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# The ICC and the situation in Afghanistan: A critical examination of the role of the Pre-Trial Chambers in the initiation of investigations *proprio motu*

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## Abstract

One of the revolutionary aspects of the Rome Statute was the decision to grant the Prosecutor the power to trigger the International Criminal Court's (ICC or the Court) jurisdiction in the absence of a state or United Nations Security Council referral. To guard against the abuse of this power, the Prosecutor was granted the power to initiate investigations *proprio motu* subject to a caveat that the decision to initiate investigations will be reviewed by the Pre-Trial Chamber (PTC) pursuant to Article 15(4) of the Statute. The interpretation of this provision came under the spotlight in the situation in Afghanistan where a turf battle between the Prosecutor and the PTC over the control of Prosecutor-initiated investigations emerged. While the Appeals Chamber's decision to authorize investigations in Afghanistan gave a lifeline to the Prosecutor's power to initiate investigations, it also raises questions regarding the extent of the PTC's powers vis-à-vis the Prosecutor's decision to initiate investigations. This article argues that the Appeals Chamber erred in its finding that the PTC has no review powers over the Prosecutor's decision to open investigations. It further argues that the Appeals Chamber erred in its determination of the factors which the PTC must take into account when it considers the Prosecutor's request to initiate investigations. The article argues that the decision undermines the balance of power between the Prosecutor and the PTC which was an important consideration for some states when they agreed to be part of the Rome Statute. The article also contests the Prosecutor and the Court's interpretation of Article 18 of the Statute.

**Keywords:** admissibility; interest of justice; *proprio motu*; Rome Statute; situation in Afghanistan

## 1. Introduction

In the *Situation in the Islamic Republic of Afghanistan*, the Appeals Chamber overturned PTC II's decision in which the Prosecutor's request for authorization of investigations into the situation in Afghanistan was rejected.<sup>1</sup> The Appeals Chamber's decision was based on the ground that PTC II had erred in its determination whether the investigations which the Prosecutor sought to conduct would serve the interests of justice. In reaching its decision, the Appeals Chamber made several pronouncements regarding the PTC's powers vis-a-vis the Prosecutor's power to open investigations *proprio motu*. These pronouncements not only overturn the jurisprudence that had been established

<sup>1</sup>*Situation in the Islamic Republic of Afghanistan*, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan No. ICC-02/17 OA4, 5 March 2020.

and followed by the Court and the Office of the Prosecutor (OTP), but also alter the role of the PTC in the initiation of investigations *proprio motu*. This article analyses the Appeals Chamber's decision in light of the drafting history, object, and purpose of the Rome Statute. While the article concurs with the Appeals Chamber's decision to authorize investigations in Afghanistan, it rejects the Chamber's interpretation of the role of the PTC in the initiation of investigations *proprio motu*. The Appeals Chamber's interpretation of Article 15(4) of the Statute erodes the PTC's supervisory role over Prosecutor-initiated investigations. Further, the Appeals Chamber's pronouncements on the role of admissibility in the determination of the Prosecutor's request under Article 15(4) and the role of states in these proceedings undermine states' ability to assert jurisdiction as required by the principle of complementarity. The article begins by providing a brief background of the situation in Afghanistan in Section 2. Section 3 examines the role of the PTC when it considers the Prosecutor's request for authorization of investigations under Article 15(4) of the Rome Statute. Section 4 examines the factors which the PTC must consider when it considers the Prosecutor's request. Thereafter, Section 5 examines the implications of the Appeals Chamber's decision on future assessments of requests for authorization of investigations. Section 6 concludes the discussion.

## 2. The ICC and the situation in Afghanistan

In 2006, the ICC Prosecutor opened preliminary investigations into the situation in Afghanistan. The Prosecutor concluded that crimes within the jurisdiction of the Court could have been committed by the Afghan Forces, the Taliban, the United States' armed forces, and the Central Intelligence Agency.<sup>2</sup> Pursuant to these findings, the Prosecutor sought the PTC's permission to open investigations in terms of Article 15(3) of the Rome Statute.<sup>3</sup> PTC II rejected this request on the basis that such investigations would not serve the interests of justice.<sup>4</sup> In reaching its decision, PTC II held that, contrary to the Prosecutor's argument that the PTC is not required to scrutinize whether investigations would serve the interests of justice, the PTC must make a 'positive determination to the effect that investigations would be in the interests of justice . . .'.<sup>5</sup> PTC II held that an investigation would be in the interests of justice 'if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame'.<sup>6</sup> Regarding the Prosecutor's request, PTC II held that, due to the significant time that had elapsed between the alleged crimes and the request, it was unlikely that evidence and potential suspects would still be within the reach of the Prosecutor.<sup>7</sup> PTC II held that due to the nature of the crimes and the context within which they were committed, pursuing an investigation would require a significant amount of resources.<sup>8</sup> Lastly, PTC II held that it was unlikely that pursuing investigations would serve the interests of the victims as the investigations were unlikely to result in prosecutions.<sup>9</sup> Thus, it rejected the Prosecutor's request.

The Prosecutor appealed against the decision of PTC II on two grounds. First, the Prosecutor contended that PTC II had 'erred in law when it sought to make a positive determination of the interests of justice'.<sup>10</sup> According to the Prosecutor, when determining a request for authorization of investigations, the PTC's assessment of the interests of justice must be confined to the contours

<sup>2</sup>*Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan No. ICC-02/17, 12 April 2019, paras. 15–26.

<sup>3</sup>*Ibid.*

<sup>4</sup>*Ibid.*, paras. 90–6.

<sup>5</sup>*Ibid.*, para. 35.

<sup>6</sup>*Ibid.*, para. 89.

<sup>7</sup>*Ibid.*, para. 91.

<sup>8</sup>*Ibid.*, para. 95.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Situation in the Islamic Republic of Afghanistan* case, *supra* note 1, para. 21.

of assessment conducted by the Prosecutor.<sup>11</sup> The second ground of appeal was that PTC II had incorrectly exercised its discretion concerning the factors it considered in assessing whether investigations in Afghanistan would be in the interests of justice.<sup>12</sup> In relation to the first ground of appeal, the Appeals Chamber held that ‘the Pre-Trial Chamber erred in its interpretation of Article 15(4) of the Statute when it found itself bound to assess the factors under Article 53(1) of the Statute’.<sup>13</sup> Regarding the second ground of appeal, the Appeals Chamber held that Article 15(4) does not require the PTC to determine whether investigations would be in the interests of justice.<sup>14</sup> Lastly, the Chamber held that Article 15(4) only requires the PTC to determine whether, based on the information contained in the Prosecutor’s request, there exists a reasonable factual basis to proceed with an investigation.<sup>15</sup> The Appeals Chamber concluded that PTC II erred in concluding that investigations into the situation in Afghanistan would not serve the interests of justice.<sup>16</sup>

This study agrees with the Appeals Chamber’s conclusion that PTC II erred in rejecting the Prosecutor’s request for authorization of investigations into the situation in Afghanistan. The decision of the PTC was not supposed to stand for three reasons. First, it stripped the Prosecutor of his/her discretion to open investigations *proprio motu* by substituting the Prosecutor’s discretion with its own. Second, the PTC adopted an expansive interpretation of the ‘interests of justice’ which would have made it impossible for the Prosecutor to successfully bring cases to the Court. Third, the PTC’s decision would have created an impression that the international criminal justice system is only meant for states that are willing to co-operate with the Court. If allowed to stand, the decision would have encouraged states facing an ICC probe to be hostile towards the Court in order to fend off investigations. Although this article agrees with the Appeals Chamber’s decision to authorize investigations, it disagrees with the Appeals Chamber’s interpretation of the role of the PTC when it considers the Prosecutor’s request for authorization of investigations as well as the role of states in Article 15(4) proceedings. The discussion below will demonstrate that the Appeals Chamber got three aspects wrong, namely, (i) the role or the extent of the PTC’s powers when determining a request for authorization of investigations, (ii) the role of states in Article 15(4) proceedings, and (iii) the factors that must be considered in making this determination.

### 3. The role of the Court in the initiation of investigations *proprio motu*

In determining the correctness of the PTC’s conclusion that investigations in Afghanistan would not serve the interests of justice, the Appeals Chamber held that the determination of the Prosecutor’s request for authorization of investigations under Article 15(4) does not constitute a review.<sup>17</sup> This conclusion is based on the understanding that the factors which the PTC must consider when determining a request from the Prosecutor are not similar to those considered by the Prosecutor when he/she assesses the information in her possession to determine if he/she can submit a request for authorization of investigations.<sup>18</sup> The Appeals Chamber observed that Article 15(3), which the Prosecutor relies on to request authorization of investigation, states that the Prosecutor can request for authorization if he/she concludes that there is ‘a reasonable basis

<sup>11</sup>*Ibid.*, para. 21. The Prosecutor argued that where the OTP fails to address ‘specific circumstances that could give rise to a negative finding as to the interests of justice ...’ the PTC must request him/her to submit additional information.

<sup>12</sup>*Ibid.*, para. 47.

<sup>13</sup>*Ibid.*, para. 25.

<sup>14</sup>*Ibid.*, para. 37.

