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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

Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'

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

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Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims
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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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REGISTRY

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Section**
Mr Philipp Ambach, Chief

Other

PRE-TRIAL CHAMBER II of the International Criminal Court hereby issues this Decision on the Prosecutor and a number of victims' requests for leave to appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' ('Afghanistan' and 'Article 15 Decision').¹

I. PROCEDURAL BACKGROUND

1. On 3 November 2017, following notice dated 30 October 2017 of the Prosecutor's intention to request judicial authorisation to commence an investigation into the situation in Afghanistan, the Presidency decided 'to assign, with immediate effect, the situation in the Islamic Republic of Afghanistan to Pre-Trial Chamber III'.²
2. On 20 November 2017, after that the Chamber granted the Prosecutor's request for an extension of the page limit for the request for authorisation of an investigation into the situation in Afghanistan,³ the latter submitted the 'Request for authorisation of an investigation pursuant to article 15' ('Article 15 Request'), together with 14 annexes, in which the Pre-Trial Chamber was requested 'to authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002'.⁴
3. Throughout the period 12 December 2017 to 9 February 2018, the Prosecutor provided, as ordered by the Chamber, additional information concerning, *inter alia*, (i) allegations attributed to special forces of a number of international forces operating in Afghanistan; (ii) the national investigations and/or prosecutions in Afghanistan; (iii) the structure, conduct, policies and organisation of other relevant States and entities.⁵

¹ Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33.

² Presidency, Decision assigning the situation in the Islamic Republic of Afghanistan, 3 November 2017, ICC-02/17-1, with public Annex I (Prosecutor's 'Notice pursuant to regulation 45 of the Regulations of the Court').

³ Prosecutor, Request for extension of the page limit for a request for authorisation of an investigation pursuant to article 15 of the Rome Statute, 3 November 2017, ICC-02/17-2; Pre-Trial Chamber III, Decision on the Prosecutor's Request for Extension of the Page Limit, 9 November 2017, ICC-02/17-5.

⁴ Prosecutor, Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7-Conf-Exp, with confidential *ex parte* Annexes 1, 2A, 2B, 2C, 3A, 3B, 3C, 4A, 4B, 4C and 6, only available to the Prosecution, and public Annexes 4, 5 and 7 (public redacted version notified same day), para. 376.

⁵ Prosecutor, Prosecutor's provision of additional information pursuant to Pre-Trial Chamber III's "Order to the Prosecutor to Provide Additional Information" (ICC-02/17-8), 12 December 2017, ICC-02/17-12, with one

4. On 20 February 2018, after having transmitted to the Chamber, pursuant to the latter's instructions,⁶ the representations of victims submitted in accordance with Article 15(3) of the Rome Statute ('Statute') on a rolling basis together with reports containing a preliminary assessment of the representations,⁷ the Registry submitted a final consolidated report summarising the process of collecting the victims' representations and the victims' views on whether or not they wished an investigation into the situation in Afghanistan to be authorised.⁸
5. On 16 March 2018, the Presidency recomposed the Chambers of the Court and assigned the situation in Afghanistan to Pre-Trial Chamber II.⁹
6. On 12 April 2019, the Chamber rendered the Article 15 Decision rejecting the Prosecutor's Article 15 Request on the grounds 'that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice';¹⁰ on 31 May 2019, Judge Antoine Kesia-Mbe Mindua issued his concurring and separate opinion.¹¹
7. On 7 June 2019, the Prosecutor filed a request for leave to appeal the Article 15 Decision ('Prosecutor's Request').¹²

confidential *ex parte* Annex, only available to the Prosecution; ICC-02/17-13-Secret-Exp; ICC-02/17-14-Secret-Exp; Prosecution response to the Second Order to the Prosecutor to provide Additional Information, 9 February 2018, ICC-02/17-26, with public Annexes A to C.

⁶ Pre-Trial Chamber III, Order to the Victims Participation and Reparation Section Concerning Victims' Representations, 9 November 2017, ICC-02/17-6.

