Annotated Leading Cases of International Criminal Tribunals (ALC)

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Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Situation in the Republic of Côte d'Ivoire, No ICC-02/11, 3 October 2011, 86 p (No ICC-02/11-14-Corr, Corrigendum of 15 November 2011)

Corrigendum to "Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", Situation in the Republic of Côte d'Ivoire, No ICC-02/11, 5 October 2011, 25p

I. INTRODUCTION

The "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation the Republic of Côte d'Ivoire" was the second decision by a Pre-Trial Chamber of the ICC authorising an investigation *proprio motu* by the Prosecutor. This decision is especially relevant as it further clarified the conditions under Art. 15(4) of the ICC Statute that need to be fulfilled in order to authorise an investigation which has not been triggered by a Security Council referral or a State referral. The Pre-Trial Chamber's decision is one of currently four decisions authorising the investigation of the Prosecutor investigating on her own initiative.[2] The Pre-Trial Chamber authorised "the commencement of an

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[2] The other situations being the one in Kenya, Georgia and Burundi. The decision concerning the possible *proprio motu* investigation in Afghanistan is still pending.

investigation in Côte d'Ivoire with respect to crimes within the jurisdiction of the court committed since 28 November 2010".[3] Interestingly it also authorised investigations "with respect to continuing crimes that may be committed in the future […] insofar as they are part of the context of the ongoing situation in Côte d'Ivoire".[4] In this context it is important to mention that on 22 February 2012, Pre-Trial Chamber III decided to "expand […] its authorization for the investigation in Côte d'lvoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010".

The separate and partially dissenting opinion by Presiding Judge Fernández de Gurmendi is insofar important since it highlights a number of problematic issues surrounding especially the procedure under Art. 15, including the scope of the Pre-Trial Chamber's examination, its role with regard to further necessary information needed, as well as the temporal scope of the investigation period. While most of her criticism has not been picked up by the ensuing practice of the ICC Pre-Trial Chambers in Art. 15 authorisations of the Prosecutor's *proprio motu* investigations, it might have led to a broader approach towards the temporal scope of the authorisation in the respective pre-trial decision in the Georgia situation[5] and the material scope of application in the Burundi situation.[6] While Judge Fernández is in full agreement that there is a reasonable basis to proceed with an investigation in Côte d'Ivoire, she was unable to agree with a number of things brought forward by the majority. She was especially of the opinion that the overall approach of the majority as to the role of the chamber under the procedure envisaged under Art. 15 ICC Statute exceeds the supervisory role granted to the chamber, and exceeds the chamber's proper (and limited) function in relation to investigation commencement and case selection.[7] Furthermore, Judge Fernández saw the fact that the majority limited the authorisation of the investigation to crimes committed since 28 November 2018 as too restrictive, since the Chamber could have expanded the temporal scope

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[3] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11, PTC III, 3 October 2011, (Corrigendum, Case No. ICC-02/11-14-Corr, 15 November 2011), par. 212.

[4] *Ibid*.

[5] ICC, Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, Case No. 01/15-12, PTC I, 27 January 2016, par. 64.

[6] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, *Situation in the Republic of Burundi*, Case No. ICC-01/17-X-9-US-Exp, 25 October 2017 (Public Redacted Version, Case No. ICC-01/17-9-Red, 9 November 2017), par. 193.

[7] Judge Fernández de Gurmendi, Separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11, PTC III, 5 October 2011 (Corrigendum, Case No. ICC-02/11-15-Corr, 5 October 2011), par. 5.

to include crimes committed since 2002 without ordering the Prosecutor to revert back with additional information on these crimes.[8] And also with regard to limiting the Prosecutor's investigation to future investigations into "continuing crimes" was too restrictive in the Presiding Judge's view, as it has no statutory basis and would unduly restrict the Prosecutor's ability to conduct future investigations into crimes arising from the situation.[9]

Overall, it is noteworthy that the Pre-Trial Chamber's authorisation of investigations into the situation of Côte d'Ivoire eventually led to the confirmation of the first charges against a former head of State before the ICC, Laurent Gbagbo, whose trial began on 28 January 2016. On 15 January 2019, Trial Chamber I acquitted – by majority – both Laurent Gbagbo and Charles Blé Goudé (whose case was joined with that of Gbagbo) from all charges of crimes against humanity which they were alleged to have committed in Côte d'Ivoire in 2010 and 2011.

