

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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PRE-TRIAL CHAMBER I

Before: Judge Iulia Antoanella Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

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

Public

**Prosecution's response to the 'Victims' request for clarification and an order to
compel the Prosecutor to act on their legal obligations under article 15(3)**

Source: Office of the Prosecutor

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The Office of the Prosecutor

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**Other
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A. INTRODUCTION

1. The Pre-Trial Chamber should dismiss *in limine* the request by Amnesty International, on behalf of victims who are members of the Jire Dole Networks, for an order compelling the Prosecutor to file an application under article 15(3) of the Statute.¹

2. The Applicants lack standing to request such an order because there are presently no judicial proceedings which could give rise to their participation, nor any *proprio motu* power of the Pre-Trial Chamber which they can seek to trigger. Rather, as the Court has affirmed, the Prosecutor's decision whether to file an application under article 15(3)—and when—is to be exercised in his discretion, without review. As set out below, the Prosecutor has not yet determined how to proceed under article 15 in this situation.

3. This does not leave victims without recourse. The Prosecutor continues to receive communications under article 15(1), and greatly values the constructive engagement with victims and civil society.

B. BACKGROUND

4. On 11 December 2020, the former Prosecutor Fatou Bensouda announced her conclusion that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in the *Situation in Nigeria*. On the basis of the facts as they existed at the time, Prosecutor Bensouda concluded that domestic proceedings did not appear to relate to the forms of conduct or categories of persons that would likely form the focus of an investigation by the Court, while noting that this did not foreclose the future possibility of relevant and genuine national proceedings.²

5. Prosecutor Bensouda further emphasised that the Office looked forward to a constructive and collaborative exchange with the Government of Nigeria to determine how justice may best be served under the shared framework of complementary domestic and international action. She noted that she would discuss with the incoming Prosecutor, once elected, the appropriate prioritisation of the Office's workload bearing in mind the relevant

¹ [ICC-ROC46\(3\)-01/24-1-Anx1](#) ("Request"), para. 85. Amnesty International and members of the Jire Dole Networks are referred to as the "Applicants".

² Press Release, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria', 11 December 2020 ("[Prosecutor's Bensouda Statement](#)").

practical constraints and the legitimate expectations of victims, affected communities, and other stakeholders.³

6. After Prosecutor Bensouda’s decision, the Office continued to engage with the national authorities in Nigeria to support relevant national proceedings in line with the principle of complementarity. This included the review of additional information on relevant cases provided by the Nigerian authorities.

7. Since the election of the incumbent Prosecutor, in line with its *Policy on Complementarity and Cooperation*,⁴ the Office has renewed its commitment to supporting domestic accountability efforts in appropriate circumstances, while moving forward with investigations if necessary in the absence of relevant proceedings.⁵ Accordingly, the Office has continued to engage with the Nigerian authorities, as illustrated by the public visits of the Prosecutor in April 2022 and Deputy Prosecutor Niang in March 2024.

C. The Request should be dismissed *in limine*

8. The Request should be dismissed *in limine* because the Applicants lack standing in the absence of any judicial proceedings. Judicial proceedings under article 15 can only be initiated by the Prosecutor, and the Prosecutor has not yet determined how to proceed. Furthermore, since there is no basis to review the Prosecutor’s exercise of discretion in this respect, the Applicants cannot resort to any *proprio motu* power of the Pre-Trial Chamber as an alternative basis for their claim of standing.

I. Absent any judicial proceedings, the Applicants lack standing

9. The Applicants claim standing for the Request based primarily on article 68(3) of the Statute,⁶ which entitles victims to present their views and concerns at stages of the proceedings determined to be appropriate by the Court.

10. However, the participation of legal representatives of victims “can take place *only* within the context of *judicial proceedings*”, meaning “a judicial cause pending *before a*

³ [Prosecutor’s Bensouda Statement](#).

⁴ Office of the Prosecutor, [Policy on Complementarity and Cooperation \(2024\)](#).

⁵ Press Release, ‘[ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria](#),’ 22 April 2022; Press Release, ‘[Statement of the ICC Office of the Prosecutor at the conclusion of Deputy Prosecutor Mame Mandiaye Niang’s official visit to Abuja, Nigeria](#),’ 27 March 2024.

⁶ See [Request](#), paras. 68-75.