⁷ First Transmission and Report on 7 December 2017: ICC-02/17-10 with five confidential *ex parte* annexes; ICC-02/17-11-Red with two confidential *ex parte* annexes; the Court received one individual and four collective representation forms; Second Transmission and Report on 21 December 2017: ICC-02/17-15 with seven confidential *ex parte* annexes; ICC-02/17-16-Red with one confidential *ex parte* annex; the Court received three individual and four collective representation forms; Third Transmission and Report on 11 January 2018: ICC-02/17-17 with 28 confidential *ex parte* annexes; ICC-02/17-18 with one confidential *ex parte* annex; the Court received five individual and 23 collective representation forms; Fourth Transmission and Report on 25 January 2018: ICC-02/17-19 with 47 confidential *ex parte* annexes; ICC-02/17-20-Red with 3 confidential *ex parte* annexes; the Court received five individual and 42 collective representation forms; Fifth Transmission and Report on 2 February 2018: ICC-02/17-21 with 138 confidential *ex parte* annexes; ICC-02/17-22-Red with three confidential *ex parte* annexes; the Court received 58 individual and 80 collective representation forms; Sixth Transmission and Report on 5 February 2018: ICC-02/17-24 with 165 confidential *ex parte* annexes; ICC-02/17-25 with two confidential *ex parte* annexes; the Court received 29 individual and 136 collective representation forms; Seventh Transmission and Report on 9 February 2018: ICC-02/17-27 with 309 confidential *ex parte* annexes; ICC-02/17-28 with two confidential *ex parte* annexes; the Court received 72 individual and 237 collective representation forms.

⁸ Registry, Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, 20 February 2018, ICC-02/17-29, with confidential and public redacted versions of Annex I and confidential *ex parte* Annex II, only available to the Registry.

⁹ Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2018, ICC-02/17-30.

¹⁰ Article 15 Decision, operative part.

¹¹ Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr, annexed to Article 15 Decision.

¹² Prosecutor, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 7 June 2019, ICC-02/17-34.

8. On 10 June 2019, a first group of non-governmental organisations ('First Group of *Amicus Curiae* Organisations') and the Office of Public Counsel for Victims ('OPCV') respectively requested to be granted leave to file written *amicus curiae* submissions and to appear before the Chamber by way of written submissions to address the issues raised in the Prosecutor's Request.¹³
9. On the same day, the Legal Representatives of 82 victims and two organisations, who had made article 15(3) representations before the Chamber, filed, pursuant to article 82(1)(d) of the Statute, a request for leave to appeal the Article 15 Decision before Pre-Trial Chamber II, seeking certification of six issues for appeal ('Victims' Request').¹⁴ Additionally, they filed a notice of appeal of the same decision before the Appeals Chamber pursuant to article 82(1)(a),¹⁵ as also did the Legal Representatives of six other victims¹⁶ and of an individual victim.¹⁷
10. On 12 June 2019, the Prosecutor filed observations to address procedural issues related to the parallel judicial proceedings arising from the Article 15 Decision before Pre-Trial Chamber II and the Appeals Chamber ('Observations').¹⁸
11. On the same day, the Chamber granted both the First Group of *Amicus Curiae* Organisations and the OPCV's requests to submit written observations.¹⁹
12. On 13 June 2019, two non-governmental organisations filed a response to the Prosecutor's Request for leave to appeal ('13 June 2019 First Response').²⁰ On the same

¹³ First Group of *Amicus Curiae* Organisations, Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan, 10 June 2019, ICC-02/17-35, with public Annex A; OPCV, Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, 10 June 2019, ICC-02/17-39.

¹⁴ Legal Representatives of Victims, Victims' request for leave to appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 10 June 2019, ICC-02/17-37, with confidential Annex I.

¹⁵ Legal Representatives of Victims, Victims' Notice of Appeal of the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 10 June 2019, ICC-02/17-36, with confidential Annex I.

¹⁶ Legal Representatives of Victims, Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 10 June 2019, ICC-02/17-38, with public Annexes.

¹⁷ Legal Representatives of Victims, Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-33), 12 June 2019, ICC-02/17-40-Corr (corrected version notified on 12 June 2019).

¹⁸ Prosecutor, 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), 12 June 2019, ICC-02/17-42.

