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Date: **30 September 2019**

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

**Public
with Public Annex 1**

Updated Victims' Appeal Brief

Source:

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I. INTRODUCTION

1. Legal representatives for 82 victims ('Victims') from the situation in the Islamic Republic of Afghanistan ('Afghanistan'), and two organizations that submitted representations on behalf of a significant number of victims, hereby respectfully file this updated appeal brief pursuant to Article 82(1)(a) of the Rome Statute ('Statute'), Rule 154 of the Rules of Procedure and Evidence ('Rules'), and Regulations 36 and 64(2) of the Regulations of the Court ('Regulations'). The Victims appeal Parts IV, V.2.I and VII of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation on an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019 ('Decision').¹

2. The Victims provided representations to the Court in accordance with Article 15(3) of the Statute and informed the Court that they want the Office of the Prosecutor ('Prosecution') 'to investigate the violence associated with the conflict in Afghanistan since May 2003.'²

3. The Victims have suffered crimes of the utmost gravity at the hands of (i) anti-government groups including the Taliban; (ii) Afghan armed forces; and (iii) United States armed forces. Afghans have endured violent conflict for over four decades. During this time, a vast number of civilians have been killed, tortured, and injured. In the past decade alone, more than 31,000 civilians have been killed, and around 60,000 persons have been injured.³

4. The number of civilians killed in Afghanistan has greatly increased in recent months. The United Nations Assistance Mission in Afghanistan ('UNAMA') reported an increase of 27 percent in civilian deaths in the second quarter of 2019.⁴ In the month of August 2019, 473 civilians were reportedly killed and 786 injured.⁵ Around 90 civilians were killed in the week leading up to the

¹ Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation on an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019', 12 April 2019, ICC-02/17-33 ('Decision'). Part IV encompasses paragraphs 29-42 of the Decision. Part V.2.I encompasses paragraphs 49-59 of the Decision. Part VII encompasses paragraphs 87-96 of the Decision.

² See footnote 10 of the Decision.

³ UNAMA, 'Civilian Deaths from Afghan Conflict in 2018 at Highest Recorded Level – UN Report', 24 February 2019.

⁴ UNAMA, 'Midyear Update on the Protection of Civilians in Armed Conflict: 1 January – 30 June 2019', 30 July 2019.

⁵ BBC, 'Afghanistan war: Tracking the killings in August 2019', 16 September 2019.

Afghan Presidential elections.⁶ On 28 September 2019, the day of the Presidential elections, dozens of attacks – including on polling stations – were carried out.⁷

5. Women and girls continue to be systematically discriminated against, deprived of their human dignity, and subjected to culturally accepted and institutionalised sexual and gender-based violence.⁸ The Afghanistan Independent Human Rights Commission (‘AIHRC’) attributes continued violence against women to a culture of impunity, as well as the insecure situation in the country and the lack of the rule of law in districts and provinces.⁹

6. The Victims argue that Pre-Trial Chamber II (‘Pre-Trial Chamber’ or ‘Chamber’) erred when it decided not to authorise an investigation, despite finding that there is a reasonable basis to believe that war crimes and crimes against humanity, as described by the Prosecution, have taken place and are sufficiently grave to warrant investigation; fall within the temporal, territorial, and material jurisdiction of the Court; and are not being investigated or prosecuted by States that have jurisdiction.¹⁰

7. The Victims argue that the Chamber acted *ultra vires* when it carried out an interests of justice assessment. The Chamber can review, or carry out, such an assessment only where the Prosecution decides *not* to investigate or prosecute. The Chamber is compelled to authorise an investigation when it considers that there is a reasonable basis to proceed with an investigation, and that the case is admissible and appears to fall within the jurisdiction of the Court, pursuant to Articles 15(4) and 17 of the Statute. Here, it made positive findings on all these points but nevertheless refused to authorise.

8. Alternatively, even if the Chamber was permitted by the Statute to carry out an interests of justice assessment, and to present this as a basis for a refusal to authorise an investigation, the

⁶ UNAMA, ‘United Nations Concerned by Continuing High Number of Civilian Casualties in Afghanistan’, 26 September 2019.

⁷ The Independent, ‘Afghan polls close after day of bombings, Taliban threats and fraud accusations’, 28 September 2019. See also The Sunday Times, ‘Terror in Kabul: A toddler’s leg blown off, a teen full of shrapnel’, 29 September 2019.

⁸ See e.g. Afghanistan Independent Human Rights Commission (‘AIHRC’), ‘Summary Report Survey of Harassment of Women and Children in Afghanistan Fiscal Year 1396’, 11 March 2018; AIHRC, ‘Summary of Report on Violence Against Women – The causes, context, and situation of violence against women in Afghanistan’, 11 March 2018; Human Rights Watch, ‘Afghanistan Events of 2018’, 2018; see also UNAMA, ‘Midyear Update on the Protection of Civilians in Armed Conflict: 1 January – 30 June 2019’, 30 July 2019, page. 3.

⁹ AIHRC, ‘Summary of Report on Violence Against Women – The causes, context, and situation of violence against women in Afghanistan’, 11 March 2018, page 4.

¹⁰ See Decision, para. 96.

Chamber committed errors of law, fact, and procedure which materially affected the Decision.

9. Procedurally, it erred by not giving the Prosecutor and victims an opportunity to be heard on ‘the interests of justice’ when conducting its unprecedented assessment of those interests. The Chamber erred in law and fact in several ways:

- a. The Chamber ignored, or gave insufficient weight to, the interests of the Victims. Its cursory references to the interests and views of victims failed to give due weight to the gravity of crimes against them, and their rights to truth, justice, and reparation.¹¹
- b. The Chamber considered factors that are not provided for in the Statute or Rules, and which, when presented as reasons to deny permission to investigate, defeat the object and purpose of the Statute.
- c. Specifically, in considering the cooperation that the Prosecution had received from State Parties during the preliminary examination, before the duty to cooperate under Part 9 of the Statute has been triggered, the Chamber ignored the model of State Party cooperation set out in Part 9. By prematurely concluding that unnamed States Parties were not likely to comply with future obligations under the Statute, and presenting this as one of its principal reasons for refusing to authorise an investigation, the Chamber unfairly deprived the victims of a procedure which would have permitted the Court to address future State non-cooperation: Article 87(7) referral.
- d. The Chamber’s analysis of the potential availability of evidence relating to the period 2005-2015 is not envisaged by the Statute and was conducted in a manner so unreasonable as to constitute an abuse of discretion.
- e. In denying the request for authorisation in part on the basis that the Chamber believed that the Prosecution should allocate its resources to other preliminary investigations, that purportedly would more realistically lead to trial, the Chamber trespassed on the Prosecution’s exclusive authority on such matters under Article 42(2) of the Statute.

¹¹ Pre-Trial Chamber I, ‘Decision on the 34 Applications for Participation at the Pre-Trial Stage’, 25 September 2009, ICC-02/05-02/09-121, para. 3. *See also* Pre-Trial Chamber I, ‘Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’, 15 Mayo 2008, ICC-01/04-01/07-474, paras 31-44.

10. The Victims have standing to bring an appeal under article 82(1)(a) of the Statute. This is based on their specific procedural status in the Statute and Rules in proceedings concerning a request for authorisation of an investigation. Interpreting ‘party’ in Article 82(1) to include victims is consistent with ‘principles and rules of international law’ and ‘internationally recognized human rights’, which may be assessed under Article 21 of the Statute. These favour recognition of victims’ right to an effective remedy against a decision which unfairly denies them an investigation. Annex 1 to this brief sets out a review of international human rights cases concerning the right of victims to a prompt and thorough investigation in cases of unlawful killing and torture.

11. The Decision is a ‘decision with respect to jurisdiction’ and thus appealable under Article 82(1)(a) of the Statute. The Decision completely deprives the Court of its mandate to *exercise* jurisdiction in Afghanistan. Furthermore, the Decision raises questions which pertain directly to jurisdiction, as discussed further in the fourth and sixth grounds of appeal.

12. As argued in detail in the fourth ground, the Chamber’s interpretation that the temporal, territorial and substantive scope of any investigation must be limited to incidents specifically mentioned in the Prosecution’s request, and those closely linked to them, is erroneous. The requirement that Prosecution return to the Pre-Trial Chamber for fresh authorisation to investigate other incidents, so that the Pre-Trial Chamber can assess admissibility and jurisdiction, is inconsistent with the Statute’s structure. That structure requires the Pre-Trial Chamber to authorise an investigation as a whole, and mandates a separate procedure under Article 19 for challenging admissibility or jurisdiction of specific cases.

13. The sixth ground of appeal concerns the territorial jurisdiction of torture and related crimes. The Chamber erred in concluding that the Court may only exercise jurisdiction over torture if (a) the *infliction* of severe physical or mental pain took place at least in part on the territory of a State Party; and (b) the victim was captured within the borders of the State in which the armed conflict is taking place. Neither is required under the Statute, Elements or jurisprudence of the Court.

14. The Chamber exceeded its authority under the Statute by denying the investigation. Its analysis of the interests of justice was affected by serious errors. As a result, the Decision resulted in the complete denial of the Victims’ rights to *inter alia* truth, justice and reparation. The Victims do not have any alternative path for justice. As the Decision itself acknowledges, relevant States are either unwilling or unable to investigate and prosecute those responsible.¹² The Appeals

¹² Decision, paras. 45-86.

Chamber should expeditiously reverse the Decision, authorise the commencement of an investigation into the situation in Afghanistan, clarify the permitted scope of the investigation, and confirm the territorial extent of the Court's investigative jurisdiction for torture and related crimes.

II. PROCEDURAL BACKGROUND

15. On 20 November 2017, the Prosecution submitted a 'Request for authorisation of an investigation pursuant to article 15' ('Request for Authorisation').¹³

16. Between 20 November 2017 and 31 January 2018, the Court received representations by victims,¹⁴ in accordance with an order of the Pre-Trial Chamber.¹⁵

17. On 12 April 2019, the Pre-Trial Chamber delivered the Decision. In the Decision, the Chamber noted that 680 out of 699 victims' representations welcomed the prospect of an investigation.¹⁶ The Victims were amongst those that provided representations.

18. On 31 May 2019, the 'Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua' ('Separate Opinion') was issued.¹⁷

19. On 7 June 2019, the Prosecution requested leave from Pre-Trial Chamber II to appeal three issues arising from the Decision.¹⁸

20. On 10 June 2019, in order to fully preserve their rights, the Victims filed a request for leave to appeal the Decision before the Pre-Trial Chamber¹⁹ and a notice of appeal of the Decision before

¹³ Prosecution, 'Public redacted version of "Request for authorisation of an investigation pursuant to article 15"', 20 November 2017, ICC_02/17-7-Conf-Exp', 20 November 2017, ICC-02/17.

¹⁴ Decision, para. 9; *see also* 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.

¹⁵ Pre-Trial Chamber III, 'Order to the Victims Participation and Reparation Section Concerning Victims' Representations', 9 November 2017, ICC-02/17.

¹⁶ Decision, para. 87.

¹⁷ Pre-Trial Chamber II, 'Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua', 31 May 2019, ICC-02/17-33-Anx-Corr ('Separate Opinion').

¹⁸ Prosecution, '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.

¹⁹ 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' with confidential Annex I, 10 June 2019, ICC-02/17-37.

the Appeals Chamber ('Notice of Appeal').²⁰ In parallel, legal representatives of other victims ('LRV 2' and 'LRV 3') filed two separate notices of appeal before the Appeals Chamber.²¹

21. On 12 June 2019, the Prosecution submitted identical observations²² on the Victims' Notice of Appeal and Request for Leave to Appeal, as well as other submissions filed on behalf of victims, simultaneously to the Appeals Chamber and Pre-Trial Chamber II.