Chamber”.⁷ This rule has consistently been applied, including before opening an investigation.⁸ Correspondingly, chambers have rejected the notion of an “automatic right of intervention by any interested entity beyond the scope of the Court’s statutory documents”,⁹ including any “right for victims’ intervention in the proceedings outside the Court’s legal framework”.¹⁰ The existence of discrete mechanisms for victims to submit or receive information, expressly provided in the Court’s legal texts, does not detract from this settled law.¹¹

11. There are currently no judicial proceedings which could give rise to the Applicants’ standing, since the Prosecutor has not filed an article 15(3) request concerning the *Situation in Nigeria*. As indicated by the Prosecutor in April 2022, any “future” decision under article 15 will be based on the dialogue with the Nigerian authorities. Such dialogue remains ongoing in 2024, as illustrated by the visit to Nigeria of Deputy Prosecutor Niang and the absence of any notifications under article 15(6). The current absence of relevant judicial proceedings is further illustrated by the need for the President of the Pre-Trial Division to constitute a chamber specifically to decide on the Request.¹² On this basis alone, the Request should be dismissed.

II. Judicial proceedings under article 15 can only be initiated by the Prosecutor

12. In any event, the sole means by which judicial proceedings under article 15 can be initiated is a request by the Prosecutor under article 15(3). In these circumstances, there is no statutory basis for action by the Pre-Trial Chamber *proprio motu*.¹³

13. Specifically, the Prosecution understands the Applicants to argue that the public statement made by Prosecutor Bensouda in 2020 triggered a legal obligation to request the opening of an investigation under article 15(3).¹⁴ They argue that the Pre-Trial Chamber must have the power to enforce that obligation, and therefore that they have standing to request the exercise of such a power. However, this interpretation is incorrect in two respects—it misinterprets the nature of Prosecutor Bensouda’s statement and the nature of prosecutorial discretion under article 15(3) of the Statute. As a consequence, there is no basis for the

⁷ [ICC-01/04-556 OA5 OA6](#), paras. 45-46, 56 (emphasis added).

⁸ See e.g. [ICC-01/09-24](#), paras 9-16.

⁹ [ICC-01/19-58](#), para. 10.

¹⁰ [ICC-01/13-89](#), para. 21.

¹¹ See e.g. [ICC-01/04-556 OA5 OA6](#), para. 48; [ICC-01/19-58](#), para. 11; [ICC-01/18-2](#), para. 10.

¹² See e.g. [ICC-ROC46\(3\)-01/24-2](#), para. 2 (referring to regulation 46(3), which relates to “[a]ny matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber”).

¹³ *Contra* [Request](#), paras. 73, 76. See also [ICC-01/09-159](#), para. 7; [ICC-01/19-38-Corr](#), para. 22.

¹⁴ See e.g. [Request](#), paras. 9, 23-45.

intervention of the Pre-Trial Chamber or the standing of the Applicants to request such intervention.

14. First, Prosecutor Bensouda’s statement created no legal rights or obligations. In its own terms, it was expressly conditional in nature. Prosecutor Bensouda noted that “we will need to take several strategic and operational decisions on the prioritisation of the Office’s workload” which she would “discuss with the incoming Prosecutor, once elected”. In addition, she qualified her conclusion “as things stand” in light of “the possibility for the authorities to conduct relevant and genuine proceedings”.¹⁵ Consequently, Prosecutor Bensouda did not request the assignment of a Pre-Trial Chamber.

15. Second, even when the article 53(1)(a)-(c) factors—which shall be considered pursuant to rule 48—are met,¹⁶ the Prosecutor still has discretion not to request the opening of an investigation based on other strategic or operational factors. This is consistent with the Statute, as authoritatively interpreted by the Appeals Chamber in the *Afghanistan* judgment.

16. The *Afghanistan* judgment clarified the important differences between the ‘referral’ regime under articles 13-14 and 53, and the ‘discretionary’ regime under article 15. In so doing, it corrected both the prior jurisprudence of the Pre-Trial Chamber, upon which the Appellants now seek to rely, and the Prosecution’s own practice including as expressed in its earlier public policies.¹⁷

17. Notably, it is now established that article 15 confers discretion upon the Prosecutor in deciding whether to trigger an investigation *proprio motu*.¹⁸ While this conclusion is supported by the word “may” in article 15(1), it characterises the Prosecutor’s function under article 15 as a whole—including article 15(3)—as explained below.¹⁹ Until the Prosecutor has actually made an application under article 15(3), nothing in article 15 or rule 48 obliges the Prosecutor to request the opening of an investigation—nor can the Pre-Trial Chamber order the Prosecutor

¹⁵ See e.g. [Prosecutor’s Bensouda Statement](#).

