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**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims**

**Source:** Office of the Prosecutor

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

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## Introduction

1. The Prosecution has requested the Pre-Trial Chamber to certify for appeal three issues arising from its recent decision declining to authorise the opening of an investigation into the situation in Afghanistan.<sup>1</sup>
2. On 19 June 2019, the Pre-Trial Chamber ordered the Prosecution to file by 19 July 2019 its response to the submissions of two *amici curiae* (each on behalf of multiple human rights organisations),<sup>2</sup> and a reply to the observations of some participating victims concerning alleged cross-border crimes (“Cross-Border Victims”),<sup>3</sup> in a consolidated document not exceeding 15 pages.<sup>4</sup>

## Submissions

3. The Prosecution welcomes the active engagement of the *amici curiae* and participating victims in these proceedings, which underlines not only the procedural significance of the Decision in this situation but also the broader implications of its reasoning for the work of the Court as a whole. Both considerations favour certification of the issues proposed for appeal under article 82(1)(d) of the Statute. This same view is taken by the Office of Public Counsel for Victims, independently concurring that the three issues identified by the Prosecution should be certified for appeal.<sup>5</sup>
4. In the interest of judicial economy, this response only addresses those points arising from the submissions of the *amici curiae* which, in the Prosecution’s view, specifically require further elaboration or clarification. It does not simply repeat all those points of mutual agreement which have already been addressed by the Prosecution in its Application, and its silence in this regard should not be interpreted

<sup>1</sup> See [ICC-02/17-34](#) (“Application”); [ICC-02/17-33](#) (“Decision”).

<sup>2</sup> See [ICC-02/17-57](#) (“First *Amicus Curiae* Submissions”); [ICC-02/17-58](#) (“Second *Amicus Curiae* Submissions”). For the decisions authorising their participation, respectively, see [ICC-02/17-43](#); [ICC-02/17-47](#).

<sup>3</sup> See [ICC-02/17-44](#) (“Cross-Border Victims’ Response”).

<sup>4</sup> See [ICC-02/17-49](#) (“Order for Consolidated Response”).

<sup>5</sup> See e.g. [ICC-02/17-59](#) (“OPCV Observations”), paras. 7, 12-17, 20, 42, 48, 50.

as disagreement or dissatisfaction with the broad participation in the crucial questions which have arisen in these proceedings.

5. Consequently, these submissions are confined to four matters arising from the submissions of the *amici curiae*: the formulation of the issues proposed for certification by the Prosecution; the additional issue proposed for certification by certain participating victims; the application of article 82(1)(d) of the Statute; and the immateriality in these proceedings of questions about standing to seise the Pre-Trial Chamber under article 82(1)(d), when this has already occurred at the instance of the Prosecutor. Likewise, the scope of the Prosecution's reply to the Cross-Border Victims is limited by the terms of the Pre-Trial Chamber's order, and thus only addresses unforeseen issues in these proceedings relating to the scope of the Prosecutor's preliminary examination.

### **Response to First *Amicus Curiae* Submissions**

6. The First *Amicus Curiae* Submissions represent the views of "17 human rights and civil society organizations based in Afghanistan",<sup>6</sup> who "strongly believe that the Chamber should permit appellate review of the Decision" and submit that the issues certified for appeal should include the three issues proposed by the Prosecution, and one issue proposed by legal representatives of some of the participating victims.<sup>7</sup> In particular the First *Amicus Curiae* Submissions concern: the way the issues proposed by the Prosecution are formulated; the additional issue proposed for certification by certain participating victims; and the application of article 82(1)(d) of the Statute.

### ***The issues proposed for certification in the Application***

7. The First *Amicus Curiae* Submissions propose a reformulation of the first issue proposed by the Prosecution, to substitute the phrase "Whether articles 15(4) and

<sup>6</sup> [First \*Amicus Curiae\* Submissions](#), para. 1.

<sup>7</sup> [First \*Amicus Curiae\* Submissions](#), para. 5; [Annex F](#) (rows (2), (4), (5), (6)). See further [First \*Amicus Curiae\* Submissions](#), paras. 35, 38-39, 41-45.