<sup>15</sup>*Ibid.*, para. 45.

<sup>16</sup>*Ibid.*, para. 46.

<sup>17</sup>*Ibid.*, para. 45.

<sup>18</sup>*Ibid.*

to proceed with investigations'.<sup>19</sup> In determining the reasonable basis test, the Prosecutor relies on factors contained in Article 53(1).<sup>20</sup> In contrast, the Appeals Chamber observed that Article 15(4) requires the PTC to consider 'two factors' when determining the Prosecutor's request for authorization.<sup>21</sup> According to the Appeals Chamber, the implication of this is that the PTC is required to reach its own determination under Article 15(4), and is not required to review the Prosecutor's analysis of the factors under Article 53(1)(a)–(c).<sup>22</sup>

The finding by the Appeals Chamber that the PTC's assessment of the Prosecutor's request under Article 15(4) does not constitute a review is incorrect. In order to fully comprehend the role of the PTC under Article 15(4), the Appeals Chamber should not have focused on the different construction of Article 15(3) and Article 15(4) only. Instead, the role of the PTC in the initiation of investigations *proprio motu* can be properly understood by referring to the drafting history of the Statute, particularly discussions around trigger mechanisms.<sup>23</sup> The question regarding the desirability of granting the Prosecutor the power to initiate investigations *proprio motu* was one of the highly contested issues during the negotiations of the Rome Statute.<sup>24</sup> Some states believed that the Prosecutor should be granted the power to initiate investigations *proprio motu*.<sup>25</sup> Others opposed the idea of granting the Prosecutor the power to open investigations in the absence of state or UNSC referral.<sup>26</sup> These states argued that such powers could be abused, resulting in politically motivated or frivolous proceedings.<sup>27</sup> This concern was shared by those who were in favour of granting the Prosecutor powers to initiate investigations *proprio motu*.<sup>28</sup>

The impasse was broken when Argentina and Germany made a proposal that would introduce some checks and balances on the Prosecutor's *proprio motu* powers.<sup>29</sup> In terms of this proposal, the Prosecutor would receive information relating to the commission of international crimes which he/she would analyse to determine its seriousness. If the Prosecutor concludes that there was a reasonable basis to proceed with an investigation, he/she would submit a request for authorization of investigations, accompanied by supporting material collected from various sources, to

<sup>19</sup>*Ibid.* See Art. 15(3).

<sup>20</sup>*Ibid.* See also Art. 53(1). These are whether there exists a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; whether the case is or would be admissible under Art. 17; and whether 'there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.

<sup>21</sup>*Ibid.* These are whether 'there is a reasonable basis to proceed with an investigation' and whether 'the case appears to fall within the jurisdiction of the Court'.

<sup>22</sup>*Ibid.* This finding overturns the jurisprudence that had been accepted by the PTCs, the Office of the Prosecutor and international criminal law scholars.

<sup>23</sup>Art. 32 of the Vienna Convention on the Law of Treaties states that 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . in order to confirm the meaning resulting from the application of article 31 . . .' or to 'determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure'. See 1969 Vienna Convention on the Law of Treaties, Vol. 1155, at 331 ('VCLT').

<sup>24</sup>M. Bergsmo, J. Pejic and D. Zhu, 'Article 15: Prosecutor', in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (2015), 725, at 726.

<sup>25</sup>Report of the Preparatory Committee on the Establishment of an International Criminal Court I (Proceedings of the Preparatory Committee during March–April and August 1996), Fifty-first Session Supplement No.22 (A/51/22) para. 149; P. Kirsch and D. Robinson 'Initiation of Investigations by the Prosecutor', in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute for an International Criminal Court: A Commentary I* (2002), 657. Proponents of this position argued that such powers would give the Prosecutor some degree of independence from states and the UNSC. They also argued that allowing the Prosecutor to act only at the behest of the states would render the court ineffective as states could be reluctant to make referrals.

<sup>26</sup>Report of the Preparatory Committee on the Establishment of an International Criminal Court, *ibid.*, para. 149.

<sup>27</sup>*Ibid.*, para. 151. They also argued that such powers would result in the Prosecutor being overwhelmed with petitions, thus putting constraints on the limited resources available to the OTP. Others viewed this proposal as unrealistic as international law had yet developed to a stage where the international community was prepared to confer the Prosecutor with the power to initiate investigations in the absence of state referral.

<sup>28</sup>See Kirsch and Robinson, *supra* note 25, at 659.

<sup>29</sup>Proposal submitted by Argentina and Germany', Preparatory Committee on the Establishment of an International Criminal Court 16 March–3 April 1998, A/AC.249/1998/WG.4/DP.35.

the PTC.<sup>30</sup> If convinced that ‘there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court . . .’,<sup>31</sup> the PTC would authorize the Prosecutor to conduct formal investigations. The proposal by Argentina and Germany was incorporated into Article 15 of the Statute with a few changes. The implication of this is that the Prosecutor’s power to initiate investigations in the absence of state or Security Council is subject to judicial oversight.

In light of the historical background behind the Prosecutor’s *proprio motu* powers outlined above, the question is, what is the nature of the process that the PTC is required to conduct under Article 15(4)? Contrary to the Appeals Chamber’s conclusion that this process does not constitute a review, this article argues that the drafters intended to subject the decision of the Prosecutor to initiate investigations using *proprio motu* powers to judicial oversight of the PTC. The role of the PTC under Article 15(4) is to determine the correctness of the decision by the Prosecutor to initiate investigations pursuant to Article 15(3). The PTC must determine whether there indeed exists a reasonable basis to initiate investigations. This conclusion finds support from the Appeals Chamber itself which held that the final text in Article 15 ‘reflects a delicate balance regarding the Prosecutor’s discretionary power to initiate investigations and the extent to which *judicial review* of these powers would be permitted’.<sup>32</sup> The Chamber’s reference to judicial review indicates that there is no other way to classify the PTC’s powers or process it undertakes under Article 15(4).

The Appeals Chamber’s finding that the PTC is not required to review the Prosecutor’s decision but should reach its own determination loses sight of the reason why the drafters decided to subject the decisions of the Prosecutor to initiate investigation *proprio motu* to judicial scrutiny. As stated above, states were wary that granting the Prosecutor unfettered powers to initiate investigations in the absence of state or UNSC referral could result in these powers being abused. Since the role of the PTC is to exercise judicial oversight over the Prosecutor’s exercise of *proprio motu*, the PTC cannot exercise this function by conducting a parallel enquiry based on factors that are different to those considered by the Prosecutor. Therefore, the fact that Article 15(3) and Article 15(4) appear to proscribe different considerations for the Prosecutor and the PTC when they are dealing with investigations initiated by the Prosecutor does not mean that the PTC is required to conduct a parallel enquiry to the one conducted by the Prosecutor.<sup>33</sup> The fact that Article 15(4) requires the PTC to review the Prosecutor’s decision has not only been accepted by previous PTCs but also by the Office of the Prosecutor in various policy documents.<sup>34</sup>

#### 4. Factors to consider in determining the Prosecutor’s request for authorization of investigations

In determining the Prosecutor’s contention that the PTC erred by ‘seeking to make a positive determination of the interests of justice’, the Appeals Chamber made a distinction between Article 15 and Article 53(1) of the Statute. The Appeals Chamber held that Article 53(1) regulates instances where a situation is referred to the Prosecutor by a state or the UNSC.<sup>35</sup> The Chamber held that where a situation is referred to the Prosecutor by a state or the UNSC, Article 53(1) obliges the Prosecutor to open an investigation unless he/she determines that there is no reasonable basis to proceed, taking into account the factors contained in Article 53(1)(a)–(c).<sup>36</sup>

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>*Situation in the Islamic Republic of Afghanistan* case, *supra* note 1, para. 26 (emphasis added).

<sup>33</sup>As shall be seen in Section 4 below, the conclusion that the Statute requires the PTC to consider different factors from the ones considered by the Prosecutor when determining whether to request for authorization of investigations is also incorrect.

<sup>34</sup>See, for example, Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’, International Criminal Court, September 2007.

<sup>35</sup>*Situation in the Islamic Republic of Afghanistan* case, *supra* note 1, para. 28.

<sup>36</sup>Ibid.

In contrast, the Appeals Chamber held that Article 15, which builds on Article 13, applies to situations where the Prosecutor initiates investigations *proprio motu*.<sup>37</sup> Unlike Article 53(1), the Appeals Chamber held that Article 15 recognizes the discretionary nature of the Prosecutor's power to open investigations *proprio motu*. Therefore, 'the content and placement of Articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts'.<sup>38</sup> This means that when the PTC is determining the Prosecutor's request under Article 15(4), it cannot consider the factors contained in Article 53(1).

