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THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

**Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15
(filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims
Ms Katherine Gallagher *et al*
Mr Fergal Gaynor *et al*
Ms Nancy Hollander *et al*

Legal Representatives of the Applicants
Ms Spojmie Nasiri

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

Procedural context

1. On 7 June 2019, the Prosecutor requested leave to appeal Pre-Trial Chamber II's decision declining, under articles 15(4) and 53(1)(c) of the Statute, to authorise an investigation into this situation.¹ The Pre-Trial Chamber had reached this conclusion despite unanimously confirming that there are reasonable grounds to believe that crimes within the jurisdiction of the Court have been committed, and that at least one potential case arising from the situation would be admissible.²

2. On 10 June 2019, various individuals and organisations made procedural requests exhibiting different understandings of the current proceedings before the Court and the applicable law. In particular:

- five non-governmental organisations with “extensive experience working with victims of international crimes in Afghanistan” (“Five NGOs”) sought leave from Pre-Trial Chamber II under rule 103 to make submissions on the Prosecution's Application as *amicus curiae*;³
- 82 individual victims and two “organizations that submitted representations on behalf of a significant number of victims” (“First Intervener”) asserted their own “standing to appeal” as a Party to the proceedings,⁴ and simultaneously sought leave to appeal before Pre-Trial Chamber II under article 82(1)(d),⁵ and to file a notice of appeal directly with the Appeals Chamber under article 82(1)(a) of the Statute;⁶

¹ [ICC-02/17-34](#) (“Prosecution Application”).

² [ICC-02/17-33](#) (“Decision”), especially paras. 64-66, 75-79, 84-87. See also [ICC-02/17-33-Corr-Anx.](#)

³ [ICC-02/17-35](#).

⁴ See e.g. [ICC-02/17-36](#) (“First Intervener Notice of Appeal”), para. 33. The Prosecution understands the natural and legal persons represented in this filing to include persons who participated in the proceedings before the Pre-Trial Chamber, but potentially not to be limited to those persons: see ICC-02/17-36-Conf-AnxI.

⁵ [ICC-02/17-37](#) (“First Intervener Application for Leave to Appeal”).

⁶ [First Intervener Notice of Appeal](#).

- six individual victims, who each “participated in proceedings before the Pre-Trial Chamber” (“Second Intervener”),⁷ asserted that they “should not be excluded from lodging appeals under [a]rticle 81” and sought to file a notice of appeal directly with the Appeals Chamber under article 82(1)(a) of the Statute;⁸
- one individual victim, who states that they “should be considered by the Chamber as a participant to article 15(3) [...] proceedings” (“Third Intervener”),⁹ and likewise considers that they have standing to file an appeal directly with the Appeals Chamber under article 82(1)(a) of the Statute,¹⁰ but also foreshadows their intention to “respond” before Pre-Trial Chamber II to the Prosecution’s Application.¹¹

3. Finally, the Office of Public Counsel for Victims (“OPCV”) sought leave under regulation 81(4)(b) to make submissions before Pre-Trial Chamber II in its consideration of the Prosecution’s Application.¹²

Observations

4. The diverging approaches and requests of the Five NGOs, the interveners, and the OPCV have created an anomalous situation in the procedure of the Court, by ostensibly triggering concurrent—and potentially incompatible—proceedings on a matter which is already *sub judice*. Consequently, the Prosecution files these limited observations simultaneously before Pre-Trial Chamber II and the Appeals Chamber, to address three important *procedural* considerations. These relate primarily to the

⁷ [ICC-02/17-38](#) (“Second Intervener Notice of Appeal”), para. 14. *But compare* para. 14 (referring to “[a]ll five victims”) with para. 1 (listing six victims).

⁸ *See e.g.* [Second Intervener Notice of Appeal](#), paras. 28, 31, 44.

⁹ [ICC-02/17-40](#) (“Third Intervener Notice of Appeal”), para. 6. While the victim has been assigned a reference number by the Victims Participation and Reparation Section, it is unclear from the face of the submission whether this victim did in fact actually make submissions before Pre-Trial Chamber II: *see e.g.* para. 8.

