

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

No.: ICC-RoC46(3)-01/24

Date: 18 December 2024

## **PRE-TRIAL CHAMBER I**

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

## **SITUATION IN NIGERIA**

### **Public Document**

**Request for leave to reply to the "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:** Amnesty International

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

**The Office of the Prosecutor**

Karim A. A. Khan KC  
Mame Mandiaye Niang

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

M. Zavala Giler, Osvaldo

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. Amnesty International, acting in representation of victims of war crimes and crimes against humanity in northeast Nigeria who are members of the Jire Dole Networks (“the Applicants”), seek leave to reply to the “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)” of 13 December 2024, pursuant to Regulation 24(5).

## PROCEDURAL HISTORY

2. On 2 December 2024, Amnesty International submitted the “Victims’ Request for Clarification and an Order to Compel the Prosecutor to Act on their Legal Obligations under Article 15(3)” (“the Request”) and a letter to the President of the Pre-Trial Division respectfully requesting that a Pre-Trial Chamber be designated to examine the Request in accordance with regulation 46(3).
3. On 3 December 2024, the Registry transmitted these documents.<sup>1</sup>
4. On 5 December 2024, Judge Maria del Socorro Flores Liera, President of the Pre-Trial Division, assigned the Request to Pre-Trial Chamber I.<sup>2</sup>
5. On 13 December 2024, the Prosecutor filed its response “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)”.<sup>3</sup>

## REQUEST

6. The Applicants seek leave to reply pursuant to regulation 24(5), which states that: “Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by

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<sup>1</sup> [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

<sup>2</sup> [Decision assigning the ‘Victims’ request for clarification and an order to compel the Prosecutor to act on their legal obligations under article 15\(3\)’](#), 5 December 2024, ICC-ROC46(3)-01/24-2

<sup>3</sup> [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

the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.”

7. The Applicants respectfully request the Chamber’s authorization to reply on the issue of the interpretation of article 15(3), submitted by the Prosecutor in relation to the Applicants’ standing.
8. Good cause exists for leave to be granted: the Prosecutor’s response raises “new and distinct issues of law”<sup>4</sup> that the Applicants could not reasonably have anticipated: the Prosecutor’s response offers an entirely new interpretation of the statutory criteria for requesting authorization to open an investigation under article 15(3). Specifically, the Prosecutor’s submission that they may exercise discretion in considering additional factors, beyond those set out in rule 48 and article 53(1)(a)-(c), in determining whether to initiate an investigation *proprio motu*<sup>5</sup> contradicts the jurisprudence of the Court<sup>6</sup> and the established practice of the Office of the Prosecutor.<sup>7</sup>

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<sup>4</sup> Pre-Trial Chamber I, [Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material"](#), Situation in the Democratic Republic of the Congo, 24 February 2011, ICC-01/04-01/10.

<sup>5</sup> Pre-Trial Chamber I, [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, paras. 15-19.

<sup>6</sup> Pre-Trial Chamber I, [Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation](#), 16 July 2015, ICC-01/13, para 14.

<sup>7</sup> The Office of the Prosecutor has consistently exclusively applied the criteria contained in rule 48 and article 53(1)(a)-(c) in its analysis of all situations under preliminary examination and as the basis for its decisions not to request authorization to initiate investigations *proprio motu*, following preliminary examination. See OTP, [Final Report on the Situation in Colombia](#), 30 November 2023; [Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the Preliminary Examination](#), 29 September 2022; OTP, [Final Report on the Situation in Iraq/UK](#), 9 December 2020; [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras](#), 28 October 2015; [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea](#), 23 June 2014; OTP, [Report on Preliminary Examination Activities 2020](#); OTP, [Report on Preliminary Examination Activities 2019](#); OTP, [Report on Preliminary Examination Activities 2018](#); OTP, [Report on Preliminary Examination Activities 2017](#); OTP, [Report on Preliminary Examination Activities 2016](#); OTP, [Report on Preliminary Examination Activities 2015](#); OTP, [Report on Preliminary Examination Activities 2014](#); OTP, [Report on Preliminary Examination Activities 2013](#); OTP, [Report on Preliminary Examination Activities 2012](#); OTP, [Report on Preliminary Examination Activities 2011](#); OTP, [Policy Paper on Preliminary Examinations](#).

9. Because of the importance of and the potential effect of this new issue for victims,<sup>8</sup> the Applicants request leave to reply to the Prosecutor's interpretation of article 15 specifically on the following issues:

- a. the correct construction of rule 48, which cannot be read the way the Prosecutor suggests<sup>9</sup> without entirely overriding the purpose of rule 48 by allowing the Prosecutor to rely on arbitrary and unpredictable criteria;
- b. the *obiter dicta* nature of the Appeals Chamber's conclusions in the *Afghanistan* judgment, relied on by the Prosecutor, which should be read without prejudice to the entirely distinct scenario at hand<sup>10</sup>;
- c. the dire consequences for victims and others who provide information to the Court if the Prosecutor is afforded absolute discretion to consider new, arbitrary, and unpredictable factors, beyond those contained in rule 48, in determining whether to initiate an investigation *proprio motu*. Permitting the Prosecutor such discretion would create legal uncertainty as well as total uncertainty for victims of crimes within the jurisdiction of the Court where the Prosecutor chooses not to act based on arbitrary factors and neither States Parties nor the Security Council make a referral.<sup>11</sup>

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<sup>8</sup> Pre-Trial Chamber I, [Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material"](#), Situation in the Democratic Republic of the Congo, 24 February 2011, ICC-01/04-01/10, p. 4.

<sup>9</sup> While there may be some ambiguity in the drafting of the English version of Rule 48, the French version of the rules reads unambiguously « Pour déterminer s'il y a une base raisonnable pour ouvrir une enquête en application du paragraphe 3 de l'article 15, le Procureur se fonde sur les considérations visées aux alinéas a) à c) du paragraphe 1 de l'article 53. »

<sup>10</sup> See Appeals Chamber, [Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, paras. 2, 4-6, 9.

<sup>11</sup> See Pre-Trial Chamber I, [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, paras. 15, 18. The Prosecutor provides, beyond the predetermined criteria contained in article 51(3)(a)-(c) and referred to in rule 48 which already include a discretionary evaluation by the Prosecutor of whether the opening of an investigation would not serve the interests of justice, as well as a preliminary assessment of the complementarity component of admissibility, that "Additional factors might include, for example, the existence of a reasonable prospect of constructive dialogue with national jurisdictions leading to accountability".

10. For these reasons, the Applicants seek leave of the Chamber to authorize them to file a reply to the “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)” under regulation 24(5).



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Mandi Mudarikwa, Head of Strategic Litigation, Amnesty International

Dated this 18<sup>th</sup> day of December

At London, United Kingdom