The distinction which the Appeals Chamber made between Article 15 and Article 53(1) is unwarranted for two reasons. First, there is nothing in the Statute that suggests that Article 53(1) is only applicable to referrals and not Prosecutor-initiated investigations. As Judge Carranza correctly points out in her separate opinion, a plain reading of Article 53(1) does not reveal anything that suggests that its application is restricted to only referrals as it does not allude to states or the Security Council.<sup>39</sup> Second, the drafting history of these provisions indicates that the two provisions are connected. For example, Draft Article 54(1) (which became Article 53(1) in the final text) stated that the Prosecutor 'shall initiate an investigation upon ... unless she determines there is no reasonable basis for a prosecution under this Statute'.<sup>40</sup> The Draft Article contained a footnote which read:

This draft does not attempt to prejudge the resolution of the number of proposals to be considered by the Committee of the Whole regarding the starting point for the Prosecutor's investigative authority. These include, among others, referrals by States, referrals by the Security Council, and *proprio motu* authority subject to approval by the Pre-Trial Chamber. In the event the last proposal is among those accepted, the text might read "... shall initiate an investigation upon ... or shall seek the approval of the Pre-Trial Chamber to initiate an investigation in a case under article 13, unless ...".<sup>41</sup>

What this suggests is that Draft Article 54(1) was not only supposed to be relied on when the Prosecutor determines whether to initiate investigations pursuant to a state or UNSC referral, but also when determining whether to open investigations *proprio motu*. This means that the Prosecutor could rely on factors in Article 54(1)(a)–(c) which became Article 53(1)(a)–(c) to determine whether to initiate investigations *proprio motu*. As the PTC correctly observed in the *Kenyan Request*, Article 53 was intended 'to be the general article for the initiation of an investigation containing the exhaustive criteria in relation to such an initiation, irrespective of the triggering mechanisms for the jurisdiction of the Court ...'.<sup>42</sup> This conclusion finds support from Judge Carranza, who pointed out in her Separate Opinion that Part 5, which Article 53(1) falls under, regulates issues regarding investigations and prosecutions with some more detail.<sup>43</sup> It follows that there is no justification for the conclusion that the PTC cannot rely on factors

<sup>37</sup>*Ibid.*, para. 27.

<sup>38</sup>*Ibid.*, para. 33.

<sup>39</sup>*Situation in the Islamic Republic of Afghanistan*, 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 No: ICC-02/17-138-Anx-Corr, 6 March 2020, para. 7.

<sup>40</sup>UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Working Paper on Article 54, UN Doc. A/Conf.183/C.1/WGPM/L.1, 18 June 1998.

<sup>41</sup>*Ibid.* At this stage, it had not been decided whether the Prosecutor's exercise of *proprio motu* powers would be subject to the review powers of the PTC or not.

<sup>42</sup>*Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya No: ICC-01/09, 31 March 2010, para. 23.

<sup>43</sup>Separate opinion of Judge Luz del Carmen Ibáñez Carranza, *supra* note 39, para. 7.



contained in Article 53(1) when it considers the Prosecutor's request for authorizations of investigation.

#### 4.1 The meaning of 'a reasonable basis to proceed'

In determining whether the PTC should take into account the interests of justice when it determines the Prosecutor's request for authorization, the Appeals Chamber held that Article 15(4) neither refers to the interests of justice nor Article 53.<sup>44</sup> Instead, it only requires the PTC to consider two requirements when determining the Prosecutor's request, namely, whether 'there is a reasonable basis to proceed with an investigation',<sup>45</sup> and whether 'the case appears to fall within the jurisdiction of the Court'.<sup>46</sup> In contrast, the Appeals Chamber held that Rule 48 of the ICC Rules and Procedure requires the Prosecutor to consider factors contained in Article 53(1). However, there is no equivalent rule that requires the PTC to take into account similar factors when it determines the Prosecutor's request.<sup>47</sup> This, therefore, means that while the Prosecutor can rely on the factors contained in Article 53(1)(a)–(c) when determining whether to request the PTC's authorization, the PTC's determination of the request will be based on factors contained in Article 15(4).

First, it should be acknowledged that a reading of Article 15(3) and Article 15(4) seems to suggest that the factors which the Prosecutor must consider when determining whether to request authorization of investigations are different from those that the PTC must consider when determining this request. However, a consideration of the *travaux préparatoires* reveals that the appearance of the phrase 'a reasonable basis to proceed' in Articles 15(3), 15(4), and 53(1) is not accidental. The phrase emanates from a proposal by Argentina and Germany which introduced judicial checks on the Prosecutor's power to open investigations *proprio motu*.<sup>48</sup> This Proposal required the PTC to use the 'reasonable basis to proceed' test when determining whether to authorize the Prosecutor's request. This is the same test which the Prosecutor would use when determining whether to request authorization of investigations. Given that the *travaux préparatoires* intended the phrase 'a reasonable basis to proceed' to mean the same thing, it is difficult to understand why the same phrase in the final text should mean different things. Further, since the role of the PTC would be to review the decision of the Prosecutor, it can only make sense that it uses the same criteria used by the Prosecutor in reaching his/her decision to request authorization of investigations.

The Appeals Chamber noted that previous PTCs held that the phrase 'a reasonable basis to proceed' in Article 15(3) and Article 15(4) have the same meaning.<sup>49</sup> It, however, held that this interpretation by the PTCs 'obscures the essential difference between the standard applicable to the assessment on the one hand and the subject-matter of the assessment on the other'.<sup>50</sup> However, there is nothing in the Statute that supports the conclusion that the PTC's review of the Prosecutor's request should be based on different factors from the ones used by the Prosecutor when he/she makes her decision. Judge Carranza rightly points out that the principle of legality requires prohibitions or limitation to a right to be expressly written and that 'an interpreter cannot create prohibitions where they are not written'.<sup>51</sup> If the drafters of the Rome Statute wanted the PTC to use a different test to the one used by the Prosecutor when it reviews the

<sup>44</sup>*Situation in the Islamic Republic of Afghanistan*, *supra* note 1, para. 34.

<sup>45</sup>*Ibid.* According to the Appeals Chamber, this enquiry entails determining whether crimes have been committed.

<sup>46</sup>*Ibid.* According to the Appeals Chamber, this enquiry entails determining whether 'potential case(s) arising from such investigation appear to fall within the Court's jurisdiction'.

<sup>47</sup>*Ibid.*, para. 35.

<sup>48</sup>Proposal submitted by Argentina and Germany', *supra* note 29.

<sup>49</sup>*Situation in the Islamic Republic of Afghanistan*, *supra* note 1, para. 36.

<sup>50</sup>*Ibid.* The Appeals Chamber further argued that 'the harmonisation of the standard between articles 15(3) and (4) and 53(1) of the Statute does not result in the harmonisation of the subject-matter of the Prosecutor's decision under articles 15(3) and 53(1) of the Statute and the Pre-Trial Chamber's assessment under article 15(4) of the Statute'.

<sup>51</sup>Separate opinion of Judge Luz del Carmen Ibáñez Carranza, *supra* note 39, para. 7.

Prosecutor's request, they would have expressly said so. Instead, the drafters used the same 'reasonable basis to proceed' test, thus implying that they intended the Prosecutor and the PTC to use the same test.

Further evidence to support the view that the Prosecutor and the PTC were intended to use the same test when it comes to the initiation of investigations *proprio motu*, and that the phrase 'a reasonable basis to proceed' was meant to mean the same thing, is found in the drafting history of the Statute. Draft Articles 12 and 13, which became Article 15, were closely linked to Article 54(1), which became Article 53(1).<sup>52</sup> While Article 12 required the Prosecutor to satisfy him/herself that there is 'sufficient basis to proceed' before initiating investigations, Article 13(1) required the Prosecutor to satisfy him/herself that 'there is a reasonable basis to proceed with an investigation' before submitting a request for authorization of investigations. Similarly, Article 13(2) required the PTC to satisfy itself that there was a reasonable basis to proceed before authorizing investigations. Draft Article 12 contained a *nota bene* that if the term 'sufficient basis' was retained, it was supposed to be harmonized with the term 'reasonable basis'.<sup>53</sup> What this suggests is that the drafters of the Statute intended the Prosecutor and the PTC to use the same 'reasonable basis to proceed' test. Since the final text now contains the phrase 'a reasonable basis to proceed', it should follow that the meaning of these phrases should be the same. It is therefore concluded that there is no evidence to support the Appeals Chamber's argument that the phrase 'reasonable basis to proceed' in Article 15(4) was intended to have a separate meaning to the one in Article 15(3) and Article 53(1).

A purposive interpretation of Article 15 also reveals that the Statute requires the PTC to consider the same factors that the Prosecutor considers when he/she determines whether to initiate investigations. Article 31(1) of the Vienna Convention requires treaties to be interpreted in accordance with 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*'.<sup>54</sup> The meaning of 'a reasonable basis to proceed' under Article 15(4) should be interpreted in light of the purpose behind subjecting the Prosecutor's *proprio motu* powers to judicial control. Since the purpose was to ensure that the PTC reviews decisions of the Prosecutor, the meaning ascribed to the phrase 'a reasonable basis to proceed' should be that which enables the PTC to review the decisions of the Prosecutor. The process conducted by the PTC cannot constitute a review if it is based on different considerations to the ones the Prosecutor relied on to reach his/her decision. As the PTC correctly argued in the *Kenyan Requests*, 'if the purpose of the article 15 procedure is to provide the Chamber with a supervisory role over the *proprio motu* initiative of the Prosecutor ...' the PTC cannot fulfil this role unless it applies the same standard which the Prosecutor relied on to reach his/her conclusion.<sup>55</sup> Heller concurs that it is a basic rule of interpretation that a word or expression is presumed to mean the same thing throughout a treaty's text.<sup>56</sup> Consequently, a purposive interpretation of Article 15(4) leads to the conclusion that the phrase 'a reasonable basis to proceed' contained therein has the same meaning as the one contained in Article 53(1). Since the contents of the phrase 'a reasonable basis' to proceed are outlined in Article 53(1)(a)–(c), it follows that the PTC can rely on this provision and the factors contained therein to determine the Prosecutor's request.