22. On 13 June 2019, LRV 2 and LRV 3 jointly responded to the Prosecution's observations on the victims' appeals.²³

23. On 24 June 2019, the Victims filed an appeal brief.²⁴

24. On 24 June 2019, the Appeals Chamber issued an 'Order suspending the time limit for the filing of an appeal brief and on related matters' ('Order') in which it *inter alia* permitted the Victims to file an updated appeal brief.²⁵

25. On 11 July 2019, two *amici curiae* presented observations to Pre-Trial Chamber II in which they supported the victims' appeals, and argued that victims should be granted standing before the Appeals Chamber.²⁶

²⁰ 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' with confidential Annex I, 10 June 2019, ICC-02/17-36.

²¹ 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, ICC02/17-38; 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-02/07-36; Legal Representatives of Victims, 'Corrected version of the 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.

²² Prosecution, 'Observations concerning diverging judicial proceedings arising from the Pre-trial Chamber's decision under article 15 (filed simultaneously before the Pre-Trial Chamber II and the Appeals Chamber', 12 June 2019, ICC-02/17.

²³ Legal Representatives of Victims, 'Victims' response to the Prosecutor's "Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15"', 19 June 2019, ICC-02-17.

²⁴ 'Victims' Appeal Brief', 24 June 2019, ICC-02/17-53 (OA).

²⁵ Appeals Chamber, 'Order suspending the time limit for the filing of an appeal brief and on related matters', 24 June 2019, ICC-02/17 OA OA2 OA3.

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).

26. On 17 September 2019, Pre-Trial Chamber II granted the Prosecution leave to appeal two of the three issues for which it had requested leave to appeal. The Chamber rejected *in limine* the Victims' request for leave to appeal.²⁷

27. On 18 September 2019, the Prosecution filed a 'Prosecution's notice of joined proceedings, and request for extension of pages' ('Prosecution's Notice').²⁸ The Prosecution requested an extension of a maximum of 75 pages for its appeal brief.

28. On 19 September 2019, the Victims responded to the Prosecution's Notice.²⁹ LRV 2 and 3 submitted a joint response to the Prosecution's Notice.³⁰

29. On 20 September 2019, the Appeals Chamber granted the Prosecution's request for extension of pages.³¹

30. On 24 September 2019, the Appeals Chamber granted the Victims' request for an extension of pages.³²

31. On 27 September 2019, the Appeals Chamber scheduled a hearing for 4, 5 and 6 December 2019, and made an order on related matters, including the time limit for the filing of the present updated appeal brief.³³

III. SUBMISSIONS

A. Victims have standing to bring an appeal under article 82(1)(a) of the Statute

32. The Victims have standing as a 'party' under Article 82(1)(a) of the Statute to appeal the Decision. This is based on their right to participate in matters relating to the authorisation of the

²⁷ Pre-Trial Chamber II, 'Decision on the Prosecutor and 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', 17 September 2019, ICC-02/17.

²⁸ Prosecution, 'Prosecution's notice of joined proceedings, and request for extension of pages', 18 September 2019, ICC-02/17.

²⁹ Legal Representatives of Victims, 'Victims response to 'Prosecution's notice of joined proceedings, and request for extension of pages', 19 September 2019, ICC-02/17/OA OA2 OA3.

³⁰ Legal Representatives of Victims, 'Victims response to the Prosecution's notice of joined proceedings, and request for extension of pages', 19 September 2019, ICC-02/17.

³¹ Appeals Chamber, 'Decision on the Prosecutor's request for an extension of page limit', 20 September 2019, ICC-02/17 OA OA2 OA3 OA4.

³² Appeals Chamber, 'Decision on victims' requests for extension of page limits', 24 September 2019, ICC-02/17 OA OA2 OA3 OA4.

³³ Appeals Chamber, Order scheduling a hearing before the Appeals Chamber and other related matters, 27 September 2019, ICC-02/17-72.

investigation, and on a purposive and contextual interpretation of Article 82(1)(a) of the Statute, which enables ‘either party’ to appeal ‘a decision with respect to jurisdiction or admissibility.’

i. Victims have a specific procedural status in proceedings concerning a request for authorisation of an investigation

33. Article 15(3) of the Statute, which concerns the submission by the Prosecutor of a request for authorisation of an investigation, provides that ‘Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.’ The manner in which victims may participate in the process is regulated by Rule 50 of the Rules. The steps taken by the Victims to participate in accordance with Article 15(3) and Rule 50 are addressed briefly below.

34. As a preliminary matter, the Victims emphasise that the Statute and the Rules at no stage refer to the concept of ‘potential victims’.³⁴ Rule 85(a) of the Rules defines victims ‘for the purpose of the Statute and the Rules of Procedure and Evidence’ as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’³⁵ Neither Rule 85 nor any other rule require that persons be granted the right to participate in proceedings under Article 68 in order to fall within the definition of ‘victims’.

35. Pre-Trial Chamber I in *Lubanga* was guided by the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law (‘Basic Principles’)³⁶ in defining victims.³⁷ Articles 8 and 9 of the Basic Principles provide that:

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the

³⁴ Decision, para. 35.

³⁵ Rule 85(a) of the Rules. Under Rule 85(b), the definition of victims is extended to organizations or institutions that have sustained direct harm in the circumstances defined therein.

³⁶ adopted by the UN General Assembly on 16 December 2005 (A/RES/60/147)

³⁷ Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, ‘Decision on victim’s participation’, 18 January 2008, ICC-01/04-01/06, para. 35.

direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

36. The Appeals Chamber found that Pre-Trial Chamber I had made no error in relying on the Basic Principles for guidance in *Lubanga*.³⁸

37. All Victims submitted views and concerns concerning the Request for Authorisation in the form of representations pursuant to Article 15(3) of the Statute, and in accordance with an order of the Pre-Trial Chamber III.³⁹ The representation forms required victims to *inter alia* provide ‘sufficient information about the[ir] identity,’ to describe the harm suffered, as well as provide who they believe is responsible for the harm suffered’.⁴⁰

38. The Victims’ representations were gathered, organised, and assessed by the Registry before transmission to Pre-Trial Chamber III, in accordance with Pre-Trial Chamber III’s order.⁴¹ The Victims therefore are unquestionably ‘victims’ for the purposes of the Statute and the Rules, even at the pre-authorisation stage, with a specific right to participate recognised by Article 15(3) and Rule 50. They have a direct interest in the process before the Court, and in particular in the appeal of the Decision, which has denied them the fulfilment of their rights to truth, justice and reparation.

ii. ‘Party’ in Article 82(1) can, in exceptional circumstances, include victims

39. Article 82(1)(a) of the Statute enables ‘either party’ to appeal ‘a decision with respect to jurisdiction or admissibility.’ The term ‘either party’ should, in the present exceptional

³⁸ Appeals Chamber, *Prosecutor v. Lubanga Dyilo*, ‘Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008’, 11 July 2008, ICC-01/04-01/06 OA 9 OA 10, para. 33

³⁹ Pre-Trial Chamber III, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17.

⁴⁰ Pre-Trial Chamber III, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17.

⁴¹ See Rule 16 and; Pre-Trial Chamber III, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17; see also 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.

circumstances, where an entire investigation has been denied notwithstanding affirmative findings on jurisdiction and admissibility, be interpreted to include victims.

40. The expression ‘either party’ is ambiguous at the pre-authorisation stage. It is erroneous to interpret the provision as referring to Prosecution and Defence, as there is no Defence at this stage. The only parties that submitted views to the Pre-Trial Chamber during the Article 15 process were the Prosecution and victims.⁴²

41. Article 15(3), which expressly regulates the submission of a request for authorisation of an investigation by the Prosecutor to the Pre-Trial Chamber, envisages the participation of *only* the Prosecutor and the victims.

42. Similarly, Rule 50 of the Rules (in particular sub-rules Rule 50(3), 50(4) and 50(5)) which regulates the procedure for authorisation of investigation, refers to the participation of only two entities in the procedure before the Pre-Trial Chamber: the Prosecutor and the victims.

43. Therefore, the two parties recognised by the Statute and the Rules to participate in the authorisation of investigation process are the Prosecution and the victims.

44. Appeals under Article 82(1) can encompass a variety of parties, depending on the specific circumstances which arise. This is reflected in the Rules and Regulations concerning Article 82 appeals, which foresee the participation of more than two parties. Rules 155(2) and 156(2), for example, refer to ‘all parties who participated in the proceedings’ rather than ‘both parties’. Rule 157 requires that ‘the other parties’ must be informed when an appealing party discontinues an appeal. Regulations 64(6) and 65(3) of the Regulations refer to ‘participants’.

45. The Statute does not define ‘party’. Nor do the Elements of Crimes, the Rules, or the Regulations.⁴³ Article 81 of the Statute allows appeals by ‘the Prosecutor’ and or ‘the convicted person’. Article 82(1) is not so confined. Had the drafters of the Statute intended for *only* Prosecution and Defence to appeal decisions under Article 82(1) then they would have expressly provided for it, as they did under Article 81.

46. The ordinary meaning of the term ‘party’, the Court’s practice concerning the term, and the object and purpose of the Statute support the interpretation that ‘party’ is not restricted to Prosecution and Defence. This is particularly true in respect of proceedings where there is no suspect nor accused, and therefore no ‘Defence’.

⁴² This emerges from the procedural history set out in the Decision at paras. 1-14.

⁴³ See Rule 155 of the Rules and Regulation 65 of the Regulations.

47. The Vienna Convention on the Law of Treaties provides that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’⁴⁴ It also provides that:

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.⁴⁵

48. The ordinary meaning of ‘party’ is ‘one (as a person, group, or entity) constituting alone or with others one of the sides of a proceeding, transaction, or agreement’⁴⁶ and ‘one of the participants in a lawsuit or other legal proceeding who has an interest in the outcome.’⁴⁷ As such, the ordinary meaning of ‘party’ in respect of proceedings concerning the authorisation of an investigation encompasses victims.⁴⁸

49. The Court accepted that a State can be considered a ‘party’ for the purpose of Article 82 in the *Omar Al Bashir* case and in the *Simone Gbagbo* case.

50. In *Al Bashir*, Jordan submitted a notice of appeal, and alternatively sought leave to appeal.⁴⁹ The Prosecution did not object,⁵⁰ and Pre-Trial Chamber II partially granted Jordan’s leave to appeal a decision under Article 82(1)(d) of the Statute.⁵¹ The Appeals Chamber heard Jordan’s appeal and decided on the merits of the appeal.⁵²

⁴⁴ Article 31(1) of the Vienna Convention on the Law of Treaties, 27 January 1980.

⁴⁵ Article 31(3) of the Vienna Convention on the Law of Treaties, 27 January 1980.

⁴⁶ Merriam-Webster Law Dictionary.

⁴⁷ The Free Dictionary by Farlex, Legal Dictionary.

⁴⁸ Pre-Trial Chamber II, ‘Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua’, 17 September 2019, ICC-02/17-62-Anx, paras. 18-52.

⁴⁹ The Hashemite Kingdom of Jordan’s Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, or, in the Alternative, Leave to Seek Such an Appeal’, 18 December 2017, ICC-02/05-01/09.

⁵⁰ *Ibid*, para. 4.

⁵¹ See Pre-Trial Chamber II, ‘Decision on Jordan’s Request for Leave to Appeal’, 21 February 2018, ICC-02/05-01/09.

⁵² Appeals Chamber, ‘Judgment in the Jordan Referral re Al-Bashir Appeal’, 6 May 2019, ICC-02/05-01/09 OA2.