Concerning the background of this decisions, it is important to highlight that on 18 April 2003, the Minister of Foreign Affairs of the government of former President Laurent Gbagbo lodged a declaration under Art. 12(3) of the ICC Statute, accepting the jurisdiction of the court for crimes committed in the territory of the Côte d'Ivoire since 19 September 2002 "for an unspecified amount of time".[10] In December 2010, the Court received a letter from the newly elected President of Côte d'Ivoire that confirmed the validity of the original declaration and ensured full cooperation with the court, especially for crimes committed since March 2004.[11] In May 2011, the Prosecutor of the ICC received another letter from the new President Outtara referring to the serious crisis which had followed the presidential elections in October and November 2010 and stating that it is "[…] unfortunately reasonable to believe that crimes falling under the jurisdiction of the [ICC] had been committed". Ouattara asked the court to provide assistance in this regard and help to ensure that perpetrators would not go unpunished.[12]

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[8] *Ibid*., par. 6.

[9] *Ibid*., par. 6.

[10] ICC, Decision pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 3 October 2011, par. 10.

[11] *Ibid*., par. 12.

[12] *Ibid*., par. 12.

II. PROCEDURE UNDER ARTICLE 15 OF THE STATUTE

Since this decision in the Côte d'Ivoire situation was only the second decision on the authorisation of the Prosecutor's application for an investigation *proprio motu* under Art. 15(1), it seems important to highlight how the Pre-Trial Chamber applied the provisions under the circumstances of a situation which was initiated by an Art. 12(3) declaration.

The Pre-Trial Chamber reiterated the procedure as envisaged in Art. 15(1) and Art. 15(3), as well as Rules 48 of the Rules of Procedure and Evidence, and clarified that in cases where she wants to investigate a situation *proprio motu,* she needs to apply the criteria as laid down in Art. 53(1)(a) to (c) of the Statute in order to determine whether there is "a reasonable basis to proceed with an investigation under Article 15(3) of the Statute".[13] In detail, the Pre-Trial Chamber pointed out that the Prosecutor has to 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 of the Statute; 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".[14] Having done so, the Prosecutor then may submit a request for authorisation for an investigation together with the supporting material.[15]

The Pre-Trial Chamber further explained the procedure under Art. 15(4) of the Statute, being the main provision guiding the chamber with regard to the authorisation of *proprio motu* investigations. In this context, it highlighted the two main requirements which need to be fulfilled in order for the Pre-Trial Chamber to authorise the investigations: it needs to be persuaded after examination of the "request and the supporting material" that a) "there is reasonable basis to proceed with an investigation", and b) "that the 'case' appears to fall within the jurisdiction of the Court".[16] Relying on the previous decision of Pre-Trial Chamber II it stresses again that the mentioned "case" in Article 15(4) of the Statute "should be understood to relate to potential cases within the situation under consideration", while the "'supporting material' consist of all the information un the annexes presented by the

[13] ICC, Decision pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 3 October 2011, par. 17.

[14] *Ibid.*

[15] *Ibid.*, par. 16.

[16] *Ibid.*, par. 18.

Prosecutor as part of his Request, including materials from governmental sources, international organisations, non-governmental organisations and the media" as well as "victims' representations".[17] Concerning the content of these latter victims' representations, it is interesting to note that despite the fact that "many of the victims did not provide sufficient information to enable the Chamber to determine whether the contextual or other elements of the underlying acts relating to the crimes have been fulfilled", the Pre-Trial Chamber decided due to the low evidentiary threshold in Article 15(4) of the Statute to consider the submissions of the victims in a "non-restrictive manner".[18]

The way the majority interpreted the supervisory role of the Pre-Trial Chamber under Art. 15 was one of the main criticisms of Judge Fernández in her separate opinion. As indicated in the introduction, she was of the opinion that the majority did not properly assess the scope of the Prosecutor's investigation. She pointed out that Art. 15 was "one of the most delicate provisions of the Statute" because of the controversy whether the Prosecutor should be empowered to trigger the court's jurisdiction *proprio motu*.[19] It is important to mention in the context that Silvia Férnandez was part of the Argentinian delegation who tabled (together with the German delegation) the final version of the draft article which finally became Article 15 at the Rome Conference. In this context, she recalled that the negotiation history indicates that drafters wanted to grant a supervisory role to the Pre-Trial Chamber solely over the Prosecutor's intention – i.e. to provide judicial "internal safeguards" and "compensate for the absence of a referral".[20] She clarified that Art. 15 was not meant to affect, in any other way, the Prosecutor's exclusive power to investigate and prosecute under the Statute. Any other conclusion would be contrary to Statute's object and purpose.[21] And while the Pre-Trial Chamber was meant to first consider the Art. 53(1)(a)-(c) requirements,[22] it should not be seen as a duplication of the Prosecutor's preliminary examination.[23] Instead, the chamber's examination was solely a review of the request and material presented, and the guiding purpose should be that of providing a judicial safeguard against frivolous or politically-

[17] *Ibid.*

[18] *Ibid.*, par. 20.

