

Dissenting Opinion of Judge Socorro Flores Liera

1. For the reasons that follow, I respectfully disagree with my colleagues' decision to dismiss the victims' request to address the Prosecutor's failure to request authorisation to open an investigation in Nigeria. Despite having found that 'the statutory criteria for opening an investigation into the situation in Nigeria ha[d] been met',¹ the Prosecutor, in contravention of his obligation under article 15(3) of the Statute, has not requested authorisation to open such investigation for more than four years.² Given that the majority failed to exercise the Chamber's judicial control in relation to the Prosecutor's violation of the obligation under article 15(3) of the Statute, I hence wish to disassociate myself from the decision of the Majority, which I consider to be contrary to the duty of the Chamber to ensure compliance by the Prosecutor with the obligation under article 15(3) of the Statute.

A. Regardless of their standing, the views of the victims could have triggered the Chamber's judicial control of the Prosecutor's inaction

2. At the outset, I note that the request before us is made on behalf of 23,382 individuals claiming to be victims of crimes against humanity and war crimes in Nigeria (the 'Request').³ I note that these individuals, being victims of the alleged crimes of Boko Haram,⁴ fall within the scope of the investigation that the Prosecutor should have requested to be opened, as the Prosecutor had already 'found a reasonable basis that Boko Haram and its splinter groups ("Boko Haram") as well as the Nigerian security forces ("NSF") committed war crimes and crimes against humanity'.⁵ While the Majority decided not to entertain their Request, I consider that these victims do have the right to present their views and concerns, and in any event, I disagree with my colleagues declining to consider the issue of standing even though it was brought before us.

3. Article 68(3) of the Statute provides that '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

4. In this regard, the Appeals Chamber has found that, although victims are not parties and their participation is restricted to issues 'touching upon their personal interests', they 'are not precluded from

¹ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

² [Report on Preliminary Examination Activities 2020, 14 December 2020](#), para 265.

³ See [Annex I to Registry transmission of "Victims' Request for Clarification and an Order to Compel the Prosecutor to Act on their Legal Obligations under Article 15\(3\)"](#), 3 December 2024, ICC-ROC46(3)-01/24-1, paras 2, 4.

⁴ See [Request](#), para. 2.

⁵ [Report on Preliminary Examination Activities 2020](#), 14 December 2020, para 253.

seeking participation in any judicial proceedings, *including proceedings affecting investigations*, provided their personal interests are affected by the issues arising for resolution’.⁶

5. I consider that the situation before us is one of those affecting the interests of the victims in such a way that, notwithstanding the discretion of the Prosecutor under article 42(1) of the Statute, they should be allowed to present their views before us, in the context of a situation as the present one. As I elaborate in the section below, the Prosecutor had already reached the conclusion that ‘the statutory criteria for opening an investigation into the situation in Nigeria ha[d] been met’.⁷ However, given that the Prosecutor has recently made statements to the contrary,⁸ the interests of the victims of the crimes that would have been otherwise investigated are necessarily affected at this stage. The Request thus asks the Chamber to intervene to enforce the Prosecutor’s obligation to request authorisation to open an investigation under article 15(3) of the Statute.

6. Given the importance of the issue and the potential prejudice to thousands of victims, I am of the view that a dismissal more than six months after it was brought to the attention of the Chamber, and on the basis of a narrow interpretation of the Statute, is the wrong way to proceed and prevents the Chamber from exercising its overarching judicial responsibility. However, I will not dwell further into the issue of the standing of the victims because, as I turn to explain, it does not affect the responsibility of the Chamber to act on its own motion in order to enforce the obligations of the Prosecutor.

B. Obligation to request the opening of an investigation

7. Turning to the substance of the Request, it asks the Chamber to act as follows:

[T]o find that, in failing to request authorisation to open an investigation into the situation in Nigeria, the Prosecutor is acting inconsistently with their obligation under article 15(3) of the Statute, and to take any appropriate measures to remedy the situation.⁹

8. In its response to the Request, the Prosecutor states that, up to 13 December 2024, he ‘ha[d] not yet determined how to proceed under article 15 in this situation’.¹⁰

9. However, I observe that the previous Prosecutor had already announced, on 11 December 2020, ‘the conclusion of the preliminary examination of the situation in Nigeria’, on the basis that ‘the

⁶ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007](#), 19 December 2008, ICC-01/04-556, para. 56 (emphasis added). See also *Situation in Darfur*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007](#), 2 February 2009, ICC-02/05-177, paras 45-55.

