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THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Consolidated Response to the Written Observations of the "Cross-Border" Victims and *Amici Curiae*, including the Office of Public Counsel for the Defence

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. With leave of Pre-Trial Chamber II,[1] the Prosecution has appealed the decision declining to authorise an investigation in the situation in Afghanistan.[2] The Prosecution argues that the Pre-Trial Chamber erred in law when interpreting articles 15(4) and 53(1)(c) of the Rome Statute, to the extent that it considered it was permitted or required to conduct a 'positive' assessment of the interests of justice,[3] and in any event that it abused any discretion it had in assessing the interests of justice.[4] If the Pre-Trial Chamber had not made either or both of these errors, it would have authorised the investigation as requested.

2. Victims entitled to make representations to the Pre-Trial Chamber, under article 15(3) of the Statute, have also expressed their strong concerns about the Decision, and sought to file their own appeals directly with the Appeals Chamber.[5] While the Prosecution welcomes their full participation, consistent with the requirements of the Statute, it does not consider that they are vested with the procedural rights of a "party" in the meaning of article 82(1) of the Statute, including the right to appeal.[6] Nor does adhering to the existing procedural law cause any prejudice to the victims since they are no less able to ensure that the Appeals Chamber has the benefit of their representations in these proceedings.[7]

3. The widespread concern provoked by the Decision is also illustrated by the numerous requests to participate in these proceedings as *amicus curiae*—of which, as the Appeals Chamber remarked, "[t]he vast majority […] have also indicated their intention to argue for the reversal of the […] Decision".[8]

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[1] *See* ICC-02/17-62 ("Certification Decision").
[2] *See* ICC-02/17-33 ("Decision").
[3] ICC-02/17-74 ("Prosecution Appeal Brief"), paras. 12-59.
[4] Prosecution Appeal Brief, paras. 60-167.
[5] *See* ICC-02/17-73-Corr; ICC-02/17-75-Corr.
[6] ICC-02/17-92 ("Prosecution Response Brief"), paras. 28-55.
[7] *See* Prosecution Response Brief, paras. 2, 5-6, 11, 28, 31-32, 80, 82.
[8] ICC-02/17-97 ("Participation Decision"), para. 49.

Submissions

4. The Prosecution welcomes the written submissions which have been received from additional participating victims (the "cross-border" victims) and nine of sixteen *amici curiae*, at the invitation of the Appeals Chamber. The Prosecution is grateful for the eloquence and concision of these submissions, and anticipates that the seven *amici curiae* who preferred to make their submissions in the forthcoming oral hearing will adopt the same focused approach, so that the various *amici curiae* are heard in full equality.

5. The Prosecution files this single document as a consolidated response to the "cross-border" victims,[9] the Office of Public Counsel for the Defence ("OPCD", participating as an *amicus curiae*),[10] and the other *amici curiae* who elected to make written submissions.[11] While the Appeals Chamber allowed a generous number of pages for the Prosecution to respond (separately) to each of these groups, it suffices on this occasion for the Prosecution to make all of its observations within the confines of the smallest applicable page limit (15 pages) and to forego the additional opportunities which have been provided.[12] However, to the extent any unforeseen matters may properly arise from the forthcoming oral hearing, the Prosecution may request a further opportunity to address these matters in writing.

6. The Prosecution agrees with many of the written submissions of the *amici curiae* concerning the merits of the Pre-Trial Chamber's decision, consistent with the

[9] *See* ICC-02/17-116 ("'Cross-Border' Victim Observations").
[10] *See* ICC-02/17-110 ("OPCD Observations"). *See also* Participation Decision, paras. 48-50.
[11] *See* ICC-02/17-115 ("QUB Observations"); ICC-02/17-109 ("Trahan Observations"); ICC-02/17-117 ("Mackintosh/Sluiter Observations"); ICC-02/17-108 ("Ambos/Heinze Observations"); ICC-02/17-114 ("INGO Observations"); ICC-02/17-112 ("AI Observations"); ICC-02/17-111 ("Rona Observations"); ICC-02/17-113 ("*Ad Hoc* Prosecutor Observations").
[12] *See* Participation Decision, paras. 37 (allowing the Prosecution to file a consolidated response to the written submissions of *amici curiae* not exceeding 30 pages), 41 (allowing the Prosecution to file a response to the "cross-border" victims not exceeding 15 pages), 51 (allowing the Prosecution to file a response to the OPCD not exceeding 35 pages).

position it has already expressed in its appeal and response briefs.[13] It will not simply repeat the various points of agreement here.