53(1)(c) require or even permit” for the phrase “Whether the Court’s legal texts require or permit”.<sup>8</sup> In the Prosecution’s view, however, articles 15(4) and 53(1)(c) plainly constitute the legal framework of the Decision, and nothing suggests that the Pre-Trial Chamber considered any *other* provision of the Statute might constitute the basis for its reasoning.<sup>9</sup> Accordingly, the Prosecution does not see how “a broader formulation [of the proposed issue] is more appropriate”, in order to make a less specific reference to “the Court’s general legal framework”.<sup>10</sup> While the Prosecution agrees that the first issue it proposed for certification does indeed go “to a fundamental constitutional question”,<sup>11</sup> this is not made any less true by acknowledging the particular provisions of the Statute which the Pre-Trial Chamber considered to be relevant. To the contrary, in the Prosecution’s understanding, the proposed first issue as already formulated will permit the Appeals Chamber to consider the extent to which the Pre-Trial Chamber may consider the interests of justice under article 53(1)(c), and the manner in which it may do so.<sup>12</sup>

8. The Prosecution agrees with the First *Amicus Curiae* Submissions that the formulation of the second issue encompasses the various narrower issues which have subsequently been suggested by some participating victims, and consequently is preferable.<sup>13</sup>

9. The Prosecution further notes in this respect that the Prosecution’s proposed second issue also encompasses the so-called “sixth” issue proposed by the

<sup>8</sup> Compare [Application](#), para. 15, with [First Amicus Curiae Submissions](#), para. 39.

<sup>9</sup> See e.g. [Decision](#), paras. 29-42.

<sup>10</sup> [First Amicus Curiae Submissions](#), para. 39.

<sup>11</sup> [First Amicus Curiae Submissions](#), para. 39. See further e.g. [Application](#), paras. 18 (noting that this concerns “a legal issue of constitutional importance for the continued practice of the Court as a whole”), 30, 38. See also [Second Amicus Curiae Submissions](#), para. 29.

<sup>12</sup> In this regard, the Prosecution notes that the so-called “first” issue proposed by the participating victims represented by Ms Gallagher and Ms Hollander is already *also* encompassed in the first issue proposed by the Prosecution: see [ICC-02/17-45](#) (“Second and Third Afghanistan Victim Group Response”), para. 13. Indeed, this may already be recognised by these victims: see para. 12. The First *Amicus Curiae* Submissions take no position on whether this issue separately requires certification for appeal: [First Amicus Curiae Submissions](#), para. 40; [Annex F](#) (row (3)).

<sup>13</sup> [First Amicus Curiae Submissions](#), para. 44. See further e.g. [ICC-02/17-41](#) (“Prosecution Observations on Diverging Proceedings”), para. 26. For the wording of the second proposed issue, see *below* para. 12.

participating victims represented by Mr Gaynor<sup>14</sup>—insofar as the correctness of the Pre-Trial Chamber’s understanding of the Court’s jurisdiction, and the meaning of the nexus requirement under article 8 of the Statute, form part of the Pre-Trial Chamber’s appreciation of the facts and circumstances material to its assessment of the interests of justice in this situation.<sup>15</sup>

10. For all these reasons, the Prosecution submits that the Pre-Trial Chamber should certify the issues proposed by the Prosecution in their original formulation.

*The additional issue proposed by certain participating victims*

11. The First *Amicus Curiae* Submissions support the request by certain participating victims that, in addition to the issues proposed for certification by the Prosecution, the Pre-Trial Chamber should also certify as an issue for appeal:

Whether the Chamber’s decision is flawed by procedural error because it turned on issues on which the Prosecution and participating victims had not been given a chance to be heard.<sup>16</sup>

12. While the Prosecution shares the concern which lies underneath this proposed issue, and expressly noted this concern in its Application,<sup>17</sup> it does not consider that it is necessary to certify this matter as a distinct issue for appeal. This is because such questions will necessarily arise in the context of the Appeals Chamber’s consideration of the second issue proposed for certification by the Prosecution, which asks:

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<sup>14</sup> See e.g. [ICC-02/17-37](#) (“First Afghanistan Victim Group Request”), para. 73. See also [First Amicus Curiae Submissions](#), para. 37; [Annex F](#) (row (1)).

