecutor's investigation to the scope of the Pre-Trial Chamber's article 15(4) decision would "conflict with her duty to investigate objectively, in order to establish the truth", under article 54(1) of the Statute.[185] Consequently, the Pre-Trial Chamber authorised the Prosecutor to investigate within identified geographic and temporal parameters, but also to include *other* allegations which are "sufficiently linked thereto and, obviously, fall within the Court's jurisdiction."[186]

- In *Burundi*, the Pre-Trial Chamber likewise authorised the investigation to include "*any crime* within the jurisdiction of the Court" committed in the requested time period,[187] as well as any crime committed prior to that period "if the legal requirements of the

[179] *Côte d'Ivoire* Decision, para. 212. *See also* para. 179 (further explaining that crimes might be regarded as being part of the "context" of the situation "insofar as the contextual elements […] are the same as for those committed prior to 23 June 2011" and thus, "at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes)"). *See further* *Côte d'Ivoire* Decision, Opinion of Judge Fernández, paras. 65-73 (noting that the reference to "continuing crimes" is unnecessary, and that it sufficed to show that "the case could be said to have arisen" from the defined situation in the sense that there was a "sufficient[] link[]").
[180] *Côte d'Ivoire* Decision, para. 180.
[181] *Côte d'Ivoire* Decision, paras. 184-185.
[182] *Côte d'Ivoire* Decision, Opinion of Judge Fernández, para. 59.
[183] *Georgia* Decision, para. 63.
[184] *Georgia* Decision, para. 63.
[185] *Georgia* Decision, para. 63.
[186] *Georgia* Decision, para. 64.
[187] *Burundi* Decision, para. 193 (emphasis supplied).

contextual elements are fulfilled" and (apparently) any crime following that period.[188] Consistent with its view of "the Prosecutor's duty to investigate objectively, in order to establish the truth," the Pre-Trial Chamber stressed that "the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes […] as long as they remain within the parameters of the authori[s]ed investigation."[189] The Pre-Trial Chamber noted that, provided the Prosecutor adhered to the Court's jurisdiction under article 12, its investigation could even extend beyond the territory of Burundi provided it concerned crimes under the same "State policy".[190]

89. Similarly, in specific cases such as *Mbarushimana* and *Mudacumura*, Pre-Trial Chambers have reaffirmed that "[t]he parameters of the investigation of a situation can include not only crimes that had already been or were being committed at the time of the referral"—or the article 15(3) request, *mutatis mutandis*—"but also crimes committed after that time, insofar as they are sufficiently linked to the situation".[191]

II.B.1.b. The distinction between the "close link" and the "sufficient link" tests lies primarily in the object to which they relate

90. As previously noted, while the majority of the Pre-Trial Chamber generally appeared to consider that the scope of any authorised investigation must be restricted to the specific incidents identified in the Request, it nonetheless also seemed to allow that allegations which were "closely linked" to the incidents identified in the Request could likewise be authorised. The majority seemed to adopt this concept in preference to the term 'sufficient link',[192] which had previously been used by other Pre-Trial Chambers as a general test to determine whether particular allegations are encompassed within the legal parameters of an investigation, whether arising from a decision under article 15(4) or a referral by a State Party or the UN Security Council.[193]

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[188] *Burundi* Decision, para. 192.
[189] *Burundi* Decision, para. 193.
[190] *Burundi* Decision, para. 194.
[191] *Mudacumura* Decision, para. 14. *See also* *Mbarushimana* Warrant Decision, para. 6; *Mbarushimana* Jurisdiction Decision, para. 41. *See further* Rastan (2012), pp. 23, 28, 32-33.
[192] Decision, para. 41 ("the Chamber does not share the views of the Prosecution, that it 'should be permitted to expand or modify its investigation […] so long as the cases brought forward for prosecution are *sufficiently linked* to the authorised situation (emphasis added)'").
[193] *See e.g.* *Georgia* Decision, paras. 62, 64; *Mbarushimana* Warrant Decision, para. 6; *Mbarushimana* Jurisdiction Decision, para. 39.

91. The majority's preference for the *terminology* of "close link" rather than "sufficient link" seems to have amounted to a distinction without a difference. While the qualification "close" may imply a heightened assessment in comparison to the qualification "sufficient", the factors underlying both the "close link" and "sufficient link" concepts appear to be substantially similar. Thus, the majority of the Pre-Trial Chamber considered that the assessment is fact-sensitive, taking into account the parameters of the authorised investigation, and factors including but not limited to "[p]roximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme".[194] Likewise, circumstances in which alleged crimes have been considered *not* to be sufficiently linked to the parameters of a situation, so as to fall within that situation, included material distinctions in "the armed groups involved, and the political context of the events".[195]

92. What may be more significant, however, is the majority's view of the 'object' to which such links must be 'attached'. Thus, appearing to consider that investigations are comprised only by a list of specific incidents (determined in the course of preliminary examination), the majority only allowed for the further possibility that incidents which are "closely linked" to *those incidents* might also be authorised for investigation. By contrast, and as previously explained, the Court has otherwise adopted the principle that investigations are defined by broad parameters (a "situation"), and that any incident falling within those parameters may be investigated as well as any incident which is sufficiently linked to *that situation* (as defined).

93. Consequently, if it is accepted that investigations must indeed be defined by broad parameters, and not a list of discrete incidents, then the majority's conception of a "close link" test is also incorrect. This misunderstanding of the scope of any authorised investigation—including not only the number and type of incidents which might be investigated, but also its temporal scope—led the Pre-Trial Chamber in turn to err in its assessment of the interests of justice, especially with regard to the time which has elapsed since the conduct which might form part of the investigation as well as the prospects for securing evidence and suspects, and State cooperation.

[194] Decision, para. 41.
[195] *See CARII* Article 53(1) Report, paras. 8-10. *See also* Rastan (2012), pp. 32-33.

II.B.2. The Pre-Trial Chamber erred in law and fact when identifying conduct with a nexus to the armed conflict

94. Among the sample of 203 incidents identified by the Prosecution in the Request, 23 concerned persons who were allegedly subject to crimes within the jurisdiction of the Court (*ratione materiae* and *ratione loci*), with a nexus to the non-international armed conflict occurring in Afghanistan, but who were initially captured in locations *outside* Afghanistan.[196] The Prosecution understands these incidents to have been excluded from consideration by the Pre-Trial Chamber.[197] However, this was erroneous, and materially affected the Decision. If the Pre-Trial Chamber had not excluded these incidents from consideration, it would have recognised that the parameters of any investigation are broader than it appreciated, and as such this would have affected its analysis of those factors which it considered to be relevant.

95. The Pre-Trial Chamber correctly recognised that the Court has jurisdiction *ratione loci* under article 12(2)(a) if the relevant conduct was "completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa."[198] It likewise correctly concluded for the purpose of article 12(2)(a) that, if crimes were committed "entirely on the territory of a non-State Party", the Court does not have jurisdiction—notwithstanding the fact that this conduct has some kind of nexus to an armed conflict occurring on the territory of a State Party.[199] Finally, the Pre-Trial Chamber was correct in its assumption (although unstated) that, for the purpose of article 8 of the Statute, the Court has jurisdiction *ratione materiae* over relevant conduct which has a nexus to an armed conflict.

96. However, these observations neither require nor support the Pre-Trial Chamber's conclusion that 23 incidents identified by the Prosecution must be excluded "due to the lack of the nexus with an internal armed conflict which is required to trigger the application of

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[196] *See* Request, paras. 49, 189, 202, 249. *See further* Request Annex 2C (*Ex Parte*), #55 to #69, #71 to #78.
[197] Decision, para. 56 (finding that, since "the alleged incidents which the Office of the Prosecutor attribute to the CIA in Annex 2C [of the Request] […] are said to have occurred against persons captured elsewhere than Afghanistan", "they fall outside the Court's jurisdiction"). However, one of the incidents attributed to the CIA in Annex 2C of the Request concerns a person who was detained inside Afghanistan and allegedly subject to crimes on the territory of Afghanistan: *see* Request Annex 2C (*Ex Parte*), #70. Notwithstanding the broad terms of paragraph 56 of the Decision, the Prosecution understands the Pre-Trial Chamber to have been aware of this exception: *see above* fn. 146. The place of capture for one other incident is unclear, but out of an abundance of caution (for the purpose of this appeal only), this is also regarded as occurring outside Afghanistan: *see* Request Annex 2C (*Ex Parte*), #76.
[198] Decision, para. 50. *See further e.g.* *Bangladesh* Article 19(3) Decision, paras. 62-72.
[199] Decision, para. 54.

international humanitarian law as well as the Court's jurisdiction."[200] This appears to confuse the separate questions of the nexus to the conflict (which forms part of the Court's jurisdiction *ratione materiae*) and jurisdiction (in the sense in which the Pre-Trial Chamber seemed to mean it, *i.e.* jurisdiction *ratione loci*).[201]

97. First, notwithstanding the Pre-Trial Chamber's ambiguous reference to jurisdiction,[202] no concern in the sense of jurisdiction *ratione loci* could conceivably arise under the Statute if conduct occurring in State A had a nexus to a non-international armed conflict occurring exclusively on the territory of State B, where *not only* State B was a Party to the Statute *but also* State A. And this is the very scenario which arises for the 23 incidents to which the Pre-Trial Chamber referred, where all the relevant conduct is alleged to have occurred on the territory of Afghanistan, Lithuania, Poland, or Romania (all States Parties to the Statute),[203] with a nexus to the non-international armed conflict occurring in Afghanistan.[204] It is immaterial for the purpose of jurisdiction *ratione loci* whether events *prior* to the alleged crimes (such as the initial capture of the victim) occurred on the territory of a State Party.

98. Second, the Prosecution of course agrees that the nexus is established when the alleged conduct "took place in the context of and [was] associated with an armed conflict".[205] However, while it is true that the Appeals Chamber has previously stressed the need to apply the nexus requirement with (intellectual) rigour,[206] this observation was made in the context of the Appeals Chamber's endorsement of the *fact-sensitive* nature of the applicable test. Specifically, no particular consideration is a *sine qua non* but rather:

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[200] Decision, para. 55.
[201] For example, this whole passage of the Decision is under the heading "Jurisdiction *ratione loci*": *see* Decision, paras. 49-59.
[202] *Contra* Decision, para. 56 (concluding that the incidents in question "fall outside the Court's jurisdiction").
[203] *See also* Request, paras. 51, 249-250.
[204] *See also* Request, para. 250 (noting that the Prosecution had already excluded from the Request "persons detained and allegedly mistreated on the territory of a State Party, but with no clear nexus to the armed conflict in Afghanistan").
[205] Decision, paras. 51-52. While the Pre-Trial Chamber took issue (without citation) with occasions in the Request when this requirement was formulated with an "or", rather than an "and", this was a typographic error—as illustrated by the consistent use of the "and" formulation elsewhere: *compare* Request, paras. 124, 162, 190, 250 ("or" formulation), *with* paras. 49, 51, 160, 186, 188, 202, 246 ("and" formulation). In any event, this distinction is immaterial given the manner in which the test has authoritatively been interpreted: *see below* fn. 207.
[206] Decision, para. 53 (citing *Ntaganda* Appeal Decision, para. 68). That the "rigour" must be *intellectual* follows from the obvious point that the Appeals Chamber would not have suggested that the evidentiary standard for matters associated with the nexus is any different from that which is generally applicable. Thus, at trial, this is proof "beyond reasonable doubt": Statute, art. 66(3). For an article 15(4) determination, this is "reasonable basis": Statute, arts. 15(4), 53(1); *see also* rule 48 (*mutatis mutandis*).