<sup>52</sup>Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1 (1998), at 37.

<sup>53</sup>*Ibid.*

<sup>54</sup>VCLT, *supra* note 23 (emphasis added). In the *Kenyan Request*, the PTC correctly argued that it would be illogical to advance the view that the scope of the phrase 'reasonable basis' under Art. 15(3) is different to the one under Art. 15(4) 'notwithstanding that the same language is used within the same or related articles and for the same purpose ...'. See *Situation in the Republic of Kenya*, *supra* note 42, para. 21.

<sup>55</sup>*Situation in the Republic of Kenya*, *ibid.*, para. 24.

<sup>56</sup>K. J. Heller, 'The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong', *Opinio Juris*, 9 March 2020, available at [www.opiniojuris.org/2020/0309/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong/](https://www.opiniojuris.org/2020/0309/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong/).



## 4.2 The interests of justice

The Appeals Chamber's conclusion that the PTC is not required to assess factors contained in Article 53(1)(a)–(c) was also based on the grounds that when requesting authorization of investigations, the Prosecutor is only required to provide the Court with limited information of a general nature.<sup>57</sup> According to the Chamber, the fact that the Prosecutor is not required to justify his/her conclusion regarding the interests of justice, and is only required to provide a factual description of the crimes allegedly committed, supports the conclusion that the PTC's determination should be limited to factors contained in Article 15(4).<sup>58</sup> This means that the PTC's assessment will be confined to assessing whether crimes have been committed and whether potential cases from the investigation fall within the Court's jurisdiction. Consequently, the Appeals Chamber held that the PTC should not assess whether investigations will serve the interests of justice or whether the admissibility requirements have been met.

The question regarding whether the PTC is required to determine if the investigations that the Prosecutor seeks to undertake are in the interests of justice has proven to be the most controversial in the Afghanistan saga.<sup>59</sup> As a result, it warrants some detailed discussion. One of the factors which the Prosecutor is required to consider when determining whether to initiate investigations is whether there exists 'substantial reasons to believe that an investigation would not serve the interests of justice', taking into account the gravity of the crime and the interests of the victim.<sup>60</sup> The OTP's understanding of this provision, which has found support from the PTCs, is that the PTC is not required to make a positive determination whether investigations will serve the interests of justice.<sup>61</sup> This position was rejected by the PTC in the Afghanistan Request. It held that when determining the Prosecutor's request, it must make a:

positive determination to the effect that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation be feasible and meaningful under the relevant circumstances.<sup>62</sup>

Jacobs argues that the PTC's decision to review the interests of justice was *ultra vires* as it is 'the Prosecutor who can decide to not open an investigation in the interests of justice'.<sup>63</sup> The question therefore is, does the Rome Statute require the PTC to review whether investigations sought by the Prosecutor would serve the interests of justice?

This article acknowledges that Article 53(1)(c) seems to create a presumption that all investigations are in the interests of justice. This means that the Prosecutor should only conclude that initiating investigations will not serve the interests of justice in exceptional circumstances. However, in this article's view, this presumption does not preclude the PTC from reviewing

<sup>57</sup>*Situation in the Islamic Republic of Afghanistan*, *supra* note 1, para. 39. Regulation 49(1) requires the Prosecutor to 'refer to the crimes committed and provide a statement of the facts alleged to provide a reasonable basis to believe that the crimes are being or have been committed, as well as a reasoned declaration that the listed crimes fall within the Court's jurisdiction'.

<sup>58</sup>*Ibid.*, para. 39.

<sup>59</sup>This is the basis upon which the PTC declined to authorize the Prosecutor's request.

<sup>60</sup>Art. 53(1)(c).

<sup>61</sup>*Situation in the Republic of Burundi*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp, 9 November 2017, para. 190. The PTCs have demonstrated disinterest in reviewing the interests of justice. In the *Burundi Request*, the PTC held that since the Prosecutor had not determined that initiating an investigation in the Burundi situation would not serve the interests of justice there were no substantial reasons to believe that an investigation would not serve the interests of justice.

<sup>62</sup>*Situation in the Islamic Republic of Afghanistan*, *supra* note 2, para. 35.

<sup>63</sup>D. Jacobs, 'ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision', *Spreading the Jam*, 12 April 2019, available at [www.dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/](http://www.dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/).

whether investigations will serve the interests of justice. In making this argument, the article considers the mischief which the drafters of the Rome Statute sought to guard against when they granted the PTC the power to review the Prosecutor's decision to open investigations. The PTC's review powers are designed to ensure that the Prosecutor will not abuse his/her power, resulting in unwarranted or frivolous investigations. For the PTC to effectively exercise its oversight role, it must consider all the factors set out in Article 53(1), including ascertaining if investigations will be in the interests of justice.

If the Appeals Chamber's argument that the PTC cannot review the interests of justice is accepted as correct, it would mean that the PTC will be obliged to authorize investigations even if there is *prima facie* evidence that such investigations are not in the interests of justice. For instance, the Office of the Prosecutor has identified gravity, interests of victims, circumstances of the accused, and other justice mechanisms as some of the considerations that are taken into account when determining the interests of justice.<sup>64</sup> If the Appeals Chamber's finding that the PTC is not required to assess the interests of justice is correct, it would mean the PTC will be obliged to allow the Prosecutor to investigate situations even if it is clear that the cases from the situation will not meet the gravity threshold.<sup>65</sup> Such a situation will lead to the same consequences which the drafters of the Rome Statute sought to guard against when they gave the PTC the power to review the Prosecutor's exercise of *proprio motu* powers.<sup>66</sup> To illustrate this point further, Article 15(3) states that victims may make representations to the PTC when it considers the Prosecutor's request for authorization of investigations.<sup>67</sup> If the PTC cannot determine whether investigations are in the interests of justice, the question is, what would happen if the victims, in their representations, argue that the investigations which the Prosecutor seeks to undertake will not serve the interests of justice? Would this mean that the PTC will ignore the victims' submissions and defer to the Prosecutor? In this article's view, such an approach is untenable. As Heller correctly argues, such an approach 'eliminate[s] any and all meaningful constraints on the OTP's ability to open new investigations *proprio motu*' while reducing the process to a box-ticking exercise.<sup>68</sup> This article therefore submits that the Statute requires the PTC to review the interests of justice.

The Appeals Chamber's reason for concluding that the PTC is not required to assess the interests of justice is that the information which the Prosecutor is required to provide when requesting authorization of investigations is of a limited and very general nature. In this article's view, the fact that the Prosecutor is required to provide information of a general nature does not mean that the PTC's oversight role should be reduced to a mere formality. Instead, this should only mean that the PTC must use a lower evidentiary standard when determining the Prosecutor's request. This approach is consistent with the reality that this review takes place at a preliminary stage of proceedings when the Prosecutor would not have conducted formal investigations. As such, the information in his/her possession will be limited. This use of low evidentiary burden in the determination of the Prosecutor's request for authorizations under Article 15(4) appears to have become the accepted norm by the PTCs. In the Kenyan Request, the PTC held that in determining

<sup>64</sup>Policy Paper on the Interests of Justice', *supra* note 34.

<sup>65</sup>Similarly, if circumstances arise where investigations would not serve the interests of justice or where there exist other justice mechanisms but the Prosecutor decides to ignore them, it would mean that the PTC will be bound to ignore them.

<sup>66</sup>It will not be consistent with the Rome Statute if the Prosecutor pursues cases when it is not in the interests of justice to do so. For instance, one of the reasons for subjecting the *proprio motu* powers of the Prosecutor to judicial review was to ensure that the Prosecutor will not pursue frivolous or politically motivated case. If the PTC does pursue a matter which does not meet the gravity threshold, it would amount to investigating frivolous cases. However, the Appeals Chamber's decision means the PTC will not be available to curtail such abuse of power.

<sup>67</sup>Art. 15(3).

<sup>68</sup>Heller, *supra* note 56.

whether the ‘reasonable basis to believe’ test has been satisfied, the PTC applies the lowest evidentiary standard which does not require the information to be comprehensive or conclusive.<sup>69</sup> Unlike the approach suggested by the Appeals Chamber in the Afghanistan Appeal, this approach strikes a balance between ensuring that the PTC fulfils its oversight role over the Prosecutor while at the same time acknowledging that proceedings under Article 15(4) are confined to preliminary examinations. If the Prosecutor fails to address some factors which in the PTC’s view could lead to a conclusion that investigations will not serve the interests of justice, it is submitted that the PTC should request the Prosecutor to address such factors. This means that the PTC should not substitute the Prosecutor and conduct a *de novo* determination without allowing the Prosecutor to address these issues raised as was the case in the Afghanistan Request.