[19] Judge Fernández, Separate and partly dissenting opinion to the Decision Pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 5 October 2011, par. 7.

[20] *Ibid.*, par. 9.

[21] *Ibid.*, par. 10.

[22] *Ibid.*, par. 13.

[23] *Ibid.*, par. 15.

motivated charges.[24] By examining closely Art. 15(4), 42, 53, and the Rules and Regulations of the court, it came to the conclusion that, "in short, the Chamber's examination is to ascertain the accuracy of the statement of facts and reasons of law advanced by the Prosecutor with regard to crimes and incidents identified in his own request and determine, on this basis, whether Article 53 is met".[25] Judge Fernández stressed that the Pre-Trial Chamber must entirely rely on the request and the material collected by the Prosecutor, and due to the lack of its evidence-gathering capabilities, the material should be considered in its entirety to determine whether the information is corroborative and whether as whole, they substantiate the Prosecutor's main conclusions.[26] Having elaborated these parameters for the chamber's supervisory role and competency to analyse the submitted material, Judge Fernández made it clear that she disagreed "with the method used by the Majority by which it singled out elements (such as individual reports or portions of reports) from the supporting material presented by the Prosecutor in order to establish facts, additional acts, and draw further conclusions on criminal responsibility".[27] She criticised especially this approach toward certain special crimes "found" by the Pre-Trial Chamber, like torture and inhumane acts,[28] the other underlying acts of war crimes not presented by the Prosecutor,[29] and acts allegedly committed by Pro-Ouattara Forces.[30] She found these findings "not sufficiently" substantiated.[31] Finally, Judge Fernández criticised the strong reliance of the majority on victims representations when determining the factual basis for authorising the investigation into certain crimes.[32] She came to the conclusion that there must be caution when assessing the content of representations with regard to specific facts or alleged crimes, given the material difficulties in assessing the reliability and the Chamber's legal limitation with

[24] *Ibid.*, par. 16.

[25] *Ibid.*, par. 28.

[26] *Ibis.*, par. 35, 34, 35, 36 and 37.

[27] *Ibid.*, par. 38.

[28] *Ibid.*, par. 39.

[29] *Ibid.*, par. 40.

[30] *Ibid.*, par. 41 and 42.

[31] *Ibid.*, par. 43.

[32] *Ibid.*, par. 46, 47, 48, 49 and 50.

information-gathering,[33] and that this stands in contrast with the "non-restrictive manner" the majority applied to the victims' submissions.[34]

III. REASONABLE BASIS THRESHOLD

In the context of examining whether the ICC had jurisdiction over the alleged crimes as contained in the application for authorisation by the Prosecutor, the Pre-Trial Chamber stated that it will examine whether there was a "reasonable basis to proceed" taking into account the Art. 53(1)(a)-(c) requirements, and bearing in mind the that underlying purpose of the procedure "is to prevent unwarranted, frivolous or politically motivated investigations".[35] Especially the latter statement will become important when looking at Judge Fernández' separate and partly dissenting opinion, since according to her view the majority decision did not properly take into account what this means with regard to the scope of the investigation which the chamber wanted to authorise. The chamber also dealt with the basis on which it has to take its decision, by clarifying that it must be satisfied that "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.[36] Finally, the Pre-Trial Chamber stressed that the "reasonable basis to proceed" standard as contained in Art. 15(4) is the same as the one in Art. 53(1)(a) and has to be seen as the "lowest evidential standard provided by the Statute", and is not expected to be "comprehensive" or "conclusive".[37]

A. Jurisdiction *Rationae Materiae*

In the main part of its decision, the Pre-Trial Chamber examined whether the Prosecutor had submitted sufficient material in order to establish that there is "reasonable basis to proceed" with regard to alleged crimes that fall under the jurisdiction of the court. In the context of the Côte d'Ivoire situation, the Prosecutor had submitted material supporting the reasonable basis to proceed with regard to crimes against humanity in multiple counts, as well as war crimes in

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[33] *Ibid.*, par. 51.