7. By contrast, however, the Prosecution does not agree that the concerns raised by the OPCD are apposite to the Pre-Trial Chamber's decision, and thus to the current appeal proceedings.

8. Likewise, on the limited issue of the standing of victims to appeal article 15(4) decisions, the Prosecution does not agree with the written submissions of the "cross-border" victims and two *amici curiae*—representing various international non-governmental organisations including FIDH, Human Rights Watch, and Amnesty International. As the Human Rights Centre at Queen's University Belfast ("QUB")—another *amicus curiae*—appears to suggest, while there may be *policy* arguments for (and against) a statutory amendment to create such standing, this simply does not reflect the *current* state of the law.[14]

9. These positions are reflected in the following eight concrete observations arising from the written submissions which have been received.

A. There is an apparent consensus in the written submissions that the Pre-Trial Chamber's interpretation of articles 15(4) and 53(1)(c) was erroneous (Ground 1 of the Prosecution appeal)

10. As a general point, the Prosecution notes that none of the written submissions which have been received in these proceedings takes the view that the Pre-Trial Chamber was correct to interpret articles 15(4) and 53(1)(c) so that it was permitted or required to undertake a *positive* assessment of the interests of justice. Indeed, many of the *amici curiae* go further than the Prosecution, arguing that *any* review of the interests of justice is *ultra vires* in the context of an article 15(4) decision.[15] While the Prosecution has previously recognised that there may be some force to this

[13] *See generally* Prosecution Appeal Brief; Prosecution Response Brief.
[14] *See below* paras. 13-16.
[15] *See e.g.* 'Cross-Border' Victim Observations, paras. 19-25; QUB Observations, paras. 3-4; Trahan Observations, pp. 1-3; INGO Observations, para. 15. *But see* Ambos/Heintze Observations, paras. 15-19.

argument, it has explicitly taken a more cautious approach in light of the apparent practice of other Pre-Trial Chambers under article 15(4), and thus argued that it was not the fact of the Pre-Trial Chamber's review which was erroneous but its understanding of *the way* in which it carried out this review.[16] Yet no matter which approach is favoured by the Appeals Chamber, both arguments lead to the granting of ground 1 of the Prosecution's appeal and reversal of the Decision.

B. There is an apparent consensus in the written submissions that the Pre-Trial Chamber abused any discretion it had in assessing the interests of justice (Ground 2 of the Prosecution appeal)

11. Likewise, the Prosecution notes that none of the written submissions which have been received in these proceedings take the view that the Pre-Trial Chamber was reasonable or correct in key aspects of its reasoning when seeking to assess the interests of justice. These aspects include:

- the Pre-Trial Chamber's understanding of the permitted scope of the investigation, which limited the facts to which its 'interests of justice' assessment applied;[17]

- the Pre-Trial Chamber's understanding of the applicable scope of common article 3 of the Geneva Conventions, which led it to misapply the nexus test under article 8 of the Statute and in turn again limited the facts to which its 'interests of justice' assessment applied;[18] and

- the Pre-Trial Chamber's disproportionate and unacknowledged emphasis on just one of the three potential major lines of inquiry in conducting its 'interests of justice' assessment.[19]

[16] Prosecution Response Brief, para. 60.
[17] *See* Prosecution Appeal Brief, paras. 73-93, 122. *See further e.g.* 'Cross-Border' Victim Observations, paras. 31-33; INGO Observations, paras. 24-30.
[18] *See* Prosecution Appeal Brief, paras. 94-110. *See further e.g.* Rona Observations, paras. 1-17; INGO Observations, paras. 31-35. The Prosecution does not agree that "the proper role for the Pre-Trial Chamber is to broaden the scope of a potential investigation". *See* Prosecution Response Brief, para. 67 (fn. 140).
[19] *See* Prosecution Appeal Brief, paras. 118-121, 124, 130, 132.