<sup>15</sup> See [Prosecution Observations on Diverging Proceedings](#), para. 26; [Application](#), paras. 19-22 (*especially* fn. 34, noting that the Decision took “a narrow approach—in contrasts to the ‘views of the Prosecution’—to the *geographic, temporal, contextual, and material* factors, including identified perpetrator groups, which define the parameters of the requested investigation”, *emphasis added*).

<sup>16</sup> [First Amicus Curiae Submissions](#), para. 41; [Annex F](#) (row (4)). See further [Second and Third Afghanistan Victim Group Response](#), para. 16.

<sup>17</sup> See [Application](#), paras. 23, 32.

Whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors.<sup>18</sup>

13. If the Appeals Chamber comes to determine this issue on the merits, it will necessarily consider whether a chamber may properly exercise its discretion when relying on certain factors without the material assistance of the Parties and participants.<sup>19</sup> Consequently, participants in any proceedings before the Appeals Chamber will have ample opportunity to address this question on its merits, and in that context the Appeals Chamber will be able to provide such guidance as it considers necessary.<sup>20</sup>

*Article 82(1)(d) of the Statute is properly engaged*

14. The Prosecution does not agree with the *amicus curiae* that “decisions to deny an investigation under article 53(1)(c) fall outside the structure of appeals provided for by the Statute”.<sup>21</sup> To the contrary, as stated in the Application, decisions under articles 15(4) and 53(1)(c) may be effectively challenged by the Prosecutor under article 82(1)(d) of the Statute, and this is consistent with the drafters’ intention to regulate such matters expressly.<sup>22</sup>

15. This common sense conclusion occasions no prejudice to any party or participant because, in applying the established criteria of article 82(1)(d), it is very likely that issues arising from adverse decisions under articles 15(4) and 53(1)(c) of the Statute will *almost always* be certified for appeal<sup>23</sup>—precisely because of their decisive implications for the fair and expeditious conduct of the proceedings and the

<sup>18</sup> [Application](#), para. 19. This issue is already endorsed in the First *Amicus Curiae* Submissions: *see above* para. 8.

<sup>19</sup> *See also* [Second Amicus Curiae Submissions](#), para. 68.

<sup>20</sup> *Cf.* [First Amicus Curiae Submissions](#), para. 42.

<sup>21</sup> [First Amicus Curiae Submissions](#), para. 30.

<sup>22</sup> *See e.g.* [ICC-01/04-168 OA3](#), paras. 34-35, 39-41. This is the authority on which the *amicus curiae* relies: *see e.g.* [First Amicus Curiae Submissions](#), paras. 10 (fn. 12), 30 (fn. 55).

<sup>23</sup> *Cf.* [First Amicus Curiae Submissions](#), para. 30 (“the Chamber should not view the [...] request to appeal the Decision with the traditional restrictive lens afforded to article 82(1)(d) requests as the Decision clearly falls outside the article’s normative paradigm”).

outcome of any trials (notably, by precluding the initiation of any trials at all) and the significance of the Appeals Chamber’s ruling in either confirming the decision or correcting any errors in decisions of such magnitude.<sup>24</sup> The present situation is a case in point.

16. To the extent, therefore, that the First *Amicus Curiae* Submissions seem to suggest that article 82(1)(d) is an entirely discretionary assessment—simply, whether a decision “*should*” receive appellate scrutiny—they are incorrect. Rather, the chamber seised of an application under article 82(1)(d) is obliged to apply the legal criteria contained in article 82(1)(d), and no other.<sup>25</sup> To do otherwise would be to defeat the plain terms of article 82(1)(d).