[34] *Ibid.*, par. 52.

[35] *Ibid.*, par. 21.

[36] *Ibid.*, par. 23.

[37] *Ibid.*, par. 24.

multiple counts. When examining the material provided by the Prosecutor, the Pre-Trial Chamber implemented clearly the standard which it had described as the "lowest evidential standard provided by the Statute". In this regard, the examination is rather cursory and confirms the reasonable basis to proceed in all the cases of crimes against humanity and war crimes which the Prosecutor had applied for. When applying the legal conditions of the elements of these two crimes, it makes ample use of the definitions of the Elements of Crimes, as well as previous decisions of the (Pre-Trial) Chambers. Overall, there are not many statements which come as a surprise or warrant further discussion.

However, one might want to highlight that with regard to the definition of the contextual element of crimes against humanity, Pre-Trial Chamber III in the current decision followed previous decisions of the ICC's Pre-Trial Chambers approach in the Kenya decision with regard to the definition of the term "policy".[38] It further supported especially Pre-Trial Chamber II's approach towards the term "organisational", and agreed that "whether a group qualifies as an 'organisation' under Statute must be made on a case-by-case basis" taking into account as elaborated before.[39]

It is also worth mentioning that Pre-Trial Chamber III went on and authorised investigations with regard to the underlying acts of torture as set out in Art. 7(1)(f) and the crime against humanity of other inhumane acts under Art. 7(1)(k) of the Statute despite the fact that the Prosecutor had not presented these crimes in his application. However, "in light of the material submitted by the Prosecutor, the Chamber is satisfied that there is reasonable basis to believe that torture and other inhumane acts were committed by pro-Gbagbo forces during the period of post-election violence from 28 November 2010 onwards".[40]

Another aspect of the 3 October 2011 Decision is the reiteration of Pre-Trial Chamber II's definition of a non-international armed conflict in the Bemba Gombo case as "[t]he outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature and which takes place within the confines of a State territory",[41] and from there explaining that hostilities can take place either between governmental authorities and organised dissident

[38] *Ibid.*, par. 43 and 44.

[39] *Ibid.*, par. 46.

[40] *Ibid.*, par. 86.

[41] *Ibid.*, par. 119.

armed groups; or between the latter groups.[42] The Chamber also confirms the definitions chosen by Pre-Trial Chamber II with regard to the definition of organised armed groups as "[g]roups with a sufficient degree of organisation to enable them to plan and carry out military operations for a prolonged period of time".[43] It finally followed Pre-Trial Chamber II also with regard to the application of the "protracted armed conflict" requirement in Art. 8(2)(e) insofar as it states that "[t]he duration of any relevant confrontation is to be considered when assessing whether there was a protracted armed conflict".[44] It is unfortunate in this context that both Pre-Trial Chamber II as well as Pre-Trial Chamber III did not address the question whether there are different levels of "armed conflict" envisaged in Art. 8(2)(d) and (f) of the Statute respectively, and especially did not discuss the question whether the requirement of "protracted armed *conflict*" as mentioned in Art. 8(2)(f) of the Statute should not rather be understood as "protracted armed *violence*" as previously elaborated by the *ad hoc* tribunals. While Pre-Trial Chamber II indicated that the judges were aware of this problem, and Pre-Trial Chamber III also included the possibility of two different standards for non-international armed conflicts in Art. 8 of the Statute,[45] it in the end decided to come to the conclusion that in any case there is reasonable basis to believe that an armed conflict not of an international character existed in Côte D'Ivoire from 25 February until 6 May 2011, since the FRCI forces were "a sufficiently organised armed group with the ability to plan and carry out military operations for a prolonged period of time".[46] In addition, the clashes between the pro-Gbagbo government forces and pro-Outtara forces which occurred over a period of at least two and a half months amounted to a "protracted" armed conflict.[47]

While this approach of the Pre-Trial Chamber to rely on the respective wording of Art. 8(2)(f) of the Statute and the jurisprudence of the other Pre-Trial Chamber is commendable from a point of view of Art. 21 of the Statute, since it seems to establish its own self-contained ICC system with regard to determining the existence of an non-international armed conflict, it needs to be criticized from an international humanitarian law perspective, as it does not take into account the previous interpretations especially by the ICTY of the definition of a non-

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[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*, par. 121.

[45] *Ibid.*, par. 120 and 121.