12. Accordingly, even if the Appeals Chamber were to find no other error in the Pre-Trial Chamber's analysis, these errors would, individually or cumulatively, lead to the granting of ground 2 of the Prosecution's appeal and reversal of the Decision.

C. The standing of victims to appeal decisions under article 15(4) may be *lex ferenda*, but is not *lex lata*

13. QUB makes nuanced submissions concerning the standing of victims to appeal, within the legal framework of this Court. While the QUB does not go so far as to conclude *expressly* that the victims' standing to appeal decisions under article 15(4) is not currently permitted at the Court (*lex lata*), even if this may be a desirable reform (*de lege ferenda*), the Prosecution can only understand this as the import of its submission.

14. Thus, QUB recognises that "[t]he ICC only allows victims to have a right of appeal for reparations decisions",[20] and affirms that it is "not suggesting that victims have a stand-alone right to appeal".[21] It also recognises that "[v]ictims have a very circumscribed role in investigations at the ICC",[22] and "there is no explicit procedure for them to review" decisions relating to investigations,[23] although they may of course participate in such judicial proceedings once they have been triggered. The statutory approach may be consistent with the fact that "[v]ictims do not speak with one voice", and that consequently the manner of their engagement with the Court is not necessarily straightforward.[24]

[20] QUB Observations, para. 18. However, the QUB adds, without citation, that victims may have a right of appeal for "other decisions at the chamber's discretion". To the Prosecution's knowledge, there is no authority for this proposition, and such a view seems inconsistent with the tenor of the QUB's other observations.
[21] QUB Observations, para. 19.
[22] QUB Observations, para. 15. While correctly acknowledging the ruling by the Appeals Chamber that victims may only participate in "judicial proceedings", the QUB seems to understand the Pre-Trial Chamber seised of the Prosecutor's request under article 19(3), in what became the *Bangladesh-Myanmar* situation, to have departed from this principle in some way. Yet this is incorrect since proceedings under article 19(3) are manifestly judicial proceedings, and article 19(3) expressly contemplates the participation of victims. This offers no support for a right of participation *beyond* that expressly provided in the Statute.
[23] QUB Observations, para. 18.
[24] QUB Observations, para. 17.

15. At the same time, the QUB expresses the view that "[d]ecisions not to commence an investigation […] *should* allow victims' standing to request a review",[25] presumably including standing to appeal, with reference to its view that this will enhance "transparency and confidence in the procedure and decision making of the Court".[26] While the Prosecution recalls that there may also exist policy arguments against such an approach, the important point for the present purposes is simply that appellate standing for victims is not *currently* provided by the law of this Court. Amnesty International's alternative submission may also allow for this conclusion, calling for the Appeals Chamber to create a "*new* procedural remedy" for victims "to appeal decisions that deny or infringe on their rights pursuant to Article 21(3)".[27]

16. Respectfully, however, the Prosecution submits that—consistent with the established practice of the Appeals Chamber—reforms of this kind should not be instituted through caselaw, when the Statute clearly establishes a different preference. If necessary, such matters are more apposite for consideration by the Assembly of States Parties, under article 121 of the Statute. Such an approach would also guard against the 'floodgates' concern that otherwise arises from any departure from strict adherence to the terms of the Statute on these matters.[28]

D. There is no obligation on the Prosecutor to refer to every communication she is publicly known to have received under article 15(1) when making a request under article 15(3)

17. The "cross-border" victims agree that it is for the Prosecutor to define the parameters of the investigation for which she requests authorisation under article 15(3) and that, if authorised, the scope of that investigation is not limited to the

[25] QUB Observations, para. 20 (emphasis added).
[26] QUB Observations, para. 20. *See also* para. 19.
[27] AI Observations, para. 17 (emphasis added).
[28] *See* Prosecution Response Brief, paras. 50-52, 55.