¹⁰ [Third Intervener Notice of Appeal](#), paras. 17, 22-23.

¹¹ [Third Intervener Notice of Appeal](#), para. 4.

¹² [ICC-02/17-39](#).

procedural significance of the requests made by the interveners, rather than the requests by the Five NGOs and the OPCV, with which the Prosecution concurs.

5. These observations are filed as promptly as possible, since they affect the further course of proceedings in this situation. They are filed simultaneously before both chambers in order to facilitate transparency, and because of the inter-related nature of these proceedings and the procedures suggested by the various interveners. These observations conclude with the Prosecution's respectful view of the appropriate means to accommodate the various interests in light of the Statute and the Rules.

6. Overall, the Prosecution stresses the adequacy of the Court's existing legal framework to ensure that the legitimate interests of the victims and associated groups are fully heard and taken into account, and the vital importance that this occurs within the context of any forthcoming appeal. Yet this is not contradicted by recognising the limited meaning of the term "party" in article 82(1), which is necessary, *inter alia*, to avoid the procedural confusion which may ensue from a broader reading. Indeed, a broader reading is not only inconsistent with the trend of the Court's prior decisions, but may lead—as in this instance—to a profusion of 'rival' submissions seeking to trigger appeals by different means before different chambers and on different legal foundations. This will not materially advance the proceedings, and does not favour judicial economy or the Court's power to deliver substantive justice.

7. Consequently, the Court should act to give effect to the *core* interest at the heart of the various interventions, which is for the victims and their advocates to have an opportunity to engage with the *substance* of the Decision. This means recognising that the Prosecutor—who is indisputably a Party to the proceedings—has already filed a valid application for leave to appeal before Pre-Trial Chamber II, which itself appears to be endorsed by the various interveners.

8. Taking account of the interveners' material submissions in that latter respect, therefore, the Prosecution respectfully submits that the Appeals Chamber should dismiss without prejudice the submissions which have been made directly before it seeking to trigger further appellate proceedings under article 82(1)(a). For its part, Pre-Trial Chamber II should issue an expeditious ruling on the Prosecution Application under article 82(1)(d) and, consistent with the submissions of the Prosecution and the victims, grant the requested certification. The Appeals Chamber's *subsequent* examination of the proposed issues *on their merits* will then be the time and place for the interveners to be heard on the substance of the Decision, in full, rather than in the context of a procedural competition as to the *means* by which that same result may be brought about.

The interests of victims are directly affected by the Decision

9. The Prosecution shares the concerns identified by the Five NGOs, the First, Second and Third Intervenors, and the OPCV, and welcomes their participation in the further proceedings before the Court through the appropriate procedures. It is this same grave concern which led the Prosecutor to file her own application for leave to appeal three issues arising from the Decision.

10. The Prosecution, therefore, emphasises its view that the interests of victims are indeed directly affected by the Decision, as stated in the Prosecution Application.¹³ It agrees that the Decision should receive the prompt scrutiny of the Appeals Chamber, and that in the context of those proceedings it would be appropriate for the victims and certain NGOs to be afforded the opportunity to address the merits of the Pre-Trial Chamber's analysis,¹⁴ as provided by articles 15(3) and/or 68(3), rule 103, and/or regulation 81(4)(b), as appropriate. Appeal proceedings arising from a decision

¹³ [Prosecution Application](#), paras. 6 (referring to "participating victims, whose interests are directly affected by the Decision"), 28 (referring to "the interests of victims"). The Prosecution specifically noted the potential significance of the Decision for the activities of the Trust Fund for Victims: *cf.* [Second Intervener Notice of Appeal](#), para. 25.

¹⁴ *See* [Prosecution Application](#), para. 5 (noting that neither "the Prosecution or any other participant previously had opportunity to address the legal interpretation adopted in the Decision"). *See also* paras. 23, 32.

under article 15(4) are indisputably “judicial proceedings”,¹⁵ in which the victims’ right to participate is active.