> [A]s rightly observed in the Impugned Decision with reference to the judgment of the ICTY Appeals Chamber in *Kunarac*, the Trial Chamber may have regard, *inter alia*, to 'the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.'[207]

99. In this regard, there is simply no basis for the Pre-Trial Chamber to conclude in absolute terms—as it appears to have done—that conduct occurring outside the territory of Afghanistan could *never* have a nexus to a non-international armed conflict occurring on the territory of Afghanistan. There is no basis in law for such a conclusion, either in the nexus test itself or in international humanitarian law more generally, nor could such a view be a reasonable assessment of the facts. Indeed, in the *Kunarac* Appeal Judgment—cited with approval by the Appeals Chamber of this Court in *Ntaganda*—the ICTY Appeals Chamber specifically remarked that, even a "requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting."[208]

100. The only substantive reasoning given by the Pre-Trial Chamber is its observation that "[b]oth the wording and the spirit of common article 3 to the Geneva Conventions are univocal in confining its territorial scope within the borders of the State where the hostilities are actually occurring".[209] However, this seems to reflect a misinterpretation of the text of common article 3.[210]

101. While it is true that the first sentence of common article 3 refers to "the territory of one of the High Contracting Parties", the better view is that this was "included to avoid any misunderstanding to the effect that the 1949 Geneva Conventions would create new obligations for States not party to them."[211] Otherwise, this would compel the view that non-international armed conflicts can *never* have any extra-territorial dimension, and therefore

[207] *Ntaganda* Appeal Decision, para. 68.
[208] *Kunarac* Appeal Judgment, para. 57.
[209] Decision, para. 53. *See also above* fn. 205.
[210] *See* Request, para. 251; GCI Commentary (2016), p. 168 (mns. 466-467). *Cf.* *Musema* Trial Judgment, para. 248 (referring to "the territory of a single State"). *But see* Pejić, p. 199, fn. 28. *See also* *Bemba* Confirmation Decision, paras. 231 (referring to non-international armed conflict "which takes place within the confines of a State territory"), 246 ("the conflict remained within the confines of the CAR").
[211] GCII Commentary (2017), p. 176 (mn. 488); GCI Commentary (2016), p. 168 (mn. 466). *See also* Vité, pp. 77-78, 88-89; Sassòli, pp. 8-9; Moir, p. 403 (mn. 31); Melzer (2016), p. 71. This concern is now redundant since all States are party to the Geneva Conventions.

that such conflicts fall into a legal vacuum outside the supposedly 'minimum' guarantees of common article 3. Such a position is plainly inconsistent with customary international law,[212] and has been overwhelmingly rejected by scholars,[213] as well as the ICRC.[214] Indeed, perhaps significantly, common article 3 also continues to state that the proscribed conduct is "prohibited at any time *and in any place whatsoever*" (emphasis added).[215]

102. Importantly, moreover, the fact that the law of non-international conflict *may* apply beyond the territory of the forum State(s)[216] does not necessarily mean that it *must* apply globally. Nor, even if this were the case, would it necessarily permit *hostilities* to be conducted globally on an unrestricted basis.[217] Consequently, the Pre-Trial Chamber's overly

[212] *See e.g. Nicaragua v. United States of America*, p. 114; Melzer (2016), p. 72; Pejić, pp. 197-198, 201-202; Radin, p. 706; Cameron, p. 700. On the recent position of the United States, for example: *see e.g.* Melzer (2016), p. 72 (fn. 111); *Hamdan v. Rumsfeld*, pp. 630-631. While the reasoning in *Hamdan* is based largely on the assumption that "any armed conflict that does not qualify as inter-state must be non-international within the meaning of [common article 3]"—and this reasoning may not be unproblematic—it nonetheless seems to be accepted in the United States that *Hamdan* represents "an important revision to the [United States'] understanding of what qualifies as a [common article 3 non-international armed conflict]": Corn, pp. 78-79.

[213] *See e.g.* Akande, pp. 71-72; Lubell (2010), pp. 100-104, 115; Lubell (2012), pp. 434-435; Lubell and Derejko, pp. 67-68; Melzer (2008), p. 258; Melzer (2016), p. 72; Milanović, pp. 42-43 (mns. 53-54), 47-48 (mn. 72); Moir, pp. 400-401 (mns. 22-24), 403 (mn. 31); Pejić, pp. 199-205, 225; Radin, pp. 704-705, 715-719; Sassòli, p. 9; Schmitt, pp. 11-13; Sivakumaran, pp. 228-232, 235, 251; Solis, pp. 163-164; Vité, pp. 88-90; Zegveld, p. 136. *See also* Ambos (2014), p. 132; Bartels (2009), pp. 60-61, 66-67; Geiß, p. 138; Holland, pp. 159-160, 178-179; Schöberl, p. 83 (mn. 37). *See also* Dinstein, pp. 24-27 (mns. 75, 77, 82: reasoning that, while a non-international armed conflict in his view must take place "in the territory of a single State", this does not mean that "every act of hostilities, without any exception, must be contained within that territory"). Implicitly, Dinstein seems to accept a distinction between the requirements to establish a non-international armed conflict as a matter of conflict classification (following from the chapter title "The preconditions of a NIAC"), and the scope of application of the relevant law once a conflict has been established.

[214] While the ICRC also acknowledges the alternative reading (that "the conflict must occur in the territory of precisely 'one' of the High Contracting Parties, thereby limiting the application of common Article 3 to 'internal' armed conflicts"), it does not regard this as the better view in light of the object and purpose of common article 3, and considers that this is supported by the practice of some States party to the Geneva Conventions: *see* GCII Commentary (2017), pp. 176-177 (mns. 488-493). *See also* ICRC Conference Report (2015), p. 14 (referring to "a NIAC with an extraterritorial element"). Previously, it had also been observed that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other", rather than other considerations (such as territoriality): AP Commentary, p. 1319 (mn. 4339); *see also* p. 1351 (mn. 4458); *but see* p. 1320 (mn. 4341). This clearly represents some development of earlier thinking: *see e.g.* GCIII Commentary (1960), p. 37 ("the conflicts referred to in Article 3 are armed conflicts […] which are in many respects similar to an international war, but take place within the confines of a single country"); *but see also* pp. 36 (urging that "the scope of application" of common article 3 "must be as wide as possible"), 39 (remarking that "[n]o possible loophole is left"). *See also* Bartels (2019), pp. 53-56, 64-66.

[215] *See also* Schmitt, p. 14 (while this "clause does not definitively answer the territoriality question, it does suggest that the article's protections are to be construed liberally").

[216] For non-international armed conflicts which feature one or more States as a party to the conflict, such State(s) would constitute the "forum State(s)" in this sense. However, since it is not legally required that the State is a party to the conflict—which may also arise between multiple non-State organised armed groups—the forum State(s) must necessarily also be potentially identified, functionally, as the State(s) in which the conflict is occurring. *See also* ICRC Conference Report (2015), p. 14; Lubell and Derejko, p. 70.

[217] *See e.g.* Lubell and Derejko, pp. 86-87 (noting that, while "IHL regulates […] hostilities, wherever they spread", this does not mean "endors[ing] the concept of a 'global battlefield' whereby the entire planet is subject to the application of IHL"). The 'global battlefield' concept—in the sense that eligible persons could be targeted

restrictive view of the law cannot be justified, even for the sake of argument, on the basis of such a concern.

103. As such, there is simply no absolute rule *against any* application of the law of non-international armed conflict beyond the forum State(s), and the Pre-Trial Chamber therefore erred in holding otherwise. Various considerations may potentially be relevant to assessing the degree to which the law of non-international armed conflict may apply in States which are not party to a non-international armed conflict. For example, the widespread recognition that non-international armed conflicts (and the applicable legal regime) may at least 'spill-over' into neighbouring States,[218] but not necessarily more remotely, perhaps implies the relevance of some kind of 'territorial nexus'.[219] But any requirement for such a nexus *arguendo* is

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under the law of non-international armed conflict wherever they are located on the planet—does indeed raise "important protection concerns": GCII Commentary (2017), pp. 181-182 (mns. 501-502, 504). *See also* Milanović, pp. 49-50 (mn. 76); Melzer (2016), p. 72; Lubell (2012), pp. 449-450; Geiß, p. 138; Schmitt, pp. 15, 17, 19; Pinzauti (2018a), p. 258. However, even to any extent *arguendo* that there are no territorial limits to the applicability of the law of non-international armed conflict, restrictions to 'global targeting' may at least still include the *jus ad bellum* and the need for a 'belligerent nexus' (a concept developed in the context of direct participation in hostilities) or similar to justify the use of force in such circumstances: Radin, pp. 740-741; Lubell and Derejko, p. 75; D'Cunha, p. 94; *see further below* fn. 219. *But see* ICRC Conference Report (2015), pp. 14-16. *See also* GCII Commentary (2017), p. 182 (mn. 503). On the distinction between different kinds of 'nexus', *see furtber below* para. *103*.

[218] S*ee e.g.* GCII Commentary (2017), pp. 178-180 (mns. 496-498); Schöberl, pp. 82-83 (mn. 35); Schmitt, pp. 11-12, 16; Sassòli, p. 9; Pejić, pp. 194, 201-203; Milanović, pp. 43-45 (mns. 55-59, 62); Moir, pp. 401-402 (mn. 25); Sivakumaran, pp. 230, 232-233; Pinzauti (2018a), p. 258; Cameron, p. 700; D'Cunha, pp. 81-82.

[219] In particular, such a notion may help to explain why it seems largely to be accepted that the law of non-international armed conflict may equally apply in States *neighbouring* the forum State(s) but it is less settled whether and in what circumstances it may apply in more remote States—a question which has no "firm answer": Pinzauti (2018a), p. 258. While no commentator has expressly suggested a 'territorial nexus' as such, to the Prosecution's knowledge, a concept of this kind underlies a variety of perspectives. *See* GCII Commentary (2017), pp. 173-174 (mns. 479, 482: reasoning that "once a non-international armed conflict has come into existence, the article applies in the whole of the territory of the State concerned", provided that there is "a certain nexus between that act and the non-international armed conflict"). This observation may reflect the view that, on some occasions, the non-international armed conflict may only affect a discrete part of the territory (*see e.g.* Lubell and Derejko, pp. 70-71), but care should be taken to avoid erroneously limiting the true scope of the conflict (and the territory and population affected by it) to the location of particular hostilities. The ICRC's reasoning may apply *a fortiori* for non-international armed conflicts under common article 3 which are not limited to the forum State(s) (*see above* fn. 214), where such a nexus may assume decisive importance: *see e.g.* GCII Commentary (2017), p. 182 (mn. 503); ICRC Conference Report (2015), p. 16. *See also* Milanović, pp. 43-44 (mn. 58: arguing for a "sufficient nexus" test); Schöberl, pp. 76 (mn. 23), 83 (mn. 37: noting concerns about the degree of arbitrariness in a strictly territorial approach and noting that "substantive approaches, such as the nexus test" may form the basis for consent in the future); Sivakumaran, pp. 251-252 (preferring the requirement of a "certain nexus between the conduct at issue and the applicable law" rather than the "arbitrary boundaries" of a strict "geographic focus"); Lubell and Derejko, pp. 73 (referring to the "factual existence of collective hostilities between the [Parties]", including in "dislocated areas affected by hostilities, in which the application of IHL will incontrovertibly follow"), 75-76 (application of IHL "beyond the primary geographical area of battle must be on the basis of a clear nexus to the prevailing armed conflict"), 78-79 (referring to a "clear nexus" to the "actual fighting"), 82-83 (noting that distance "cannot be the primary determinant for the applicability of IHL" and referring to other factors such as the law on targeting), 87 (relevant considerations include the "general nexus to an armed conflict", in the sense of the relationship "between the state carrying out the strike and the armed group being targeted" as "the foundational analytical step"); Radin, pp. 721, 742. *But see* Schmitt, pp. 12, 16. By contrast, the early suggestion by the ICTY, as an *obiter dictum*, that international humanitarian law

legally distinct from the nexus requirement for war crimes.[220] Whereas the former is concerned with the characterisation of the conflict as a whole (in order to determine the sufficiency of the links to a remote extra-territorial location),[221] the latter is concerned with the characterisation of one or more specific alleged acts (in order to determine the sufficiency of the links to the conflict, as it may be defined). These are very different questions.