incidents specifically identified for the purpose of showing that there is a reasonable basis to proceed in the meaning of article 53(1) of the Statute.[29]

18. Yet if these principles are acknowledged, as they should be, it is inconsistent to suggest that the Prosecutor is nonetheless obliged to "identify" or make findings about alleged crimes concerning the authors of *all* publicly-known article 15 communications.[30] As the Prosecution has previously explained, there are many reasons why incidents may be selected (or not) as the basis for an article 15(3) request, and this is a matter of prosecutorial discretion.[31] The approach favoured by the "cross-border" victims would not only be contrary to judicial economy (insofar as it would increase the burden of analysis required in preliminary examinations, and lengthen these proceedings),[32] but might also be counter-productive in requiring the Prosecutor to make initial 'negative' findings about certain allegations when she may for various reasons consider neutral silence to be the more appropriate course.

19. This does not mean that information provided under article 15 is ignored, as the Prosecution has pointed out.[33] It simply does not make sense to require the Prosecution to give a public indication of how certain victims or allegations might

[29] *Compare*, *e.g.*, 'Cross-Border' Victim Observations, paras. 31-33, *with* Prosecution Appeal Brief, paras. 77-93. The Prosecution notes that, in their conclusion, the "cross-border" victims request the Appeals Chamber to "hold that Article 15 of the Statute *does* restrict the scope of an authorized investigation to the incidents expressly identified", but understands this in the context of their prior submissions to be a typographic error, which was intended to read "does not restrict": *see* 'Cross-Border' Victim Observations, para. 39 (emphasis added).
[30] *Contra* 'Cross-Border' Victim Observations, paras. 14-15, 34-35.
[31] *See e.g.* ICC-02/17-60 ("Prosecution Reply (Pre-Trial Chamber)"), para. 28; 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 (recalling the 'methodological' discretion of the Prosecutor in conducting preliminary examinations), 247-250 (noting that "a preliminary examination which supports the opening of an investigation is [not] likely to provide a 'full' account of all the types of crimes which might have been committed", including because "[c]ertain Article 5 crimes are, by their nature, more difficult to establish because they require a greater number of elements to be satisfied" and "some required elements, by their nature, may be difficult to establish to the standard of proof" without investigation; also referring to other "practical considerations" which may be relevant, and concluding that, "[i]nevitably, certain features, possibly key features, of the situation may well be suspected at the preliminary examination stage, but are only susceptible to proof by means of the investigation itself" but "[t]his presents no legal problem as such, since the scope of the investigation once opened is not limited to the incidents discussed in any public outcomes of the preliminary examination").
[32] *See also* Prosecution Appeal Brief, para. 16 (text accompanying fn. 28).
[33] *See* 'Cross-Border' Victim Observations, paras. 10-12. *Contra* paras. 9, 37.1, 37.3.

"be treated in its investigation"[34]—to the contrary, as the practice of the Court abundantly demonstrates, the conduct of investigations is exclusively a matter for the Prosecutor, and she may properly decide to maintain the confidentiality of her inquiries.

20. The very practice of the "cross-border" victims in this case also demonstrates that it is incorrect to suggest that the absence of any public reference in an article 15(3) request prevents them from making "meaningful representations" to the Pre-Trial Chamber.[35] To the contrary, as in this very situation, they were fully able to make such representations, and did so.[36]

21. For similar reasons, the apparent silence of the Prosecutor in an article 15(3) request can never justify the standing of victims of the alleged conduct to appeal a decision by the Pre-Trial Chamber under article 15(4).[37] If the request is granted, then there is no adverse judicial decision for such victims to challenge. And if the request is denied, then it is necessarily denied on the basis of considerations *other* than those pertaining to alleged victims who are not mentioned in an article 15(3) request. This does not leave those persons without recourse. For example, in such circumstances, it remains open to the Prosecutor, in her discretion, to renew her request to the Pre-Trial Chamber under article 15(5) of the Statute, including potentially on the basis of different alleged incidents from her first request under article 15(3).