11. For the purpose of identifying which victims are eligible to participate, the Prosecution has no objection to the adoption of the approach applicable to article 15(3) proceedings for any proceedings arising from the Pre-Trial Chamber’s decision under article 15(4), including those relating to the Prosecutor’s request under article 82(1)(d) and any subsequent appeal.¹⁶

Parties and participants have different roles under the Statute, favouring the fair and expeditious resolution of the current proceedings

12. The Prosecution must, however, respectfully correct the assertion by the First, Second, and Third Interveners that the victims have standing as a “party” to these proceedings and consequently may themselves trigger appellate proceedings under article 82(1)(a) and/or (d). To the contrary, while victims are undoubtedly participants, only the Prosecution is a “party” to the current proceedings for the purpose of article 82(1).

13. In raising this point, the Prosecution seeks to maintain the integrity and consistency of the Court’s established procedures as a whole, with regard to those persons and organisations which may act as a “party” in the proceedings for the purpose of article 82(1)—and who, if the standing requirement is broadly interpreted, may include not only victims but a range of other actors. Maintaining a narrow interpretation thus benefits future proceedings in other situations and cases, by ensuring legal certainty and judicial economy. It also favours the fair and expeditious resolution of the current proceedings, since it ensures a clear and streamlined procedure while giving full effect to the interests of victims and allowing their active participation on matters of substance.

¹⁵ See e.g. [ICC-01/04-556 OA5 OA6](#), para. 56; [ICC-01/09-159](#), para. 7.

¹⁶ See [Second Intervener Notice of Appeal](#), para. 30. See also para. 18.

14. Accordingly, the Prosecution entirely agrees that victims and other associated entities can and must have a voice in these proceedings—but considers that this opportunity is already expressly provided in the Court’s legal texts through the modalities of victim participation encompassed in articles 15(3) and/or 68(3) of the Statute, or otherwise as an *amicus curiae* under rule 103. The approach of the Five NGOs is entirely consistent with this understanding, as is the further safeguard represented by the permanent role played at the Court by the OPCV and its power to request leave to intervene under regulation 81(4)(b)—as it has done in this situation.

15. The Prosecution submits that it is incorrect to consider that the effectiveness of victims’ participation in these proceedings, and particularly the *importance* of their participation, should be measured in terms of the extent to which they may exercise the procedural function of a “party” under article 82(1) of the Statute. This conflates the importance of the active participation of victims on matters of substance with participation on matters of procedure—where a profusion of actors, no matter how important their views or how just their motivation, will risk delay, inefficiency, and inconsistency.

16. The Prosecution will not respond to the interveners’ assertions point by point, but highlights below relevant aspects of the Court’s prior jurisprudence on the question of standing to appeal or to seek leave to appeal.¹⁷

- The distinction between the victims’ right of participation and the procedural function of a “party” has been consistently endorsed by the Court. Thus, almost a decade ago, it was held that “victims, having been granted the right to participate in the present proceedings, are not to be perceived as parties to the proceedings, which are the Prosecutor and the Defence.”¹⁸ The Appeals

¹⁷ Cf. [First Intervener Notice of Appeal](#), para. 27 (asserting that the position presented “is consistent with the Court’s jurisprudence”); [First Intervener Application for Leave to Appeal](#), para. 24.

¹⁸ [ICC-01/05-01/08-462](#), para. 9. See also [ICC-01/04-01/07-675 OA7](#), Dissenting Opinion of Judge Pikis, para. 4 (recalling that an appeal under article 82(1) of the Statute “may be raised by either party to the proceedings, that is, the Prosecution and the defence”).