51. The Appeals Chamber also ruled on the merits of an appeal by Côte D'Ivoire under Article 82(1)(a), and described it as an 'appeal pursuant to article 82 (1) (a) of the Statute'.⁵³ The Prosecution did not, it appears, take the position that Côte D'Ivoire was not a 'party' for the purpose of Article 82(1)(a) of the Statute and therefore did not have standing to appeal.⁵⁴

52. Just as States have interests which should be respected in exceptional circumstances by providing an avenue to appeal under Article 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision in exceptional circumstances that goes to the core of their interests. That is the case here.

53. The Special Tribunal for Lebanon ('STL') recognised victims' interests when it granted victims standing to initiate an interlocutory appeal under exceptional circumstances. Rule 126(E) of the STL Rules of Procedure and Evidence provide that 'If certification is granted, a Party shall appeal to the Appeals Chamber.' In the *Ayyash et al.* case at the STL, the Pre-Trial Judge granted certification for appeal by the legal representative of victims.⁵⁵ The STL Appeals Chamber confirmed that the victims' appeal was admissible, and stated that 'Rule 126(E) is exceptionally applicable by analogy to allow for a narrow right to an interlocutory appeal of the VPPs [Victims Participating in the Proceedings] in strictly confined circumstances.'⁵⁶

54. Interpreting the word 'party' in a manner that always excludes victims would be 'a result which is manifestly absurd or unreasonable'.⁵⁷ It would threaten the effective functioning of the Court. For example, Article 70(1)(b) of the Statute gives the Court jurisdiction over offences including: 'Presenting evidence that the party knows is false or forged'. The Court would not have jurisdiction over the presentation of forged or false evidence by victims or their legal representatives as an offence against the administration of justice, unless they were considered a party. Articles 64(6)(d) (which refers to evidence 'presented during the trial by the parties') and

⁵³ Appeals Chamber, 'Judgment on the appeal of Côte D'Ivoire against the decision of the 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 OA, paras. 36 and 141.

⁵⁴ Prosecution, 'Public redacted version of "Prosecutions Response to the Government of the Republic of Côte D'Ivoire's Appeal against Pre-Trial Chamber I's "Decision on Côte D'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"', 2 February 2015, ICC-02/11-01/12-61-Conf", 13 February 2015, ICC-02/11-01/12.

⁵⁵ STL, Pre-Trial Judge, *Prosecutor v. Ayyash et al.*, Decision on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measure, 30 January 2013, STL-11-01/PT/PTJ.

⁵⁶ STL, Appeals Chamber, *Prosecutor v. Ayyash et al.*, 'Decision on Appeal by Legal Representative of Victims against Pre-Trial Judge's Decision on Protective Measures', 10 April 2013, STL-11-01/PT/AC/AR126.3, para. 10.

⁵⁷ Vienna Convention on the Law of Treaties, Article 32(b).

Article 64(8)(b) (which concerns directions for the conduct of trial, and provides that ‘the parties may submit evidence’) would not address evidence submitted by the victims or their legal representatives during trial. The absurd result of interpreting ‘party’ as excluding victims extends to the Rules, including Rules 132 *bis* (4) and (5) (which address measures to ensure the expeditious conduct of a trial, including enabling a judge to ‘establish a work plan indicating the obligations the parties are required to meet’), 155, and 157 of the Rules. References to ‘party’ in these provisions highlight the importance of interpreting the term purposefully and contextually.

iii. The Statute and Rules reflect the specific interest of victims in decisions concerning commencement or denial of an investigation

55. The Statute recognizes that victims have a specific interest in decisions on authorisation of investigation, and a decision not to investigate or prosecute. In the pre-authorisation phase, the Statute and Rules grant victims participatory rights that are considerably broader than those of *amicus curiae*. In a pre-authorisation decision in *Myanmar*, Pre-Trial Chamber I accepted observations made by victims of the situation pursuant to Article 19(3) of the Statute.⁵⁸

56. Victims have a strong interest in decisions not to investigate or prosecute. This is widely reflected in the Statute and Rules. As noted, Article 15(3) of the Statute and Rules 50(3), 50(4) and 50(5) of the Rules permit victims to participate in proceedings concerning authorisation of investigation. No such standing is provided to any other person or entity, nor to States. The Prosecutor is required to consider ‘the interests of victims’ when assessing the interests of justice under Article 53(1)(c) prior to a decision not to investigate. This is reflected in reference in Rule 93 (which enables a Chamber to seek the views of victims or their legal representatives), to Rules 107 and 109, which concern prosecutorial decisions not to investigate or prosecute. In short, the Statute recognizes that the victims have a strong interest in the process of authorizing an investigation under Article 15(3), rulings on jurisdiction and admissibility under Article 19(3), and the ‘interests of justice’ assessment under Article 53(1)(c).

57. The Appeals Chamber has ‘clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided

⁵⁸ Pre-Trial Chamber, ‘Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ (‘Myanmar Decision’), 06 September 2018, ICC-RoC46(3)-01/18-37, para. 21.

their personal interests are affected by the issues arising for resolution.’⁵⁹ The Appeals Chamber in that decision, as well as Pre-Trial Chamber I in *Myanmar*,⁶⁰ relied on Article 68(3) of the Statute to permit views by victims. The *Myanmar* Pre-Trial Chamber also noted that ‘rule 93 of the Rules gives it discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate.’⁶¹

58. On any reasonable view, the Victims should have standing to appeal. The victims’ views were communicated to the Chamber during the Article 15 process,⁶² and the Chamber acknowledged that the Victims suffered serious crimes.⁶³ The Decision represents a concrete, actual threat to the Victims’ rights to truth, justice, and reparation: without active investigation by the Prosecution, there can be no trials at the Court and those responsible for the crimes will be not be held accountable. The Court will make no declaration of truth at the conclusion of any trial. Reparation cannot be awarded in the absence of conviction. It is *only* through investigation by the Prosecution that there will be a realistic prospect of trial, and reparation. A favourable decision for the Victims on appeal would enable the Prosecution to use all powers conferred upon it by the Statute – in particular those triggered only after an investigation has been authorised – to ensure an effective investigation and prosecution. This is the *only* avenue for redress available, given the inability or unwillingness of governments, including the governments of Afghanistan and the United States, to meaningfully investigate and prosecute the crimes under consideration.

59. As a result of the Decision, the message to millions of victims of crimes against humanity and war crimes is that the Court has found that the crimes against them are of appalling gravity, that the situation is admissible, and that the Court has jurisdiction, but that the investigation cannot be opened as the Court considers that it is ‘not feasible and inevitably doomed to failure’.⁶⁴ The framers of the Statute could not have intended victims to be without recourse in such a situation. To the contrary, victims at the Court are actors of international justice rather than its passive

⁵⁹ Appeals Chamber, ‘Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007,’ 19 December 2008, ICC-01/04 OA4 OA5 OA6, para 56.

⁶⁰ Myanmar Decision, paras. 20-21.

⁶¹ Myanmar Decision, para. 21.

⁶² Decision, para. 9.

⁶³ Decision, paras. 80 to 86.

⁶⁴ Decision, para. 90.

subjects.⁶⁵ Victims have a right to a just process, and to be treated fairly, at all stages of the proceedings.⁶⁶

60. The framers of the Statute intended for victims to have an effective remedy for violation of their rights. The Court is required to promptly inform victims of a Prosecution decision not to investigate.⁶⁷ Victims may, and the victims here did, make representations to the Chamber concerning a request for authorisation of an investigation.⁶⁸ The Court must permit victims to present their views and concerns at stages of the proceedings determined to be appropriate by the Court, and the Court is required to consider their position.⁶⁹ Rule 86 provides that *inter alia* the Prosecution and the Chamber ‘in performing their functions under the Statute or the Rules, *shall* take into account *the needs of all victims*’ (emphasis added). Hearing an appeal by victims against a decision to deny investigation of all the crimes committed in an entire situation is consistent with the centrality of victims in the Statute.

iv. ‘Principles and rules of international law’ and ‘internationally recognized human rights’ favour recognition of victims’ standing to appeal a decision which denies an investigation into an entire situation

61. The Appeals Chamber may resolve the ambiguity concerning the meaning of ‘party’ in Article 82(1), and corresponding rules and regulations, by considering ‘principles and rules of international law’ and ‘internationally recognized human rights’ pursuant to Article 21 of the Statute.

62. The Statute is a living document, and its object and purpose as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.⁷⁰ The Court has recognised many procedural mechanisms not expressly provided for by the Statute, including the ‘no-case-to-answer’

⁶⁵ See ‘Report of the Court on the Strategy in Relation to Victims’, 1 November 2009, ICC/ASP/8/45, para. 46.

⁶⁶ See Pre-Trial Chamber, ‘Decision On The Prosecution’s Application For Leave To Appeal The Chamber’s Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6’, 31 March 2006, ICC-01/04-135-tEN, paras. 36 and 39-40.

⁶⁷ Rule 92(2) of the Rules.

⁶⁸ Article 15(3) of the Statute, and Rules 50(3) and 50(4) of the Rules.

⁶⁹ Article 68(3) of the Statute.

⁷⁰ See, *inter alia*, the judgments of the European Court of Human Rights in Soering v. the United Kingdom, 7 July 1989, Series A no. 161, p. 34, para. 87, and Loizidou v. Turkey (Preliminary Objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72; McCann v. United Kingdom, para. 146.

procedure;⁷¹ the power to compel witnesses to appear before a Chamber;⁷² and the power of a Chamber to excuse an accused from attending large parts of his trial, despite Article 63(1)'s requirement that '[t]he accused shall be present during the trial'.⁷³

63. Under Article 21(3), the Chamber must ensure that its application and interpretation of the Statute is consistent with internationally recognized human rights. The Court has interpreted Article 21(3) in a broad and expansive manner, holding that it pertains to all articles of the Statute and constitutes a general principle of interpretation that must be applied when 'interpreting the contours' of the statutory framework.⁷⁴

64. Victims have a right to an investigation that meets international standards, including the standard of promptness. Victims also have a right to a remedy when they are denied a prompt and thorough investigation. The Basic Principles and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,⁷⁵ reflect principles and rules of international law. They encapsulate the concept that an investigation must be thorough, prompt and impartial, and effective.⁷⁶

65. With regard to the duty to investigate under the International Convention on Civil and Political Rights, the UN Human Rights Committee has said: 'Complaints must be investigated

⁷¹ Trial Chamber, *Prosecutor v. Ruto and Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), ICC-01/09-01/11-1334, 3 June 2014.

⁷² Appeals Chamber, *Prosecutor v. Ruto and Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598, 9 October 2014. The Appeals Chamber's key findings were (a) article 64 (6) (b) of the Statute gives Trial Chambers the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned ; and (b) Under article 93 (1) (b) of the Statute the Court may request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link.

⁷³ Appeals Chamber, *Prosecutor v. Ruto and Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ICC-01/09-01/11-1066, 25 October 2013.

⁷⁴ Appeals Chamber, Situation in the DRC, 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 para. 38. ("Like every other Article of the Statute, Article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in Article 21 (3) of the Statute.")

⁷⁵ Adopted on 24 May 1989 by an Economic and Social Council Resolution.