104. Thus, on the facts of this situation, the Pre-Trial Chamber should *separately* have considered, first, whether a non-international armed conflict had come into existence, triggering the law of non-international armed conflict, and then, second, whether the alleged criminal conduct had a nexus to that conflict. Instead, it wrongly conflated the two. The fact that the alleged mistreatment in 7 of the 23 incidents may have occurred exclusively on the territory of ICC States Parties outside Afghanistan[222] does not mean that it took place beyond the scope of the law of non-international armed conflict. This would not only be squarely inconsistent with the ruling of the United States Supreme Court in *Hamdan*,[223] but would suggest, for example, that a State party to a non-international armed conflict may escape its obligations by re-locating detainees from one location under its control to another location under its control. This cannot be correct. Nor in any event may a detained person be transferred beyond the protection of common article 3 once they have become entitled to it.[224]

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simply applies to "territory under the *control* of a party [to the conflict]" (emphasis added) should be treated with caution, and may not be correct. *Compare e.g.* *Tadić* Jurisdiction Appeal Decision, para. 70, *with* Kreß, pp. 265-266; Radin, pp. 719, 739-740; Schöberl, pp. 67-68 (mn. 1), 76-77 (mn. 24); Lubell and Derejko, pp. 69-70; Schmitt, pp. 10-11.

[220] A similar situation arises with regard to the so-called 'belligerent nexus'—which is said to be an aspect of the test for determining 'direct participation in hostilities' for the purpose of targeting, within the law of armed conflict—which is clearly distinct from the nexus required for war crimes liability. *See e.g.* DPH Interpretive Guidance, pp. 58-59 (fn. 147: distinguishing the belligerent nexus from the nexus requirement for war crimes and observing that, "[w]hile the general nexus requirement refers to the relation between an act and a situation of armed conflict as a whole, the requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict"); Lubell and Derejko, p. 84 ("[t]he concept of belligerent nexus was derived and developed on the foundation of the general, although no less requisite, nexus requirement to determine potential war crimes" but "it was generally agreed that while a general nexus to an armed conflict is necessary for the application of IHL, it is not sufficient for the qualification of a particular act as direct participation in hostilities", and thus "[t]he concept of belligerent nexus is conceived more narrowly than the general nexus requirement […] for the qualification of an act or omission as a war crime"). *See also* Radin, pp. 729, 731, 741; Schöberl, p. 73 (mn. 12).

[221] *See also* Schmitt, p. 16.

[222] *See* Request Annex 2C (*Ex Parte*), #58, #60 to #61, #67, #74, #76 to #77. By contrast, 14 incidents are alleged to have occurred, in whole or in part, on the territory of Afghanistan: *see* #55 to #57, #62 to #66, #69 to #73, #75, #78. The location of two incidents is less clear: *see* #59, #68.

[223] *See above* fn. 212. Mr Hamdan, who had been detained in Afghanistan but was held in Guantanamo Bay, Cuba, was considered to be entitled to the protections of common article 3.

[224] *See e.g.* *Mrkšić* Appeal Judgment, paras. 70-74, *especially* para. 70 (reasoning that, in this respect, common article 3 reflects similar principles to Geneva Convention III).

105. Even if the Pre-Trial Chamber considered it necessary to determine whether that conflict extended to the territory where victims were initially *captured*—which, for the reasons set out below, was incorrect[225]—this requirement could, as a matter of law, have been met for the vast majority of the relevant incidents identified in this situation. Consistent with the broad acceptance that non-international armed conflicts (and the applicable legal regime) may 'spill-over' into the territory of *neighbouring* States,[226] the victims of 19 of the 23 incidents (83%) identified by the Prosecution appear to have been captured in Pakistan,[227] which is indeed a neighbouring State to Afghanistan.[228] Only four persons were captured in non-contiguous States.[229] The Pre-Trial Chamber made no reference to this fact, and drew no distinction between the various incidents identified by the Prosecution.

106. Furthermore, and again assuming that the Pre-Trial Chamber was correct to take account of the circumstances in which the victims initially came into the custody of agents of a party to the conflict,[230] this occurred *indirectly* for many of the victims. Specifically, they were first captured by a third party, which may not have been a party to the armed conflict, and then subsequently transferred to a party to the armed conflict.[231] In such a context, what might be material to assessing the nexus to the armed conflict are not the circumstances of the victim's prior dealings with the third party, but the circumstances of the victim's *transfer* to a party to the armed conflict. Not only will the locations of the initial apprehension and transfer potentially differ, but so may the reasons for these two transactions. Again, the Pre-Trial Chamber made no reference to this fact, and drew no distinction between the various incidents identified by the Prosecution.

107. In any event, the geographic *location* in which a victim was initially captured or transferred into the custody of a party to the armed conflict cannot be legally dispositive of the question whether their *subsequent* alleged mistreatment has a nexus to an armed conflict. This makes two incorrect assumptions, which have no basis in law, and are unreasonable as a

[225] *See below* para. 107.
[226] *See above* fn. 218.
[227] *See* Request Annex 2C (*Ex Parte*), #55 to #57, #59 to #68, #71 to #73, #75 to #78.
[228] Indeed, the situation in Afghanistan has been specifically identified as an example of a non-international armed conflict which not only features the intervention of third States in support of the government but which may also have some 'spill-over' into neighbouring States: *e.g.* Milanović, pp. 44-45 (mns. 62-63), 49-50 (mn. 76).
[229] *See* Request Annex 2C (*Ex Parte*), #58, #69, #71, #74.
[230] *But see below* para. 107.
[231] *See e.g.* Request Annex 2C (*Ex Parte*), #64 to #66, #68 to #69, #71 to #73, #75, #77 (referring, expressly or by necessary implication, to the activities of States which are not necessarily party to the non-international armed conflict in Afghanistan).

matter of fact. First, it is erroneous to consider that the circumstances in which an alleged perpetrator obtains custody over the victim of crimes such as torture or inhumane treatment is necessarily *dispositive* of the existence of a nexus to the armed conflict. To the contrary, while such matters may potentially be of factual relevance, it is also perfectly possible that a party to a conflict may obtain custody over a person for one reason, and then mistreat them for another. To take an hypothetical example, a person could well be initially detained for reasons unconnected with the conflict (such as a suspected domestic law crime) but then tortured for reasons overtly connected with the conflict (for example, when the state realises who it has in custody). Second, even if it were the case that the circumstances of the initial apprehension might potentially be *relevant* to the nexus assessment, the location of that event is again not *dispositive* of the true character of those circumstances. To return to the example, it would be absurd to suggest that the particular location where the person was initially detained (for the suspected domestic law crime) was necessarily a material consideration.

108. The facts of this situation illustrate that all of the (non-exhaustive) factors endorsed by the Appeals Chamber are met,[232] to the requisite standard of proof, with regard to the 23 identified incidents in which persons captured outside Afghanistan were alleged to have been deliberately mistreated while in detention. Specifically:

- There is a reasonable basis to believe that the alleged perpetrators of the 23 identified incidents were officers or agents of the CIA,[233] which is an official agency of the United States government, which was at the material times a party to the non-international armed conflict in Afghanistan in support of the government of Afghanistan.[234]

- There is a reasonable basis to believe that the alleged perpetrators acted in their official capacity at all material times. In particular, this is consistent with information suggesting that CIA personnel at times participated directly in hostilities in Afghanistan, and cooperated more generally with other branches of the US government, such as the US armed forces, conducting military operations in Afghanistan in pursuance of the non-international armed conflict. This included sharing intelligence, cooperating in detainee operations, and so on.[235]

[232] *See above* para. 98.
[233] *See* Request, para. 248.
[234] *See* Request, paras. 126-128, 248, 250.
[235] *See* Request, para. 248.

- There is a reasonable basis to believe that the victims were deliberately selected by the alleged perpetrators on the basis of their perceived affiliation to or suspected knowledge of the "anti-governmental armed groups" which formed the adverse party or parties to the non-international armed conflict,[236] such as the Taliban, Al Qaeda, and HIG.[237]

- There is a reasonable basis to believe that alleged perpetrators deliberately sought to gain custody over the victims, whether through their direct capture by US forces, or by obtaining their transfer from other US agencies or from third parties, if they had already been apprehended.

- There is a reasonable basis to believe that the alleged crimes were perceived by the perpetrators to be instrumental or desirable in questioning the victims about the plans, facilities, and personnel of the adverse party or parties to the conflict, in order to confer a further military advantage on the United States and its allies in that conflict.[238]

109. The Pre-Trial Chamber failed to address or to consider any of these factors, but simply declined to find a nexus on the basis of an erroneous interpretation of the applicable law, and thus fell into error. No reasonable chamber could have assessed the fact-sensitive nexus requirement in such a fashion. Even if the Pre-Trial Chamber was entitled to take account of the location in which victims were initially captured, as a matter of fact rather than of law, this consideration was insignificant in light of the other factors which are reasonably suggested by the information made available.

110. For all these reasons, if the Pre-Trial Chamber had not made these errors, it would have conducted its analysis under articles 15(4) and 53(1)(c) in light of the understanding that any authorised investigation could encompass the 23 identified incidents in which victims were captured outside Afghanistan but allegedly mistreated on the territory of a State Party. Consequently, these errors materially affected the Decision, insofar as the Pre-Trial Chamber misappreciated the scope of the investigation which might be authorised and thus failed to consider the factors it identified as relevant to the interests of justice in this context.

[236] *See* Request, paras. 129-134, 246-250. *See also e.g.* Decision, para. 65.
[237] *See* Request Annex 2C (*Ex Parte*), fn. 270. *See also* Request, para. 250.
[238] *See* Request Annex 2C (*Ex Parte*), fn. 270.

II.B.3. The Pre-Trial Chamber erred in relying on the passage of time as a relevant factor

111. For those incidents which it did consider to fall within the scope of any authorised investigation,[239] and thus for which it considered that it must make a positive assessment of the interests of justice,[240] the Pre-Trial Chamber expressly determined that "the significant time elapsed between the alleged crimes and the Request" was one "particularly relevant" factor.[241] It opined that the preliminary examination of this situation was "particularly long", insofar as "about eleven years" had elapsed from the opening of the preliminary examination characterised by "heightened political instability, in Afghanistan and elsewhere".[242]

112. However, notwithstanding its assertion that the elapsed time was a relevant factor in and of itself, the Pre-Trial Chamber then failed to engage in any substantive reasoning to this effect. Instead, it merely noted that "some of the circumstances at the origin of the difficulties" which led to the length of the preliminary examination—specifically, access to relevant information and State cooperation in light of the changing political climate[243]—"either remain unchanged or have rather changed for the worse."[244] Consequently, to the extent that the Pre-Trial Chamber expressly considered *three* factors to militate against the opening of an investigation, one of these (time) was in fact double-counted—the elapsed time was merely a contributing cause (in the Pre-Trial Chamber's view) of the other two factors (prospects for State cooperation and access to evidence) that it had identified.