[46] *Ibid*, par. 127.

[47] *Ibid.*, par. 127.

international armed conflict under Common Art. 3 and Additional Protocol II to the Geneva Conventions, respectively. While the ICC is of course not bound by the ICTY/ICTR jurisprudence, it should have taken at least into account that the ICTY coined the term "protracted armed *violence*" in its 1995 Tadic decision, which was in generally accepted as the prevailing definition for an non-international armed conflict under Common Art. 3, and that it was – for hardly explicable reasons – transferred into "protracted armed *conflict*" in article 8(2)(f) of the ICC Statute. While originally this was partly seen as an editing mistake, the jurisprudence of the ICC Pre-Trial Chambers seemed to be pointing into a direction that the judges at the court are of the opinion that this special wording has to be taken literally. This is regrettable considering the fact that all the provisions contained in Art. 8 of the ICC Statute have their origin in traditional IHL treaty documents, including the 1970 Hague Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols. In this regard, it would have been desirable to find an approach which brings Art. 8(2)(f) of the Statute in coherence with existing interpretations of these treaty documents. This was luckily remedied in ensuing pre-trial and trial decisions like in the Trial Chamber's judgment in the Bemba Gombo case, when it correctly referred to the definition as elaborated by the *Tadić* Appeals Chamber: "the Chamber notes that the *Tadić* Appeals Chamber, by reference to various provisions of the Geneva Conventions and Additional Protocols I and II, defined an armed conflict as follows ("*Tadić* definition"): '[...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State'".[48]

As in the context of the examination of the possible crimes against humanity, the Pre-Trial Chamber also came to the conclusion that there is reasonable basis to believe that other war crimes in the form of rape and sexual violence were committed by pro-Gbagbo forces during the period from 25 February to 6 May 2011,[49] although the Prosecutor had not included these crimes in his application. This was on the one hand based on materials presented by the Prosecutor, but also substantiated by representations from especially two victims referring to "acts of rape and sexual violence allegedly committed by pro-Gbagbo forces in Abidjan".[50] This is especially interesting because it proves what kind of impact the representation of victims in the proceedings before the ICC can have.

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[48] ICC, Judgement pursuant to Article 74 of the Rome Statute, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-3343, T. Ch. III, 21 March 2016, par. 128.

[49] ICC, Decision pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 3 October 2011, par. 148.

[50] *Ibid.*, par. 147.

B. Jurisdiction *Rationae Temporis*

With regard to the temporal jurisdiction of the ICC concerning the situation in Côte D'Ivoire, the Pre-Trial Chamber stressed that due to the Art. 12(3) declaration lodged by the former Foreign Minister, the court has jurisdiction over possible crimes committed in Côte D'Ivoire since 19 September 2002.[51] However, despite the possibility to prosecute crimes up until 2002, he decided to only apply for authorisation of investigations for crimes committed after 28 November 2010 because "(i) the violence during this later period reached unprecedented levels and (ii) there is a wealth of information available to establish that the reasonable basis threshold is satisfied with respect to the alleged crimes committed during this period".[52] It has to however be seen as an interesting side-aspect of the Prosecutor request that he also suggested that the Pre-Trial Chamber "may conclude that the temporal scope of the investigation should be broadened to encompass events that occurred between 19 September 2002 and the date of the filing of the Request, i.e. 23 June 2011.[53] This must be seen as a strange strategic move on the side of the Prosecutor to relieve himself from the responsibility of applying for a broader time-frame, and in that case risking a (partial) rejection of his application. This part of the Prosecutor's application gave however the Pre-Trial Chamber the chance to elaborate on the requirements for the temporal scope of its authorisation of the Prosecutor's investigation, and obviously stirred some disagreement among the bench of three judges, because it was one of the main aspects which Presiding Judge Fernández elaborated upon in her separate and partially dissenting opinion. In essence, the Pre-Trial Chamber had to decide to authorise the investigation post 28 November 2010 only, or for the whole period before and after the period the Prosecutor aimed at.

The Pre-Trial Chamber chose a very differentiated approach with regard to determining the time period of the authorised investigation: it first dealt with the end date of the investigation, and recalled previous decisions by the Pre-Trial Chambers in the Kenya which had decided that "it would be erroneous to widen the time limit of the investigation to include events following the date of the Prosecutor's Request".[54] This had been similarly stated by Pre-Trial Chamber I in the DRC situation when mentioning that in order for the case "not to exceed the

[51] *Ibid.*, par. 173.