⁷⁶ The Basic Principles provide *inter alia* that States have an obligation to 'investigate violations *effectively, promptly, thoroughly* and impartially and, where appropriate, *take action against those allegedly responsible* in accordance with domestic and international law' (Article 3(b); emphasis added). Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65 provides, *inter alia*, that: "There shall be a *thorough, prompt* and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ...". Emphasis added.

promptly and impartially by competent authorities so as to make the remedy effective.’⁷⁷ The aims of an effective investigation are to ensure as far as possible that the truth is established and that those responsible are tried and convicted.⁷⁸

66. The Court frequently looks to the case law of the European Court of Human Rights (‘ECtHR’) and the Inter-American Court of Human Rights (‘IACtHR’) to crystalize applicable legal principles under the Statute and ensure that the Court’s rulings accord with internationally recognized human rights under Article 21(3).⁷⁹

67. Analysis of case law from the ECtHR and the IACtHR confirms that a failure to adequately and effectively investigate or prosecute criminal conduct may constitute a violation of internationally recognized human rights, including the right to life, the prohibition on torture, the right to a fair trial, the right to judicial protection and the right to an effective remedy. Annex 1 to this brief sets out a review of ECtHR and the IACtHR decisions concerning the right of victims to a prompt and thorough investigation in cases of unlawful killing and torture.

68. The ECtHR has found that a prosecuting or investigating body’s failure to provide an adequate investigation into an alleged crime is in itself a violation of the European Convention on Human Rights (‘European Convention’), notably of article 13 which guarantees the right to an effective remedy.⁸⁰ Inadequate investigations that violate human rights have included decisions against opening formal investigations despite evidence of human rights abuses.⁸¹

⁷⁷ See Human Rights Committee, ‘General Comment 20: Article 7’.

⁷⁸ The Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (‘Minnesota Protocol’) provides, *inter alia*, in section B on the “Purposes of an inquiry”: “As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek: (a) to identify the victim; (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible; (c) to identify possible witnesses and obtain statements from them concerning the death; (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; (e) to distinguish between natural death, accidental death, suicide and homicide; (f) to identify and apprehend the person(s) involved in the death; (g) to bring the suspected perpetrator(s) before a competent court established by law.”

⁷⁹ See e.g., Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, Annex I to decision issued on 24 February 2006, ICC-01/04-01/06-8-Corr. (Feb. 10, 2006) (analyzing ECtHR and IACHR jurisprudence relating to the right to liberty); Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, paras. 20, 50 (Dec. 14, 2006) (analyzing ECtHR jurisprudence regarding use of anonymous witness testimony during confirmation of charges stage).

⁸⁰ *Aksoy v. Turkey* (1996); *Khashiyev and Akayeva v. Russia* (2005).

⁸¹ *Aksoy v. Turkey* (1996); *Biser Kostov v. Bulgaria* (2012)

69. *McCann v. United Kingdom* was the first in a long line of ECtHR decisions requiring effective investigations of lethal use of force.⁸² The court set out its expectation that States would carry out ‘thorough, impartial and careful examination of the circumstances surrounding the killings.’⁸³ A State Party to the European Convention is obliged to conduct an investigation that is effective ‘in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible’.⁸⁴ What constitutes an ‘effective’ investigation into unlawful killing was summarised by the ECtHR in *Jordan v United Kingdom*:

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.⁸⁵

70. In *Armani Da Silva v. United Kingdom* (2016), the Court noted that, for an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident.⁸⁶

71. Where the crime is torture, the ECtHR has held that:

⁸² *McCann v. United Kingdom*, para. 161.

⁸³ *McCann v. United Kingdom*, para. 163.

⁸⁴ *Kelly and Others v. United Kingdom*, para. 96.

⁸⁵ *Jordan v. United Kingdom*, paras 106-109. Emphasis added. Internal citations omitted. The case arose from the fatal shooting of a man by a police officer in Northern Ireland. The Court found a violation of article 2 in respect of failings in the investigative procedures concerning the death.

⁸⁶ *Armani Da Silva v. the United Kingdom* (2016).

there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity ... The investigation into serious allegations of ill-treatment must be both prompt and thorough.’⁸⁷

72. Similarly, the IACtHR has held that the failure to conduct an adequate investigation violates the American Convention of Human Rights, particularly article 8 (right to a fair trial) and article 25 (right to judicial protection). Inadequate investigations that violate human rights have included deficiencies in the way the investigation was carried out, and excessive delays in investigating and prosecuting crimes.⁸⁸

73. At least two decades of international human rights jurisprudence establishes the right of a victim of serious crimes to timely and robust investigation and prosecution.⁸⁹ The victims, denied a timely and robust investigation and prosecution of those responsible for the crimes against them by national authorities, have once again denied this right before this Court, as a direct result of the Decision.

74. Jurisprudence of the Court recognises that victims have three principal rights: (i) to have a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.⁹⁰

75. In the present case, not one of these rights has been realized, nor will they be realised if the Decision is permitted to stand. Consistent with the principle of *ubi jus ibi remedium*, there must

⁸⁷ *Al Nashiri v. Poland*, application no. 28761/11, 24 July 2014, paras 485-486.

⁸⁸ *Gomez-Palomina v. Peru* (2005); *Laneta Mejias Brothers et al. v. Venezuela* (2014); *Massacres of El Mozote and Nearby Places v. El Salvador* (2012); *Case of Gudiel Alvarez et al v. Guatemala* (2012); *Gonzalez Medina and Family v. Dominican Republic* (2012). These cases are summarized, with hyperlinks, in Annex 1 to this brief.

⁸⁹ See Annex 1 to this brief.

⁹⁰ Pre-Trial Chamber I, ‘Decision on the 34 Applications for Participation at the Pre-Trial Stage’, 25 September 2009, ICC-02/05-02/09-121, para. 3. See also Pre-Trial Chamber I, ‘Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’, 15 Mayo 2008, ICC-01/04-01/07-474, paras 31-44.

be a remedy for this comprehensive breach of the victims' rights. The rights of victims to an effective remedy and access to justice 'lie at the heart of victims' rights' at the Court.⁹¹

76. Against this backdrop of applicable international human rights and customary law, it would be absurd and unreasonable⁹² to interpret the Statute as depriving victims of an effective means of challenging a decision by the Chamber not to permit an investigation, where the requirements of jurisdiction and admissibility have been met.

77. For these reasons, it is consistent with Articles 21(1) and 21(3) of the Statute and the Court's jurisprudence on victims' rights to interpret Article 82(1) of the Statute to permit the Victims to challenge the Decision, in their own right.

v. The interests of victims are distinct from those of the Prosecution

78. In Section III(A)(iii) above, the specific interests and role of victims in the commencement of an investigation have been identified.

79. By extending victims a right to participate in the Article 15 process, and in pre-trial, trial and appeal proceedings at the Court,⁹³ the Statute recognises that the views and concerns of victims are not necessarily identical to those of the Prosecution.

80. Pre-Trial Chamber I in the situation in *The Democratic Republic of the Congo* held:

the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different."⁹⁴

81. Where a Pre-Trial Chamber denies authorisation to investigate, it deprives victims of their right to a prompt and thorough investigation. Victims should have an avenue to appeal such a

⁹¹ Pre-Trial Chamber I, 'Decision on Information and Outreach for the Victims of the Situation', 13 July 2018, ICC-01/18, para. 9.

⁹² Vienna Convention on the Law of Treaties, Article 32(b).

⁹³ See Article 68(3) of the Statute, Rule 89 of the Rules, Regulation 86 of the Regulations.

⁹⁴ Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04, para. 51.

decision independently to that of the Prosecution. Their right to an effective remedy should not depend on the willingness of the Prosecution to appeal.

82. The Prosecution's right to appeal decisions pursuant to the Statute does not render victims' appeals unnecessary. The current appeal illustrates the point: Prosecution decided to only seek leave to appeal the Decision through Pre-Trial Chamber II, thereby running the risk that leave to appeal would be denied. Furthermore, the Pre-Trial Chamber only granted leave to appeal two of the three grounds of appeal for which the Prosecution sought authorisation. The Victims' interpretation of the Decision and the Statute, on the other hand, obliged them to simultaneously seek leave to appeal from the Pre-Trial Chamber (which was denied) and file a notice of appeal before the Appeals Chamber. As a result, the Victim's appeal encompasses critically important issues that are not appealable by the Prosecution. These are addressed in the fourth and sixth grounds of appeal below.⁹⁵

vi. Victims' appeals do not infringe upon the rights of other parties

83. To recognise an Article 82(1)(a) right of appeal by victims of a decision rejecting authorisation to initiate an investigation in no way infringes upon the independence of the Prosecutor or the rights of future suspects or accused.

84. The Victims accept that the Prosecution has an exclusive right to decide whether to initiate an investigation according to Article 15 of the Statute. An Article 82(1)(a) appeal by victims of a decision rejecting authorisation to initiate an investigation is only possible *after* the Prosecution has reached a decision to initiate an investigation. The Victims' appeal therefore does not infringe upon the exclusive powers of the Prosecutor to determine whether to investigate.

85. Nor does it infringe on the Prosecutor's power to determine how to conduct its investigation. The Victims' appeal is not, implicitly or explicitly, a request to participate in the investigation. The Victims seek appeal of a decision denying the initiation of an investigation. As noted, the Appeals Chamber has said: '*victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations*, provided their personal interests are affected by the issues arising for resolution' (emphasis added).⁹⁶ This appeal is a judicial proceeding affecting an investigation, while 'an investigation is not a judicial proceeding

⁹⁵ Legal Representatives of Victims, 'Victims' response to 'Prosecution's notice of joined proceedings, and request for extension of pages', 19 September 2019, ICC-01/17OA OA2 OA3, paras. 16-23.

⁹⁶ <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>, ICC-01/04-556 19-12-2008, para. 56. Emphasis added.

but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.’⁹⁷ As discussed above, the Victims’ personal interests are clearly affected by the Decision, which is a decision to deny investigation.

86. Nor does the Victims’ appeal infringe upon the rights of any accused person. At the pre-authorisation stage there are no accused and no suspects. As recalled above, the Statute and Rules envision the participation only of the Prosecution and victims at the authorisation stage.

87. Furthermore, even at stages of the proceedings where there are accused persons, interpretation of the Statute must be consonant with the central role afforded to the victims in it, to the greatest extent possible without unfairly prejudicing the rights of the accused. The President of the STL said, when finding implicit in the STL statute a right for victims to seek interlocutory appeal in special circumstances:

Justice requires meticulous protection of the lawful rights of persons suspected or accused of crimes. But, subject only to that absolute requirement, the law should take care to protect those who have been victimized by crime. That indeed is the *raison d’être* both of the criminal law and of this Tribunal. The Statute of the Tribunal stipulates measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. That is a policy which, within the limits of a fair and expeditious trial, should receive full effect in decision-making. It is consistent with the reaffirmation in the United Nations Charter of fundamental human rights and of the dignity and worth of the human person, which must have particular resonance for victims of the grave crimes that have resulted in the Tribunal’s creation under Chapter VII [of the UN Charter]. Failure to apply such a policy would risk re-victimizing victims.⁹⁸

B. The Decision is a ‘decision with respect to jurisdiction’

88. The Decision pertains directly to jurisdiction: the Chamber refused to allow the Prosecutor to exercise investigative jurisdiction, and refused to allow the Court, as a whole, to ‘exercise its

⁹⁷ ICC-01/04-556 19-12-2008, para. 45.

jurisdiction’ in accordance with Article 13(c) of the Statute,⁹⁹ on the basis of an erroneous legal test.

89. The Decision prevented this exercise of jurisdiction in Afghanistan and must reasonably be understood as a decision ‘with respect to jurisdiction’ pursuant to Article 82(1)(a) of the Statute. Neither the legal texts of the court, nor the court’s jurisprudence, nor the *travaux préparatoires* exclude decisions under Article 15(4) from being appealed on the basis of Article 82(1)(a) of the Statute.