113. Indeed, to suggest in the abstract that the mere passage of time since the commission of international crimes is a factor which could *as such* militate against their investigation and potential prosecution, in the interests of justice, would also contradict hard-won principles of international law. The Pre-Trial Chamber did not acknowledge this tension with the established practice of the international community, which has for example taken positive steps to restrict the imposition of statutory limitations (also known as 'prescription') for international crimes,[245] including in article 29 of the Statute of this Court. As two former

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[239] *But see above* paras. 73-110.
[240] *See above* paras. 13-16.
[241] Decision, para. 91.
[242] Decision, para. 92.
[243] *See below* paras. 123-129 (on State cooperation), 130-138 (on access to evidence).
[244] Decision, para. 92. In this context, the intended meaning or implication of the Pre-Trial Chamber's acknowledgment that, "for the purpose of timing, type of activities or resources[,] one thing is a preliminary examination and another one a proper investigation which has been authorised" is simply unclear.
[245] *See e.g.* 1968 Convention, art. 1; 1974 European Convention, art. 1; 1994 Inter-American Convention, art. 7. While ratification of these treaties is relatively modest, "they have had the further benefit of prompting other states to adopt relevant legislation": Pinzauti (2018b), pp. 253 (mn. 8), pp. 255 (mn. 14: reporting a 2006 study

judges *ad hoc* of the ICJ have observed, this "arguabl[y] […] reflects customary international law."[246] Such practice illustrates that the passage of time can—at most—be a factor to be weighed in assessing whether it is fair to bring a *particular* prosecution.[247] Furthermore, while such concerns may weigh more heavily for domestic crimes (including because of greater difficulties in accessing evidence as time passes),[248] this may not be true to the same extent for international crimes. Thus:

> In such circumstances, even if difficulties in the gathering of evidence persist when proceedings are delayed, this may not be sufficient to justify barring those proceedings altogether given the particular interests at stake. First, there is a much stronger case for punishing the perpetrators of serious international crimes, even if after the lapse of much time, in light of their extraordinary gravity and exceptional nature. Second, unlike common crimes, which tend only to affect a particular community, international crimes generally have a much broader impact, offending the international community as a whole. […] Third, delays in initiating legal proceedings with respect to international crimes are often not due simply to a lack of prosecutorial diligence. A range of independent factors may commonly impede or delay the initiation or fruition of such proceedings, including political circumstances, legal impediments, or victims' or witnesses' psychological difficulties in facing the past. Yet all of these things may change with the passage of time, and the public policy interest in confronting international crimes, as well as the interests of justice, may warrant prosecutorial action.[249]

114. The practice of the international community is consistent with these principles. For example, the Extraordinary Chambers in the Courts of Cambodia were not even established until more than 20 years after the time of the alleged crimes under their jurisdiction,[250] and the Kosovo Specialist Chambers were not established until approximately 15 years after the

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which suggested 146 States had relevant legislation of some kind). *See also* UN Principles to Combat Impunity, principle 23.

[246] Van den Wyngaert and Dugard, p. 887.

[247] *See* Van den Wyngaert and Dugard, pp. 873-874 (noting that, while limitation periods may be excluded, this is without prejudice to other time limits such as "time limits arising from the right to be tried within a 'reasonable period' of time or without 'undue delay'").

[248] Pinzauti (2018b), p. 251 (mn. 4).

[249] Pinzauti (2018b), p. 252 (mn. 5).

[250] *See* ECCC Law, art. 1 (establishing temporal jurisdiction between 17 April 1975 and 6 January 1979). This law was first passed on 10 August 2001, and amended on 27 October 2004.

time of the alleged crimes under their jurisdiction.[251] States continue, even now, to prosecute crimes allegedly committed during the Second World War.[252]

115. Accordingly, to any extent that the Pre-Trial Chamber considered the length of time which has elapsed since the alleged crimes and the Request to constitute, in and of itself, a factor to weigh strongly against even the opening of an *investigation*, this was erroneous. While such questions might potentially arise one day in the context of a particular prosecution—where they can be measured against the concrete circumstances of the individuals concerned—they are largely inapposite for the threshold process of determining even whether the evidence exists for one or more prosecutions to be brought. Indeed, there is no basis in international practice to suggest that the more general interests associated with investigations necessarily diminish with time, especially not when the time period in question remains well within the lifetime of the various individuals affected by the alleged crimes. To the contrary, the public interest in ascertaining at least whether there may be one or more cases meriting prosecution is significant, and the intrusion into the rights of particular individuals is relatively limited.

116. In any event, even if the passage of time could be considered to be a material consideration in assessing the interests of justice, the Pre-Trial Chamber appears to have given considerable weight to its view that "most of [the incidents identified for the purpose of the Request] date back to the early part" of the period from 2005 to 2015.[253] This was also erroneous, for several reasons.

117. First, not only is it impermissible—in the Prosecution's view—to limit the scope of any authorised investigation to the specific incidents identified for the limited purpose of article 15(3),[254] but in any event the Pre-Trial Chamber may not intrude into the Prosecutor's independent exercise of discretion in selecting cases for investigation and prosecution.[255] Thus, even if the Prosecutor's investigation could be limited to the incidents concretely identified by the Pre-Trial Chamber, she would still remain perfectly entitled to select the *later* of these incidents (if she considered it appropriate) for prosecution. Consequently, the Pre-Trial Chamber's reliance on its view of the timing of "most" of the identified incidents

[251] *See* KSC Law, art. 7 (establishing temporal jurisdiction between 1 January 1998 and 31 December 2000). This law was passed on 3 August 2015.
[252] *See e.g.* 'O. Gröning,' *Trial International*; 'J. Demjanjuk,' *International Crimes Database*.
[253] Decision, para. 93.
[254] *See above* paras. 73-93.
[255] *See above* fn. 47.

was erroneous, since it had no proper basis to assume that those incidents are more or less likely than any other to be selected for further investigation and prosecution.

118. Second, the Pre-Trial Chamber's suggestion that "most" of the identified incidents occurred in the "early" part of the period from 2005 to 2015 was un-nuanced and led to a serious misunderstanding. It gave disproportionate weight to just one of the three major potential lines of inquiry in the investigation. For example, contrary to the strong implication of the Decision:

- 46 of 75 identified incidents (61%) attributed to the Taliban and other anti-government armed groups occurred in the *later* part of this period (*i.e.*, on or after 1 July 2010);[256] *and*

- 31 of 50 identified incidents (62%) attributed to Afghan government forces also occurred in this *later* period (*i.e.*, on or after 1 July 2010),[257] while the timing of a further 17 of the remaining incidents (34%) simply could not be determined at this stage;[258] indeed, there is only a reasonable basis to believe that 2 incidents (4%) occurred in the "early" period identified by the Pre-Trial Chamber;[259] *but*

- only 10 of 78 incidents (13%) attributed to United States forces occurred in this later period (*i.e.*, on or after 1 July 2010), in the sense of 10 of 54 incidents attributed to the United States armed forces[260] and 0 of 24 incidents attributed to the CIA.[261]

119. This information thus illustrates that the Pre-Trial Chamber's understanding of the passage of time appears to have been distorted by the relatively early occurrence of the allegations underlying just *one* of the three potential lines of inquiry (concerning the activities of United States personnel) which might be pursued in any authorised investigation. While the preponderance of identified incidents relevant to a 'United States' line of inquiry did indeed occur before mid-2010, the majority of identified incidents relevant to the 'Taliban and others' and 'Afghan government' lines of inquiry occurred *after* mid-2010. Nor in any

[256] *See* Request Annex 2A (*Ex Parte*), #12 to #28, #30 to #34, #38 to #41, #45 to #50, #54 to #58, #65, #68 to #75.
[257] *See* Request Annex 2B (*Ex Parte*), #1 to #10, #12, #17 to #19, #21 to #23, #32 to #34, #36 to #41, #43 to #44, #46, #48 to #49.
[258] *See* Request Annex 2B (*Ex Parte*), #13 to #16, #24 to #31, #35, #42, #45, #47, #50.
[259] *See* Request Annex 2B (*Ex Parte*), #11, #20.
[260] *See* Request Annex 2C (*Ex Parte*), #14, #25, #37 to #39, #42, #44, #52 to #54.
[261] As previously noted, the Pre-Trial Chamber erroneously excluded from consideration 23 of the 24 identified incidents attributed to the CIA: *see above* paras. 94-110. In any event, however, none of these incidents is alleged to have continued until after 1 July 2010: *see* Request Annex 2C (*Ex Parte*), #55 to #78.

event is there any investigative significance to mid-2010 as such, except to the extent that this was apparently selected by the Pre-Trial Chamber as a means of dividing 'early' from 'later' allegations.

120. Consequently, the Pre-Trial Chamber's assessment of the time elapsed since the alleged crimes was mistaken with regard to two of the three major lines of inquiry to be pursued in any investigation, which it erroneously treated as a unity.[262] Nor was there any reasonable basis to ascribe such prominence to just one of the three potential major lines of inquiry. For example, at least in numerical terms, the 'United States' line of inquiry—which was tacitly emphasised by the Pre-Trial Chamber—does not reflect the greatest scale of victimisation.[263] Nor does it reflect the greatest variety of alleged offences,[264] nor apparently the most prolonged period of criminality.[265] Thus, not only was it unreasonable and improper for the Pre-Trial Chamber to tacitly exclude two of the three major lines of inquiry from its analysis at all, but in any event there was no obvious legal basis for why it focused on one line of inquiry of apparently lesser scope (based on the information currently available) than others.