⁷ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

⁸ See below paras 14-18.

⁹ [Request](#), para. 85.

¹⁰ [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\(3\)](#), 13 December 2024, ICC-ROC46(3)-01/24-3, para. 2. No further announcement has been made up to the writing of this dissent.

statutory criteria for opening an investigation into the situation in Nigeria ha[d] been met'.¹¹ Having made this conclusion, the Prosecutor is *ipso jure* under the obligation to request the Chamber's authorisation to open an investigation pursuant to article 15(3) of the Statute, which reads as follows:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she *shall* submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence [emphasis added].

10. I consider this provision is clearly imposing upon the Prosecutor an obligation to request an authorisation to open an investigation whenever it finds a reasonable basis to do so. In the current situation, the Prosecutor has already exercised its discretionary power and concluded that there is a reasonable basis to proceed with an investigation. As such, he ***shall*** submit to the Chamber a request for authorisation of an investigation, together with any supporting material collected. The language of the Statute is clear and unambiguous and the Prosecutor is under a legal duty to request authorisation to proceed with an investigation.

11. I further note that, although the plain reading of article 15(3) of the Statute leaves no room for ambiguity, my interpretation is confirmed by reading the word 'shall' under its ordinary meaning.¹² This word signals that the Prosecutor is indeed under a 'command' or a 'duty' to submit such request for authorisation as indicated above.¹³ Additionally, reading this provision in its context shows that the drafters of the Statute made the conscious choice to use 'shall' instead of 'may'. In this regard, the preceding paragraph, article 15(2) of the Statute, shows that the drafters used the word 'may' to indicate that the Prosecutor 'may seek additional information from States' and other sources, and to indicate that it 'may receive written or oral testimony at the seat of the Court'. However, in article 15(3), the drafters decided to use the word 'shall', which demonstrates their resolution to provide for binding, rather than discretionary, actions for the Prosecutor to undertake.

¹¹ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

¹² See article 31(1) of the [Vienna Convention on the law of Treaties](#), 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980. See also Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-04/06-3121-Red, para. 277 ('[a]ccording to article 31 of the Vienna Convention on the Law of Treaties, treaty provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty').

¹³ Under the Concise Oxford Dictionary of Current English, 'shall' must be understood 'in the 2nd and 3rd persons' as 'expressing a strong assertion or command rather than a wish (cf. WILL)'. See The Concise Oxford Dictionary of Current English, Eighth Edition, p. 1113. Furthermore, 'shall' is understood as 'expressing a command or duty (thou shall not steal; they shall obey)'. According to the Cambridge Dictionary, 'shall' is 'used to say that something certainly will or must happen, or that you are determined that something will happen'. See Cambridge English, Eighth Edition, available at <https://dictionary.cambridge.org/grammar/britishgrammar/could-may-and-might>.

12. This choice was confirmed by a contextual interpretation of article 15(3) along with article 53(1) of the Statute, which provides the criteria for the Prosecutor to assess whether to open an investigation under article 15 thereof,¹⁴ and also uses the word ‘shall’ as follows:

1. The Prosecutor *shall*, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

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

13. The need for the Prosecutor to assess the criteria under article 53(1) to make his/her determination under article 15 of the Statute is further confirmed by rule 48 of the Rules of Procedure and Evidence (the ‘Rules’):

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)’ [emphasis added].

14. Once the conclusion is reached that the criteria under article 53(1) of the Statute are met, the Prosecutor has the obligation to request authorisation to open an investigation under article 15(3) of the Statute.

15. Thus, in the situation before us, having already reached the conclusion that ‘the statutory criteria for opening an investigation into the situation in Nigeria ha[d] been met’,¹⁵ the Prosecutor had no option but to request authorisation to open an investigation in Nigeria. This is confirmed by commentators of the Statute who indicate that, on the basis of the drafting history of the provision and the drafters’ use of the word ‘shall’, ‘[t]his is a binding obligation on the Prosecutor. He or she is not at liberty to exercise discretion in applying to the Chamber to proceed when he or she considers that there is a sufficient basis’.¹⁶

16. Yet, despite having reached this conclusion, and contrary to the obligation emerging from that conclusion pursuant to articles 15(3) and 53(1) of the Statute, and rule 48 of the Rules, Mr Karim Khan, the Prosecutor who took office in 2021, and his Deputy Prosecutor, have made further announcements

¹⁴ [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138 (hereinafter: ‘Afghanistan Appeals Chamber’s Judgment’), para. 32.