¹⁹ Pre-Trial Chamber II, Decision on the 'Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39), 12 June 2019, ICC-02/17-43.

day, the Legal Representatives of seven victims also submitted a response to the Prosecutor and other victims' requests for leave to appeal the Article 15 Decision ('13 June 2019 Second Response').²¹

13. On 14 June 2019, a second group of non-governmental organisations ('Second Group of *Amicus Curiae* Organisations') requested the Chamber to be granted leave to file written *amicus curiae* submissions on the Prosecutor's Request and Observations.²² On 17 June 2019, the Chamber granted that request.²³
14. On 18 June 2019, the Prosecutor filed a request (i) proposing the Chamber to file a response to the forthcoming *amicus curiae* submissions; and (ii) requesting to be granted leave to reply to the 13 June 2019 First and Second Response.²⁴ On the same day, the Chamber granted that request.²⁵
15. On 11 July 2019, the First and Second Group of *Amicus Curiae* Organisations filed their respective written submissions pursuant to rule 103 of the Rules of Procedure and Evidence ('Rules', 'First *Amicus Curiae* Submissions' and 'Second *Amicus Curiae* Submissions').²⁶ The day after, the OPCV also filed its submissions in the general interest of the victims.²⁷
16. On 19 July 2019, the Prosecutor submitted a consolidated response to the 13 June 2019 First Response and to the *Amicus Curiae*'s submissions ('Prosecutor's Response').²⁸

²⁰ Reprieve/Foundation for Fundamental Rights Pakistan, RESPONSE TO OFFICE OF THE PROSECUTOR'S: 'Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 13 June 2019, ICC-02/17-44.

²¹ Legal Representatives of Victims, Victims' response to the Requests for Leave to Appeal filed by the Prosecution and by other victims, 13 June 2019, ICC-02/17-45.

²² Second Group of *Amicus Curiae* Organisations, Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 14 June 2019, ICC-02/17-46-Corr (corrected version notified on 17 June 2019).

²³ Pre-Trial Chamber II, Decision on the 'Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' (ICC-02/17-46), 17 June 2019, ICC-02/17-47.

²⁴ Prosecutor, Request for scheduling order under rules 91(2) and 103(2), and regulation 24, 18 June 2019, ICC-02/17-48.

²⁵ Pre-Trial Chamber II, Decision on the 'Request for scheduling order under rules 91(2) and 103(2), and regulation 24' (ICC-02/17-48), 18 June 2019, ICC-02/17-49 (notified on 19 June 2019).

²⁶ First Group of *Amicus Curiae* Organisations, *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan, 11 July 2019, ICC-02/17-57, with confidential Annexes A to E and public Annexes F to H; Second Group of *Amicus Curiae* Organisations, *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 11 July 2019, ICC-02/17-58, with a public Annex (notified on 12 July 2019).

²⁷ OPCV, Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 12 July 2019, ICC-02/17-59, with a public Annex.

²⁸ Prosecutor, Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims, 19 July 2019, ICC-02/17-60.

CHAMBER'S DETERMINATIONS

II. VICTIMS' REQUEST

17. The Legal Representatives identify as many as six issues for which they seek certification for appeal;²⁹ as well as the Prosecutor and the *amici curiae*, they have also submitted several observations as to whether victims have procedural standing to appeal a decision under article 82(1)(d) of the Statute.³⁰ In light of the preliminary and critical nature of this issue, the Chamber considers it appropriate to first address it.
18. At the outset, the Chamber finds it necessary to clarify the meaning and content of the notion of 'victim' for the purposes of the interpretation of the Court's statutory instruments, most notably rule 85 of the Rules. Not all individuals in a position to claim to have suffered harm from mass atrocities qualify as 'victims' vested with participatory rights and prerogatives in respect of proceedings before the Court; not until – and unless – they have been going through the statutory process of applying for being recognised as 'victims' by the relevant organs of the Court. Only those individuals who have been recognised as victims according to the relevant statutory provisions are vested with procedural rights. Furthermore, while the Statute refers to 'victims' in the context and for the purposes of all stages of the proceedings, including the pre-authorisation stage, the Chamber is of the view that the specific nature and scope of the prerogatives attached to the status of victims significantly varies depending on the nature, object and purpose of the specific procedural phase at stake.
19. Before the issuance of a Pre-Trial Chamber's decision *granting* the Prosecutor's request for an authorisation to open an investigation *proprio motu* under article 15 of the Statute, one may say that the Court's jurisdiction cannot yet be considered as actually 'triggered'. It is only *following* a Chamber's authorisation of the investigation that it will be possible for proceedings to be defined in terms of identification of the specific incidents suitable to become the subject matter of the Prosecutor's case(s) and of their relevant objective, subjective and temporal circumstances. Accordingly, at this stage, individuals alleging having suffered harm within the meaning of rule 85 of the Rules can only be considered as *potential* victims, aiming at having their status assessed by the Court in accordance with the relevant statutory instruments; only in the event that

²⁹ Victims' Request, paras 47, 53, 59, 63, 68, 73.