**Response to First and Second *Amicus Curiae* Submissions: standing of victims to seek leave to appeal under article 82(1)(d)**

17. The Second *Amicus Curiae* Submissions represent three human rights organisations,<sup>26</sup> who “*aver*” *inter alia* “that the Prosecution Request for Leave to Appeal [...] should be granted by the Chamber.”<sup>27</sup> However, their submissions raise one issue in common with the First *Amicus Curiae* Submissions, based on their view that the request for leave to appeal by certain participating victims should also be granted.<sup>28</sup>

18. Both the First and Second *Amicus Curiae* Submissions seem to assert that victims have standing as a “party” in the meaning of article 82, allowing them to trigger appellate proceedings *inter alia* under article 82(1)(d).<sup>29</sup> The Prosecution has already indicated—and will not repeat—the detailed reasons for its respectful disagreement

<sup>24</sup> See e.g. [Application](#), para. 37; [Prosecution Observations on Diverging Proceedings](#), para. 25. See also [OPCV Observations](#), paras. 44-46, 48, 52.

<sup>25</sup> Cf. [First Amicus Curiae Submissions](#), para. 10 (“The Appeals Chamber has determined that the right to appeal a decision under article 82(1)(d) arises only if the Chamber believes its decision should receive the Appeals Chamber’s immediate attention. Nothing in the Statute or the Rules circumscribes the factors the Chamber may consider when exercising its discretion”).

<sup>26</sup> [Second Amicus Curiae Submissions](#), para. 1.

<sup>27</sup> [Second Amicus Curiae Submissions](#), para. 6.

<sup>28</sup> [Second Amicus Curiae Submissions](#), para. 6.

<sup>29</sup> See [First Amicus Curiae Submissions](#), paras. 31-34; [Second Amicus Curiae Submissions](#), paras. 72-96.

with this position, which it considers to be legally incorrect. While the Prosecution whole-heartedly agrees that the Statute promotes the rights of victims to participate by engaging in judicial proceedings on *substantive* matters, this does not endow them with the plenary rights belonging to the “Parties” (usually, just the Prosecution and the Defence) on matters of procedure.<sup>30</sup> Recognising this important distinction does not render victim participation merely “symbolic”.<sup>31</sup>

19. The Second *Amicus Curiae* Submissions appear to misapprehend in part the position of the Prosecution. Specifically, the Prosecution has not suggested that victims must “rely on the OPCV” in order to participate in these proceedings,<sup>32</sup> but has indeed welcomed the participation of various groups of victims, through their own representatives, within the scope of articles 15(3) and 68(3). In this regard, the Prosecution also agrees that the procedural status of victims under article 15(3) may well be analogous in the current situation to the procedural status of victims under article 68(3),<sup>33</sup> but this does not change the fact that article 68(3) does not grant participating victims a general right of standing under article 82.

20. The reference in the Second *Amicus Curiae* Submissions to the right to reparations offers a further significant clue to the correct interpretation of article 82.<sup>34</sup> While it is true that, in one way, all proceedings prior to an order under article 75 determine whether reparations may ever ultimately be awarded, as the *amicus curiae* suggests, the drafters of the Statute expressly granted the legal representatives of victims standing to file an appeal *only* when an order under article 75 has been

<sup>30</sup> See [Prosecution Observations on Diverging Proceedings](#), paras. 6-8, 12-21 (*especially* para. 15: warning against conflating “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”).

<sup>31</sup> Cf. [Second Amicus Curiae Submissions](#), para. 88.

<sup>32</sup> Cf. [Second Amicus Curiae Submissions](#), para. 75. See *e.g.* [Prosecution Observations on Diverging Proceedings](#), para. 14 (agreeing that “victims [...] can and must have a voice in these proceedings” and stating that this is already expressly provided in the Court’s legal texts through the modalities of victim participation encompassed in article 15(3) and/or 68(3) of the Statute”, and characterising “the permanent role played at the Court by the OPCV” only as a “further safeguard”).

<sup>33</sup> [Second Amicus Curiae Submissions](#), para. 82 (“from this specific and exceptional right that victims have under article 15(3), flow all the other rights that victims have under the Rome Statute framework”).

<sup>34</sup> See [Second Amicus Curiae Submissions](#), paras. 83, 86-87, 90.

made<sup>35</sup>—when, indeed, they are full parties to the proceedings, and the Prosecutor is not. This strongly implies, *a contrario*, that the drafters did *not* consider the victims would have general standing to appeal under other circumstances. While the drafters left this matter for the Court to interpret,<sup>36</sup> this must be done on the basis of the concrete provisions of the Statute.