¹⁵ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

¹⁶ Morten Bergsmo *et al*, ‘Article 15’, in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court*, 4th edition, p. 891, mn 24.

that seem to conflict with the conclusion the Prosecutor had already reached. On 22 April 2022, the Prosecutor stated publicly that he found ‘the need to continue [his] engagement with the Nigerian authorities and clarify the status of the situation in Nigeria following the conclusion of its preliminary examination by [the previous Prosecutor] in December 2020’.¹⁷

17. Acting as if the Prosecutor had not already made the conclusion to request the opening of an investigation, Mr Khan ‘agreed with Nigerian authorities on the next immediate steps to inform *any future decision [he] will be making on the situation*’.¹⁸ Notably, he stated that ‘the principle of complementarity’ required the crimes committed ‘in the course of the non-international armed conflict between the Nigerian security forces and Boko Haram’ *‘to be addressed through domestic proceedings, or failing that, by [the Prosecutor]’*, and that he ‘will therefore continue to look for ways and means to engage in dialogue to *promote complementarity, whether at the current threshold where we stand or in the context of an opened situation*’.¹⁹ Mr Khan’s words contradicted the decision already made by the Prosecutor as an organ.

18. Furthermore, in 2024, following his visit to Nigeria, the Deputy Prosecutor, Mr Mame Mandiaye Niang, further acted in contradiction with the decision previously taken by the Prosecutor in 2020 that ‘the statutory criteria for opening an investigation into the situation in Nigeria ha[d] been met’.²⁰ Notably, Mr Mandiaye Niang observed, in relation to the Nigerian authorities, that ‘[i]n light of the actions taken so far and the commitment to deepen collaboration with the [Prosecutor], we will continue to monitor any progress regarding national proceedings and *we will seek to give a chance to the principle of complementarity in Nigeria*’.²¹

19. In my view, the aforementioned statements, added to the Prosecutor’s failure to request the Chamber’s authorisation to open an investigation in Nigeria, amount to a violation of the Prosecutor’s obligation under article 15(3) of the Statute to ask for authorisation to open such investigation given the Prosecutor’s own conclusion in 2020 that the statutory criteria had already been met.

20. More than four years have lapsed since the Prosecutor announced the conclusion that the criteria to proceed with an investigation were met with respect to the subject matter jurisdiction over the crimes, the admissibility of potential cases and the interest of justice, all the criteria that needed to be assessed under article 53(1) of the Statute and rule 48 of the Rules. More than a reasonable period of time has passed and the duty to request authorisation has not materialized. Contrary to other situations before

¹⁷ [ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria](#), 22 April 2022.

¹⁸ [ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria](#), 22 April 2022 (emphasis added).

¹⁹ [ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria](#), 22 April 2022 (emphasis added).

²⁰ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

²¹ [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 (emphasis added).

the Court, we are not facing an absence of decision, but a decision that was taken, but not yet implemented in accordance with the statutory requirement.

21. On this point I emphasise that the fact that the conclusion was reached by former Prosecutor Ms Fatou Bensouda is not a relevant consideration. This decision was not a personal one, but rather an institutional one taken by the Office of the Prosecutor under the authority of the head of that organ under article 42(2): ‘The Prosecutor’. The follow up with visits to Nigeria from the current Prosecutor does not change the obligations of the Prosecutor under the Statute. Whether Mr Khan in his personal capacity disagrees with the decision is not material and does not justify the failure to request the Chamber’s authorisation to investigate crimes for which a conclusion has already been reached by the Prosecutor under article 15(3). The Office of the Prosecutor is an organ with statutory and regulatory obligations which cannot be overridden on the basis of the opinion of the individuals vested with the role to represent it and their opinions about the work of previous Prosecutors.