³⁰ Victims' Request, paras 21-42; Observations, paras 6, 8, 12-13, 15-17, 19, 21; Second *Amicus Curiae* Submissions, paras 10, 77-88, 89-96; Prosecutor's Response, paras 18-24.

the relevant requirements are met, will the applicants be recognised as victims and specific individual procedural rights will be vested in them. During this phase, the Chamber has no access to the identity and other personal information of these individuals and hence no possibility for scrutiny as to the genuineness of their claims. Access and scrutiny will only become possible at a later stage, namely in the context of the specific procedure aiming at assessing the relevant requirements of those applying to have their status of victim and their ensuing participatory rights recognised. This procedure involves both the Registry, responsible for the gathering and the preliminary assessment of victims' applications and their transmission to the Pre-Trial Chamber, and the latter, ultimately responsible for determining which applicants, if any, meet all the relevant requirements so as to be admitted and allowed to participate as victims in the proceedings.³¹

20. For the purposes of this decision, the Chamber finds that the individuals who submitted the Victims' Request only qualify as *potential* victims, whose procedural rights are limited to those expressly bestowed on them:³² since the Statute is silent as to a right to apply for leave to appeal a decision under article 15, the Chamber believes that potential victims cannot be considered as vested with such right.

21. In the view of the Chamber, this conclusion is not only supported by the wording of the relevant texts, but also consistent with the Statute's broader approach to appeals proceedings. First, the victims' most significant and distinctive participatory right, as encompassed in article 68 of the Statute, consists in the possibility to voice their 'views and concerns'. However significant and meaningful, this right of voice cannot *per se*, in the absence of an explicit provision to this effect, be construed as encompassing a right to request a leave for appeal. Accordingly, the Chamber finds it impossible to conclude that, by mere virtue of the general provision of article 68 of the Statute, victims may qualify as 'parties to the proceedings'; even less so in the context of article 15 proceedings prior to the Chamber's decision on whether to authorise a *proprio motu* investigation. Although (potential) victims are the only interveners before the Chamber together with the Prosecutor at that stage, their role is limited to their right to submit information to the Chamber through article 15(3) representations. Accordingly, the Chamber finds that potential victims at the pre-authorisation stage do not qualify as '[e]ither parties' for the purposes of an application under article 82(1) of the Statute.

³¹ See article 68(3) of the Statute and rules 89-93 of the Rules.

³² See e.g. article 15(3) of the Statute.

22. The Chamber also takes the view that reading article 82(1)(d) in such a way as to include potential victims among those vested with the right to lodge a request for leave to appeal a decision under article 15 of the Statute might result in unduly broadening – and possibly subverting – the overall statutory framework when it comes to appeals proceedings.³³ Indeed, once the absence of a provision explicitly vesting victims with a right to appeal were no longer to be considered an obstacle for such right to exist, one may submit that there is no statutory basis or good reason to limit this approach to article 82(1)(d) in the context of article 15 proceedings; a similarly broad and liberal approach would have to be adopted to the benefit of victims in respect of *any* decision, including those listed in article 81 and 82 of the Statute. In the view of the Chamber, this conclusion would be too far-fetching, and unwarranted by either the text or the *rationale* of the relevant statutory provisions.
23. The Chamber finds this conclusion supported by the fact that, whenever the drafters’ intention was to vest victims with a right of appeal, they did explicitly provide for it: article 82(4) of the Statute allows reparation orders to be appealed by victims, *i.e.* those individuals whose status as participating victim has been procedurally recognised.³⁴ Accordingly, the Chamber is persuaded that the silence of the Statute cannot be construed as vesting a right to (request leave to) appeal in individuals whose status as victims is only potential.³⁵
24. Furthermore, it is to be recalled that, following and as a result of extensive discussions in the context of the preparatory works of the Statute, it was decided to vest the power

³³ The Chamber is aware that it has been accepted that, in particular circumstances, States may appeal a decision under article 82(1). However, the Chamber underlines that, first, such recognition of a States’ right of appeal has always taken place when judicial criminal proceedings were already ongoing. Second, such recognition is justified either because (i) the State in question could, according to the Statute, especially articles 18(4) and 19(6), trigger the mechanism leading to the impugned decision and appeal it pursuant to article 82 of the Statute (*see e.g.* Appeals Chamber, *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red); or (ii) the State’s own conduct constituted the matter at hand, which rendered it a party defending own interests (*see e.g.* Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, Decision on Jordan’s request for leave to appeal, 21 February 2018, ICC-02/05-01/09-319).