21. In this context, it is important to note that the right of victims to reparations under the Statute is conditional upon a trial resulting in a conviction. It does not, indirectly, establish a right for all victims to enforce the initiation of proceedings at this Court—whether investigations or specific prosecutions—which, in turn, demands a procedural remedy, in the form of general standing to appeal, to ensure its effectiveness.<sup>37</sup> Such a right is contradicted by the selective mandate of the Court, as illustrated by articles 15 and 53 themselves, and the nature of the right to a remedy under international human rights law—which is primarily opposable to States and requires measures under *national* law which are capable in principle of providing judicial capacity of the necessary scale and comprehensiveness.<sup>38</sup>

22. In this regard, the Prosecution stresses its agreement with the observations of the *amicus curiae* concerning the potential impact of the Decision on the activities of the Trust Fund for Victims under its assistance mandate,<sup>39</sup> which was noted with particular concern in the Prosecution’s Application.<sup>40</sup> While the Prosecution does not

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<sup>35</sup> See [Statute](#), art. 85(4).

<sup>36</sup> See also H. Brady, ‘Appeal’, in R. Lee *et al* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardley: Transnational, 2001), pp. 593-596, especially pp. 593 (noting “[d]ivergent views” at the Rome negotiations “on the question of who is a ‘party’”), 595-596 (considering that victims may be a party under article 82(4) of the Statute, and that additionally they *may* be able to seek leave to appeal under article 82(1)(d) if they “brought the motion” which led to the impugned decision and/or are “directly affected” by the resulting decision, but noting that “the Court will need to inject a good dose of pragmatism into its approach” so as “not to endlessly tie up” the Court’s resources). See further [Prosecution Observations on Diverging Proceedings](#), para. 16 (noting that the Court’s approach has generally proved to be a restrictive one, and that exceptions to the broad principle that the “parties” for the purpose of article 82(1) means the Prosecutor and the Defence still have direct support in the Statute and generally pertain to entities which had the right of initiative in bringing the underlying motion or request leading to the impugned decision).

<sup>37</sup> Cf. [Second Amicus Curiae Submissions](#), paras. 89-96.

<sup>38</sup> For a fuller elaboration of relevant authorities on this point, see [ICC-01/13-85](#), para. 119 (Prosecution submissions addressing the position under relevant international human rights treaties).

<sup>39</sup> [Second Amicus Curiae Submissions](#), para. 85.

<sup>40</sup> [Application](#), para. 28 (fn. 42).

understand access to such assistance from the TFV to be judicially enforceable in the manner which the *amicus curiae* may seem to imply, this consequence of the Decision is nonetheless another factor favouring certification for appeal of the proposed issues.

23. The First *Amicus Curiae* Submissions also seem to take a more muted position on these procedural questions. While they do seem to claim that, in the last resort, victims should have some kind of standing to appeal,<sup>41</sup> they otherwise stress that “the Court must always provide opportunity for the[] inclusion [of victims] in the process”,<sup>42</sup> and that the victim participation regime was intended “to *enhance* their participation in the criminal justice process” from the position of a mere passive bystander.<sup>43</sup> They note the critical importance that the Court provides “Afghan victims and Afghan society with assurances that their interests will be understood and delivered by permitting an appeal”.<sup>44</sup> But none of these observations necessarily requires standing for victims to appeal. Instead, they are all considerations which are properly accommodated within the framework of articles 15(3) and 68(3), as borne out by these very proceedings, and which may be further vindicated by certifying the issues proposed by the Prosecution.

24. Indeed, having regard to all these considerations, the Prosecution submits that questions of standing are simply moot in the present circumstances. The interests of the participating victims are not prejudiced in any way, because the Prosecutor has *already* triggered proceedings under article 82(1)(d), and participating victims have availed themselves of the opportunity to raise their concerns before this Chamber. They will likewise have such an opportunity before the Appeals Chamber if the Pre-Trial Chamber grants leave to appeal, as the Prosecution has requested.

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<sup>41</sup> See e.g. [First Amicus Curiae Submissions](#), para. 33, apparently claiming a right for “Afghan victims and Afghan society [...] to appeal the Decision when it directly implicates their interests”). See also para. 32 (referring to “the right to seek appellate review”).