### 4.3 Admissibility

Perhaps a more contentious issue that arose in the Appeals Chamber’s decision concerns the issue of admissibility. The Appeals Chamber held that if the PTCs were expected to apply all the factors under Article 53(1)(a)–(c) of the Statute when reviewing the Prosecutor’s request, this would include an assessment of the admissibility of potential cases.<sup>70</sup> According to the Appeals Chamber ‘the value of judicial assessment of admissibility at this stage would be limited’.<sup>71</sup> The Chamber observed that since there is no obligation for the Prosecutor to notify states of his/her intention to seek authorization for an investigation and the participation of states in these proceedings is not provided for in the Statute, the PTC would have to rely on the Prosecutor ‘to provide information that would allow it to form a view on issues of admissibility’.<sup>72</sup> The Appeals Chamber concluded that ‘it is sufficient for the purposes of the article 15 procedure that the Prosecutor considers the admissibility of potential cases in determining whether she should request authorization for an investigation under Article 15(3) of the Statute’ and that there is no basis for the PTC to consider the question of admissibility.<sup>73</sup> The Appeals Chamber observed that during the Rome Conference, a provision which required the PTC to determine issues of admissibility was deleted from Draft Article 15 and that a proposal to incorporate issues of admissibility was rejected during the drafting of the Rule.<sup>74</sup> According to the Appeals Chamber, ‘specific procedural mechanisms based on the full participation of relevant parties, participants and States are provided for elsewhere in the legal framework ensuring that the Court pursues investigations and prosecutions only in relation to admissible cases’.<sup>75</sup> The Chamber agreed with the Prosecutor that Article 18 allows the PTC to consider the issue of admissibility immediately following the authorization of an investigation.<sup>76</sup> Thus, the Appeals Chamber’s pronouncement raises three questions, namely whether the PTC is required to determine the issue of admissibility, whether the Prosecutor is required to notify the state, and whether states can participate in Article 15(4) proceedings.

The conclusion that the Prosecutor is not obliged to notify states of his/her intention to seek authorization is, in this article’s view, incorrect. The contention here arises from the interpretation and application of Article 18. The relevant provisions states that:

<sup>69</sup>*Situation in the Republic of Kenya*, *supra* note 42, para. 27. The Appeals Chamber neither acknowledges the existences of this approach nor interrogates its correctness.

<sup>70</sup>*Situation in the Islamic Republic of Afghanistan*, *supra* note 1, para. 40. This is because the PTC would only have to rely on the information provided by the Prosecutor in determining admissibility.

<sup>71</sup>*Ibid.*

<sup>72</sup>*Ibid.*

<sup>73</sup>*Ibid.*

<sup>74</sup>*Ibid.*, para. 41. The Appeals Chamber’s finding means that states can no longer participate in the proceedings under Art. 15(4) as has been the practice.

<sup>75</sup>*Ibid.*, para. 41.

<sup>76</sup>*Ibid.*

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. 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.
3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.<sup>77</sup>

Article 18 is perhaps one of the most obscure provisions of the Rome Statute. On the face of it, the provision looks straightforward and uncontroversial. Initially, the provision was understood as requiring the Prosecutor to inform states of his/her decision to open investigations pursuant to Articles 13(a), 13(c), and 15 of the Statute.<sup>78</sup> States with jurisdiction would be able to respond to the Prosecutor's announcement, informing him/her of if they were conducting or had conducted investigations. The Prosecutor would then defer to the state unless he/she disputes the state's claim that it is conducting investigations. In that case, the Prosecutor would have to seek authorization to investigate from the PTC.

The application of Article 18 became controversial when PTC II considered the Prosecutor's request for authorization of investigations in Kenya. While dealing with the issue of admissibility, the PTC remarked that 'the Chamber emphasizes that defining the scope of potential case(s) at this stage may well serve an effective application of article 18 of the Statute, which is *immediately applicable when a Pre-Trial Chamber authorizes the commencement of an investigation*'.<sup>79</sup> This pronouncement suggests that Article 18 becomes applicable after the PTC has authorized investigations. This conclusion reflects the position of the Office of the Prosecutor.<sup>80</sup> The Court's interpretation was even made clearer by PTC III in the situation in Burundi where it held that 'the

<sup>77</sup>Art. 18(1)-(4).

<sup>78</sup>See M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Mich. J. Int'l L.* 869, at 905-12; M. Benzig, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck UNYB* 591; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *EJIL* 144; D. N. Nsereko 'Article 18: Preliminary rulings regarding admissibility', in Triffterer and Ambos, *supra* note 24, at 832.

<sup>79</sup>*Situation in the Republic of Kenya*, *supra* note 42, para. 51 (emphasis added).

<sup>80</sup>*Situation in the Republic of Kenya*, Request for Authorisation of an Investigation Pursuant to Article 15, *Office of the Prosecutor*, No. ICC- 01/09, 26 November 2009, para. 113. The Prosecutor informed the Chamber that 'it will provide the notice foreseen in Article 18 (1) of the Statute upon a decision of the Chamber to authorise an investigation into the situation in the Republic of Kenya' and that 'such a notification can only occur after an affirmative determination of the Chamber on the Prosecutor's Application'. It should be noted that the Prosecutor cites no authority for these conclusions. For similar submissions, see *Situation in the Republic of Côte d'Ivoire*, Request for Authorisation of an Investigation Pursuant to Article 15, *Office of the Prosecutor*, ICC-02/11-3, 23 June 2011, para. 180.

Chamber agrees that article 15(3) of the Statute does not confer any rights of participation on the State(s) which would normally exercise jurisdiction over the alleged crimes' and that 'pursuant to article 18 of the Statute, such a State acquires rights of participation only once the Prosecutor initiates an investigation following authorization by a Pre-Trial Chamber'.<sup>81</sup> Therefore, the Appeals Chamber's decision in the Afghanistan request crystallized the Prosecutor and the PTCs' interpretation of Article 18. The discussion below will attempt to demonstrate why the Court and the Prosecutor's understanding is not only incorrect but inconsistent with the intention of the drafters of the Rome Statute.

#### 4.3.1 *Origins and meaning and purpose of Article 18*

In order to fully understand the meaning and application of Article 18, it is necessary to examine the origins and drafting history of this provision. Article 18, which was introduced as Draft Article 11*bis* originates from a proposal made by the United States during Preparatory Committee proceedings.<sup>82</sup> Draft Article 11*bis* (1) stated that when a matter has been referred to the Court and the Prosecutor has determined that there would be sufficient basis to commence an investigation, the Prosecutor would make such a referral known by making a public announcement as well as by sending a notification to all states parties.<sup>83</sup> Article 11*bis* (2) required a state which was investigating the matter referred to the Court to inform the Court of its investigations.<sup>84</sup> At the state's request, the Prosecutor would defer to the state's investigations unless he or she determines that 'there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions'.<sup>85</sup> Once the Prosecutor made such determination, he/she would have to seek confirmation of the same from the PTC.

A number of important points need to be highlighted here as they have implications on how Article 18 must be understood. First, the proposal required the Prosecutor to notify states once he/she had decided that there was a sufficient basis to commence investigations. This means that the notification contemplated was supposed to be sent before the Prosecutor applied to the PTC for authorization of investigations. Second, the proposal granted states the opportunity to assert jurisdiction before the Prosecutor commenced investigations. Third, the Prosecutor's determination that there was a total or partial collapse or unavailability of the state's national judicial system, or the state was unwilling or unable genuinely to carry out the investigation and prosecutions had to be confirmed by the PTC. Since these determinations concerned aspects of admissibility,<sup>86</sup> it meant that the PTC was required to determine issues of admissibility.

Draft Article 11*bis* was introduced to augment the principle of complementarity. In its statement accompanying the proposal, the United States noted that since delegates supported the idea of a Prosecutor with *proprio motu* powers, 'the principle of complementarity should be recognized at the outset of any referral of a matter to the court in addition to the investigation of individual

<sup>81</sup>*Situation in the Republic of Burundi*, Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017, para. 8.

<sup>82</sup>Proposal submitted by the United States of America: Article 11 bis – Preliminary Rulings Regarding Admissibility', UN Doc. A/AC.249/1998/WG.3/DP.2, 25 March 1998.

<sup>83</sup>*Ibid.*

<sup>84</sup>*Ibid.*

<sup>85</sup>*Ibid.* The Prosecutor could review the deferral six months or one year after deferral. Art. 11*bis* (3) allowed a state to appeal the decision of the PTC confirming the Prosecutor's determination under Art. 11*bis* (2). After deferring to a state, the Prosecutor could request periodical progress report from that state in terms of Article 11*bis* (4). Lastly, according to Article 11*bis* (5), a state that challenged admissibility at preliminary stage could not lose its right to challenge admissibility at a later stage.