Chamber has likewise made the same distinction.¹⁹ The Court has disclaimed “a right for victims’ intervention in the proceedings *outside* the Court’s legal framework”.²⁰

- In the specific context of article 82(1)(d), the Court has generally interpreted the term “party” in a restrictive sense. Thus, with regard to *ex parte* matters such as those under article 58, only the Prosecutor is a “party”.²¹ Nor on *inter partes* matters does the OPCV, even when directly acting as legal representatives for victims, have standing to appeal interlocutory matters under article 82(1)(d).²²
- The definition of a “party of given proceedings is a matter of substance rather than of formal labelling”.²³ In this regard, it is notable that it was only the Prosecution which was engaged as the main procedural actor in the article 15(3) proceedings before the Pre-Trial Chamber, consistent with the Prosecutor’s unique competence under articles 15 and 53(1) and rule 48. The right of victims to make “representations” before the Pre-Trial Chamber, in proceedings triggered by the Prosecutor under article 15(3), does not give them the same procedural role as the Prosecutor.²⁴ Indeed, the fact that an

¹⁹ [ICC-01/04-01/06-2953 A A2 A3 OA21](#), para. 67 (distinguishing appeals under article 82(4) by stating that, under this provision, “victims are entitled to bring an appeal” and “are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68(3) of the Statute, may present their views and concerns where their personal interests are affected”). Rules such as 155(2) or 156(2), providing for notification of an appeal to “all parties who participated in the proceedings”, likewise reflect this distinction by employing an elaborated formulation different from the plain “party” who may file an appeal or an application for leave to appeal under rules 154(1) or 155(1). The emphasis on notification to those who *participate* in proceedings before the Court (“participants”) is consistent with their right to address matters of substance while not having the procedural right of initiative under article 82: *cf.* [Second Intervener Notice of Appeal](#), para. 16 (fn. 18).

²⁰ [ICC-01/13-89](#) (“*Comoros Art. 119 Decision*”), para. 21 (emphasis added).

²¹ *See e.g.* [ICC-01/05-01/13-187](#), pp. 6-7; [ICC-01/09-43](#), para. 9. *Cf.* [Second Intervener Notice of Appeal](#), para. 17 (acknowledging that it “seems to be the case for criminal proceedings *stricto sensu*” that the term “party” in article 82(1) encompasses “solely the Prosecutor and the defence”).

²² *See e.g.* [ICC-01/04-444](#), p. 4.

²³ [ICC-01/05-01/13-187](#), p. 8.

²⁴ *Contra* [Second Intervener Notice of Appeal](#), paras. 18-19. *See also* [First Intervener Notice of Appeal](#), paras. 30-31; [First Intervener Application for Leave to Appeal](#), paras. 27-28. The fact that victims were recently permitted to make observations in proceedings under article 19(3) is immaterial; there was no suggestion that they were granted further procedural rights beyond that: *cf.* [First Intervener Notice of Appeal](#), paras. 29, 32; [First Intervener Application for Leave to Appeal](#), paras. 26, 29. *See further* [Comoros Art. 119 Decision](#), para. 21.

entity has previously been permitted to make submissions before a chamber does not *ipso facto* transform them into a “party” to those proceedings with standing to seek leave to appeal that chamber’s decisions.²⁵

- It is incorrect to say that the Court has interpreted the term “either party” in article 82(1) to allow other entities, such as States, to appeal without direct support in the Statute.²⁶ Furthermore, in matters under articles 18 and 19, States are vested with the right of initiative to trigger the proceedings leading to the impugned decision.²⁷ It is true that, exceptionally, States have also been permitted to seek leave to appeal under article 82(1)(d) but this was for the purpose of ancillary proceedings under the Statute, under article 87(7), and in circumstances when the lawfulness of their own conduct was at issue.²⁸

17. More broadly, the Appeals Chamber has previously and consistently confirmed that the Statute defines exhaustively the right to appeal, and that the limitation of interlocutory appeals “to those subjects listed in article 82 of the Statute” is fully consistent with internationally recognised human rights.²⁹ It is true that one bench has suggested that any concern about the compatibility of article 82 with internationally recognised rights, if it ever arises, should be resolved—exceptionally—within the context of the procedure under article 82(1)(d).³⁰ But this

²⁵ See e.g. [ICC-01/11-01/11-60](#), pp. 4-5. This applies *a fortiori* to persons who have only “communicated with the Prosecutor”: *contra* [Third Intervener Notice of Appeal](#), para. 14.