121. Furthermore, these considerations not only materially affect the Pre-Trial Chamber's conclusion about the passage of time *per se*, but also its assessment of the prospects for State cooperation and access to evidence and suspects,[266] which it expressly associated with the passage of time.[267]

122. Finally, and in any event, the Pre-Trial Chamber's view that significant time has elapsed since the commission of the alleged crimes and the start of an investigation is also intrinsically linked to its erroneous view of the scope of that investigation—and specifically its view that the investigation could *not* encompass any incident occurring after the date of the Request. For the reasons previously described, this was incorrect, and indeed obviously inconsistent with the established practice of the Court in authorising the investigation of new

[262] *See* Decision, para. 96 (concluding without further nuance that "the prospects for a successful investigation and prosecution [are] extremely limited"); Separate Opinion, para. 31.
[263] *See e.g.* Request, paras. 93-94 (noting that, in the period from 2009 to 2016, UNAMA documented over 50,000 civilian casualties which were attributed to the Taliban and other anti-government elements, including 6,994 in 2016 alone). *See also* Decision, paras. 84-85 (distinguishing the crimes allegedly committed by the Taliban and other anti-government groups by their "devastating and unfinished systematic consequences").
[264] *See e.g.* Request, para. 4 (submitting that "there is a reasonable basis to believe that members of the Taliban and affiliated armed groups are responsible for […] crimes against humanity and war crimes", and that members of the Afghan National Security Forces and United States government personnel are responsible for war crimes).
[265] *See e.g.* Decision, para. 84 (referring to "brutal violence inflicted upon civilians and other protected persons in Afghanistan" by members of the Taliban and other anti-government groups "for a prolonged period of time").
[266] *See below* paras. 123-129 (on State cooperation), 130-138 (on access to evidence).
[267] *See above* para. 112.

crimes committed within a situation.[268] If the Pre-Trial Chamber had not made this error, then necessarily it would have given significant weight to the Prosecution's warning that "the situation in Afghanistan is one in which crimes allegedly continue to be committed on a near daily basis, by a wide range of armed actors, including some newly emerging entities, both in support of and against the [Afghan] Government",[269] and thus recognised that the authorised investigation could well address alleged crimes which have very recently occurred.[270]

II.B.4. The Pre-Trial Chamber erred in pre-judging or speculating about the prospects for State cooperation

123. Likewise, again within the framework of its unduly restrictive appreciation of the scope of any authorised investigation,[271] as well as its misapprehension as to the time elapsed since most of the incidents related to the three major lines of inquiry,[272] the Pre-Trial Chamber also considered the "scarce cooperation" obtained during the preliminary examination to be a "particularly relevant" factor in assessing the interests of justice.[273] Most relevantly, it stated:

> [S]ubsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted. Indeed, the Prosecution acknowledges the difficulties in securing albeit minimal cooperation from the relevant authorities as one of the reasons explaining the unusual duration of the preliminary examination. The Chamber has noted the Prosecution's submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems

[268] *See e.g.* *Côte d'Ivoire* Decision, paras. 179, 212; *Georgia* Decision, para. 64; *Burundi* Decision, paras. 192-193. *See also above* para. 88.
[269] Request, para. 38. *See also* para. 25 (referring to "information on alleged crimes that continue to be reported on a nearly daily basis").
[270] *See e.g.* UNAMA 2019 Press Statement ("[m]ore civilians were killed in the Afghan conflict [in 2018] than at any time since have been kept"). *See also above* fn. 263.
[271] *See above* paras. 73-110.
[272] *See above* paras. 118-121.
[273] Decision, para. 91.

> reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper.[274]

124. The Pre-Trial Chamber's conclusions in this respect were, however, unreasonable, and could not have been reached by any reasonable chamber. In particular, the Pre-Trial Chamber appears to have erroneously considered the prospects for State cooperation with reference to just one of three major potential lines of inquiry, and in any event to have incorrectly confused the cooperation regime for preliminary examinations with that applicable to investigations. In this context, it appears to have given disproportionate weight to the difficulty in forecasting changes in State policies, and to have given insufficient weight to the legal framework for State cooperation. It also seems to misunderstand those submissions of the Prosecution on which it purported to rely.

125. First, the Pre-Trial Chamber's reference to the "political landscape" of Afghanistan and "key States", which are "both parties and non-parties to the Statute" is vague, and tends to suggest some confusion about the relevance of the cooperation of certain un-named States. In particular, while the available information obviously suggests that the cooperation of *one* State which is not a party to the Statute (the United States) is likely to be desirable in any investigation—although not indispensable—the Prosecution cannot discern which (if any) other non-parties the Pre-Trial Chamber seemed to take into account. By contrast, with regard to States Parties, in addition to Afghanistan, the available information suggests that the cooperation of Lithuania, Poland, and Romania may also be desirable in some respects. But to the extent the Pre-Trial Chamber seemed to consider that *all aspects* of any investigation of this situation would significantly depend upon the consideration of States not party to the Statute,[275] this is mistaken. Again, as previously observed,[276] the Pre-Trial Chamber seems to have overlooked two of three major potential lines of inquiry—and these do not (at this stage) suggest any particular requirement for the cooperation of States not party to the Statute.

126. Second, in any event, the Pre-Trial Chamber also overlooked that the degree of cooperation provided by States Parties to the Statute during the course of a preliminary examination is *not* a straightforward guide to the degree of cooperation which may be anticipated during an investigation. Notably, States Parties do not have cooperation

[274] Decision, para. 94.
[275] *See e.g.* Decision, para. 96.
[276] *See above* paras. 118-121.

obligations under the Statute prior to the opening of an investigation.[277] But *subsequently*, once an investigation has been opened, they do have international legal obligations to cooperate in the manner set out in Part 9 of the Statute, including in the gathering of evidence and in the arrest of suspects. There is simply no evidentiary basis for the Pre-Trial Chamber to assume that States Parties would choose to breach binding legal obligations of this kind; indeed, to the contrary, it must be assumed that States Parties will *fulfil* their obligations in good faith.[278] Moreover, in those rare circumstances in which a State Party chooses not to cooperate in accordance with its legal obligations, the Statute provides for a procedural scheme in which the State Party and the Court may themselves attempt to resolve any material obstacles, or otherwise for the Court to refer the matter to the Assembly of States Parties with a view to its facilitation of a constructive resolution.[279] Moreover, even to the extent that State cooperation is governed exclusively by State policy, the momentum of an investigation may lead to circumstances in which the policy costs associated with non-cooperation simply become too high.[280] Accordingly, no reasonable Pre-Trial Chamber could properly treat the degree of cooperation afforded during a preliminary examination as determining, in and of itself, the nature or degree of cooperation to be expected from a State Party during an investigation. The same evolution over time may also be true, although for somewhat different reasons, concerning the cooperation of States which are not Parties to the Statute.

127. Third, the reasoning of the Pre-Trial Chamber is internally inconsistent, and erroneously presupposes that—even if it were legally necessary to forecast State cooperation prior to opening an investigation[281]—the showing in this situation was insufficient. Thus, on the one hand, the Pre-Trial Chamber acknowledged that the "complexity and volatility" of the political climate makes it "extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future"—but then, in an apparent *non sequitur*, it suggested that "nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted".[282] The first of these observations recognises, perhaps

[277] *Burundi* Decision, para. 15 ("States Parties are not obliged to cooperate with the Court prior to the initiation of an investigation", even though the Prosecutor and the Court may seek their "voluntary cooperation").
[278] *See e.g.* Shaw, p. 655 (noting that the principle *pacta sunt servanda* "underlies every international agreement"—such as the Statute—"for, in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other").
[279] *See Bashir* Appeal Decision, para. 183; *Bashir* Appeal Decision, Joint Dissenting Opinion of Judges Ibáñez Carranza and Bossa, paras. 196-199.
[280] *See* Akande and De Souza Dias. *See also e.g.* Rastan (2009), pp. 167-168.
[281] *But see above* paras. 12-59 (error in requiring a positive assessment of the interests of justice).
[282] Decision, para. 94.

astutely, that the vagaries of the political climate make an *ex ante* assessment of the future *political* appetite for cooperation with the Court very difficult. But this contradicts the Pre-Trial Chamber's apparent implication that the prospects of such cooperation must thus be assumed to be *poor*. To the contrary, the only conclusion is that such prospects cannot be meaningfully assessed—which is precisely why the drafters of the Statute did not think it sufficient to leave the question of cooperation with the Court merely as a matter of State *policy*, but instead established it as a *legal* obligation for States Parties. The Pre-Trial Chamber thus erred by apparently giving disproportionate weight to political considerations with regard to the future cooperation of States Parties—which it even acknowledged that it was not in a position to assess—and by giving insufficient or any weight to the legal considerations pertaining to the future cooperation of States Parties.

128. Finally, the Pre-Trial Chamber misinterpreted or took out of context the Prosecution's own submissions concerning the nature and degree of cooperation provided during the preliminary examination of this situation. While it is true that the Prosecution reported that it had received "limited or reluctant cooperation from many stakeholders" during the preliminary examination,[283] it also stated that it "took several steps over the years to overcome such challenges."[284] Such cooperation also improved over time in some respects.[285] At no point did it conclude or suggest that any particular course of action had proved to be absolutely "unfeasible".[286] The Pre-Trial Chamber's apparent misunderstanding in this respect was further exacerbated by its erroneous decision not to seek specific additional information or submissions from the Prosecutor, once it identified concerns with regard to the assessment of the interests of justice.[287] In these circumstances, therefore, no reasonable Pre-Trial Chamber could have understood from the Prosecution's submissions that any difficulties in State cooperation made any aspect of the conduct of the preliminary examination impossible. To the contrary, the very existence of the Request demonstrated that it *had* been possible to complete the preliminary examination, notwithstanding the challenges which it had proved necessary to overcome.

[283] Request, para. 24. *See also* paras. 26 (referring to "the limited scope for cooperation"), 27 (noting that the complementarity assessment was "hampered" by the "limited information" made available, but that the Afghan authorities had ultimately submitted "additional information"), 330 (referring to a reported lack of cooperation by the United States authorities in an investigation by Polish authorities).
[284] Request, para. 25.
[285] *See e.g.* Request, para. 329 (fn. 549: noting responses from Lithuania, Poland, and Romania in 2015-2017).
[286] *Contra* Decision, para. 94.
[287] *See above* paras. 37-38, 64-68. *See also* *Amicus Curiae* Declaration 4 (Confidential), para. 36.

129. These various misapprehensions, individually and cumulatively, materially affected the Pre-Trial Chamber's conclusion as to the prospects for State cooperation in the conduct of any authorised investigation.[288]

II.B.5. The Pre-Trial Chamber erred in pre-judging or speculating about the prospects for securing relevant evidence and apprehending any identified suspects

130. Similarly—and again within the framework of its unduly restrictive appreciation of the scope of any authorised investigation,[289] its misapprehensions as to the time elapsed since most of the incidents related to the three potential major lines of inquiry,[290] and the prospects for material State cooperation[291]—the Pre-Trial Chamber considered the "likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage" to be "particularly relevant" to its assessment of the interests of justice.[292] It understood the Prosecution to have "admi[tted]" that it was not "in a position to meaningfully act" during the period from 2005 to 2015 "for the purposes of preserving evidence, or for the protection of witnesses", and that in any event "no request was filed under article 57(3)(c) of the Statute and rule 47" during the preliminary examination "in order to preserve evidence."[293] In the Pre-Trial Chamber's view, "[t]he very availability of evidence for crimes dating back so long in time"—specifically, at the earliest, to 2005—"is also far from being likely."[294]

131. However, the Pre-Trial Chamber's view of the prospects for securing relevant evidence and apprehending any identified suspects was, again, unreasonable, and could not have been reached by any reasonable chamber. The Pre-Trial Chamber's conclusion was materially affected by its error in appreciating the time which has elapsed since the commission of the alleged crimes relevant to two of the three potential major lines of inquiry.[295] It also impermissibly took into account irrelevant considerations such as the use or otherwise of particular procedural mechanisms under the Statute. More generally, its assessment of the degree to which evidence may have been degraded or otherwise become unavailable does not seem to have been based on any concrete information or submission, but rather to reflect the

[288] *See* Decision, para. 96.
[289] *See above* paras. 73-110.
[290] *See above* paras. 118-121.
[291] *See above* paras. 123-129.
[292] Decision, para. 91.
[293] Decision, para. 93.
[294] Decision, para. 93.
[295] *See above* paras. 118-121.