<sup>86</sup>See Art. 17 which outlines factors that must be considered when determining whether a matter is admissible before the ICC.

cases by the prosecutor'.<sup>87</sup> The statement further pointed out that the proposal sought to ensure that 'at the outset of a referral of an overall matter, a state can assert its responsibility to enforce the law itself provided it is capable and willing to do so'.<sup>88</sup> Lastly, the United States argued that its proposal sought to guard against 'unwarranted investigation and prosecution of persons who are being investigated by their own national authorities' as well as allow states to assert their responsibility to enforce the law in line with the principle of complementarity.<sup>89</sup>

The proposal by the United States was adopted as Article 16 of the Draft Statute.<sup>90</sup> The United States reiterated its position that it was necessary and in line with the principle of complementarity 'to provide for a procedure which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned'.<sup>91</sup> Following some criticism and calls for clarification, the United States submitted a revised Draft Article 16 to the Committee of the Whole.<sup>92</sup> The new Draft Article 16 no longer required the Prosecutor to make a public announcement when he/she concludes that there exists sufficient basis to proceed.<sup>93</sup> Instead, the Prosecutor had to notify all states parties and any non-states parties that may have jurisdiction.<sup>94</sup> Draft Article 16(2) required states to respond to the Prosecutor's notification within a period of one month, informing him/her whether it was investigating or has investigated its nationals or others within its jurisdiction.<sup>95</sup> The Prosecutor would have to defer to the state which claimed to be investigating unless he/she 'determines that the State is unwilling or unable genuinely to carry out the investigation of the matter'.<sup>96</sup> In making the determination in terms of Draft Article 16(2), the Prosecutor had to rely on factors contained in Draft Articles 15 or 18.<sup>97</sup> What this suggests is that the issue of admissibility had to be determined from the onset when the Prosecutor determined that there was sufficient basis to proceed with investigations. Lastly, Draft Article 16(6) allowed the Prosecutor, while awaiting the PTC's ruling under Draft Article 16(2), to 'seek specific authority from the Pre-Trial Chamber to pursue investigative steps where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence will not be subsequently available'.<sup>98</sup> Once again, this provision demonstrates that the procedures contemplated in Draft Article 16 were intended to apply before the Prosecutor had initiated investigations.

<sup>87</sup>Statement of the United States Delegation on "Article 11 *bis* - Preliminary Rulings Regarding Admissibility", A/AC.249/1998/WG.3/DP.2, 3 April 1998.

<sup>88</sup>*Ibid.*

<sup>89</sup>*Ibid.*

<sup>90</sup>Report of the Preparatory Committee on the Establishment of an International Criminal Court – Addendum: Part One – Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Add.1, 14 April 1998. Draft Art. 16 made a huge departure from the provisions of the ICL Draft. While Draft Art. 35 of the ICL Draft required the accused person or an interested state to challenge jurisdiction before the commencement of trial, Draft Art. 16 allowed the state to assert jurisdiction before investigations. See 'ILC Draft Statute for an International Criminal Court', in *Report of the International Law Commission on the Work of its Forty-sixth Session (2 May–22 July 1994)*, UN Doc. A/49/10 (1994), at Draft Art. 35; 'Yearbook of the International Law Commission 1994 – Volume II, Part Two', UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (1997), at 26–74.

<sup>91</sup>Committee of the Whole Summary Record of the 11th Meeting', A/CONF.183/C.1/SR.11, 20 November 1998. While some states supported the inclusion of Article 16 on the basis that it supported complementarity, others argued that the provision would create obstacles for the Court to exercise jurisdiction. The majority of states expressed reservations and requested for further clarity from the United States.

<sup>92</sup>Proposal submitted by the United States of America', *supra* note 82.

<sup>93</sup>See Draft Art. 16(1).

<sup>94</sup>*Ibid.* Such a notification could be given on confidential bases if it would protect persons or prevent destruction of evidence

<sup>95</sup>Draft Art. 16(2).

<sup>96</sup>Such a determination had to be confirmed by the PTC.

<sup>97</sup>Draft Art. 15 which became Art. 17 in the Final Draft dealt with the issue of admissibility. This part was, however, removed later.

<sup>98</sup>Draft Art. 16(6).



After more deliberations, Article 16 was further amended.<sup>99</sup> While Draft Article 16 was intended to apply to state and Security Council referrals as well as when the Prosecutor initiates investigations *proprio motu*, the provision was now applicable to instances where a situation is referred to the Prosecutor by the state or the Prosecutor was acting *proprio motu*.<sup>100</sup> Second, the Prosecutor was no longer empowered to determine the unwillingness or inability of a state to prosecute.<sup>101</sup> Instead, the Prosecutor had to apply to the PTC which would make such a determination. Thus, the Prosecutor required the PTC's authorization to commence investigations. The amended Draft Article 16 received mixed reactions from states. Those who were in favour of the provision argued that it provided safeguards against abuse of *proprio motu* powers and embodied the principle of complementarity.<sup>102</sup> Those who opposed the provision did so on the grounds that it was cumbersome and 'would seriously impair the effectiveness of the system'.<sup>103</sup> It is, however, important to note that all the states agreed on the purpose, meaning, and implications of Article 16.<sup>104</sup> As Human Rights Watch correctly points out, Article 16 required the determination of complementarity and admissibility at the pre-investigation stage.<sup>105</sup> Draft Article 16 was included in the Draft that was submitted at the Rome Conference and became Article 18 in the final Statute.

#### 4.3.2 The relationship between Article 18 and Article 15

Having traced the drafting history of Article 18 and demonstrated that the provision was intended to apply at the pre-investigation stage and prior to the Prosecutor seeking authorization to investigate, the next step is to determine its relationship with Article 15. In this article's view, the mechanism contained in Article 18 is a component of Article 15. In other words, the two provisions are intended to apply together. Article 18 elaborates the procedures that the Prosecutor follow before submitting a request for authorization under Article 15(4). In coming up with this interpretation, the article is cognisant of the fact that the ICC Rules of Procedure and Evidence suggest that the procedures contemplated in Articles 15 and 18 are separate.<sup>106</sup> The proposition that the procedures contemplated in Articles 15 and 18 are different is untenable for two reasons. The first reason is that both Article 15 and Article 18 deal with pre-investigation procedures. A reading of the Rome Statute indicates that there is only one pre-investigation proceeding before the Prosecutor formally conducts investigations. This is when the PTC considers the Prosecutor's request for authorization to investigate under Article 15(4). The question then is, at what stage can Article 18 proceedings take place? The Appeals Chamber and the Prosecutor's response is that Article 18 applies immediately after authorization of investigations. However, this position is not supported by the drafting history of Article 18.<sup>107</sup> The proposition that Article 18 should be seen as a component of Article 15 can be illustrated through Article 18(2). This provision

<sup>99</sup>Bureau Proposal: Part 2 – Jurisdiction, admissibility and applicable law', UN Doc. A/CONF.183/C.1/L.59.

<sup>100</sup>See Draft Art. 16(1). Therefore, the provision was no longer applicable in relation to United Nations Security Council referrals.

<sup>101</sup>*Ibid.*

<sup>102</sup>UN Doc. A/CONF.183/C.1/SR.34, 13 July 1998, at para. 90, UN Doc. A/CONF.183/C.1/SR.35, 13 July 1998, paras. 36, 48.

<sup>103</sup>UN Doc. A/CONF.183/C.1/SR.33, 13 July 1998, para. 21.

<sup>104</sup>There was consensus that this provision would require state to be notified of the Prosecutor's conclusion that there is sufficient basis to investigate and that states would have the opportunity to assert jurisdiction before the Prosecutor sought authorization to investigate.

<sup>105</sup>'Section E: Complementarity', *Human Rights Watch*, available at [www.hrw.org/legacy/reports98/icc/jitbw-07.htm](http://www.hrw.org/legacy/reports98/icc/jitbw-07.htm).

<sup>106</sup>See 'Rules of Procedure and Evidence of the International Criminal Court', ICC-ASP/1/3 and Corr.1, part IIA, at Sec. II and III. Cf. W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), 478. See also D. Jacobs, 'Peek A Boo ICC Authorises Investigation in Burundi Some Thoughts on Legality and Cooperation', *Spreading the Jam*, available at [www.dovjacobs.com/2017/11/11/peek-a-boo-icc-authorises-investigation-in-burundi-some-thoughts-on-legality-and-cooperation/](http://www.dovjacobs.com/2017/11/11/peek-a-boo-icc-authorises-investigation-in-burundi-some-thoughts-on-legality-and-cooperation/).

<sup>107</sup>D. D. N. Nsereko, 'Triggering the jurisdiction of the International Criminal Court', (2004) 4 *African Human Rights Law Journal* 256, at 272.

provides that where the Prosecutor disputes the state's claim that it is investigating or has investigated the situation concerned, *he/she may apply to the PTC for authorization of investigations*. If the Appeals Chamber is correct that Article 18 applies after the Prosecutor has been authorized to investigate, the question is, what other authorization would be the Prosecutor be seeking under Article 18(2) since the PTC would have granted authorization already?<sup>108</sup> If the Appeals Chamber and the Prosecutor's conclusion is that Article 18 only applies after the PTC has granted the Prosecutor's request under Article 15(4), the implication will be that, if the Prosecutor disputes the state's claim that it is investigating or has investigated the situation concerned, the Prosecutor should seek two requests for authorizations in succession. The first request will be in terms of Article 15(4) and the second request will be in terms of Article 18(2). Such an outcome is, in this article's view, illogical. It is therefore more logical to conclude that Article 18 is a component of Article 15.