<sup>42</sup> [First Amicus Curiae Submissions](#), para. 32.

<sup>43</sup> [First Amicus Curiae Submissions](#), para. 33 (emphasis added).

<sup>44</sup> [First Amicus Curiae Submissions](#), para. 34.

### **Reply to the Cross-Border Victims' Response: scope of the article 15 procedure**

25. The Pre-Trial Chamber granted the Prosecution leave to reply to the observations filed by the Cross-Border Victims on the “new issues” identified by the Prosecution,<sup>45</sup> which could not reasonably have been anticipated in a response to the Prosecution Application on the basis of article 82(1)(d) and which included a request for specific relief beyond the scope of the Application.<sup>46</sup>

26. In general, the Cross-Border Victims allege that crimes under the Statute may have been committed during “the aerial bombardment of Pakistan launched by international forces from Afghanistan”.<sup>47</sup> Specifically, the Cross-Border Victims raise concerns that the Prosecutor’s initial request under article 15(3) of the Statute “made no reference to the crimes alleged by such victims”,<sup>48</sup> and assert that “those incidents were not duly considered by the Prosecutor in line with its obligations under Article 15(2) of the Statute”.<sup>49</sup> They request the Pre-Trial Chamber to issue an order to the Prosecutor to provide further information on her analysis of these allegations, and to “make findings as to the scope of the Court’s jurisdiction” on these allegations.<sup>50</sup>

27. Without intending any prejudice to the substance of the allegations which they relate, the Cross-Border Victims’ Response is inapposite for the narrow *procedural* question of which the Pre-Trial Chamber is presently seised (under article 82(1)(d) of the Statute). Consequently, it should be summarily dismissed. The Cross-Border Victims do not engage with any aspect of the Prosecution’s request under article 82(1)(d) and seek instead to raise new matters unrelated to the pending proceedings—which is the function of a motion, not a response. Moreover, for the reasons which follow, their submissions seem to rest on a legal misunderstanding. Nor in any event

<sup>45</sup> [Order for Consolidated Response](#), para. 7.

<sup>46</sup> See [ICC-02/17-48](#), para. 2. In footnotes 4 and 5, as examples of these new issues, the Prosecution cited paragraphs 14-15, 17, 25, 29-30, 34, and 41 of the Cross-Border Victims’ Response.

<sup>47</sup> [Cross-Border Victims’ Response](#), para. 22. See also paras. 12, 35.

<sup>48</sup> [Cross-Border Victims’ Response](#), para. 14. See also para. 15.

<sup>49</sup> [Cross-Border Victims’ Response](#), para. 17. *But see* para. 23 (acknowledging that “[i]t remains unclear whether this material has been considered by the Prosecutor’s office”).

<sup>50</sup> [Cross-Border Victims’ Response](#), para. 41.

has anything in the conduct of the preliminary examination in this situation prejudiced the interests of the Cross-Border Victims. Indeed, the Prosecutor—by seeking leave to appeal on the third proposed issue—has already acted to confirm her understanding of the law potentially allowing *all* well founded allegations to be included in any investigation. That was the basis on which the Prosecution carried out the preliminary examination in this situation, as in all others, and the basis on which, consequently, the interests of the Cross-Border Victims are protected.

28. At the heart of the Cross-Border Victims’ submission is the assumption that, once information has been communicated to the Prosecutor under article 15(1), she is required to “satisfactorily clarify her position on jurisdiction”.<sup>51</sup> This is incorrect. The Prosecutor “may” seek the Pre-Trial Chamber’s ruling on matters of jurisdiction under article 19(3) at such times as she chooses, in her absolute discretion, but may not be required to do so by the conduct of any outside entity.<sup>52</sup> Nor do her functions under articles 15 and 53 require that she publicly reports her opinion of each and every allegation of which she is aware.<sup>53</sup> Not only does the standard of proof in article 53(1) restrict the allegations which the Prosecutor may present to the Pre-Trial Chamber under article 15(3) but the Prosecutor may for other reasons exercise her discretion in determining which allegations she presents to the Pre-Trial Chamber for that purpose.<sup>54</sup> Indeed, this Pre-Trial Chamber has already stressed as much in the Decision.<sup>55</sup>

29. The Cross-Border Victims are also incorrect that the Pre-Trial Chamber is required or permitted, when making a decision under article 15(4), to enter into the

<sup>51</sup> [Cross-Border Victims’ Response](#), para. 30.