Pre-Trial Chamber's own subjective prognostication. Similarly, its view that "potential relevant suspects" may no longer be "within reach" appears to be unsubstantiated, and simply to reflect a potentially confusing 'double-counting' of the concern it had otherwise expressed—and erroneously—about the prospects for State cooperation.[296]

132. First, as identified in previous paragraphs, the Pre-Trial Chamber gave disproportionate weight to the timing of the identified incidents relevant to one potential line of inquiry (concerning the alleged activities of United States personnel), and appears to have overlooked the more recent occurrence of identified incidents (and other potential crimes, including ongoing crimes) relevant to the other two potential major lines of inquiry (concerning the alleged activities of members of the Taliban and associated armed groups, and agents of the Afghan government).[297] While the Pre-Trial Chamber seemed to have reasoned on the basis that the majority of incidents material to these latter lines of inquiry occurred before 2010, they in fact occurred *after* 2010.[298] Thus, even if it is assumed (as the Pre-Trial Chamber did) that the passage of time increases the likelihood that evidence will become unavailable, the Pre-Trial Chamber's analysis rested on a faulty premise. Many of the relevant crimes, and thus the relevant evidence, were allegedly committed much more recently than it assumed, and consequently there was no basis to consider that the success of the investigation as a whole was necessarily in doubt.[299]

133. Second, the Pre-Trial Chamber's reference to the use or otherwise of measures under article 57(3)(c) and rule 47 is irrelevant, and cannot justify its conclusion. As another Pre-Trial Chamber recently clarified, article 15(2) provides that the Prosecutor "*may*" receive written or oral testimony at the seat of the Court (emphasis added).[300] It is this discretionary power which is implemented in rule 47(2)—which also provides that the Prosecutor "*may*" request the Pre-Trial Chamber to take measures "to ensure the efficiency and integrity of the proceedings", provided that these are consistent with the "voluntary cooperation" regime applicable at the pre-investigation stage.[301] Similar principles must likewise apply to any

[296] *See above* paras. 123-129.
[297] *See above* paras. 118-121.
[298] *See above* fns. 256-261.
[299] *See* Decision, para. 96
[300] *Burundi* Decision, para. 15.
[301] *Burundi* Decision, para. 15.

measures which might be requested by the Prosecutor from the Pre-Trial Chamber under article 57(3)(c).[302]

134. It follows from this that the Prosecutor's request of such procedural measures is an absolute *discretion,* as the permissive language of the Statute and the Rules illustrates. She has no duty to give reasons, or to account to any person, as to the manner in which she exercised that discretion. As such, her decision *not* to exercise such a discretion in any particular circumstances may not be held against her, and especially not at such times as the Pre-Trial Chamber may come to consider her position under articles 15(4) and 53(1)(c) of the Statute.

135. Indeed, to consider that such procedural applications might be implicitly required by the Pre-Trial Chamber, as a showing of the Prosecutor's good faith belief that evidence will be obtained during any authorised investigation, is both illogical and counter-productive. Since the Pre-Trial Chamber will never be in a position to know *why* the Prosecutor has not made such an application, it cannot interpret the significance of this position—which might simply be because the Prosecutor did not consider that it was justified or required, or that she had put in place alternative measures consistent with the Statute through means of voluntary cooperation, or that she did not consider that it would be effective in the circumstances. Likewise, it is inconsistent with the principle of judicial economy to suggest that the Prosecutor should make such procedural applications without a good faith belief as to their feasibility or necessity, simply in order to ensure that the Pre-Trial Chamber will take her future submissions on unrelated matters in good faith.

136. In the concrete circumstances of this situation, and for the avoidance of doubt, the Prosecution emphasises that it made no express or implied submission at all to the Pre-Trial Chamber concerning the potential availability of evidence which might be relevant and probative of the crimes identified in the Request. Again, to the extent that the Pre-Trial Chamber entertained any doubt in this respect, it could have resolved such a doubt by seeking further information or submissions from the Prosecution. It failed to do so.[303]

[302] By analogy, *mutatis mutandis*, *see* Statute, art. 57(3)(a) ("[a]t the request of the Prosecutor", the Pre-Trial Chamber may "issue such orders and warrants as may be required" for the purpose of investigation).
[303] *See above* paras. 64-68. *See also* Certification Decision, para. 24 (referring to the Prosecutor's "exclusive responsibility when it comes to assess the feasibility of investigations").

137. Third, there is simply no basis at all—either in the record, the law, or the customary practice of international criminal courts and tribunals—for the Pre-Trial Chamber's view that it is "far from being likely" that evidence would remain available concerning those alleged crimes which were committed (at most, and for the sake of argument) some 16 years ago. Nothing in the Request supports this conclusion, nor is it supported by international law or practice. Indeed, to the contrary, documentary and testimonial evidence relevant to at least some of the potential lines of inquiry has in fact only come to light in recent years.[304] Furthermore, both international courts and tribunals and domestic jurisdictions have frequently not only investigated alleged crimes after a much greater lapse of time, but also initiated prosecutions and obtained convictions. The practice of the ECCC offers just one such example.[305] Likewise, the Pre-Trial Chamber's unexplained suggestion that "potential relevant suspects" might no longer be "within reach" appears simply to reflect a reiteration of its (erroneous) concern about the prospects of State cooperation, and not to suggest that such suspects may not exist. To the contrary, as the Prosecution indicated in the Request, such persons can already be identified on a preliminary basis, subject to the outcome of any authorised investigation.[306] There is no reasonable basis to believe that all such persons have deceased, or may be expected to do so within a material time.

138. These various misapprehensions, individually and cumulatively, materially affected the Pre-Trial Chamber's conclusion as to the prospects for securing relevant evidence and suspects in the conduct of any authorised investigation.[307]

II.C. The Pre-Trial Chamber took into account factors which it could not permissibly take into account

139. The Appeals Chamber has confirmed that a chamber may abuse its discretion by giving "weight" in its decision-making to "extraneous or irrelevant considerations".[308] As previously explained, the Prosecution does not agree that articles 15(4) and 53(1)(c) permit or require a positive assessment of the interests of justice at all.[309] However, even accepting this, and further accepting for the sake of argument that factors relating to the basic feasibility of the

[304] *See e.g.* Request, para. 25.
[305] *See above* para. 114. *See e.g.* *Case 002/01* Appeal Judgment, para. 2, Disposition (affirming, in 2016, convictions for conduct between 17 April 1975 and the end of 1977); *Case 001* Appeal Judgment, paras. 2, 7, Disposition (affirming, in 2012, convictions for conduct between October 1975 and 6 January 1979).
[306] *See e.g.* Request, paras. 338, 345, 353. *See further* Request Annex 3A (*Ex Parte*); Request Annex 3B (*Ex Parte*); Request Annex 3C (*Ex Parte*).
[307] *See* Decision, para. 96.
[308] *See above* para. 61.
[309] *See above* paras. 12-59.

proposed investigation could in principle have some relevance, the previous paragraphs have demonstrated that these will be very difficult to forecast in the abstract, and hence merit little or no weight.[310]

140. By contrast, however, certain other factors will never be permissible for the Pre-Trial Chamber to take into account, such as factors which trespass into matters reserved by the Statute for the Prosecutor's independent exercise of discretion. These include questions related to the management and administration of the Office of the Prosecutor, including its staff, facilities, and resources.

II.C.1. The allocation of the Prosecutor's resources is a matter of her independent and exclusive assessment and determination

141. While the Pre-Trial Chamber did not initially identify resource considerations as being "particularly relevant" to its assessment under article 53(1)(c),[311] this factor was nevertheless plainly taken into account in its reasoning, and must be considered to have materially affected its ultimate determination.[312] Thus, the Pre-Trial Chamber concluded its reasoning on the interests of justice by "not[ing]" that:

> in light of the nature of the crimes and the context where they are alleged to have occurred, pursuing an investigation would inevitably require a significant amount of resources. In the foreseeable absence of additional resources for the coming years in the Court's budget, authorising the investigation would therefore result in the Prosecution having to reallocate its financial and human resources; in light of the limited amount of such resources, this will go to the detriment of other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice, possibly compromising their chances of success.[313]

142. In this sense, the Pre-Trial Chamber appears not only to have taken into account its own view whether the requested investigation would be a suitable or appropriate use of the limited

[310] By contrast, such questions may well be relevant to the Prosecutor in her discretionary decisions concerning the selection and prioritisation of cases, especially in the context of prioritisation—which is entirely a matter of prosecutorial discretion: *see* OTP Case Selection and Prioritisation Policy, paras. 49, 51.
[311] *See* Decision, para. 91. *See above* paras. 71, 111, 123, 130.
[312] *See also* Separate Opinion, paras. 32, 48.
[313] Decision, para. 95. *See also* para. 88 (apparently referring to the "organisational and financial sustainability" of the Court as a factor which might be relevant to the Pre-Trial Chamber's discharge of its functions under article 15(4)).

resources available to the Prosecutor, based on its own appreciation of the requested investigation,[314] but also to have attempted to make some kind of comparative assessment with other situations under consideration by the Prosecutor. This was *ultra vires*, since the management and administration of the Prosecutor's resources is exclusively a matter for the Prosecutor. It was also impermissibly speculative, since the Pre-Trial Chamber was neither entitled to nor had access to any of the available information concerning such internal matters. Furthermore, even if the Pre-Trial Chamber was entitled to take into account considerations regarding the Prosecutor's internal allocation of resources, it is yet to be settled whether resource considerations can *ever* be validly taken into account for the purpose of article 53(1).[315]

143. Article 42(2) of the Statute provides that "[t]he Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof", in the context of the cardinal principle in article 42(1) that "[t]he Office of the Prosecutor shall act independently as a separate organ of the Court." The purpose of these provisions, relevantly, "is to ensure that *the Prosecutor* can control the use of the resources of the Office as required by its statutory activities".[316] While some "management oversight" of the Prosecutor's administrative activities may be exercised, this function is assigned exclusively to the Assembly of States Parties[317]—and even States in that context have been advised to "exercise caution […] in the use of budgetary powers, control of extra-budgetary resources or oversight mechanisms" insofar as they touch on the Prosecutor's independent statutory functions.[318]

144. It follows from these principles that Pre-Trial Chambers must refrain from direct attempts to determine how the Prosecutor manages and administers her resources.[319] While it may of course act within its various statutory competences (and such acts may well have resource implications), it may not, for example, simply require the Prosecutor to increase the

[314] *But see above* paras. 73-93 (concerning the scope of the investigation), 94-110 (concerning the nexus to the armed conflict), 111-122 (concerning the timing of the identified incidents), 123-129 (concerning the prospects of State cooperation), 130-138 (concerning the availability of evidence and suspects).
[315] *See e.g.* Cross, pp. 235-236, 240- 241 (noting that, while "the Statute does not expressly allow for the resource implications of a new investigation to be taken into account in the Prosecutor's Article 53 determination", the standard of proof in article 53(1) serves to prevent the opening of investigations on "a purely speculative basis", and that the Prosecutor's discretion in controlling the process of preliminary examinations might be exercised in the context, among other factors, of her control over her resources). *See also below* fn. 321.
[316] Bergsmo *et al* (2016a), p. 1271 (mn. 12, emphasis added).
[317] Statute, art. 112(2)(b).
[318] Bergsmo *et al* (2016a), p. 1272 (mn. 13).
[319] *See also* *Kenya* Investigation Decision, para. 13; *Sudan* Decision, para. 12; *above* fn. 47.

resources allocated to a particular investigation, or indeed to reduce them.[320] Rather, it must accept that she has made such determinations in good faith in the exercise of her absolute discretion.[321]

145. If this is accepted, as it must be, then likewise the Pre-Trial Chamber may not—to any degree—condition its determination whether to authorise an investigation on its own view as to whether this would be an appropriate use of the Prosecutor's resources. This would effectively defeat the Prosecutor's resource management discretion. By requesting authorisation to investigate, the Prosecutor has already indicated her intention to allocate resources to that investigation—and, indeed, has already employed resources to put herself in a position to make that request. While the Pre-Trial Chamber may naturally decline to grant that request, it must do so for objective reasons independent of the question of resources. Consequently, it may not permissibly take questions of the allocation of the Prosecutor's resources into account for the purpose of article 53(1)(c).