The second reason why it is improbable to treat procedures contemplated in Article 15 and Article 18 as distinct is that a purposive interpretation of Article 18 will lead to the conclusion that this provision is a component of Article 15. Article 18 was introduced in order to ensure that states can assert their jurisdiction in terms of the principle of complementarity at an early stage, before the Prosecutor has been authorized to investigate. The provision is designed to guard against unwarranted investigation and prosecution of persons who are being investigated by their own national authorities. Article 18 can only achieve this purpose if it is applied before the Prosecutor is authorized to investigate.<sup>109</sup> Since the Prosecutor can only seek authorization to investigate once, it follows that the only time Article 18 can be applied is during Article 15 proceedings.<sup>110</sup> Any interpretation to the contrary is inconsistent with the intention of the drafters of the Statute. In conclusion, the proposition that the proceedings contemplated in Article 18 are intended to apply after the Prosecutor has sought and acquired permission to launch investigations is not supported by the drafting history of the provision.

#### 4.3.3 Evaluation of the Appeals Chamber's findings on admissibility

Having discussed the relationship between Articles 15 and 18, the next question is whether the Appeals Chamber's findings regarding the issue of admissibility are correct. First, the conclusion that there is no obligation to notify states of his/her intention to seek authorization for an investigation and the participation of states is incorrect. Article 18(1) creates an obligation for the Prosecutor to notify states of his/her decision to seek authorization of investigations when he/she is conducting investigations pursuant to Articles 13(a), 13(c), and 15.<sup>111</sup> The Appeals Chamber also concluded that the participation of states in Article 15(4) proceedings is not provided for in the Statute. However, Article 18(2), which this article has argued to be a component of

<sup>108</sup>This cannot be authorization to investigate specific cases. The language in Art. 18 does not suggest that it deals with authorization to investigate cases but situations. Further, in its statement accompanying its proposal, the United States stated that the provision would apply before specific cases are identified for investigation. See 'Statement of the United States Delegation on "Article 11 *bis*"', *supra* note 87.

<sup>109</sup>Heller concurs that Art. 18(1) requires notification to be sent before the authorization 'because the point of Art. 18 is to give a state the opportunity to avoid a formal investigation'. See K. J. Heller, 'How the PTC Botched the Ex Parte Request to Investigate Burundi', *Opinio Juris*, 10 November 2017, available at [www.opiniojuris.org/2017/11/10/33332/](http://www.opiniojuris.org/2017/11/10/33332/).

<sup>110</sup>This view finds support from Zakerhossein who argues that since the Prosecutor is supposed to examine the issue of admissibility, including ascertaining whether there are domestic proceedings going on and the state of national jurisdictions during preliminary investigations, he/she would need to notify states that normally have jurisdiction over a situation in order to effectively examine the complementarity requirement. The author therefore argues that there is no justification to postpone discharging the notification obligation under Art. 18 to post-authorization stage. See M. H. Zakerhossein, 'Article 18 Mechanism', 20 December 2017, available at [www.opiniojuris.org/2017/12/20/article-18-mechanism/](http://www.opiniojuris.org/2017/12/20/article-18-mechanism/).

<sup>111</sup>Such a notification must be made prior to the authorization of investigations. It follows that the Prosecutor's decision in the Situations in the Republic of Kenya and Côte d'Ivoire to give notice contemplated in Art. 18(1) states upon a decision of the Chamber to authorize an investigation into the situations is *ultra vires*.

Article 15, contemplates a situation whereby a Prosecutor may dispute a state's ability or willingness to conduct proceedings. In such a case, the Prosecutor will have to apply to the PTC for authorization of investigations. While neither Article 18 nor Article 15 specifically provides for the participation of states, one can assume that this participation is implied since the *audi alteram partem* principle would require the state to make its own submissions.<sup>112</sup>

The Appeals Chamber argued that the participation of states is not provided for in Article 15(4) because there are specific procedural mechanisms which provide for the full participation of relevant parties elsewhere in the legal framework. The Appeals Chamber cites Article 18 as the provision that a state can rely on to challenge jurisdiction.<sup>113</sup> However, as this article has shown, the Proposal by the United States intended to establish a mechanism whereby states can assert jurisdiction prior to investigations. It is inconsistent with the intention of the drafters of the Statute to claim that states can only assert their jurisdiction after the Prosecutor has commenced investigations. The fact that there are other procedural frameworks under which states can assert jurisdiction in line with the principle of complementarity or where the issue of admissibility can be determined is not a justifiable reason to deny the states their right under the Statute.

The Appeals Chambers also concluded that it is not required to determine the issue of admissibility since this means it will be required to determine admissibility of potential cases. This reasoning fails to consider the fact that the determination of admissibility does not apply to cases alone. The Rome Statute contemplates the determination of admissibility at different stages of proceedings. While Article 18 contemplates the determination of admissibility at a situation stage prior to investigations, Article 19 regulates the determination of admissibility at the case stage. The PTC does not have to concern itself with the admissibility of individual cases under Article 15(4).<sup>114</sup> The Appeals Chamber also cites the Proposal submitted by France to the Working Group on Rules of Procedure and Evidence of the International Criminal Court to support its conclusion that the PTC is not required to consider the issue of admissibility when it determines the Prosecutor's request under Article 15(4).<sup>115</sup> While the relevant page relied on by the Appeals Chamber points to the difficulties of determining admissibility at different stages of proceedings, it specifically points out that 'the Court must make sure that it has jurisdiction over any case referred to it from the very beginning of the proceedings' and that 'States can challenge the jurisdiction of the Court or the admissibility of the case from the beginning of the proceedings provided for in article 15 or article 18'.<sup>116</sup> Such challenges of jurisdiction, according to the Proposal, are not just a possibility but an obligation for States. The Proposal by France not only confirms the argument advanced in this article that the issue of admissibility must be determined during Article 15(4) proceedings but also confirms that Article 18 is applicable when the Prosecutor seeks authorization of investigations.

Admissibility is a key factor that should be considered when determining if the ICC's intervention is warranted. The Rome Statute is founded on the principle of complementarity in terms of which the ICC is a court of last resort which only intervenes when states are unable or unwilling

<sup>112</sup>However, where no state responds to the Prosecutor's notification under Art. 18(2), the PTC may consider the Prosecutor's request based on his/her submissions as has been the norm under Art. 15(4).

<sup>113</sup>*Situation in the Republic of Afghanistan*, *supra* note 1, para. 42.

<sup>114</sup>The United States in its statement accompanying the Proposal which gave birth to Art. 18 states that the provision was intended to apply 'at a much earlier stage when no particular suspects have been identified'. See 'Statement of the United States Delegation on "Article 11 bis"', *supra* note 87. Therefore, the determination should only be confined to admissibility of situations and potential cases. It should be noted that the drafters of the Statute were aware that proceedings under Art. 15(4) take place at a time when no in-depth investigations have taken place. For this reason, Art. 15(4) states that this determination will not prejudice future determination of jurisdiction and admissibility.

<sup>115</sup>Preparatory Commission for the International Criminal Court-Working Group on Rules of Procedure and Evidence, 'Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law', PCNICC/1999/WGRPE/DP.43, 23 November 1999.

<sup>116</sup>*Ibid.*

to conduct proceedings.<sup>117</sup> A matter in which the state with jurisdiction is conducting or has conducted genuine investigations is not admissible before the ICC. Article 18 was introduced to ensure that the issue of admissibility is determined at the earliest stage possible and that the Prosecutor will not even commence investigations unless authorized by the PTC. The determination of admissibility at situation stage cannot be said to be of no judicial value. The purpose of determining admissibility under Article 15(4) and Article 18 is to ensure that states can assert jurisdiction at an earlier stage of proceedings in line with the principle of complementarity.<sup>118</sup> Further, the determination of admissibility under Article 15 cannot be left to the Prosecutor as the Appeals Chamber suggests. A provision in Article 18 which allowed the Prosecutor to make a determination of admissibility was amended and the power to make such a determination was conferred on the PTC. If the Prosecutor and the Court are to give effect to the true intentions of the drafters and the states, Article 18 should be implemented as suggested in this article.