90. Article 82(1)(a) is not expressly restricted to decisions based on Articles 18 and 19 of the Statute. The *Triffterer* commentary on the Statute confirms that Article 15(4) decisions may fall within the scope of Article 82(1)(a).¹⁰⁰ The drafters of the Statute left it to the Court to decide on the scope of Article 82(1)(a) of the Statute.¹⁰¹

91. The Appeals Chamber has ruled on the scope of Article 82(1)(a) in relation to admissibility in the situations of *Comoros*,¹⁰² *Kenya*,¹⁰³ *Libya*,¹⁰⁴ and *Democratic Republic of the Congo*¹⁰⁵ (‘Admissibility Decisions’). The Admissibility Decisions are different from the impugned Decision, as none of them concerned an appeal of a decision that prevented the Prosecution or the Court from exercising jurisdiction over an entire situation.

92. The Admissibility Decisions note that ‘[i]t is the nature, and not the ultimate effect or

⁹⁹ Under Article 13(c), ‘[t]he Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:[...] (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.’

¹⁰⁰ O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing, 3rd Edition, 2016) (‘Triffterer Commentary’), page 1957.

¹⁰¹ *Ibid.*

¹⁰² Appeals Chamber, ‘Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”’, 6 November 2015, ICC-01/13 OA (‘Comoros Admissibility Decision’).

¹⁰³ Appeals Chamber, ‘Decision on the admissibility of the “Appeal of the Government of Kenya against the Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”’, 10 August 2011, ICC-01/09 OA (‘Kenya Admissibility Decision’).

¹⁰⁴ Appeals Chamber, ‘Decision on the admissibility of the “Appeal Against Decision on Application Under Rule 103” of Ms Mishana Hosseinioun of 7 February 2012’’, 9 March 2011, ICC-01/11-01/11 OA (‘Hosseinioun Admissibility Decision’); Appeals Chamber, *Prosecutor v. Gaddafi*, Decision on “Government of Libya’s Appeal Against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” of 10 April 2012’, 25 April 2012, ICC-01/11-01/11 OA 2 (‘Libya Admissibility Decision’).

¹⁰⁵ Appeals Chamber, ‘Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges” of 29 January 2007’’, 13 June 2007, CC-01/04-01/06 OA8; and Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, ICC-01/04.

implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute’¹⁰⁶ and that ‘[i]t is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.’¹⁰⁷ The impugned Decision relates *directly* to the Court’s ability to ‘exercise its jurisdiction’ in the situation in Afghanistan in accordance with Article 13(c). The *nature* of the Decision pertains directly to the Court’s ability to exercise jurisdiction where the requirements of admissibility and temporal, territorial, subject matter and personal jurisdiction are met.

93. It is not required that the operative part of a decision explicitly refers to the terms ‘jurisdiction’ or ‘admissibility’ for it to be a decision on jurisdiction or admissibility. Rather, ‘the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case.’¹⁰⁸ The operative part in the Decision pertains directly to the question on jurisdiction as it prevents the Prosecutor and the Court as a whole from exercising jurisdiction over the situation in Afghanistan.

94. The Chamber, in a section entitled “2.1 Jurisdiction *ratione loci*”, and in a subsection headed “Other acts”, within a section entitled “2.2. Jurisdiction *ratione materiae*”, committed further legal errors which directly pertain to jurisdiction. (The substance of these errors is addressed further below).

95. The Chamber’s assessment of the permitted temporal, territorial and substantive scope of the investigation, if it is authorised in the future, contains numerous errors which directly pertain to jurisdiction.¹⁰⁹ These errors (discussed in detail below) directly relate to the exercise of the temporal and territorial jurisdiction of the Court. The Chamber *inter alia* erroneously limited the temporal scope of any future investigation by the Prosecution (and consequently, the jurisdiction of future Chambers in carrying out their truth-seeking functions in accordance with the Statute), to crimes occurring before the Request for Authorisation was filed. The Chamber also erroneously limited the investigation in territorial scope to locations identified in the Prosecution’s request or

¹⁰⁶ Comoros Admissibility Decision, para. 44-45; Kenya Admissibility Decision, para. 17; Hosseinioun Admissibility Decision, para. 10; and Libya Admissibility Decision para. 13.

¹⁰⁷ Kenya Admissibility Decision, para. 15.

¹⁰⁸ Kenya Admissibility Decision, para. 15.

¹⁰⁹ Decision, para. 40: ‘the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it.’

closely linked to them.¹¹⁰ Furthermore, its analysis of the Court's territorial jurisdiction over torture and related crimes was erroneous, as discussed further below. All these matters pertain directly to jurisdiction.

96. A decision 'with respect to jurisdiction' includes one preventing the exercise of jurisdiction. Part 2 of the Statute ('Jurisdiction, Admissibility and Applicable Law') includes Articles 12 and 13.¹¹¹ These 'set the jurisdictional parameters of the Court and its Prosecutor',¹¹² and address the 'exercise of jurisdiction' by the Court. There is nothing to suggest that the Chamber will depart from this approach if the matter is remanded to it by the Appeals Chamber. Appellate scrutiny is necessary.

97. The Decision, by denying the exercise of jurisdiction, pertains directly to jurisdiction and may be appealed directly to the Appeals Chamber under Article 82(1)(a).

C. Errors of law, fact and procedure materially affected the Chamber's determination

98. The Victims submit that the Pre-Trial Chamber made errors of law, fact and procedure in the Decision, discussed in the six grounds of appeal below, which materially affected its determination.

99. The Chamber made an error of law when it carried out an interests of justice review. The interest of justice review was *ultra vires* as it was not within the powers granted to the Pre-Trial Chamber in Articles 15(4) and 53(3) of the Statute.

100. Alternatively, if the Appeals Chamber considers that the Chamber's interests of justice assessment was a *proprio motu* assessment and was not a review of the Prosecutor's assessment, this was also *ultra vires* as nothing in Articles 15 and 53 envisage that the Chamber will carry out an interests of justice assessment *proprio motu* and present it as a basis for declining to authorise an investigation.

101. In either case, the Chamber committed a procedural error by not inviting the Prosecutor, and the victims, to make full and reasoned submissions on the interests of justice prior to making

¹¹⁰ Decision, para. 41.

¹¹¹ The title of Article 12 is 'Preconditions to the exercise of jurisdiction' and of Article 13 is 'Exercise of jurisdiction'.

¹¹² Triffterer Commentary, page. 1367.

its own interests of justice assessment.

102. If the Chamber had applied the correct test, it would have authorised the investigation once it was satisfied that there was ‘a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court’, as required by Article 15(4).

103. The present appeal allows the Appeals Chamber to clarify the considerable uncertainty which has resulted from the Decision, particularly in respect of the applicable statutory regime for authorisation of investigation, the Pre-Trial Chamber’s powers to review the Prosecution’s interest of justice assessment, and the delimitation of powers between the Prosecution and the Pre-Trial Chamber. It enables the Appeals Chamber to “settle the matter [...] through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”¹¹³

104. A clarification by the Appeals Chamber on the statutory regime applicable, and the temporal and substantive scope of any investigation that is authorised, is not only necessary for the purpose of the situation in Afghanistan. The approach of the Pre-Trial Chamber in this case, if upheld on appeal, will radically affect every situation in the future where the Prosecutor seeks to initiate an investigation *proprio motu*.

105. Furthermore, the Decision, if it is permitted to stand, might well be widely perceived as a reward for non-cooperation by States under the Court’s scrutiny. The Decision, if uncorrected, is therefore likely to constitute an incentive for non-cooperation. Failure by the Appeals Chamber to correct the approach of the Pre-Trial Chamber would significantly hamper the future work of the court. Left unrestrained, State non-cooperation can and will defeat the Rome Statute’s structure of investigation and prosecution.

- i. First ground of appeal: the Chamber erred in reviewing the Prosecutor’s assessment of ‘the interests of justice’, after the Prosecutor has determined that there is a reasonable basis to proceed with an investigation, and further erred by not giving the Prosecutor and victims an opportunity to be heard on ‘the interests of justice’.**

106. The first ground of appeal relates to Part IV, paras. 29-38, and part VII, paras. 87-96, of the Decision. In these parts the Chamber erroneously carried out an ‘interest of justice’ assessment.

¹¹³ Appeals Chamber, ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s Decision Denying Leave to Appeal’, 13 July 2006, ICC-01/04-168, para. 14 and paras 15-18. *See also* Pre-Trial Chamber I, ‘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, para. 43.

The Chamber's error goes to the heart of one of its major functions: approving the opening of an investigation.

107. The judicial review function of a Pre-Trial Chamber concerning the 'interests of justice' is expressly limited by Article 53(3). That subsection enables a Pre-Trial Chamber only to review a decision of the Prosecution *not* to proceed with an investigation where the *Prosecution* determines that there are 'substantial reasons to believe that an investigation would not serve the interests of justice.' That is not the case here: the Prosecution decided to proceed with the investigation. Article 53(3) does not permit review of a decision to proceed. There is nothing in Article 53, nor elsewhere in the Statute, to suggest that the Chamber may review a decision of the Prosecution to proceed with an investigation by applying an 'interests of justice' test. Nor does Article 53 permit the Pre-Trial Chamber to conduct an 'interests of justice' assessment *proprio motu*.

108. A literal reading of Article 53(3), permitting a Pre-Trial Chamber to undertake an interests of justice review only if the Prosecutor decides not to open an investigation, finds support in the *travaux préparatoires*. One leading commentator, who participated in the drafting of the Statute, has clarified that the drafters agreed that the Prosecution does not have to show that a situation is in the interests of justice.¹¹⁴

109. Article 15(4) *compels* the Chamber to authorise an investigation if it 'considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.' The Chamber made positive determinations as to admissibility and jurisdiction in its Decision, and erroneously conducted an 'interests of justice' assessment.

110. The Chamber did not cite jurisprudence of the Court, nor the *travaux préparatoires* of the Statute, in support of its interpretation of Article 53(1).

111. The Chamber's interpretation of Article 53(1) is inconsistent with the position taken by other Pre-Trial Chambers. In *Kenya*¹¹⁵ and *Côte d'Ivoire*, the Pre-Trial Chambers affirmed that its review power is only triggered when Prosecution decides on the sole basis of interests of justice not to open an investigation. The Pre-Trial Chamber in *Côte d'Ivoire* concisely summarised the position:

¹¹⁴ G. Bitti, 'The Interests of Justice – where does it come from? Part I' EJIL: Talk, 13 August 2019; G. Bitti, 'The Interests of Justice – where does it come from? Part II', EJIL: Talk, 14 August 2019.

¹¹⁵ Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya' ('Kenya Decision'), 31 March 2010, ICC_01/09, para. 63.

Unlike sub-paragraphs (a) and (b) of Article 53(1) of the Statute, which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed the Prosecutor does not have to present reasons or supporting material in this respect. It is only when the Prosecutor decided that an investigation would not be in the interests of justice that he or she is under an obligation to notify the Chamber of the reasons for the decision, to enable the Chamber to exercise its power of review in accordance with Article 53(3)(b) if the Statute.¹¹⁶

112. In the recent decisions authorising investigations in *Georgia and Burundi*, the Pre-Trial Chambers accepted the Prosecution's finding that an investigation would be in the interests of justice.¹¹⁷ Notably, these decisions showed deference to the views of victims on whether "an investigation should be opened.