22. In support of this position, different commentators refer to the Prosecutor as a separate organ of the Court under article 42(1) of the Statute and its duty to establish the truth under article 54(1)(a) thereof, defining it as ‘*the organ* responsible for conducting investigations and prosecutions before the Court’.²² They explain that, rather than entrusting private individuals, the drafters preferred that ‘the authority to prosecute resides with public authority’, vested in the Prosecutor, as ‘an impartial truth-seeker or organ of justice’.²³ Commentators specifically consider that the duty ‘to establish the truth’ under article 54(1)(a) ‘relates to the investigation of the Prosecutor subsequent to the initial evaluation of information and *a finding that a reasonable basis does exist on which to proceed under the Statute*’.²⁴ Thus, to the extent that the former Prosecutor, acting under her duty to determine the truth found that ‘the criteria to proceed with an investigation are met’,²⁵ stating otherwise would be contrary to the truth-seeking duty of the Prosecutor as an organ. Given the duties of the Prosecutor and the conception according to which it was conceived under the Statute,²⁶ a new Prosecutor cannot act against obligations already acquired by former Prosecutors to the extent that such obligations lie with the Prosecutor as an organ.

²² Morten Bergsmo *et al*, ‘Article 42’, in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court*, 4th edition, p. 1512, mn 8.

²³ Volker Röben, ‘[The Procedure of the ICC: Status and Function of the Prosecutor](#)’, in Max Planck Yearbook of United Nations Law, Volume 7, 2003, p. 520, 527.

²⁴ Kai Ambos, ‘Article 15’, in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court*, 4th edition, p. 891, mn 24 (emphasis added).

²⁵ [Report on Preliminary Examination Activities 2020](#), 14 December 2020, para 265.

²⁶ In this regard, ‘the Prosecutor is much more than simply a “party” to the proceedings and is expected rather to function as an “impartial organ of justice”’. See Ania Salinas Cerda, [Guarding the gates: the essential role of a robust pre-trial chamber in ensuring the International Criminal Court’s impartiality, independence and legitimacy](#), p. 82, *referring to* Giuliano Turone, ‘Powers and Duties of the Prosecutor’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, p. 1165.

23. With respect to the Prosecutor's references to complementarity, article 18 of the Statute provides a mechanism on which the Prosecutor could rely to allow a State to carry on its own investigations. However, this does not exempt the Prosecutor from its obligation to request authorisation to open an investigation. Fulfilling his obligation under article 15(3) of the Statute does not prevent him from ensuring complementarity at the following stages of the investigation, as article 18 deals precisely with issues that may arise from admissibility and complementarity. Certainly, while article 18(1) of the Statute provides for the obligation of the Prosecutor to notify Nigeria about the start of its investigation, article 18(2) indicates that the investigation could be deferred under the control of the Chamber:

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

24. Thus, complementarity considerations after the closure of the preliminary examination and the conclusion that there is a reasonable basis to proceed with an investigation cannot serve as a justification to delay *sine die* the request for authorisation when a positive conclusion referred to in article 15(3) of the Statute has been reached.

25. If the Prosecutor is allowed to conclude that there is reasonable basis to proceed with an investigation, but does not request authorisation for a prolonged period of time, a potential paralysis of the Court would result. It is precisely for this reason that the Chamber, in the exercise of its judicial control, has the power to remind the Prosecutor of his obligations under the Statute.

26. In these circumstances, I consider that the Chamber has the duty to ensure that the Prosecutor acts within the remits of the Statute. As clearly stated the by Appeals Chamber, 'under the procedure set out in article 15 of the Statute, the pre-trial chamber has a role in respect of the Prosecutor's exercise of discretionary power only if he/she determines that there is a basis to proceed with an investigation'.²⁷ Therefore, unlike the Majority, noting that the Prosecutor has concluded that 'the statutory criteria for opening an investigation into the situation in Nigeria have been met',²⁸ I would have ordered him to file, within a specific time limit, his request for authorisation to open such investigation, on the basis of his obligation under article 15(3) of the Statute.

27. In brief, I consider that the Chamber had the duty to exercise judicial control in this situation, due to a violation of the Prosecutor of the obligation to investigate under article 15(3) of the Statute. The non-materialisation of a duty under the Statute is of such a fundamental importance, that the

²⁷ [Afghanistan Appeals Chamber's Judgment](#), para. 32.

²⁸ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020.

Chamber, as the organ with the power to exercise judicial control on issues related to *proprio motu* investigations under article 15 of the Statute, has the duty to intervene, particularly, when the issue is brought to its attention by the victims.

28. In light of the foregoing, I would have granted the Request.

Done in English. A French version will follow. The English version remains authoritative.



Judge María del Socorro Flores Liera

Dated this Monday, 16 June 2025

At The Hague, The Netherlands