This article is cognisant of the challenges that may arise if Article 18 is applied the way it was intended to apply by the drafters. Possible challenges include the use of this provision to stall or frustrate the Prosecutor's investigations as well as the fact that determination of admissibility at pre-investigation stage may make the Prosecutor's work and the prosecution of cases before the ICC more tedious. However, counter-arguments can be made against these challenges. Regarding the potential abuse of Article 18, it should be noted that this problem was raised by some stakeholders during the deliberations on Article 18. The PTC can mitigate this challenge by thoroughly examining states' claims that they are conducting investigations. Since the Prosecutor would have conducted preliminary investigations already, it should be possible to determine the genuineness of national proceedings. Further, the Statute gives the Prosecutor the power to request periodical reports on national proceedings as well as to review his/her decision to defer to a state after six months. As such, the Prosecutor has a readily available remedy if he/she realizes that there is inaction on the part of the state or that the investigations are not genuine. Regarding the argument that the determination of admissibility as well as allowing state to assert jurisdiction at preliminary stages may make the Prosecutor and the Court's work tedious, it should be noted that the approach of applying Article 18 during Article 15(4) proceedings actually saves the Court and the Prosecutor time and resources. If states are allowed to assert jurisdiction pursuant to Article 18 after the Prosecutor has obtained authorization to investigate, it would mean that where a state decides to assert jurisdiction under Article 18 and the Prosecutor disputes the state's claims, the Court will have to conduct two similar proceedings with the same purpose in succession. In other words, after authorizing the Prosecutor's request under Article 15(4), it will have to authorize the Prosecutor's request again under Article 18(2). Such a duplication of procedures will be absurd, especially if one takes into account the constant complaints by the ICC that its budget is limited.<sup>119</sup>

<sup>117</sup>See W. A. Schabas and M. M. El Zeidy, 'Article 17 "Issues of admissibility"', in Triffterer and Ambos, *supra* note 24, at 781.

<sup>118</sup>The finding that the PTC should not assess issues of admissibility means that the Prosecutor can seek and obtain authorization to investigate a situation which is already being dealt with at domestic level. This will be a clear violation of the principle of complementarity. This decision also mean that resources may be expended in investigating situations that may be declared inadmissible at a later stage.

<sup>119</sup>So far, the PTC has not presided over a matter brought in terms of Art. 18. Two requests for deferrals pursuant to Art. 18 have been made by the Republic of Afghanistan and the Republic of the Philippines. In the case of Afghanistan, while the Prosecutor was still considering Afghanistan's request, new political developments took place which changed the landscape in the country. The Prosecutor subsequently asked the PTC for permission to resume its investigations. At the time of writing, the PTC had not determined this request. See *Situation in the Islamic Republic of Afghanistan*, Request to Authorise Resumption of Investigation under Article 18(2) of the Statute, No.: ICC-02/17, 27 September 2021. In the Philippines, the Prosecutor announced that he had received a request for deferral pursuant to Art. 18. The investigations were suspended, pending determination of the request. The outcome of this determination had not been announced at the time of writing. See 'ICC Prosecutor, Mr Karim A.A. Khan QC, notifies Pre-Trial Chamber I of a request from the Republic of the Philippines to

## 5. Implications of the Appeals Chamber's decision

The implications of the Appeals Chamber's decision can be classified into three categories, namely its impact on the general interpretation of the Statute, impact on the determination of future requests for authorization of investigations, and implications on states' ability to assert jurisdiction. First, the decision raises concerns regarding the general interpretation of the Statute. The Rome Statute is a multilateral treaty whose interpretation is subject to rules of treaty interpretation. Article 31(1) of the Vienna Convention requires treaties to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, and in the light of its object and purpose.<sup>120</sup> As this article has highlighted, when the idea of granting the Prosecutor the power to initiate investigations was raised, opposing views were expressed regarding the desirability of granting the Prosecutor such powers. As such, the decision to subject the Prosecutor's powers to initiate investigations to judicial review could be seen as a political compromise between states. As Bergsmo et al. argue, 'the role given to the Pre-Trial Chamber as the authorizer of Prosecutor-initiated investigations was the decisive factor for many States' and this makes how the Prosecutor exercises his/her *proprio motu* powers vital for the way some states perceive the Court.<sup>121</sup> Therefore, the interpretation of the PTC's powers under Article 15(4) must be sensitive to the object and purpose behind granting the Chamber such powers.

The Appeals Chamber's decision in the Afghanistan Appeal fails to consider the object and purpose behind Article 15(4). The drafters of the Statute intended the PTC to act as an 'inherent constitutional check on the Prosecutor'.<sup>122</sup> However, the Appeals Chamber's decision effectively removes this constitutional check. This article endorses Heller's view that the Appeals Chamber's decision 'undermines the careful balance of power between the OTP and PTC that states negotiated at Rome, without which many states would have refused to give the OTP *proprio motu* power in the first place'.<sup>123</sup> By failing to take into account the object and purpose of the Statute as well as introducing limitations on the PTC's power which are not expressly provided for in the Statute, it could be argued that the Appeals Chamber's determination of the PTC's role in the initiation of investigations by the Prosecutor falls short of what is required by Article 31(1) of the Vienna Convention. As the highest authority in the interpretation of the Statute, one would expect the Appeals Chamber to ensure that its decisions are consistent with the object and purpose of the Statute. This could be useful in maintaining states' faith in the Court. The Appeals Chamber's decision fails to achieve this. Instead, the decision has the potential of raising concerns among states who initially objected to granting the Prosecutor unfettered powers. Further, an interpretation of the Statute that fails to take into account the political compromise can also discourage would-be states parties from joining the Rome Statute.

Second, the Appeals Chamber's decision has huge implications on the future role of the PTC in the opening of investigations *proprio motu*. The decision significantly limits the extent to which the PTC can review the decision of the Prosecutor to initiate investigations. For instance, the decision takes away the PTC's power to review whether the investigations being sought by the Prosecutor will serve the interests of justice. It also takes away the PTC's power to determine admissibility. The implication of this is that the PTC now has very limited power to prevent the Prosecutor from initiating frivolous or politically motivated investigations. In fact, the Appeals Chamber's decision reduces the Article 15(4) proceedings to a mere box-ticking exercise. In her dissenting judgment, Judge Carranza pointed out that 'transparency and accountability of the international rule of law require that any decision, be it from the Prosecutor or first instance

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defer his investigation under article 18(2) of the Rome Statute', *ICC Press Release*, 23 November 2021, available at [www.icc-cpi.int/Pages/item.aspx?name=pr1628](http://www.icc-cpi.int/Pages/item.aspx?name=pr1628).

<sup>120</sup>VCLT, *supra* note 23.

<sup>121</sup>Bergsmo, Pejic and Zhu, *supra* note 24, at 729.

<sup>122</sup>Separate opinion of Judge Luz del Carmen Ibáñez Carranza, *supra* note 39, para. 7.

<sup>123</sup>Heller, *supra* note 56.



Chambers, must be subject to judicial review'.<sup>124</sup> The drafters of the Rome Statute intended the Prosecutor to be accountable to the PTC. However, the Appeals Chamber's decision effectively weakens this accountability mechanism.

Lastly, the Appeals Chamber's finding that the Prosecutor has no obligation to inform states of his/her decision to seek authorization of investigations and that the Statute does not provide for the involvement of states means that states cannot assert jurisdiction at the pre-investigation stage as contemplated when Article 18 was introduced. While this conclusion only confirms the interpretation that had been adopted earlier by the PTC and the Prosecutor, it nevertheless demonstrates the Court's casual approach to the interpretation of the provisions of the Statute. While Article 18 may appear ambiguous,<sup>125</sup> this ambiguity could have been cleared had the Appeals Chamber considered the preparatory work of the treaty and the circumstances surrounding the inclusion of Article 18. This is what Article 32 of the Vienna Convention on the Law of Treaties commands. Apart from taking away the states' right and obligation to assert jurisdiction at the earliest stage possible, the Appeals Chamber's finding also leaves the question of application of Article 18 open. As the article has argued the provision cannot be relied on in post-authorization stage as it was intended to apply in pre-authorization and investigation stage. The implication of all this is that states that are genuinely conducting investigations or are willing to conduct investigations will have to stand aside and watch while the Prosecutor seeks and gets permission to investigate situations that can be handled at national level.

## 6. Conclusion

The Afghanistan request has attracted widespread interests, especially in the way it dealt with the *proprio motu* powers of the Prosecutor. While the PTC's decision was rightly criticized for the way it diminished the Prosecutor's powers to open investigations *proprio motu*, the Appeals Chamber's decision does the opposite by stripping the PTC of its powers vis-à-vis the initiation of investigations through *proprio motu* powers. Given the already existing tensions between some ICC states parties and the ICC regarding the way the *proprio motu* powers have been exercised, it is imprudent to weaken the PTC's oversight role over the Prosecutor. The Appeals Chamber's decision also shredded the existing jurisprudence regarding *proprio motu* powers. For the OTP, this means there is a need to consider new approaches as well as formulating new policies around the initiation of investigations *proprio motu*. For the PTCs, a period of uncertainty lies ahead as they must find a new approach to determining Article 15(4) requests. For states, the decision is disempowering. It takes away their right to assert jurisdiction pursuant to the principle of complementarity at the earliest stage of proceedings. This article submits that if the impending clashes around the *proprio motu* powers are to be avoided, the issue concerning the exact role of the PTC in the initiation of investigations must be brought to the attention of the ICC Assembly of State Parties for clarification. Alternatively, some provisions of the Statute should be amended to clarify issues around the initiation of investigations *proprio motu*.

<sup>124</sup>Separate opinion of Judge Luz del Carmen Ibáñez Carranza, *supra* note 39, para. 7.

<sup>125</sup>M. Bergsmo, P. Kruger and O. Bekou, 'Article 53: Initiation of an investigation', in Triffterer and Ambos, *supra* note 24, at 1372.