[52] *Ibid.*, par. 174.

[53] *Ibid.*, par. 175.

[54] *Ibid.*, par. 177.

parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Request must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court".[55] While taking these past decisions as valid interpretations into account, the Pre-Trial Chamber in the Côte D'Ivoire situation made a very interesting statement concerning the present temporal scope of the authorised investigations:

> Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes' – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011.[56]

Furthermore, as the only requirement which would need to be fulfilled the chamber concluded that the contextual elements for the respective crimes are the same as for those committed prior to 23 June 2011, "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)".[57] This approach brings an interesting aspect to the scope of Pre-Trial Chamber's authorisation of the Prosecutor's investigation as it expands the latter's possibility to incidents which actually took place after he had submitted his request. This is might be seen as insofar problematic as the concept of "continuing crimes" or so-called "composite crimes" have not yet been sufficiently elaborated in the jurisprudence of the ICC, although the concept is known from national jurisdictions and the jurisprudence of other *ad hoc* tribunals.[58]

With regard to the starting date of the period the Pre-Trial Chamber picked up on the Prosecutor's indication that there might be material supporting an authorisation of the investigation before 2010,[59] and indicated that "[t]he Chamber considers that a similar analysis should apply to any crimes that may have been committed before the commencement date requested by the Prosecutor for the authorisation, provided they are part of the same situation".[60] Although the Chamber in principle seemed to have been willing to expand the

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[55] *Ibid.*, par. 178.

[56] *Ibid.*, par. 179.

[57] *Ibid.*, par. 179.

[58] For an overview of the concept of continuing crimes, see A. Nissel, Continuing Crimes in the Rome Statute, 25 Michigan Journal of International Law 2004, p. 653.

[59] ICC, Decision pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 3 October 2011, par. 183.

[60] *Ibid.*, par. 180.

temporal scope of the investigation, it came to the conclusion that due to the absence of sufficient information to determine whether the reasonable basis threshold has been met with regard to specific crimes, the Chamber in the end felt unable to do so, highlighting that sufficient information would be absolutely necessary.[61] As a consequence, the Chamber ordered the Prosecutor to revert to the Chamber with "any additional information that is available to him on potentially relevant crimes committed between 2002 and 2010" using Rules 50(4) of the Rules of Procedure and Evidence as the basis for its decision.[62]

This order triggered great criticism from the side of Judge Fernández. With regard to the starting date of the investigation, she noted that the majority's decision to only authorise investigations post-2010 with an order to revert with additional material for the period of 2002 to 2010 was at odds with its own conclusion that "while the context of violence reached a critical point in late 2010, it appears that this was a continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire", one which was "devastating from the point of view of human rights and punctuated by atrocities committed by both sides".[63] According to Judge Fernández' opinion, this "continuation" and "culmination" could have been used by the Chamber to actually authorise an investigation in the respective crimes, sine the incidents presented serve only as examples for the gravest types of criminality.[64] Overall, she did not agree with the way the majority concluded that sufficient information on specific crimes is an essential requisite for the Chamber to assess whether there was reasonable basis to proceed and how it was reflected in the order "to determine whether the reasonable basis threshold has been met with regard to any specific crimes committed between 2002 and 2010".[65] She further criticised that the request for "any information" on "potentially relevant crimes" as too imprecise as the necessary information should at least contain the statement of facts and reasons of law and the other requirements contained in Regulation 49.[66]

Judge Fernández also disagreed with regard to the end date of the investigation and insofar as the Chamber authorised investigations into "continuing crimes" which would continue to be

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[61] *Ibid.*, par. 185.

[62] *Ibid.*, par. 185.

[63] *Ibid.*, par. 56 and 57.

[64] *Ibid.*, par. 58.

[65] *Ibid.*, par. 59.

[66] *Ibid.*, par. 60 and 61.