146. This same principle is recognised even beyond the context of the Statute, where it has been affirmed that it "is the job of the Prosecutor [to] calibrate legal and policy considerations in making her choices on how to utilise limited resources", and that for judges to entertain such matters would be to enter into "strange and uncharted terrain".[322]

147. The importance of this principle is readily illustrated by the obvious difficulties faced by the Pre-Trial Chamber in attempting to take questions of the Prosecutor's resources into account. Such an exercise will always be highly speculative. For example, without knowing how the Prosecutor may intend to conduct any authorised investigation—including such factors as case selection, prioritisation, and sequencing, which it is not competent to review[323]—the Pre-Trial Chamber could not make any assessment of the resources which might be needed for this concrete situation. Nor did the Pre-Trial Chamber have any

[320] This proposition is not only important as a matter of principle, but also practicality and judicial comity. Since the Prosecutor is a party to multiple proceedings before the Court at the same time, the effect of a chamber in one case ordering the Prosecutor to increase the resources for that case may well be to remove resources from a case before *another* chamber, or indeed to divert resources towards prosecutions from investigations—which in turn will lead to a hiatus in court proceedings when those prosecutions finish and new cases are not yet ready to emerge from the 'pipeline'. In order to avoid such difficulties, therefore, one entity—the Prosecutor—must have sole responsibility to balance her resources in order to manage all her obligations appropriately.
[321] Statute, art. 54(1)(b). *See also* OTP Case Selection and Prioritisation Policy, para. 49 (setting out the Prosecutor's view that, in accordance with her duty under article 54(1)(b) of the Statute to ensure effective investigations and prosecutions, she will prioritise cases and situations taking into account "the practical realities faced by the Office"); *below* fn. 328.
[322] *Jelišić* Appeal Judgment, Partly Dissenting Opinion of Judge Wald, para. 14. *See also* Webb, p. 341.
[323] *See above* fn. 319.

information as to the resources available to the Prosecutor, including the extent to which they may be assigned to other ongoing investigations and prosecutions,[324] or the Prosecutor's assessment whether they could or should be diverted towards or away from those other activities (based on the Prosecutor's assessment of factors such as their rate of progress, the gravity of the material allegations, internal determinations concerning prioritisation, and various operational matters). In short, notwithstanding its assertion in the Decision, the Pre-Trial Chamber simply could not have made the comparative assessment that it purported to make.[325]

148. The Pre-Trial Chamber's reference to the "foreseeable absence of additional resources for the coming years"[326] also raises a broader question—even for the Prosecutor—as to whether such questions may *ever* permissibly be taken into account under article 53(1)(c). On its face, such an approach might seem to create a potentially inappropriate link between judicial (or, in the case of the Prosecutor, quasi-judicial determinations) and administrative determinations.[327] While the Prosecutor must of course be a good steward of the resources with which she is entrusted, her statutory duty of independence would seem to imply that ongoing budgetary discussions (which occur regularly, in every calendar year) may not directly affect the opening of investigations in particular situations or the selection of cases for prosecutorial action.[328] If this is so, then the budget to be set for the Prosecutor, and the operational priorities which the Prosecutor sets for herself, must remain distinct considerations. This ensures, for example, that there is no appearance that the Assembly of States Parties may tacitly favour or impede particular investigations or prosecutions by means of its decisions leading to fluctuations in the budget—if the Prosecutor considers it appropriate, she can in her absolute discretion always reallocate her resources to ensure that the higher priority activities proceed. Necessarily, to any extent that the Prosecutor herself

[324] Concretely, the Pre-Trial Chamber appears to have misunderstood the internal structure of the Office of the Prosecutor, insofar as it suggested *inter alia* that opening the requested investigation might divert resources away from ongoing "preliminary examinations": Decision, para. 95. To the contrary, it is the further review of this situation for the purpose of article 15(5)—in essence, a continuation of the preliminary examination—that may divert resources away from other preliminary examinations: *see* Separate Opinion, para. 50.
[325] *Contra* Decision, para. 95.
[326] Decision, para. 95. *See also* Separate Opinion, para. 48.
[327] *But see* Webb, pp. 340-342 (concluding that resource considerations may "be a criterion"—for the *Prosecutor*—"in assessing the 'interests of justice', but it should not be a decisive criterion"). *Cf.* Cross, p. 253 ("pragmatic considerations are not a primary consideration in deciding whether to open or not to open an investigation, unless they rise to the level of a consideration relevant to Article 53(1)(c)").
[328] *But see further* OTP Case Selection and Prioritisation Policy, paras. 12, 49 (noting that the limited resources available to the Prosecution necessarily limits the number of cases it can investigate and prosecute at any one time, but that this calls for a deliberative internal process of case selection and prioritisation).

may not take into account budgetary concerns for the purpose of article 53(1)(c) or more broadly, then *a fortiori* neither may the Pre-Trial Chamber under article 15(4).

149. Accordingly, to any extent that the Pre-Trial Chamber took account of the Prosecutor's allocation of resources, as it appears to have done, this was erroneous and materially affected the Decision. Indeed, even raising the spectre of an impermissible consideration makes it impossible for the Appeals Chamber now to be sure whether or not the Pre-Trial Chamber's reasoning was tainted as a result. The only safe recourse is for the Pre-Trial Chamber's assessment of the interests of justice to be set aside.

II.D. The Pre-Trial Chamber failed to take sufficient account of relevant factors

150. The Appeals Chamber has also affirmed that a chamber may abuse its discretion by failing "to give weight or sufficient weight to relevant considerations".[329] Article 53(1)(c) expressly requires that any assessment of the interests of justice must take into account "the gravity of the crime and the interests of victims". Yet, while the Pre-Trial Chamber briefly acknowledged this legal requirement,[330] it failed in the context of its express reasoning on the interests of justice to make any reference at all to its own findings on the gravity of the identified crimes, and only made limited reference to the interests of victims.[331] In this context, it is submitted, the Pre-Trial Chamber failed to give weight or sufficient weight either to the gravity of the identified crimes or to the interests of victims.

II.D.1. The gravity of the crimes favours an investigation

151. Having decided—erroneously[332]—that it must make a positive assessment of the interests of justice, the Pre-Trial Chamber failed to give any or sufficient consideration to the gravity of the identified crimes, which was a relevant factor. Again, this materially affected its exercise of discretion, leading it to reach a conclusion that no reasonable chamber could have reached.

152. Earlier in the Decision, the Pre-Trial Chamber had readily acknowledged the very significant gravity of the alleged crimes, including their "devastating and unfinished systematic consequences", the "brutal violence", the "prolonged period" of their commission, the aim to "instil[] fear" and to subjugate the wider population, the recurrent targeting of

[329] *See above* para. 61.
[330] Decision, para. 87.
[331] *See* Decision, paras. 87-96.
[332] *See above* paras. 12-59.

"women", the "very young", and the "vulnerable", and the commission of some of the identified crimes by public officials in the course of their functions.[333] The Pre-Trial Chamber had also agreed that the information available disclosed multiple potential cases reaching the necessary standard.[334] Yet it subsequently made no reference to any of these considerations when it assessed the interests of justice under article 53(1)(c).

153. For an investigation to be opened at all, article 53(1)(b) requires the identification of at least *one* potential case of sufficient gravity arising from the situation.[335] Ordinarily, once this threshold is met, the "strong presumption" is established that opening an investigation will be in the interests of justice, for the purpose of article 53(1)(c),[336] such that no further substantive explanation may be necessary. However, exceptionally, even if the Prosecutor has identified a specific circumstance which might militate against opening an investigation,[337] the *greater the degree* of gravity indicated by the available information will weigh *more strongly* in favour of opening an investigation, notwithstanding the countervailing consideration identified.

154. In other words, while the concept of gravity is a 'threshold' for the purpose of article 53(1)(b), it becomes a question of 'degree' in those exceptional circumstances where the Prosecutor considers it is necessary to give express reasoning concerning her assessment under article 53(1)(c).[338]

155. Correspondingly, the Pre-Trial Chamber's own findings of sufficient gravity for the purpose of admissibility—which plainly surpassed the article 53(1)(b) requirement—should then have been expressly taken into account in its assessment of the interests of justice. But they were not. It is not sufficient simply that the Pre-Trial Chamber might be presumed to have been aware of its own previous findings—what was required was a specific and concrete weighing of those findings in light of the particular countervailing concerns that troubled the Pre-Trial Chamber, with a view to ascertaining where the interests of justice really lay.

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[333] Decision, paras. 84-85. *See also* paras. 81-83 (recalling relevant additional submissions by the Prosecution)
[334] Decision, para. 86 (referring to "'categories' of crimes for which the Prosecution requests authorisation to investigate"). The Prosecution understands by this that the Pre-Trial Chamber referred at least to each of the three potential major lines of inquiry (*i.e.*, relating to identified crimes committed by the Taliban and other anti-government groups, agents of the Afghan government, and United States personnel).
[335] *See e.g. Kenya* Decision, para. 48.
[336] OTP Interests of Justice Policy, p. 5.
[337] *See above* para. 28, 37.
[338] *Compare also* Statute, art. 17(1)(d) ("sufficient gravity"), *with* art. 53(1)(c) ("gravity").

156. The only conclusion that can be drawn from the unexplained contradictions between the Pre-Trial Chamber's own findings as to the gravity of the identified crimes, and the concerns that it purported to identify in assessing the interests of justice, is that it failed to give any or sufficient weight to the gravity of the crimes in that interests of justice assessment. Since such consideration is legally required by article 53(1)(c), the Pre-Trial Chamber abused its discretion, materially affecting its conclusions.

II.D.2. The interests of victims favour an investigation

157. Likewise, the Pre-Trial Chamber failed to properly identify and give sufficient weight to the interests of the victims in its assessment of the interests of justice. This, too, materially affected its exercise of discretion, leading it to reach an overall conclusion which no reasonable chamber could have reached.

158. Consistent with the Prosecution's own findings,[339] the Pre-Trial Chamber recognised that "680 out of the 699 applications [from victims wishing to participate in the Court's proceedings]"—approximately 97%—"welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth."[340] Absent any self-evident or ostensible concern that an investigation would *not* serve the interests of justice, it was not necessary to engage further with this issue, [341] since "the interests of victims will generally weigh in favour" of investigation or prosecution.[342] However, to any extent that more substantive reasoning *was* required, the Pre-Trial Chamber was at least obliged to proceed with due caution, since "understanding the interests of victims" is nevertheless "a very complex matter".[343] It failed to do so.

159. Based on its concerns about the prospects for "a successful investigation", the Pre-Trial Chamber stated that:

> [I]t is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it. It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role […] as participants in the

[339] *See* Request, paras. 365-371.
[340] Decision, para. 87.
[341] *See above* paras. 27, 37.
[342] OTP Interests of Justice Policy, p. 5. *See also* Akande and De Souza Dias; Webb, pp. 329-330.
[343] OTP Interests of Justice Policy, p. 5. *See also* HRW Policy Paper, p. 20.

> relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.[344]

160. In this way, the Pre-Trial Chamber seemed to understand that an investigation was *not* in the interests of the victims, notwithstanding their subjective views, because it considered that the Court simply could not meet their expectations. No reasonable chamber could have reached this conclusion. In particular, the Pre-Trial Chamber misunderstood or overlooked the variety of ways in which victims can play a role in or otherwise benefit from the Court's proceedings, and conflated the victims' interests with its view of the Court's own institutional interest. Furthermore, it again failed to weigh the victims' apparent support for all three potential major lines of inquiry against the Pre-Trial Chamber's own concerns, which appear to relate primarily to one potential line of inquiry.