<sup>52</sup> [Statute](#), art. 42(1).

<sup>53</sup> See e.g. [ICC-01/13-34](#), para. 13 (recalling that an investigation may be opened “[i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that *at least one* crime within the jurisdiction of the Court has been committed and that the case would be admissible”, emphasis added).

<sup>54</sup> See further M. Cross, ‘[The standard of proof in preliminary examinations.](#)’ in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examinations: Volume 2* (Brussels: TOAEP, 2018), pp. 239-243, 247-250.

<sup>55</sup> [Decision](#), para. 39 (“The proceedings under article 15 are triggered by an entirely discretionary request of the Prosecution. It is therefore its sole responsibility to identify and select specific incidents and conducts in the context of ongoing preliminary examinations, pursuant to the conditions set forth in article 53”).

merits of issues which go *beyond* the geographic, temporal, and other material parameters of the investigation requested by the Prosecutor under article 15(3).<sup>56</sup> This would disrupt the delicate balance of the Statute governing the opening of investigations, which always requires the concurrence of *two* independent bodies in this course of action.<sup>57</sup> The function of the Pre-Trial Chamber in ruling under article 15(4) is simply to confirm whether, in its independent view, the Prosecutor's conclusions in her request under article 15(3) are well founded, according to the requirements of article 53(1).<sup>58</sup> Resort to inherent powers is inappropriate to circumvent the separation of powers clearly established in the Statute.<sup>59</sup>

30. In any event, the Cross-Borders Victims are not, in fact, prejudiced in any way by the conduct of the preliminary examination or the contents of the Prosecutor's request to the Pre-Trial Chamber under article 15(3). Consistent with its understanding of the applicable law, the Prosecutor's request under article 15(3) was filed on the basis that any authorised investigation could potentially include *all* allegations falling within its geographic, temporal or other material parameters, as well as allegations which are sufficiently linked to those parameters. This could potentially include the allegations by the Cross-Border Victims, if sufficiently grave, well founded and within the jurisdiction of the Court. While it is true that the Decision appears to have disagreed with the parameters of an authorised investigation, the Prosecution has requested the Pre-Trial Chamber to certify for appeal the third proposed issue, which addresses:

Whether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the

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<sup>56</sup> Cf. [Cross-Border Victims' Response](#), paras. 25, 32.

<sup>57</sup> See e.g. [Statute](#), arts. 13-15, 53(1). In other words, an investigation requires the concurrence of: a referring State Party and the Prosecutor, or the UN Security Council acting under chapter VII of the UN Charter and the Prosecutor, or the Prosecutor and the Pre-Trial Chamber.

<sup>58</sup> Cf. [Cross-Border Victims' Response](#), para. 34.

<sup>59</sup> Cf. [Cross-Border Victims' Response](#), para. 29. See e.g. [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), paras. 75-76 (resort to inherent powers is only justified when there is a genuine lacuna in the Statute).

particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents.<sup>60</sup>

31. For this reason, even though the Cross-Border Victims refrain from addressing the merits of the Application, the Prosecution submits that their concerns further illustrate why the Pre-Trial Chamber should certify the third issue proposed by the Prosecution.

### Conclusion

32. For all these reasons, and consistent with the core concerns raised by the *amici curiae* and the participating victims, the Pre-Trial Chamber should promptly certify for appeal the three issues proposed by the Prosecution in the Application. In doing so, it need not address the broader submissions made by the *amici curiae* and participating victims, which are moot. The Cross-Border Victims' Response should be summarily dismissed, since it is unrelated to the object of the Application.



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Fatou Bensouda, Prosecutor

Dated this 19<sup>th</sup> day of July 2019

At The Hague, The Netherlands

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<sup>60</sup> [Application](#), para. 24.