committed after the time the Prosecutor filed his request. In this context she pointed out that Art. 53(1) is silent with regard to an end date, with Art. 53(1) merely providing that the Prosecutor shall consider whether the "information available […] provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".[67] Contrasting it with the approach of Pre-Trial Chamber II in the Kenya situation where the judges only allowed investigations "that have occurred up until the time of the filing of the Prosecutor's request"[68], Judge Fernández argued that the majority's reliance on ICTR precedent using the concept of "continuing crimes" is flawed since, the *ad hoc* tribunal's chamber rather had to deal with crimes that although they started before the cut-off date of 1 January 1994, took place during the actual temporal jurisdiction of the ICTR.[69] Using the majority's approach might however exclude the investigation of underlying acts of war crimes and crimes against humanity, even if part of the same attack or armed conflict.[70] She did not see any legal basis for such an interpretation in the statutory provisions.[71] Instead, she would have seen it as more appropriate for the situation under Art. 15 to authorise the Prosecutor's investigation if the Chamber would have instead adopted the approach taken by Pre-Trial Chamber I in Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana by referring to the "on-going situation of crisis that triggered the jurisdiction of the Court".[72] This would create a situation where not only crimes that have already been or are being committed at the time of the referral would be included, but also crimes committed after that time, insofar as the crimes are sufficiently linked to the situation of crisis referred to the court as ongoing at the time of the referral.[73] According to her opinion, judging this would have better served the declared objective of ensuring that the investigations cover those crimes whose commission extend past the date of the application, and enhance the preventative impact of the intervention of the court in the situation at hand.[74]

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[67] *Ibid.*, par. 62.

[68] *Ibid.*, par. 63.

[69] *Ibid.*, par. 64, 65, 66 and 67.

[70] *Ibid.*, par. 69.

[71] *Ibid.*, par. 70.

[72] *Ibid.*, par. 71.

[73] *Ibid.*, par. 72.

[74] *Ibid.*, par. 73.

IV. ADMISSIBILITY

In the final part of its decision, the Pre-Trial Chamber further elaborated on two important aspects of the admissibility examination which it had to conduct in order to authorise the Prosecutor's request for authorisation. First, it clarified that when conducting the gravity assessment under Art. 17(1)(a) and (b) of the Statue with regard to "potential cases" it has to take into account the previously by Pre-Trial Chamber II adopted parameters,[75] namely "(i) whether the individuals or groups of persons that are likely to be the object of an investigation include those who bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the object of an investigation (including, inter alia, their scale, the manner in which they were carried out, their impact on the victims, and any aggravating circumstances).[76] Second, the Pre-Trial Chamber highlighted the final requirement that the Chamber has to review in the context of the authorisation of an investigation, namely that whether under Art. 53(1)(c) of the Statute "[t]aking into account 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". The Pre-Trial Chamber clarified in this context that unlike in the first two sub-paragraphs of Art. 53(1), which would require an affirmative finding on the existence of an interest of justice, this would not hold true for sub-paragraph (c), and that the Prosecutor does not even have to present reasons or supporting material in this respect.[77]

V. CONCLUSION

The importance of this decision lies in the fact that it highlights and tests the legal standards applicable to the procedure under Art. 15(4) of the ICC Statute when the Pre-Trial Chamber authorises a request by the Prosecutor for a *proprio motu* investigation. On the hand, the decision of the Pre-Trial Chamber clarifies that also for the Art. 15(4) procedure the same evidentiary standard as the one laid down in Art. 53(1) of the ICC Statute is applicable, and insofar the Pre-Trial Chamber needs to examine whether there is "reasonable basis to proceed with an investigation". It is important to note that this decision confirmed that this evidentiary

[75] ICC, Decision pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 3 October 2011, par. 202 and 204.

[76] *Ibid.*, par. 204.

[77] *Ibid.*, par. 207.

standard is the "lowest standard" in the Rome Statute and therefore does not require a high threshold with regard to the material which has to be presented. As Judge Fernández formulated in her dissenting opinion, the goal of Art. 15 was merely to prevent "frivolous" or politically motivated investigations from the side of the Prosecutor.

Furthermore, this decision also demonstrated the value of the representations by victims, as they were used in order to support the Prosecutor's request, although this was partially criticized by Presiding Judge Fernández, especially since the Chamber used the victims' contributions in order to authorise investigations in crimes which were not requested by the Prosecutor. However, this view by the Presiding Judge might not be in complete coherence with the general approach of the ICC Statute. The crucial provision dealing with the value of victim's participation is Art. 68(3), which states that "[w]here the personal interests of the victims are affected, the Court shall permit their views an 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." And while Art. 15(4) of the Statute reminds us that the Pre-Trial Chamber, "*upon examination of the request and the supporting material*, considers that there is reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation", from the view of the commentator would not exclude that representations from victims would be taken into account also at this state of the proceedings. The overall approach of the ICC Statute has to be seen as "victims-friendly", and although Art. 68(3) belongs to Part VI ("The trial") of the Statute, it has been confirmed in constant jurisprudence that the possibility of victims' participation is applicable throughout all stages of the ICC proceedings.[78] Concerning the procedure for authorisation by the Pre-Trial Chamber, Rule 50(3) of the Rules of Procedure and Evidence clearly says that "victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations". It would be completely illogical if these representations would not be able to be taken into account when authorising the Prosecutor's investigations as Judge Fernández seems to indicate.