³⁴ *See* article 82(4) of the Statute; ‘A legal representative of victims [...] may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence’.

³⁵ It is also to be noted that never in the Court’s jurisprudence has the existence of such *locus standi* been addressed, let alone been granted. The only debated issue regarding the victims’ role in proceedings linked to interlocutory appeals at the pre-authorisation and investigation stages has been their right to participate in such proceedings. This renders clear that they have never been considered as potential appellants under article 82(1)(d). *See e.g.* Appeals Chamber, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)”, 31 July 2015, ICC-02/11-01/15-172, paras 12, 15-19.

to trigger article 15 proceedings exclusively in the Prosecutor. In the view of the Chamber, allowing (potential) victims to request leave for an appeal review of the decision adjudicating those proceedings would subvert this legislative choice and thus unduly interfere with the delicate balance underlying the provision as a whole.³⁶ According to the Statute, the Prosecutor is meant to act as the driving engine of the investigations, enjoying exclusive responsibility when it comes to assess the feasibility of investigations: allowing potential victims to request for leave to appeal decisions pursuant to article 15, independently from – and thus possibly against – the determinations of the Prosecutor, does not seem to be consistent or compatible with this approach. It may *inter alia* result in individuals or organisations alleging to be or represent ‘victims’ of crimes overcoming and nullifying the Prosecution’s determinations, despite their not being privy to the information available to the latter. The Chamber considers that this would damage the coherence, internal balance and the very functioning of the system as devised by the Statute.

25. Finally, the Chamber notes that this conclusion, based both on the wording of the relevant provisions and the statutory overall system of appellate review, is fully compliant with international human rights norms.³⁷ While the Court’s jurisprudence has to some extent and in some respects indeed progressed towards strengthening the procedural entitlements of victims, this has always happened on the basis of strong supporting elements to be found either in specific provisions or in the overall principles underlying the Court’s legal framework. In the present case, the Chamber is unable to find a basis adequately supporting such extension in the statutory instruments as currently in force. While being fully aware of the victims’ suffering, and of the need for

³⁶ Indeed, victims only have a right to appeal pursuant to article 82(4), *i.e.* against reparation orders: this right ensues from the fact that victims can be considered as ‘parties’ only to reparation proceedings under article 75 of the Statute, since the latter are the only proceedings they may initiate by themselves through a request for reparations (*see e.g.* Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 67). Hence, a right to appeal a certain decision is dependent upon the status of ‘party’ of the prospective appellant, which in turn is determined by the possibility of triggering the judicial proceedings leading to the impugned decision.

³⁷ *See e.g.* Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 24 July 2006, ICC-01/04-168, paras 38-39; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799, para. 7; Appeals Chamber, *Prosecutor v. Germain Katanga*, Decision on the admissibility of the appeal against the “Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350”, 20 January 2014, ICC-01/04-01/07-3424, para. 28; Appeals Chamber, *Prosecutor v. Bemba et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”, 23 December 2015, ICC-01/05-01/13-1533, para. 14.

international criminal justice to live up to their right to truth and justice and their rightful expectations to play a meaningful role, the Chamber believes that, in the absence of adequate support in the relevant texts, this need can only be addressed *de iure condendo*, *i.e.* as a matter of statutory reform, for which States parties are responsible.

26. In light of the above, the Chamber finds it unnecessary to address the merits of the issues raised in the Victims' Request and to determine whether one or more of them would qualify as appealable issues within the meaning of article 82(1)(d) of the Statute.

III. PROSECUTOR'S REQUEST

27. The Prosecutor submits that three issues arising from the Article 15 decision qualify as 'appealable issues' within the meaning and for the purposes of article 82(1)(d) of the Statute and, accordingly, requests the Chamber to grant leave to appeal on those issues.³⁸