E. It is correct that the obligations of internationally recognised human rights must be "contextualised" for the purpose of article 21(3) of the Statute

22. The Prosecution agrees with Ms Mackintosh and Professor Sluiter that, in interpreting the legal texts of the Court, reference to internationally recognised rights under article 21(3) of the Statute must be based on a proper methodology.[38] As they acknowledge, such rights require "contextualization"— conducted with due care—in

[34] *Contra* 'Cross-Border' Victim Observations, para. 37.2.
[35] *Contra* 'Cross-Border' Victim Observations, para. 16.
[36] *See* 'Cross-Border' Victim Observations, para. 4.2.
[37] *Contra* 'Cross-Border' Victim Observations, paras. 7-9, 13.
[38] Mackintosh/Sluiter Observations, para. 9.

recognition of the materially different circumstances of the Court in comparison to States, which are the primary addressees of human rights obligations.[39]

23. For example, according to Ms Mackintosh and Professor Sluiter, "one clear difference between the context of ICC investigations and those of domestic systems is the limited focus of the Court", in that "[i]t cannot be that every victim of a crime within the jurisdiction of the Court has a right to have the Prosecutor investigate it, in the same way that this claim can be made against national authorities."[40] As the Prosecution has previously recalled, this distinction is of particular importance in considering the claim that victims must be vested with the right to appeal an adverse article 15(4) decision, because they have a right to a remedy for the crimes which the Prosecution has identified.[41]

24. Yet if the right to an effective remedy is properly contextualised to the circumstances of the Court, which has a selective mandate, it is clear that *States* remain the primary addressees of the right to a remedy. States Parties to the Statute have designated the Court as a forum by which their obligations may be discharged, but only in those circumstances enumerated in the Statute. Where the statutory conditions are not met, the obligation on States Parties to provide an effective remedy is *not* discharged, but is a matter for resolution under applicable domestic law.

[39] Mackintosh/Sluiter Observations, paras. 12-13, 24. *See also* paras. 6-7. While the *amicus curiae* suggests that "not every international criminal tribunal appears to support a contextualized application of human rights law", the only authority given for this proposition is the practice of the Kosovo Specialist Chambers (KSC): para. 8. However, the KSC is not an international body in the same sense as this Court, but rather an "internationalised" entity. While it has some international characteristics, it is in fact a domestic court of Kosovo: *see e.g.* S. Williams, 'The Specialist Chambers of Kosovo: the limits of internationalization?' [2016] 14(1) *Journal of International Criminal Justice* 25, pp. 26-27, 33-35; M. Cross, 'Equipping the Specialist Chambers of Kosovo to try transnational crimes: remarks on independence and cooperation,' [2016] 14(1) *Journal of International Criminal Justice* 73, p. 86.
[40] Mackintosh/Sluiter Observations, para. 26.
[41] *See* Prosecution Response Brief, para. 48.

F. Factors relevant to the interests of justice must be assessed on a case-by-case basis, but certain factors may in practice be more apposite in determinations whether to prosecute rather than whether to investigate

25. The OPCD argues generally that "[f]air trial rights should be considered when assessing the 'interests of justice' under Article 53(1)(c) of the Statute".[42] As the Prosecution recalled in its Appeal Brief, the "materiality" of any considerations other than the gravity of the crime and the interests of victims to the assessment of the interests of justice is to be determined on a case-by-case basis.[43] Accordingly, it does not necessarily disagree in principle that fair trial considerations *might* be properly taken into account *if* required by the concrete facts of a particular situation, assessed as part of the Prosecutor's exercise of discretion.[44]

26. Yet in the Prosecution's view, even within the exceptional context of article 53(1)(c) itself,[45] it is likely to be extremely unusual for the facts justifying reference to such considerations to be established even when determining whether to open an investigation. Rather, such questions are likely to be more apposite to determinations whether to *prosecute* a concrete case, as in article 53(2)(c) of the Statute. The Prosecution has already expressly referred to this possibility with regard to the extensive lapse of time since the commission of alleged crimes.[46]