Judge Fernández' position that the Chamber should not have so easily authorised investigations into other crimes which were actually not brought forward by the Prosecutor

[78] On this topic, please see C. Stahn, H. Olasolo & K. Gibson, Participation of Victims in Pre-Trial Proceedings of the ICC, Journal of International Criminal Justice, Volume 4, Issue 2, 1 May 2006, Pages 219–238.

(like torture and other inhumane acts as a crime against humanity or rape and sexual violence as a war crime) seems to underestimate the powers of the Pre-Trial Chamber. Unlike in a typical common law system, where the applications of the parties have to be strictly followed, the ICC Statute and its Rules and Regulations give the judges more power with regard especially the legal characterisation of facts. This becomes first and foremost clear in Regulation 55 which indicates that "[i]n its decision under Article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7, or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges". While this is directly only applicable to the decision by the Trial Chamber under Art. 74, it reflects the general idea that the judges have the final say on the legal characterisation of the presented facts and this should also be possible at the authorisation stage, as it the earliest moment where judges can clarify that other crimes might also be applicable.

Judge Fernández' criticism concerning the temporal jurisdiction of the investigation and that the Chamber did not immediately also authorise an investigation from 2002 to 2010, but preferred to ask the Prosecutor to revert back with additional information, seems perfectly in line with Rule 50(4) of the Rules of Procedure and Evidence, since it envisages that the Pre-Trial Chamber "may request additional information from the Prosecutor and from any of the victims who have made representations". In the context of the decision, one would rather have to wonder why the Prosecutor not immediately asked for an authorisation which covered also this early phase of the situation. The answer was given already in the introduction: it seems as if the Prosecutor wanted to avoid a rejection of this part of his request for authorisation. In this regard, the order of the Pre-Trial Chamber seems to be completely plausible, and a good way to invoke the Prosecutor's responsibility for the investigations he is requesting.

The commentator also finds it difficult to fully agree with Judge Fernández' criticism concerning the majority's approach to use the concept of "continuing crimes" in order to expand the authorisation of the investigation also into acts which have been committed after the submission of the Prosecutor's request. While the Presiding Judge would have preferred that the Chamber had instead adopted the same approach taken by Pre-Trial Chamber I in the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana by referring

to the "on-going situation of crisis that triggered the jurisdiction of the Court".[79] This standard seems overly vague and has the disadvantage for the defence that it can encompass almost everything falling into the context of the respective situation. One should therefore rather prefer the approach which was later chosen by Pre-Trial Chamber in the Kenya situation, in which the chamber stated:

> Therefore, an authorization to investigate, given by the Pre-Trial Chamber, extends to all crimes within the jurisdiction of the Court. It is only limited by the parameters of the situation […]. Therefore, in principle, events which […] occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto and, obviously, fall within the Court's jurisdiction.[80]

Whether this link to the situation is an act belonging to a "continuing crime" or have another obvious link would then have been decided on a case by case basis. This approach seems to be more practical and more in coherence with the requirements of legal certainty on the one hand, and the low evidentiary standard of Art. 15 on the other hand.

Overall, both the decision of the Pre-Trial Chamber as well as the separate and partially dissenting opinion of Judge Fernández have contributed to elucidating the procedure and the legal standards which have to be followed by the Pre-Trial Chamber under Art. 15 when authorising the Prosecutor's request for *proprio motu* investigations. But it has also to be noted that this was only one of the first (actually the second) step on the way to finding a coherent approach in applying Art. 15(4) to the authorisation of investigations. Due to the fact that these decisions are not subject to appeal, the Court will probably need some more occasions to fine-tune the procedure through its jurisprudence and cover all problematic aspects. The Pre-Trial Chamber decisions in the Georgia and Burundi decisions were further steps which have already contributed to clarifying the underlying legal principles.

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[79] Judge Fernández, Separate and partly dissenting opinion to the Decision Pursuant to Article 15 (Côte d'Ivoire), Case No. ICC-02/11, PTC III, 5 October 2011, par. 71.

[80] ICC, Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, Case No. 01/15-12, PTC I, 27 January 2016, par. 64