113. There is nothing in the Decision to suggest that the Chamber gave the Prosecution an opportunity to fully explain its own 'interests of justice' assessment, including its consideration of the victims' interests. Nor were the victims provided with any opportunity to make submissions on this assessment. This was a procedural error. As a matter of procedural fairness, both parties expressly identified by Article 53 as having an interest in a decision not to proceed with an investigation 'in the interests of justice' – the Prosecutor and the victims – should have been afforded an opportunity to make specific submissions on this point. This is especially so, given the unprecedented nature of the Chamber's interpretation of its judicial review function, and the devastating effect of the Decision on the victims' right to a prompt and thorough investigation.

114. Any judicial review of an 'interests of justice' assessment by the Prosecutor must be an *informed* review. This principle is found in Regulation 48, which enables the Chamber carrying out the review to request the Prosecutor 'to provide specific or additional information or documents in his or her possession, or summaries thereof in order for the Chamber to properly

¹¹⁶ Pre-Trial Chamber III, 'Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte D'Ivoire"' ('Côte D'Ivoire Decision'), 15 November 2011, ICC-02-11, para. 207.

¹¹⁷ Pre-Trial Chamber I, 'Decision on the Prosecutor's request for authorisation of an investigation' ('Georgia Decision'), 27 January 2016, ICC-01/15, para. 58; Pre-Trial Chamber III, 'Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi"', ICC-01/17-X-9-US-Exp, 25 October 2017" ('Burundi Decision'), 25 October 2017, ICC-01/17-X, para. 190.

carry out' its Article 53(3)(b) 'interests of justice' review. This is to say, the Regulations contemplate that the Pre-Trial Chamber will be fully informed of the reasons why the Prosecutor believes that an investigation or prosecution is not in the interests of justice before it reviews that assessment.

115. Article 53(1)(c) of the Statute also requires the Prosecutor to take into account victims' interests in deciding not to open an investigation. The failure to give the Prosecutor and the victims an opportunity to be heard on a critically important issue,¹¹⁸ which directly resulted in the denial of authorisation of investigate an entire situation, was a procedural error. Even if, *arguendo*, it is accepted that the Pre-Trial Chamber may carry out an interests of justice assessment when the Prosecution has decided to initiate an investigation, the assessment must give significant weight to the interests of the victims and gravity. Article 53(1)(c) provides; 'Taking into account the gravity of the crime and the interests of victims, there are nonetheless *substantial* reasons to believe that an investigation would not serve the interests of justice' (emphasis added). The presumption is that the interests of the victims and gravity shall prevail, and trigger the initiation of an investigation. The interpretation is consistent with the non-discretionary nature of Article 15(4): where the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it '*shall* authorise the commencement of the investigation' (emphasis added).

116. The cursory, nonspecific references to the victims' interests in the Decision indicate that the Pre-Trial Chamber failed to properly attribute sufficient weight to the gravity of the crimes and to the interests of the victims in carrying out an interests of justice assessment. Only 'substantial' reasons permit the Pre-Trial Chamber to refuse an investigation. As argued in greater detail below, the Chamber's analysis of the principal factors it provided to justify refusal to authorise (future non-cooperation by States Parties and other States, and the feasibility of gathering evidence) was erroneous, and as a result the Chamber failed to provide 'substantial reasons' that override the interests of victims and the gravity of the crimes.

¹¹⁸ See Appeals Chamber, 'Judgment on the appeal of the Prosecutor against the decision of the Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', 17 June 2015, ICC-02/04-01/15 OA 3, para. 46. The Appeals Chamber found that making a decision 'without first receiving submissions from the parties' meant that the decision 'was unfair and unreasonable and had a material effect on the Impugned Decision.' The decision in that case concerned pre-trial analysis charts.

- ii. **Second ground of appeal: the Chamber erred in considering the extent of cooperation that the Prosecution had received from State Parties during the preliminary examination, before the duty to cooperate under Part 9 of the Statute has been fully triggered, in deciding whether to authorise the investigation.**

117. In Part VII, paras. 91-94, of the Decision the Chamber erred in its assessment of cooperation by Afghanistan and other States Parties.¹¹⁹ The Chamber referred to ‘the relevant political landscape in Afghanistan and in key States (both parties and not parties to the Statute)’ and said that it is ‘extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects. Nothing in the present conjecture gives any reason to believe that such cooperation can be taken for granted’.¹²⁰

118. The Chamber did not refer to specific incidents of non-cooperation, nor any part of the Prosecution’s Request for Authorisation, in making its assessment. The Chamber did not refer to the fact that authorisation would enable the full range of the Prosecution’s investigative tools under the Statute. Nor did it note that the authorisation of an investigation would trigger the commencement of the general obligation in Article 86 of the Statute on all States Parties to comply with an investigation. Furthermore, the Chamber failed to invite submissions from States on the question of co-operation, which directly affects their interests. The Chamber did not separately assess the prospects for cooperation from States Parties and other (non-party) States, or elaborate on the ‘relevant political landscape in Afghanistan and in key States’.¹²¹ The lack of detailed reasoning or citation to incidents means that it is not possible to understand in full the Chamber’s reasoning.

119. The Chamber erred as a matter of law and procedure as it, in effect, concluded that States Parties are not complying with their duties to cooperate with the Court. The Court is not yet at a stage at which it can conclude that Afghanistan, or any other State Party, has not complied with its duty to cooperate under the Statute. This is because the investigation has not yet begun.

120. The Article 86 obligation on Afghanistan, Poland, Lithuania, Romania and all other States Parties to cooperate with the Court applies only to the investigation and prosecution stages. The Prosecution has recognised this in its Policy Paper on Preliminary Examinations at paragraph 85:

¹¹⁹ Decision, para. 94.

¹²⁰ Decision, para. 94.

‘At the preliminary examination stage, the [Prosecution] does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States’.

121. The Chamber, in effect, made a pre-emptive and speculative assessment that certain unnamed States Parties, on the basis of past unspecified acts of obstruction, were unlikely to comply with obligations under Part 9 that had not yet been triggered. It disregarded the fact that they had, by signing and ratifying the Statute, voluntarily assumed the obligation to cooperate with the Court. It also ignored that the government of Afghanistan has voiced its commitment to the international legal order and justice and to ‘strengthen the Court by supporting its decisions.’¹²²

122. As a matter of fairness, the Chamber should, at the very least, have heard from the States Parties in question, to determine the nature of the cooperation problems and address whether solutions could be found, in line with the spirit of Article 97 and Rule 195.

123. Where a State Party’s non-compliance with its duties under the Statute are such as to prevent the Court from exercising its functions or powers, the appropriate remedy is to trigger the procedures which can culminate in referral to the Assembly of States Parties (‘ASP’) or (in the case of referral by the United Nations Security Council, to the Council) under Article 87(7) of the Statute. Article 87(7) provides the Court with a tool so that it may seek assistance to eliminate impediments to cooperation.¹²³ Referral under Article 87(7) triggers the ASP’s own formal procedure for securing cooperation,¹²⁴ provides a clear legal basis for other States Parties to take action to address non-compliance with requests from the Court. But no referral can be made if no obligation to cooperate exists.

124. The Decision completely ignored this. The Decision was an inappropriate and disproportionate remedy to potential future non-cooperation, and unfair to the victims because it erroneously deprived them of recourse to the structure of State Party cooperation set down in Part 9, and to the ultimate remedy of an Article 87(7) referral.

125. Whether, following authorisation of investigation, States Parties do comply with their obligations under Part 9, or take any action in response to non-cooperation by other States Parties,

¹²² See Statement by Ambassador of the Islamic Republic of Afghanistan to The Netherlands at the 17th session of the Assembly of States Parties, 2018

¹²³ Pre-Trial Chamber I, ‘Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council’, 10 December 2014, ICC-01/11-01/11-577, para. 33.

¹²⁴ At its tenth session, the Assembly of States Parties adopted the ‘Assembly Procedures relating to non-cooperation’.

or succeed in any action that they do take, is not for the Chamber to prejudge. Its duty was solely to enable the investigation to begin. Doing so would enable the Statute to function as it should.

126. Authorising commencement of the investigation would also trigger the operation of the obligations of States Parties under international law generally, including under the Articles on the Responsibility of States for Internationally Wrongful Acts ('Articles on State Responsibility'). Non-compliance with the Statute by a State Party is an internationally wrongful act¹²⁵ entailing the international responsibility of the non-cooperative State Party, in accordance with Articles 1¹²⁶ and 2¹²⁷ of the Articles on State Responsibility.

127. Under the Articles on State Responsibility, any State Party remains under a duty to perform its obligations under the Statute,¹²⁸ obliged to cease non-compliance with the Statute, and 'to offer appropriate assurances and guarantees of non-repetition'.¹²⁹ A non-compliant State Party 'may not rely on the provisions of its internal law as justification for failure to comply'.¹³⁰

128. Additionally, the Statute makes specific provision for the situation where a State (including a non-party State) has information relevant to an investigation which it might be reluctant to disclose on national security grounds. Articles 72(5) and 72(7) set forth an expectation that the Prosecution will act in conjunction with the relevant Chamber and the State to seek to resolve the matter by cooperative means, and provide specific steps that might be taken to protect the State's security interests while ensuring that the truth will emerge. Article 87(5) permits the Court to invite non-party States to provide assistance on the basis of an *ad hoc* arrangement. The Chamber has given no indication that it has considered the potential for access to relevant evidence that the Article 72 and 87(5) procedures envisage. To reiterate, these procedures only become available to the Court after the investigation has commenced.

¹²⁵ 'A "failure to comply with the request of a Court contrary to the provisions of this Statute" should be construed as being tantamount to an internationally wrongful act in the sense of the ILC Articles on States responsibility.' (O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Second Edition, 2008, Article 87, p. 1529)

¹²⁶ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 ('ASRIWA'), (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf accessed 29 April 2015), Article 1: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

¹²⁷ Articles on State Responsibility, Article 2: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.'

¹²⁸ Articles on State Responsibility, Article 29.

¹²⁹ Articles on State Responsibility, Article 30.

¹³⁰ Articles on State Responsibility, Article 32. The Articles also contain provisions requiring reparation (Article 34), restitution (Article 35), compensation (Article 36) and satisfaction (Article 37).

129. Even if, *arguendo*, the Appeals Chamber finds that Pre-Trial Chamber II was right to carry out an interests of justice assessment, the Pre-Trial Chamber exceeded its discretion by failing to consider the Statute's remedies for State Party non-cooperation in assessing state cooperation as a factor to deny an investigation.

130. The Chamber's rejection of the Request for Authorisation because of *inter alia* a perceived lack of cooperation as part of its interests of justice assessment runs contrary to the assessment by the Pre-Trial Chamber in *Burundi*. The Pre-Trial Chamber in *Burundi* granted authorisation, at the time that Burundi was withdrawing from the Statute. The Pre-Trial Chamber in *Burundi* did not consider the concrete lack of willingness by Burundi to cooperate with the Court to be a factor meriting denial of authorisation.¹³¹

131. In refusing an investigation on the basis of non-cooperation, the Decision may be perceived to have rewarded States that have refused in the past to cooperate with the Court, and to encourage future non-cooperation.

132. Due to these errors, the Chamber prevented the Prosecution, and the Court as a whole, from taking all the action that they can to secure the cooperation of States Parties and other States in respect of providing access to relevant witnesses and evidence. The Appeals Chamber can remedy these errors by ordering the investigation to commence, thereby enabling the triggering of the Article 86 cooperation obligation for all States Parties, and permitting the use of the procedures set out in Articles 72(5), 72(7) and 87(5) in respect of all States.

iii. Third ground of appeal: the Chamber erred in denying a request for authorisation to investigate on the basis that it believed that the investigation is unfeasible.