¹⁶ [Prosecutor’s Bensouda Statement](#) (“the statutory criteria for opening an investigation into the situation in Nigeria have been met”).

¹⁷ *Contra* [Request](#), paras. 26-28. With regard to the OTP *Policy on Preliminary Examinations*, the Prosecution further notes that it predates the *Afghanistan* judgment, is marked publicly on the Court’s website as ‘under revision’, and states that “it does not give rise to legal rights, and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court”: [OTP Policy Paper on Preliminary Examinations \(under revision\)](#), November 2013, para. 20.

¹⁸ See e.g. [Statute](#), art. 15(1) (“The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”); [ICC-02/17-138 OA4](#) (“*Afghanistan* Appeal Judgment”), para. 30 (“it is for the Prosecutor to determine whether there is a reasonable basis to initiate an investigation”).

¹⁹ *Contra* [Request](#), paras. 29-30. See further below para. 18.

to do so.²⁰ The Pre-Trial Chamber only has a role *if* the Prosecutor “determines that there is a basis to initiate an investigation” by way of an article 15(3) application.²¹ As noted above, neither Prosecutor Bensouda nor the current Prosecutor made any such determination in this situation.

18. Furthermore, contrary to the assumption in the Request, article 15(3) does not require the Prosecutor to apply to the Pre-Trial Chamber whenever it is determined that the factors in rule 48 are met. Rather, article 15(3) specifies the overall threshold for the Prosecutor to consider (whether there is a reasonable basis to proceed) in exercising their discretion whether to apply to the Pre-Trial Chamber. This exercise of discretion is based on factors including but not limited to those set out in rule 48.²² Additional factors might include, for example, the existence of a reasonable prospect of constructive dialogue with national jurisdictions leading to accountability—even below the threshold of article 53(1)(b). Any other interpretation of article 15(3) and rule 48 would fetter the discretion recognised by the Appeals Chamber and defeat its purpose.

19. Importantly, this interpretation is consistent with the nature of article 15 as a mechanism to ensure that the Court is *not deprived* of the opportunity to exercise its jurisdiction where justified—but without transforming article 15 into a mechanism analogous to a referral, *obliging* the Court to open investigations. As the Appeals Chamber has stressed, the procedures and considerations appropriate for the initiation of an investigation on the basis of a referral are different from those appropriate for the initiation of an investigation *proprio motu*.²³ For example, while the Prosecutor’s decision not to open an investigation of a *referred* situation may be subject to judicial review under article 53(3), the “appropriate remedy” for any concern with regard to the Prosecutor’s exercise of discretion under article 15 “is the right vested in all States Parties and in the Security Council to refer situations” to the Court.²⁴ This is without prejudice to ongoing engagement between victims and affected communities, civil societies, and the Prosecutor under article 15(1).

²⁰ [Afghanistan Appeal Judgment](#), para. 31 (“it would be contrary to the very [nature of the power accorded to the Prosecutor under article 15] to suggest that a duty to investigate could be imposed by the pre-trial chamber in the absence of a request for authorisation of investigation by the Prosecutor”).

²¹ [Afghanistan Appeal Judgment](#), para. 32.

²² [ICC RPE](#), rule 48 (“The Prosecutor shall *consider the factors* set out in article 53, paragraph 1 (a) to (c)”, emphasis added).

²³ [Afghanistan Appeal Judgment](#), paras. 29-30, 33. Pre-Trial Chambers have likewise recognised this “clear distinction”: [ICC-RoC46\(3\)-01/22-6](#), para. 6.

²⁴ [Afghanistan Appeal Judgment](#), para. 31.

D. CONCLUSION

20. For all the above reasons, the Prosecution respectfully requests the Pre-Trial Chamber to dismiss the Applicants' request *in limine* due to lack of standing.



Karim A. A. Khan KC, Prosecutor

Dated this 13th day of December 2024

At The Hague, The Netherlands