²⁶ *Contra* [First Intervener Notice of Appeal](#), para. 27 (*especially* fn. 24, referring to [ICC-02/11-01/12-75-Red OA](#), concerning an admissibility challenge by a State under article 19); [First Intervener Application for Leave to Appeal](#), para. 24; [Second Intervener Notice of Appeal](#), para. 20 (*especially* fn. 25, referring to [ICC-01/11-01/11-547-Red OA4](#), and recalling that “States may initiate proceedings with regard to jurisdiction and admissibility in accordance with article 19(2) of the Statute”). *But see further* [Statute](#), art. 19(6) (“Decisions with respect to jurisdiction or admissibility may be appealed [...] in accordance with article 82”); *see also* art. 18(4) (allowing “[t]he State concerned or the Prosecutor” to “appeal to the Appeals Chamber [...] in accordance with article 82”).

²⁷ See e.g. [Statute](#), arts. 18-19.

²⁸ Cf. [First Intervener Notice of Appeal](#), para. 27; [First Intervener Application for Leave to Appeal](#), para. 24; [Second Intervener Notice of Appeal](#), para. 21 (citing [ICC-02/05-01/09-397-Corr OA2](#))

²⁹ See e.g. [ICC-01/04-01/07-3424 OA14](#), para. 28 (citing [ICC-01/04-168 OA3](#), paras. 38-39). *But see* para. 39 (finding it unnecessary in that context to address the definition of “parties” within the meaning of article 82(1) of the Statute).

³⁰ See e.g. [ICC-01/05-01/13-1533 OA12](#), para. 16. Cf. [Third Intervener Notice of Appeal](#), para. 18 (referring to the approach of the STL). Other benches, however, have dismissed as *ultra vires* appeals certified by a Trial

again militates against allowing the interveners in this case to petition the Appeals Chamber directly. To the Prosecution’s knowledge, the Appeals Chamber has never allowed any entity other than those expressly recognised in the Statute—the Prosecutor, the Defence, and in limited circumstances, certain States—to seise the Appeals Chamber directly of an appeal.

18. Furthermore, there is simply no need in the present circumstances to stretch the definition of “party” in article 82(1), nor indeed any tension with article 21(3), because the statutory procedures of the Court remain available to accommodate the victims’ interests and concerns.³¹ This is because the Prosecutor has *already* triggered proceedings leading to further scrutiny of the Decision. In that context, the right of participating victims to engage with the Court is protected by articles 15(3) and/or 68(3),³² in addition to any observations from any State, organisation or person which may be allowed under rule 103, including on appeal.³³

19. The interveners’ express support for the Prosecution Application also strongly suggests that adhering to the established law governing the meaning of “party” in article 82(1) will not adversely affect their interests.³⁴ Since the three issues proposed by the Prosecution for certification encompass many of the concerns raised by the interveners,³⁵ the Court is already in a position to ensure that these receive the appellate scrutiny that the victims consider to be appropriate, where they can of course further intervene on the merits. And since the course is already set for a fair and expeditious determination of this question, which in the Prosecution’s respectful

Chamber which go beyond the scope of article 82: [ICC-01/04-01/07-3424 OA14](#), para. 35; [ICC-01/04-01/06-2799 OA19](#), para. 8.

³¹ Cf. [First Intervener Notice of Appeal](#), paras. 34-35, 39-45; [First Intervener Application for Leave to Appeal](#), paras. 30-32, 35-41; [Second Intervener Notice of Appeal](#), paras. 22-23, 27-29, 33; [Third Intervener Notice of Appeal](#), paras. 19-21.

³² See e.g. [First Intervener Notice of Appeal](#), para. 36; [First Intervener Application for Leave to Appeal](#), para. 32.

³³ See e.g. [ICC-01/04-01/06-1289 OA11](#), para. 8.

³⁴ [First Intervener Notice of Appeal](#), para. 14; [First Intervener Application for Leave to Appeal](#), para. 12; [Third Intervener Notice of Appeal](#), para. 4.