27. In this context, the OPCD's disagreement with the Prosecution's view of the irrelevance of the passage of time,[47] "as such",[48] seems to have missed the point. This position—which is consistent with article 29 of the Statute[49]—does not exclude considerations of fairness, *if* these are ever justified by the facts. Rather, it merely means that the passage of time *of itself* is not a relevant consideration. But if the facts

[42] OPCD Observations, para. 25. *See also* para. 24.
[43] Prosecution Appeal Brief, para. 32.
[44] *See also* Prosecution Appeal Brief, para. 139.
[45] Prosecution Appeal Brief, para. 23.
[46] Prosecution Appeal Brief, paras. 113 ("the passage of time can—at most—be a factor to be weighed in assessing whether it is fair to bring a *particular* prosecution", emphasis supplied). *See also* para. 115.
[47] OPCD Observations, paras. 42-51.
[48] Prosecution Appeal Brief, para. 113.
[49] *Cf.* OPCD Observations, para. 45 (conceding, as it must, that article 29 was in fact adopted).

adequately suggest that the passage of time will lead to concrete unfairness, then of course this might be taken into account under article 53(1)(c).[50] The analogy drawn by the OPCD to a 'stay of proceedings' in fact supports this approach, insofar as a stay is likewise a case-by-case assessment based on the occasioning of actual prejudice.[51]

28. In any event, the OPCD fails to take account of the relatively limited amount of time which has elapsed since the alleged crimes in this situation, as compared for example to prosecuted cases arising out of the situation in Cambodia under the Khmer Rouge, or the Second World War.[52] Nor does it address the key error in this situation in that two of the three potential major lines of inquiry would encompass events which are substantially more recent than apparently acknowledged by the Pre-Trial Chamber.[53]

29. Likewise, the OPCD only expresses a generalised view that the prospects for State cooperation and securing evidence may be taken into account for the purpose of article 53(1)(c).[54] Yet this does not answer the concrete issues identified in the Prosecution's appeal, which showed that "[t]he Pre-Trial Chamber's conclusions" on these matters were "unreasonable, and could not have been reached by any reasonable chamber."[55] The OPCD appears to take issue with none of the Prosecution's arguments in this respect. Nor does it challenge the Prosecution's argument that the Pre-Trial Chamber was not entitled to undertake its own 'positive' assessment of the interests of justice under articles 15(4) and 53(1)(c), whether with respect to these or any other factors.

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[50] *See* Prosecution Appeal Brief, para. 115 (questions such as the passage of time "might potentially arise one day in the context of a particular prosecution—where they can be measured against the concrete circumstances of the individuals concerned").
[51] *See* OPCD Observations, para. 50 (citing ICC-01/04-01/06-1486 OA13, para. 81).
[52] *See* Prosecution Appeal Brief, para. 114.
[53] Prosecution Appeal Brief, paras. 116-122.
[54] *See* OPCD Observations, paras. 52-66.
[55] Prosecution Appeal Brief, paras. 124 (on the prospects of State cooperation), 131 (on the prospects for securing relevant evidence). *See further* paras. 125-128 (on the prospects of State cooperation), 132-138 (on the prospects for securing relevant evidence).

G. The Appeals Chamber need not grant any remedy beyond that requested by the Prosecution

30. One *amicus curiae*, Amnesty International, has not only concurred in the Prosecution's request that the Appeals Chamber should reverse the Decision with a view to the prompt opening of an investigation,[56] but also requested ancillary orders directed to the Prosecution on matters falling exclusively within the competence of the Prosecutor under articles 42 and 54 of the Statute (such as the investigative priority to be given to this situation and the content of the Prosecutor's submission to the ASP in negotiating her budget).[57] In the Prosecution's respectful view, this would be *ultra vires*. Yet, in any event, the absence of any demonstrated forensic need for such orders—especially in circumstances where the Prosecutor is plainly making good faith efforts to execute her mandate—mean that the Appeals Chamber need not even enter into the legalities of the relief requested.