133. In Part VII, paras. 90-93 of the Decision, the Chamber erred in determining that the investigation is 'not feasible and doomed to failure', and therefore should not take place, and relatedly considering that suspects might be unavailable and that '[t]he very availability of evidence for crimes dating back so long in time [2005-2015] is far from being likely'.¹³² Feasibility is not a factor mentioned anywhere in the Statute. The Statute does not envisage that investigations will take place only where it is easy to investigate. It foresees the opposite. An interests of justice

¹³¹ See Burundi Decision.

¹³² Decision, paras. 91 and 93.

assessment that speculatively considers feasibility of an investigation as a reason to deny authorisation to investigate defeats the object and purpose of the Statute.

134. The Court deals exclusively with crimes of the utmost seriousness—genocide, crimes against humanity, war crimes and aggression¹³³—which inevitably take place in great turmoil. Post-conflict environments are typically uncondusive to investigation. The Court can exercise jurisdiction over such crimes *only* where the State that has jurisdiction over them is unwilling or unable genuinely to carry out an investigation or prosecution.¹³⁴ The Statute recognises that in many—if not most—cases, the Court will be required to carry out investigations in challenging and risky environments, where the State itself might not be able or willing to assist. For example, Article 56 foresees that unique opportunities to take evidence will arise, which may not be available subsequently: Article 57(3)(d) envisages investigations on the territory of a failed state; and, as noted, Article 87(7) foresees and provides a remedy for State non-cooperation.

135. The Chamber did not cite jurisprudence of the Court, nor the *travaux préparatoires* of the Statute, in support of its interpretation of Article 53(1). The Chamber exceeded its discretion by reading into the Statute a requirement that the investigation should be deemed by the Chamber to be feasible. The Chamber’s conclusion was also grossly unfair to the victims.

136. The Chamber, in assuming that evidence and suspects may be unavailable, ignored the fact that much relevant material has been collected and preserved, and many victims and other witnesses are available to testify. The Chamber also failed to acknowledge that much probative evidence in modern international criminal prosecutions consists of communications, images, audio and video in digital form, and which can be preserved in pristine condition for an indefinite period. Furthermore, there are many persons in Afghanistan, and elsewhere, who are able to provide reliable oral evidence relating to incidents which took place since May 2003 in Afghanistan, and July 2002 in other States Parties.

137. The Chamber’s finding that too much time has passed since the period 2005-2015, when most crimes alleged by the Prosecution occurred,¹³⁵ for evidence collection to be worthwhile, and to present this as a reason to deny authorisation to investigate, was so unreasonable that it is an abuse of discretion.

¹³³ See Article 5 of the Statute.

¹³⁴ See Article 17(1) of the Statute.

¹³⁵ Decision, paras. 91 and 93.

138. First, the Prosecution is surely in a better position to assess this factor than the Chamber. Second, it is inconsistent with the experience of other international courts. The Extraordinary Chambers in the Courts of Cambodia was intended, when it was established, to have jurisdiction exclusively over crimes committed in the period from 17 April 1975 to 6 January 1979. It commenced operations over 27 years later, in 2006. Despite the passage of time, and the fact that Cambodia was in a state of armed conflict for many years after 1979, the ECCC nevertheless conducted successful prosecutions of Khmer Rouge leaders, with trials starting in 2009, for crimes committed in 1975-1979. This demonstrates that probative evidence and suspects can remain available for decades.¹³⁶ World War II-era trials have famously taken place in every decade since the war. Proceedings have taken place in Germany as recently as 2018 for crimes in 1944, 74 years earlier; recent proceedings were brought to a halt due to issues relating to the fitness of the now very elderly accused to stand trial, not due to a lack of evidence.¹³⁷

139. The Chamber provided no clear basis for its view that '[t]he very availability of evidence for crimes dating back so long in time is far from being likely.'¹³⁸ The time period it was referring to was 2005-2015. This is, on any reasonable view, a relatively recent time period. Most of it overlaps with the period during which the Prosecution has been carrying out a preliminary examination into events in Afghanistan.

140. In addition, the Chamber did not recognise that crimes which appear to fall within the Court's jurisdiction continue to take place in Afghanistan, on an almost weekly basis. But perhaps most importantly the Chamber failed to recognize that the very *purpose* of an investigation is to conduct a full and fair inquiry into the events and to collect all available evidence.

141. It also ignored the deterrent effect of investigations, a matter which is of real and immediate relevance in Afghanistan. On 26 September 2019, Tadamichi Yamamoto, the UN Secretary-General's Special Representative for Afghanistan, said: 'The disregard for civilian life exhibited by parties to the conflict in recent days, especially in indiscriminate attacks, is appalling.'¹³⁹ Formally opening an investigation in Afghanistan might not only achieve justice in the short term,

¹³⁶ See for example, ECCC, Supreme Court Chamber, *Prosecutor v. Nuon Chea and Khieu Samphan*, Appeal Judgement, 23 October 2016.

¹³⁷ <https://www.bbc.com/news/world-europe-46108753>

¹³⁸ Decision, paras. 91 and 93.

¹³⁹ UNAMA, 'United Nations Concerned by Continuing High Number of Civilian Casualties in Afghanistan', 26 September 2019.

but it might also focus the minds of leaders of some of the parties to the conflict on their criminal liability for indiscriminate attacks.

142. The prospect of failure should never deter an international criminal investigation. The trials and convictions of many persons were once considered to be hopelessly unlikely. These include former Bosnian Serb president Radovan Karadžić, former commander of the main staff of the Bosnian Serb Army Ratko Mladić, former Liberian president Charles Taylor, and former Khmer Rouge leaders Nuon Chea and Khieu Samphan. All were duly convicted, and their convictions upheld on appeal, by international or hybrid criminal courts.

143. In summary, the Chamber read into the Statute a criterion of ‘feasibility’ that does not appear in it. It unfairly determined that an investigation into crimes committed in the period 2005 to 2015 as too long ago to be worth trying. It ignored the fact that appalling crimes within the Court’s jurisdiction, resulting in great suffering to the civilian population, continue to take place in Afghanistan, and that probative evidence relating to those crimes is available for collection. In each of these ways, the Chamber exceeded its discretion and unfairly deprived the Victims of their *only* chance of investigation and prosecution.

iv. Fourth ground of appeal: the Chamber, by majority, erred in attempting to restrict the scope of any investigation which might be authorised in the future to incidents specifically mentioned in the Prosecution’s request, as well as those ‘comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it’.

144. In Part IV, paras. 39-42 of the Decision, the Chamber erred in restricting the scope of an authorised investigation. As the Separate Opinion clarifies, the Chamber was divided on this issue.¹⁴⁰ The Prosecution expressly sought leave to appeal this issue, and leave was denied.¹⁴¹ The issue is amenable to appeal under Article 82(1)(a) as it pertains directly to the Court’s geographic, temporal and substantive jurisdiction in Afghanistan.

145. The Chamber, by majority, ruled that, even if it authorised the investigation, the Prosecution would only be permitted to investigate ‘the incidents that are specifically mentioned

¹⁴⁰ Separate Opinion, paras. 4-15.

¹⁴¹ Pre-Trial Chamber II, ‘Decision on the Prosecutor and 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’, 17 September 2019, ICC-02/17.

in the Request and are authorised by the Chamber, as well as those comprised within the authorisation's geographical, temporal, and contextual scope'¹⁴² as well as those incidents which can be regarded as having a close link, rather than a simply 'sufficient' one, with one or more of the incidents specifically authorised by the Pre-Trial Chamber.'¹⁴³ It further described the permitted scope of the investigation as 'those events or categories of events that have been identified by the Prosecution'.¹⁴⁴ The Chamber said that 'incidents not closely related to those authorised would only be possible on the basis of a new request for authorisation under article 15,'¹⁴⁵ requiring a fresh examination of jurisdiction, complementarity, gravity and the interests of justice. The Chamber also said that 'the scope of the scrutiny could not encompass incidents and groups of offenders other than those for which the authorisation was specifically requested. Quite logically, the same applies for other alleged crimes that may have occurred after the date of the Request.'¹⁴⁶

146. The Chamber's various formulations of the test to be applied are confusing at best. It is difficult to establish precisely what incidents and perpetrator groups might fall within the scope of a permitted investigation. It appears that post-authorisation incidents will almost always fall outside the permitted scope of an investigation, according to the Chamber's interpretation.

147. The question of which incidents fall within the scope of an investigation is not an abstract legal question. It is an important issue, which affects all future investigations by the Court.

148. It is also a live issue, as it directly affects the temporal and territorial jurisdictional parameters of the Prosecution's investigation in Afghanistan, if an investigation is authorised. This is a matter of immediate significance for Afghanistan. On 18 August 2019, Islamic State reportedly claimed responsibility for a bomb which exploded at a wedding hall in Kabul, killing 63 people and wounding more than 180.¹⁴⁷ On 17 September 2019, the Taliban said that it was behind two suicide attacks. One, in Parwan province, was at an election rally where President Ashraf Ghani was due to speak. 26 people died. Another, near the US embassy in central Kabul, killed 22

¹⁴² Decision, para. 40.

¹⁴³ Decision, para. 41.

¹⁴⁴ Decision, para. 42.

¹⁴⁵ Decision, para.

¹⁴⁶ Decision, para. 69.

¹⁴⁷ BBC, '[Afghanistan: Bomb kills 63 at wedding in Kabul](#)', 18 August 2019.

people.¹⁴⁸ On 19 September 2019, Taliban militants reportedly detonated a truck packed with explosives outside a hospital in the southern city of Qalat, killing at least 29 persons and possibly as many as 39. Women, children, health workers and patients in the hospital were critically injured in the blast.¹⁴⁹ It is important that the Prosecution is at liberty to investigate such incidents without repeatedly having to return to the Pre-Trial Chamber with new requests for authorisation.

149. In setting out its test for the scope of an investigation, the Chamber did not cite prior jurisprudence of the Court, nor did it cite to any Rule or Regulation, or to the *travaux préparatoires* of the Court. The Chamber relied only on the perceived ‘filtering and restrictive function’ of Article 15, and ‘the very rationale of article 15’.¹⁵⁰

150. The Statute does not expressly limit the temporal, territorial, or material parameters of an authorised investigation beyond the general limits of the Court’s jurisdiction. The Chamber’s view that an authorisation may only cover incidents specifically mentioned in the Request for Authorisation, and those closely linked to those incidents, and to require that the Prosecutor must return to the Pre-Trial Chamber every time she wishes to investigate a new incident ‘on the basis of a new request for authorisation under article 15,’¹⁵¹ is inconsistent with the Court’s structure.

151. Under Article 15(4) of the Statute, authorisation by a Pre-Trial Chamber to investigate is expressly ‘without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.’ Challenges to the jurisdiction of the Court or the admissibility of a case can be brought by an accused or a person for whom a warrant of arrest or a summons to appear has been issued, or a State in certain circumstances, under Article 19.

152. Issues such as jurisdiction, complementarity, and gravity are plainly suitable for challenge under Article 19. Judicial review of an interests of justice determination by the Prosecutor may take place under Article 53(3)(b). The Pre-Trial Chamber erroneously conflated the procedure for resolving challenges to the Court’s jurisdiction, the admissibility of a case, and a decision by the Prosecution not to proceed, with the procedure for authorizing an investigation when the Prosecution does want to proceed. In doing so, the Chamber exceeded its discretion.

¹⁴⁸ BBC, ‘Afghanistan war: Taliban bombs election rally and Kabul square’, 17 September 2019.

¹⁴⁹ Aljazeera, ‘Afghanistan hospital attack death toll soars to 39’, 20 September 2019.

¹⁵⁰ Decision, para.

¹⁵¹ Decision, para. 42.