³⁵ See e.g. [First Intervener Notice of Appeal](#), paras. 50-53; [First Intervener Application for Leave to Appeal](#), paras. 43, 47, 53, 59, 63, 68, 73; [Second Intervener Notice of Appeal](#), paras. 38-39, 41-42. See further below para. 26.

view should then lead to further proceedings before the Appeals Chamber, judicial economy favours adherence to the existing process.

20. Endorsing a narrow interpretation of the term “party” in article 82(1) but a broad approach to participation under articles 15(3) and/or 68(3) will ensure, moreover, that all victims have a meaningful right to engage in the proceedings of this Court in full equality with one another. It also serves to ensure that other persons and entities—who do not benefit from the special provisions expressly relating to victims—will not in other situations seek to contest the Court’s decisions for their own purposes, and to the detriment of judicial economy. For all persons not benefiting from special provision in the Court’s legal texts, such as the victims, it is essential that rule 103 remains the exclusive procedural means of participation.³⁶

21. Accordingly, while the interveners should be permitted to participate in these proceedings under articles 15(3) and/or 68(3), or rule 103 or regulation 81(4)(b) as applicable, the Prosecution submits that their rights as participants do not confer upon them the procedural rights of a “party” for the purpose of article 82(1).

Following appellate precedent, the Decision is not a ‘ruling’ on jurisdiction or admissibility

22. Finally, and in any event, the Prosecution does not understand article 82(1)(a) to apply to the current proceedings, since the operative part of the Decision did not concern either jurisdiction or admissibility.³⁷ As the First Intervener points out, “the Pre-Trial Chamber found that ‘all the relevant requirements are *met* as regards both jurisdiction and admissibility’”.³⁸ The issues which the Prosecutor has sought to

³⁶ See e.g. [Comoros Art. 119 Decision](#), paras. 19, 21, 23-24.

³⁷ *Contra* [First Intervener Notice of Appeal](#), paras. 28, 47, 55; [Second Intervener Notice of Appeal](#), para. 31; [Third Intervener Notice of Appeal](#), para. 22.

³⁸ [First Intervener Notice of Appeal](#), para. 47 (emphasis added). See also [Second Intervener Notice of Appeal](#), para. 31.

appeal thus concern precisely the correctness of the Pre-Trial Chamber's approach in circumstances where there is *no issue* of jurisdiction or admissibility.³⁹

23. The Appeals Chamber's most recent ruling on the scope of article 82(1)(a) reaffirmed that "[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)" and that, materially, "the *operative part* of the decision must pertain directly to a question on the jurisdiction of the Court".⁴⁰ The interveners seem to adopt this test,⁴¹ yet to err in its application.

24. While the Prosecution agrees that the Decision has the procedural effect of preventing the immediate opening of an investigation, this is not the same as ruling on jurisdiction or admissibility, and does not satisfy the requirement of article 82(1)(a).⁴² To the contrary, it is important to stress—including for the purpose of future proceedings in this situation—that no binding determination (in the sense of an article 82(1)(a) 'ruling') has been made restricting the scope of the Court's jurisdiction or the admissibility of potential cases arising from this situation. Not only do many of the interveners seem to acknowledge this aspect of the Decision,⁴³ but the Court's jurisdiction continues to be engaged, at least for the limited purpose of the Prosecution's own activity under articles 15(5) and 53(4).⁴⁴

25. The operative part of the Decision concerns instead the interpretation and application of the concept of the "interests of justice"—which article 53(1)

³⁹ See e.g. [Prosecution Application](#), para. 1. See also above fn. 2.

⁴⁰ [ICC-01/13-51 OA](#) ("*Comoros* Admissibility Decision"), paras. 44, 49 (emphasis added, also referring to the "strict conditions" which apply). See also paras. 42, 50 (requiring decisions which may be appealed under article 82(1)(a) to be, by their "nature", a "ruling" on jurisdiction or admissibility).

⁴¹ [First Intervener Notice of Appeal](#), para. 54 (citing ICC-01/09-78, paras. 15-16); [Third Intervener Notice of Appeal](#), para. 22 (citing [Comoros Admissibility Decision](#), para. 49). See also [Second Intervener Notice of Appeal](#), para. 32.