H. *Amici curiae* participating in the oral hearing should, like the *amici curiae* who have made written submissions, focus their observations on matters germane to the appeal

31. Finally, mindful that parties do not have standing to respond to requests to participate in the Court's proceedings as an *amicus curiae*,[58] the Prosecution takes this opportunity to draw attention to the apparent indication by two *amici curiae*—whose submissions will be heard for the first time in the forthcoming hearing[59]—that they might address matters of law that appear to extend beyond, and to be unrelated to, the scope of these appeal proceedings. The Prosecution seeks to place this observation on record in a timely fashion, so that any ambiguity that may inadvertently have arisen may be clarified, if required.

32. The Prosecution recalls that, in the Decision, the Pre-Trial Chamber determined that the Court has jurisdiction *ratione loci* over all conduct occurring in the territory

[56] AI Observations, paras. 19, 23.
[57] AI Observations, paras. 20-22
[58] *See e.g.* ICC-01/19-26, para. 9; ICC-02/05-01/09-51, para. 8; ICC-01/05-01/08-602, para. 7.
[59] *See* ICC-02/17-106.

of Afghanistan.[60] This finding has not been appealed, and is not in issue for the purpose of these proceedings. Consequently, it is not a matter which may properly be addressed by *amici curiae* on appeal.

33. Indeed, even if the Pre-Trial Chamber's assessment under article 53(1)(c) *were* (for the sake of argument) to be considered 'jurisdictional' for the purpose of article 82(1)(a), this still would not mean that the *scope* of the appeal necessarily extends to *any* jurisdictional question. To the contrary, the scope of this appeal remains confined to the question whether the Pre-Trial Chamber erred in its interpretation and application of articles 15(4) and 53(1)(c). Matters are only germane to the appeal insofar as they formed part of or shaped its determination under article 53(1)(c).

34. Notwithstanding these principles, the group of human rights organisations including UK Lawyers for Israel ("Lawyers for Israel") have suggested that the question whether article 82(1)(a) applies to the Decision also constitutes a basis for:

> observations on *broader considerations* underlying this issue, namely the *interpretation of provisions of the Rome Statute that touch upon the question of jurisdiction*, including Articles 5, 12, 13 and 53.[61]

35. While the Prosecution acknowledges that the distinction between the concepts of "'jurisdiction' and the 'exercise of jurisdiction'" might be relevant to the interpretation of article 82(1)(a) of the Statute,[62] and thus may assist the Appeals Chamber in resolving the issues on appeal, it submits that any *broader* substantive discussion of the jurisdictional foundations of the Court under articles 5, 12, 13, and 53(1)(a) of the Statute would *not* be relevant.

36. The European Centre for Law and Justice ("ECLJ"), another *amicus curiae*, also makes a very similar proposal to the Lawyers for Israel, but subject to even fewer

[60] *See* Decision, paras. 45, 50.
[61] ICC-02/17-87 ("Lawyers for Israel Request to Participate"), para. 5 (emphasis added).
[62] Lawyers for Israel Request to Participate, para. 5. *See further* ICC-02/17-118, p. 6 (Group B, (b)).

qualifications. Again, ostensibly within the framework of the question as to the proper application of article 82(1)(a) to the Decision, the ECLJ proposes to submit:

> observations on broader considerations concerning the question of jurisdiction/admissibility, which would include *inter alia* evaluation of Articles 5, 12, 13 and 53.[63]

37. Maintaining the focus of these appeal proceedings on the issues relevant to the alleged error(s) in the Decision, consistent with the established practice of the Appeals Chamber, will not occasion any prejudice to any person. The Prosecution recalls that any challenge to the jurisdiction of the Court can properly be made, in due time, pursuant to article 19 of the Statute. Given the existence of such dedicated procedures, similar matters should not be raised before the Appeals Chamber at first instance, nor by entities which are neither permitted to make challenges to jurisdiction under article 19(2) nor have standing to appeal such decisions.

Conclusion

38. For all these reasons, and consistent with the submissions in the Prosecution Appeal Brief and the Prosecution Response Brief, the Appeals Chamber should reverse the Decision and grant the remedy requested by the Prosecution.

Fatou Bensouda, Prosecutor

Dated this 25th day of November 2019

At The Hague, The Netherlands

[63] ICC-02/17-95 ("ECLJ Request to Participate"), para. 8.