A. Preliminary considerations as to the scope of article 82(1)(d) of the Statute

28. At the outset, the Chamber wishes to address the preliminary issue as to whether a decision under article 15 may fall within the scope of article 82(1)(d) of the Statute.
29. In the view of the Chamber, there are serious doubts as to the possibility to extend the scope of application of article 82(1)(d) as far as to encompass decisions adopted in connection with preliminary examinations and, more specifically, in the context of proceedings under article 15. The Chamber believes that the scope and features of the preliminary examination phase are to some extent shaped by the type of mechanism having triggered the jurisdiction of the Court. When a situation has been referred either by a State Party or the United Nations Security Council, the Court's jurisdiction should be considered as fully triggered at the moment of the referral; accordingly, the ensuing preliminary examination may be considered as the earliest stage of the judicial proceedings.³⁹ On the contrary, when a preliminary examination is carried out by the Prosecutor on the sole basis of information received by individuals, groups, organisations and States under article 15 of the Statute, one may submit that the Court's

³⁸ Prosecutor's Request, paras 16-18, 20-23, 25-28, 31, 36, and 37-39.

³⁹ See *e.g.* Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", 18 January 2019, ICC-01/13-73.

jurisdiction is not ‘fully triggered’, unless and until the Chamber authorises the opening of an investigation. In the scenario currently before the Chamber, where an authorisation to investigate has been rejected, one may submit that the exercise of the Court’s jurisdiction is strictly limited – and instrumental – to allowing the Chamber to exercise its specific, fundamental and decisive filtering role in accordance with article 15 of the Statute.⁴⁰ Accordingly, there would be no room for potential additional litigation at the appellate stage as a result of the application of article 82(1)(d).

30. Additional questions along the same lines may arise from the drafters’ choice to make reference to ‘[e]ither party’ to indicate those entitled to submit an application under article 82(1)(d) of the Statute. This choice might be read as signalling the intent to restrict the scope of application of this provision to a procedural context where judicial criminal proceedings have already been started and are at hand, excluding any and all stages which are preliminary to it. The two natural parties to criminal proceedings are the Prosecution and the defence; in the absence of a specific explicit provision to this effect, doubts arise as to the possibility that victims may qualify as ‘parties’ for the purposes of requesting a leave to appeal. Such doubts are inevitably stronger when it comes to potential victims, *i.e.* individuals whose claims to have suffered harm within the meaning of rule 85 of the Rules have not yet been scrutinised by the relevant organs.
31. One may even go so far as to consider that, at the pre-authorisation stage, no ‘parties’ are yet involved in the proceedings. First, in the absence of identified or identifiable suspects, there is no need for the defence to be involved. Second, in the context of proceedings under article 15, the Prosecutor acts as an impartial organ of justice responsible for requesting the Pre-Trial Chamber to authorise the opening of an investigation and hence cannot be considered as a ‘party’. The Chamber also notes that article 15 decisions – unlike other decisions issued by the Pre-Trial Chamber, such as those under article 57(3)(d) of the Statute – are not listed among the appealable acts in article 82 of the Statute; without being *per se* decisive, it appears reasonable to hold that this may be the result of a purposeful exclusion by the drafters.
32. Finally, it should also be borne in mind that a Chamber’s rejection of a request for authorisation to investigate under article 15 does not prevent the Prosecutor to return before the Pre-Trial Chamber with a new request pursuant to articles 15(5) and 53(4) of the Statute. A number of options are available to the Prosecutor to submit new requests:

⁴⁰ See Article 15 Decision, para. 30.

they may (i) be based on new facts or evidence pursuant to article 15(5); (ii) allege that relevant changes have occurred in the conditions previously considered by the Chamber, thus requiring a new assessment; or (iii) amend, including by way of narrowing its focus, the material, geographical and temporal scope of the requested investigation and/or provide new information so as to allow and require the Chamber to assess the relevant requirements anew. In this perspective, it does not seem unreasonable to conclude that the drafters might have taken the view that the statutory possibility for the Prosecutor to have the Chamber consider a new request would make appellate scrutiny under article 82(1)(d) redundant.

33. In light of the above, the Chamber considers that, as a matter of principle, several serious doubts exist as to the possibility to apply for leave to appeal decisions issued under article 15 pursuant to article 82(1)(d) of the Statute. By the same token, the Chamber is also mindful of the novel and complex nature of the matter, as well as of the impact that a decision sanctioning the inapplicability *in limine* of article 82(1)(d) may have in the context of these specific proceedings. Accordingly, it still finds it necessary and appropriate to nevertheless approach the resolution of the Prosecutor's Request on the basis of article 82(1)(d) of the Statute and, accordingly, to proceed with the analysis of the issues identified by the Prosecutor as appealable within the meaning and for the purposes of article 82(1)(d) of the Statute.