⁴² *Contra* [First Intervener Notice of Appeal](#), para. 55; [Second Intervener Notice of Appeal](#), paras. 33-37.

⁴³ See e.g. [First Intervener Notice of Appeal](#), para. 47 ("the Pre-Trial Chamber found that 'all the relevant requirements are met as regards both jurisdiction and admissibility'"); [Second Intervener Notice of Appeal](#), paras. 22 (fn. 30: emphasising that "there is no appeal against the Pre-Trial Chamber's Decision that the Situation is admissible"), 26 (recalling that the "Decision explicitly recognised that the Court had jurisdiction over the crimes allegedly committed").

⁴⁴ See e.g. [Decision](#), para. 29.

distinguishes both from considerations of jurisdiction and admissibility—as well as the predicate reasoning of the Pre-Trial Chamber which informed that assessment. On this basis, and mindful of the Appeals Chamber’s previous guidance, the Prosecution understands that such rulings must fall for appeal exclusively under article 82(1)(d). But it stresses that this need not diminish the potential for appellate review in this context—indeed, the significance of a negative ruling under articles 15(4) and 53(1)(c) for the fair and expeditious conduct of proceedings, and the outcome of any trial, is such that the requirements of article 82(1)(d) may almost always be met.⁴⁵

26. The Prosecution shares many of the interveners’ concerns with regard to the legal reasoning of the Pre-Trial Chamber in assessing the temporal, territorial, and personal scope of the requested investigation,⁴⁶ but considers that these are potential legal errors which arose in the context of the Pre-Trial Chamber’s determination of the interests of justice (the ‘operative part’ and ‘nature’ of the Decision), rather than to represent binding determinations of the Court’s jurisdiction. The Prosecution fully concurs that these should ultimately be addressed by the Appeals Chamber,⁴⁷ and intends to address these matters in any brief it is permitted to file, but considers the correct procedure to achieve that end is thus by means of an appeal certified under article 82(1)(d).

Procedural submission

27. For all these reasons, applying the established procedural law of the Court and in the interest of a fair and expeditious hearing of the substance of the concerns

⁴⁵ See [Prosecution Application](#), paras. 31-38.

⁴⁶ See e.g. [First Intervener Notice of Appeal](#), para. 56-60 (suggesting that the Pre-Trial Chamber erred in its understanding of “the temporal and territorial scope of the Prosecutor’s inquiry”, including with regard to whether the investigation would be confined to incidents identified in the Prosecutor’s request and those closely linked to those incidents, and the nexus requirement); [Second Intervener Notice of Appeal](#), para. 40 (suggesting that the Pre-Trial Chamber erred in “its assessment of the ‘nexus’ requirement”); [Third Intervener Notice of Appeal](#), para. 24 (referring to the Pre-Trial Chamber’s assessment of the scope of the requested investigation, with particular reference to its understanding of the nexus requirement).

⁴⁷ These considerations fall under the second and third issues of which the Prosecution has requested certification from the Pre-Trial Chamber: see [Prosecution Application](#), paras. 19-28. See also paras. 34-35.

raised regarding the Decision, as well as judicial economy, the Prosecution respectfully submits that:

- the Appeals Chamber should dismiss without prejudice the notices of appeal filed by the three interveners; *and*
- Pre-Trial Chamber II should,
 - receive pursuant to articles 15(3) and/or 68(3) the material aspects of the interveners' submissions, and treat them in equality with any submissions received from the Five NGOs and the OPCV (with leave of the Pre-Trial Chamber under rule 103 and regulation 81(4)(b)), but dismiss *in limine* any aspects of their submissions which incorrectly depend on status as a "party" to the proceedings for the purpose of article 82(1); *and*, in any event,
 - rule expeditiously on the Prosecution Application, and certify the three issues for appeal as proposed.



Fatou Bensouda, Prosecutor

Dated this 12th day of June 2019

At The Hague, The Netherlands