161. First, while the Pre-Trial Chamber was correct that only victims of "specific cases brought before the Court" may be "participants" in judicial proceedings *related to those cases*, it failed to address (much less give any weight to) the *additional* ways in which victims may benefit from the initiation of an investigation at the Court. In particular, it was erroneous to assume that the victims' desire for an independent and impartial investigation can necessarily be reduced solely to a desire to see one or more subsequent prosecutions resulting in a conviction. Indeed, as the Pre-Trial Chamber itself recognised, while victims expressed a wish to see "culprits" brought to justice, they also wished to see the prevention of further crimes and the establishment of the truth.[345] While the Prosecution of course seeks to bring appropriate cases to trial, these latter objectives may potentially be advanced even by an investigation which does *not* result in any conviction before the Court. For example, an ICC investigation may present opportunity for coordination with relevant national proceedings, including by information sharing (consistent with confidentiality obligations), and may even stimulate or incentivise the continuation of those proceedings.[346] Likewise, active ICC

[344] Decision, para. 96.
[345] Decision, para. 87. *See further* *Amicus Curiae* Declaration 1 (Confidential), paras. 24-25; *Amicus Curiae* Declaration 2 (Confidential), para. 10; *Amicus Curiae* Declaration 4 (Confidential), paras. 19-23.
[346] *See* OTP Strategic Plan (2019-2021), paras. 48, 50-56. *See also* *Amicus Curiae* Certification Submissions, paras. 16-18; *Amicus Curiae* Declaration 1 (Confidential), paras. 6-7; *Amicus Curiae* Declaration 3

engagement may assist in deterring the further commission of crimes within a volatile political and military climate—a factor which is brought into sharper focus when the scope of any authorised investigation is correctly appreciated.[347]

162. Furthermore, even within the context of victim participation in active judicial proceedings before the Court, the Pre-Trial Chamber's apparent view that the interests of victims are only vindicated by 'successful' ICC prosecutions may also be overly simplistic.[348] Obviously, from the perspective of the Court as a whole—including victims—the objective of any prosecution is the achievement of justice, and not necessarily a conviction. The experience of participating victims in previous cases at the Court seems to suggest that there is at least potential to ensure benefits to victims from their engagement with the Court's proceedings regardless of the outcome;[349] what matters equally, perhaps, may be the *process*.[350] It is not safe to assume, therefore, that any challenges which may arise in securing convictions or even bringing cases to trial will necessarily create "frustration and possibly hostility" among the participating victims.[351]

163. Although not subjectively identified by the victims, the opening of an investigation at the Court also triggers the assistance mandate of the Trust Fund for Victims ("TFV"),[352] which provides some degree of "tangible" help to victims from the outset and even "in the

(Confidential), paras. 37-39, 41; *Amicus Curiae* Declaration 4 (Confidential), paras. 15-17; AI Comments, p. 6 (referring to the "catalytic role" of the Court).

[347] *See above* paras. 73-93.

[348] *See* Decision, para. 96.

[349] *See e.g.* Sehmi, pp. 573 (discussing the *Kenyatta* case, and remarking that while the termination of the case "was seen by some as a humiliating fiasco", "[f[rom the perspective of the victims in the *Kenyatta* case—who did not get their day in court, nor a cent in reparations—their participation presents a more mixed picture"), 590 ("the *Kenyatta* case demonstrates that Article 68(3) of the Statute has the potential to provide restorative justice, no matter the outcome of any particular prosecution").

[350] *See e.g.* Sehmi, p. 579 (suggesting that "experience in the *Kenyatta* case has shown that there are two preconditions for 'meaningful' participation of victims. The first is ensuring consistent communication between the Court and victims, and the second is the implementation of a holistic approach to participation with an emphasis on restoring victims' dignity"). *See further* pp. 583-584 ("Approximately a year after the termination of [the] *Kenyatta* case, the views of victims regarding their participation were, perhaps surprisingly, positive. […] Although legal processes at the ICC and in Kenya did not result in restitution for victims, a significant number still maintain that the process was meaningful for them"), 587 ("The ICC intervention in Kenya, including its victim participation element, paved the way for a multitude of victim-centred initiatives in Kenya"). *See also* *Amicus Curiae* Certification Submissions, para. 12 ("Social psychologists studying the impact of victim participation in hearings have concluded that *the way a case is conducted* and the extent to which victims have a 'voice' are major influences on society's satisfaction that justice was done", emphasis added).

[351] *Contra* Decision, para. 96. *See further* *Amicus Curiae* Declaration 1 (Confidential), paras. 24-25; *Amicus Curiae* Declaration 2 (Confidential), para. 10.

[352] *See* Statute, art. 79; rules 85, 98(5); Regulations of the TFV, para. 50(a). *Contra* Separate Opinion, para. 50 (recognising the importance of the TFV's assistance mandate and seeming to assume that this can be triggered *without* the opening of an investigation).

absence of convictions and reparations orders by the Court."[353] Investigations must of course not be opened purely for this instrumental purpose, and this would be inconsistent with articles 53 and 54 of the Statute. But nor can the importance of the TFV's work be overlooked when assessing the concrete interests of victims in relation to a putative investigation.[354] Indeed, the TFV's assistance mandate reflects the international community's own acknowledgement of the harm which one or more organs of the Court have independently verified—at the article 53(1) standard of proof—to have occurred in a situation country,[355] and its resolve to make some measure of redress for those harms in a concrete and appropriate way.[356]

164. Second, the Pre-Trial Chamber appears to have conflated the interests of the victims with its own view of the institutional interest of the Court. Thus, it expressed its fear that if "victims' expectations" are not met, and consequently they experience "frustration and possibly hostility vis-à-vis the Court", this will "negatively impact its very ability to pursue credibly the objectives it was created to serve."[357] While of course it is reasonable and legitimate for all the organs of the Court to seek to protect its institutional reputation, and to wish to ensure that it lives up to the promise of the Statute, this is not strictly an interest of the victims. To the extent that it is feared that victims may experience frustration, and the negative consequences of that feeling *from their perspective*, this may be a proper consideration within the context of the interests of victims. But to any extent that the Pre-Trial Chamber took into account the negative consequences *for the Court* of any frustration felt by the victims, this was not a material consideration.[358] In any event, the Pre-Trial Chamber's logic would also seem to be flawed, insofar as the approach of the Decision already appears to have created precisely the frustration that the Pre-Trial Chamber expressed a desire to avoid.[359]

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[353] TFV Report (2017), p. 7.
[354] *Cf.* HRW Policy Paper, p. 19.
[355] *See also above* paras. 73-93.
[356] Although reasoning on a somewhat different basis, *see also* *Ruto* Termination Decision, Reasons of Judge Eboe-Osuji, paras. 199, 202-203, 209; *Bemba* Appeal Judgment, Separate Opinion of Judge Eboe-Osuji, para. 1. *See also* *Amicus Curiae* Declaration 1 (Confidential), paras. 26-27.
[357] Decision, para. 96.
[358] To the extent that Judge Mindua seemed to suggest that "preserving the Court's credibility" is, as such, in the interests of victims, this would seem at most to be a minor consideration in the broader assessment of their more concrete concerns: Separate Opinion, para. 53. *See also* AI Comments, p. 9 (suggesting that the reference to the interests of victims in article 53(1)(c) was intended to be "a brake on prosecutorial decisions not to investigate, not a brake on investigations").
[359] Even in the context of the initial procedural litigation relating to this appeal, *see e.g.* OPCV Certification Submissions, para. 53 (reporting that victims and organisations representing victims "unanimously deplore" the

165. Third, the Pre-Trial Chamber failed to consider the interests of the victims in the specific context of the three potential major lines of inquiry arising from its findings under article 53(1)(a) and (b) of the Statute. In particular, even assuming for the sake of argument that its concerns were valid with regard even to one of those potential lines of inquiry, it did not apparently take into account whether the interests of the victims would favour opening an investigation if other lines of inquiry could be more effectively pursued. Rather, it treated all the different potential lines of inquiry as if they were the same, in order to conclude absolutely that "the prospects for a successful investigation and prosecution are extremely limited", and assessed the interests of the victims through this lens. This was incorrect.

166. By all these means, therefore, the Pre-Trial Chamber failed to properly identify and give sufficient weight to the interests of the victims in its assessment of the interests of justice, which materially affected its conclusion.

II.E. The Pre-Trial Chamber's error materially affected the Decision

167. The manifold errors in the Pre-Trial Chamber's assessment of the interests of justice—including its appreciation of the legal scope of the requested investigation (both under the Court's own procedure, and in the scope of its jurisdiction) and of the material distinctions in the three potential major lines of inquiry, and by taking into account irrelevant considerations and failing to take any or sufficient account of relevant considerations—demonstrate that it abused its discretion. It reached a conclusion that no reasonable chamber could have reached. Nor can it be doubted that this materially affected the Decision since, if the Pre-Trial Chamber had not found that there were substantial reasons to believe that an investigation would be contrary to the interests of justice, it would have authorised the opening of an investigation, rather than denying it.

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effect of the Decision, "deeply resent that their quest for justice is being thwarted by the only jurisdiction they trusted would provide them with a remedy", and "have difficulties in understanding whose interests exactly is the Court aiming to serve, since its understanding of the 'interests of justice' is so disconnected from the interests of victims"); *Amicus Curiae* Certification Submissions, paras. 4 (arguing, on behalf of 17 human rights and civil society organisations in Afghanistan that, "if the Court declines investigations or cases because of […] difficulties[,] […] then the disservice done to the Court's mandate and to the victims is even greater than if it were to try and fail"), 8, 12-13 ("Afghan victims and Afghan society already bear general disappointment and resentment against the international community and institutions" and that the "Decision re[i]nforced those sentiments"); *Amicus Curiae* Declaration 1 (Confidential), para. 19; *Amicus Curiae* Declaration 2 (Confidential), paras. 25-28; *Amicus Curiae* Declaration 3 (Confidential), paras. 42-44; *Amicus Curiae* Declaration 4 (Confidential), paras. 40-42.

Conclusion

168. For all the reasons above, the Appeals Chamber should confirm the applicable law as set out herein, and reverse the Pre-Trial Chamber's findings that:

- articles 15(4) and 53(1)(c) of the Statute permit or require the Pre-Trial Chamber to make its own positive assessment of the interests of justice, in determining whether to authorise an investigation; and
- article 15 or anything in the Statute restricts the scope of an authorised investigation to the incidents expressly identified in a request under article 15(3); and
- articles 8 or 12 or anything in the Statute, or in the established framework of international law, precludes the finding of a nexus to the armed conflict in the material circumstances alleged; and, or in any event, that,
- in the concrete circumstances of this situation, there are substantial reasons to believe that an investigation would not serve the interests of justice.

169. Having reversed these findings, and in light of the Pre-Trial Chamber's remaining findings under articles 15(4) and 53(1)(a) and (b) of the Statute, the Appeals Chamber should exercise its power under article 83(2) to enter its own finding confirming the Prosecutor's determination that there are no substantial reasons to believe that an investigation of this situation would not serve the interests of justice. On this basis, it should authorise an investigation, as required by article 15(4) of the Statute, or otherwise remand the matter back to the Pre-Trial Chamber with a direction for it to promptly authorise an investigation.

Fatou Bensouda, Prosecutor

Dated this 30th day of September 2019
At The Hague, The Netherlands