B. Determinations of the Chamber in respect of the Prosecutor's First, Second and Third issues

34. The Prosecutor seeks leave to appeal in respect of the following three issues:
- (i) 'Whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice' ('First Issue');⁴¹
 - (ii) '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' ('Second Issue');⁴²
 - (iii) '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

⁴¹ Prosecutor's Request, para. 15.

⁴² Prosecutor's Request, para. 19.

particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents’ (‘Third Issue’).⁴³

35. It has since long been well-established in the case law of the Court that an interlocutory appeal pursuant to article 82(1)(d) of the Statute can only be allowed in respect of issues arising out of the impugned decision, meaning issues essential for the disposition of the matter. In addition, appeal can only be certified in respect of issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

1. The First and the Second Issue

36. The First Issue regards whether there exists a necessity or possibility for a Pre-Trial Chamber to carry out an assessment of the ‘interests of justice’, pursuant to articles 15(4) and 53(1)(c) of the Statute, and to reach a positive determination in that regard for the purposes of authorising an investigation.⁴⁴ In the event that the first question is answered in the affirmative, the Prosecutor’s Second Issue aims at identifying the proper and relevant factors a Pre-Trial Chamber must or may consider for the purposes of such assessment.⁴⁵ The Chamber considers that the two issues are tightly intertwined; to the extent that the Second Issue would not exist should the First Issue be answered in the negative, one may say that the Second Issue is dependent upon the First. Accordingly, the Chamber will address them jointly.

37. Both the First and the Second Issues address the core element of the Article 15 Decision, namely the Chamber’s determination not to authorise the investigation on the basis of finding that investigation would not be in the interests of justice. As such, they both do arise from the Decision. Furthermore, to the extent that the Prosecutor submits that the approach taken by the Chamber has a negative impact on its very ability to honour some of the core responsibilities of its mandate, they neither consist of ‘a mere disagreement or conflicting opinion’, nor do they represent a hypothetical concern or abstract legal question.

38. Second, the Chamber is satisfied that the First and Second Issues may have an impact on the fairness and expeditiousness of the proceedings. An appellate determination on

⁴³ Prosecutor’s Request, para. 24.

⁴⁴ Prosecutor’s Request, paras 3, 29.

⁴⁵ Prosecutor’s Request, paras 3, 29.

the parameters and criteria of an article 15 request's assessment would indeed benefit the Prosecution in terms of legal certainty in matters concerning preliminary examinations, by allowing it to appropriately shape and focus its efforts including for the purposes of avoiding that the right to submit requests under article 15(5) to the Chamber be deprived of meaningful content. The Chamber also believes that allowing an appellate review of the First and Second Issues by the Appeals Chamber may also contribute to materially advance proceedings in this situation.

39. For these reasons, the Chamber is satisfied that the First and Second Issues amount to appealable issues within the meaning and for the purposes of article 82(1)(d) of the Statute.

2. The Third Issue

40. The Third Issue relates to the understanding of the scope of any investigation authorised by a Pre-Trial Chamber under article 15 of the Statute.⁴⁶
41. The Third Issue takes issue with a specific part of the decision in which the Chamber expressed its opinion with regard to some of the arguments contained in the Prosecutor's Article 15 Request.⁴⁷ However, the Chamber notes that those determinations were not essential to the decision, as they did not constitute the basis for the Chamber's determination to reject the request for authorisation. Accordingly, rather than an issue arising from the decision and essential for the determination of the matter, the Third Issue rather qualifies as an abstract legal question, as such unsuitable to warrant granting an application under article 82(1)(d) of the Statute.

⁴⁶ Prosecutor's Request, paras 3, 29.

⁴⁷ Article 15 Decision, paras 40-42.

FOR THESE REASONS, THE CHAMBER HEREBY

DISMISSES, by majority, Judge Antoine Kesia-Mbe Mindua dissenting, the Victims' Request *in limine*;

PARTIALLY GRANTS the Prosecutor's Request, by granting leave to appeal the First and the Second Issues;

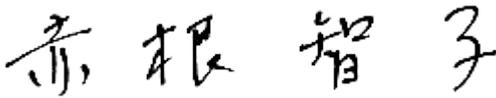
REJECTS the Prosecutor's Request with regard to the Third Issue.

Judge Antoine Kesia-Mbe Mindua appends a Partially Dissenting Opinion.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this 17 September 2019

At The Hague, The Netherlands