153. In summary, nothing in Article 15 requires the Chamber to individually assess specific *incidents* and to approve them for investigation. It requires, rather, the Chamber to authorise an ‘investigation’. Had the framers of the Statute wished the Prosecutor to return to the Pre-Trial Chamber for serial authorisations of different incidents, they could have required this. They chose instead to provide a procedure for authorisation of a ‘situation’ (the term used in Article 15(5) and 15(6)), and to permit the jurisdiction and admissibility of specific cases within a situation to be challenged in accordance with Article 19.

154. The Chamber’s approach is also inconsistent with the Court’s jurisprudence. As Judge Mindua in the Separate Opinion noted, the Chamber in *Burundi* authorised the commencement of an investigation into *any crime* committed on the territory of Burundi or by Burundi nationals elsewhere, and extended the temporal scope of the authorised investigation to cover crimes committed before and after the dates requested by the Prosecution.¹⁵² In *Georgia*, the Pre-Trial Chamber authorised an investigation into ‘all crimes within the jurisdiction of the Court’ in the situation.¹⁵³ In *Côte D’Ivoire*, the Pre-Trial Chamber, while ‘bearing in mind the volatile environment’ in the country,¹⁵⁴ found it ‘necessary to ensure that any grant of authorisation covers investigations into “continuing crimes” – those whose commission extends past the date of the application.’¹⁵⁵ It stated that the authorised investigation ‘will include the investigation of any ongoing and continuing crimes that may be committed after [the date of the request for authorisation] as part of the ongoing situation.’¹⁵⁶

155. The notion that crimes should be limited to those known to the Prosecution before the investigation has commenced is also inconsistent with the Court’s Article 69(3) function ‘to request the submission of all evidence that it considers necessary for the determination of the truth’, and the Prosecution’s strict duty in Article 54(1) to ‘establish the truth’ by extending ‘the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility’. As the Pre-Trial Chamber stated in *Georgia*, ‘It is precisely the purpose of the

¹⁵² Burundi Decision, para. 192.

¹⁵³ Georgia Decision, para. 64.

¹⁵⁴ Côte D’Ivoire Decision, para. 179.

¹⁵⁵ Côte D’Ivoire Decision, para. 179.

¹⁵⁶ Côte D’Ivoire Decision, para. 179.

investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted.’¹⁵⁷

156. Furthermore, as there are no accused or suspects at the authorisation stage, no fair trial rights arise. There are no fundamental guarantees to be protected by needless limitation of the investigation to that which is known at the authorisation stage.

157. The Chamber’s position that incidents must be ‘closely linked’ to the authorised incidents constitutes a departure from the Court’s jurisprudence establishing that incidents be ‘sufficiently linked’. In the decision authorising an investigation in *Georgia* the Pre-Trial Chamber stated:

in principle, events which did not occur in or around South Ossetia or which occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto and, obviously, fall within the Court’s jurisdiction.¹⁵⁸

158. The *Georgia* decision is consistent with a decision in *the Democratic Republic of Congo*, where the Pre-Trial Chamber stated:

such a situation can include not only crimes that had already been or were committed at the time of the referral, but also crimes committed after that time, insofar as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.¹⁵⁹

159. The Appeals Chamber upheld the Pre-Trial Chamber’s view in *Democratic Republic of Congo* that incidents be ‘sufficiently linked.’¹⁶⁰

160. As a matter of practice, the Chamber’s limitations to the scope of the authorised investigation make little sense. A desk-based preliminary examination of ‘information received’¹⁶¹ and open source material¹⁶² is inevitably an imperfect probe of a situation.¹⁶³

¹⁵⁷ Georgia Decision, para. 63.

¹⁵⁸ Georgia Decision, para. 64.

¹⁵⁹ Pre-Trial Chamber I, *The Prosecutor v. Mbarushimana*, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana’, 28 September 2010, ICC-01/04-01/10, para. 6.

¹⁶⁰ Appeals Chamber, *The Prosecutor v. Mbarushimana*, ‘Decision on the “Defence Challenge to the Jurisdiction of the Court”’, 26 October 2011, ICC-01/04-01/10, paras. 16-19 and para. 39.

¹⁶¹ Article 15(2) of the Statute: The Prosecutor shall analyse the seriousness of the information received [...]

¹⁶² Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’, 2013.

¹⁶³ See Georgia Decision, para. 63: ‘Indeed, for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor’s investigation to the crimes which are mentioned by the Chamber in its decision

161. Given the size of Afghanistan, its geography, and its current instability, it is likely that there have been numerous crimes—including sexual and gender-based crimes and crimes against children—which are totally or in large part unknown to the Prosecution. UNAMA has confirmed that there is widespread under-reporting of violence against women cases to the formal justice system, and that women survivors that come forward are often referred to mediation through traditional dispute resolution mechanisms.¹⁶⁴

162. It is similarly likely that crimes committed in relation to cases of rendition to other States Parties are not yet known to the Prosecution. It would be unfair to the victims of those crimes to exclude them from the justice process at the Court for reasons beyond their control.

163. The scenario of repeated litigation presented by the Pre-Trial Chamber in the Decision, would, as Judge Mindua pointed out, ‘render the investigative proceedings unduly cumbersome’.¹⁶⁵ It would also divert the Court’s limited resources away from the critically important work of collection and analysis of probative evidence, to the preparation and consideration of unnecessary filings before the Pre-Trial Chamber and, potentially, the Appeals Chamber. It would delay delivery of justice to the victims and be to the detriment of judicial economy.

164. There is nothing in the extensive experience of the ICTY, ICTR and ECCC—all of which conducted trials based at least in part on events which came to light during, and as a result of, investigation—to warrant the limitation proposed by the majority of the Chamber.

165. The Chamber denied the Prosecution leave to appeal this issue, and did not give any indication that it would depart from its interpretation, if this matter is remanded to it by the Appeals Chamber. All victims in Afghanistan, all relevant States Parties, and the Prosecution, are entitled to clarity from the Appeals Chamber as to whether any investigation in Afghanistan may encompass incidents which become known to the Prosecution after it submitted its request for authorisation, those which occur after submission of a request for authorisation, and those which occur after a decision authorizing investigation. As a matter of procedural fairness, States Parties

authorizing investigation. To impose such limitation would be also illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information.’

¹⁶⁴ UNAMA, ‘Injustice and Impunity, Mediation of Criminal Offences of Violence against Women’, May 2018.

¹⁶⁵ Concurring and Separate Opinion, para. 9.

must be made aware as to whether they have an obligation to cooperate under Part 9 of the Statute with investigations into post-authorisation incidents.

166. For these reasons, immediate resolution by the Appeals Chamber is warranted in order to clarify the permissible bounds of any investigation that might result, if the Decision is reversed.

167. The Appeals Chamber should clarify that the temporal scope of an investigation may cover incidents other than those expressly identified by the Prosecution in its request for authorisation, including crimes within the jurisdiction of the Court which take place after authorisation to investigate is granted.

- v. **Fifth ground of appeal: the Chamber erred in denying the request for authorisation in part on the basis that it believed that the Prosecution should allocate its resources to other preliminary investigations, investigations or cases which have ‘more realistic prospects to lead to trials’.**

168. The Chamber’s assessment, in Part VII, para. 95 of the Decision, of the Prosecution’s allocation of its resources in deciding not to authorise the investigation was a legal error. It represents an unwarranted invasion of the Prosecution’s competence to determine how to best allocate the resources made available to it by the States Parties, and the Prosecutor’s discretion to prioritize situations and case.

169. Article 42(2) of the Statute gives the Prosecutor exclusively ‘full authority over the management and administration of the [Office of the Prosecutor] including the staff, facilities and other resources.’ The Prosecution is inevitably in a better position than the Chamber to address the sufficiency or otherwise of its own resources. This is particularly so, as the Prosecution is not obliged to make public, nor to disclose to the Chamber, all activities which it is undertaking in order to comply with its Article 54(1) duties across all its investigations and prosecutions. During an investigation, the Prosecution is inevitably better placed than the Chamber to determine how to prioritise specific aspects of an investigation of a situation, and to determine how best to sequence its investigative steps, in light of the situation on the ground.

170. Without prejudice to the discretionary power of the Prosecutor to manage and administer her resources, the overall budget of the Court is the responsibility of the ASP under Article 112(2)(d) of the Statute.

171. The Chamber's analysis of the Prosecution's 'financial and human resources,'¹⁶⁶ in determining whether to authorise the investigation, is not envisaged in the Statute, Rules or Regulations. Further, the Chamber's assessment of the Prosecutor's resources was cursory and unspecific. It did not cite, nor analyse, any of the budgetary documents discussed by the ASP, such as those prepared by the Court or Committee on Budget and Finance. It is only in exceptional circumstances, following a demonstrated failure by the Prosecution to manage its resources responsibly, that the Chamber should invade on the Prosecution's exclusive competence under Article 42(2). That has not been demonstrated here.

- vi. **Sixth ground of appeal: the Chamber erred in concluding that the Court may only exercise jurisdiction over torture if (a) the infliction of severe physical or mental pain took place at least in part on the territory of a State Party; and (b) the victim was captured within the borders of the State in which the armed conflict is taking place.**

172. The Chamber erred in Part V.2.1, paras. 51-55, in its reasoning and finding that 'for the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of 'inflicting severe physical or mental pain' [...] takes place at least in part in the territory of a State Party.'¹⁶⁷ In these paragraphs the Chamber appears to have conflated the preconditions for the exercise of the Court's jurisdiction under Article 12(2) of the Statute, and the elements of war crimes pursuant to Article 8 of the Statute. It further failed to consider the many modes of liability under Article 25 of the Statute.

173. The Chamber failed to distinguish between the participation of a suspect in a crime of torture (or a related crime, such as cruel treatment) who physically inflicts severe mental or physical pain, and that of a suspect who participates in the crime, and is criminally responsible for the physical commission of the crime, through another mode of liability.

174. The Court's territorial jurisdiction is triggered *inter alia* when 'the conduct in question' occurs on the territory of a State Party.¹⁶⁸ The 'conduct in question' is not confined to the infliction of severe physical or mental pain or suffering. The Appeals Chamber has confirmed that 'it is the conduct of the suspect him or herself that is the basis for the case against him or her [...] the

¹⁶⁶ Decision, para. 95.

¹⁶⁷ Decision, para. 54.

¹⁶⁸ Article 12(2)(a).

"conduct" that defines the "case" is both that of the suspect [...] and that described in the incidents under investigation which is imputed to the suspect.'¹⁶⁹

175. Therefore, the infliction of 'severe physical or mental pain or suffering upon one or more person'¹⁷⁰ is a necessary element of the crime but it is not the only way in which a person can participate in the crime.

176. The Court may therefore exercise jurisdiction over a person who is not a direct perpetrator in an act of torture but participates in another manner on the territory of a State Party. As Article 25(3) of the Statute makes clear, criminal participation extends beyond the physical perpetration of the crime. It includes direct and indirect co-perpetration, ordering, soliciting, inducing, aiding, abetting or otherwise assisting in the commission or attempted commission of the crime, or in any other way contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose.

177. What must be established, regardless of the location of the suspect or victim, and regardless of the method of the suspect's participation, is the nexus to the armed conflict. The Elements of Crimes require that, for the war crimes of torture and associated crimes, the 'conduct took place in the context of and was associated with an armed conflict'. The Elements do not require that the conduct took place in the state where the armed conflict was taking place, nor that the victim was captured in that state, nor that the accused was present in that state when the criminal conduct took place.

178. Under the Court's jurisprudence, the nexus requirement is satisfied if the conduct is 'closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict.'¹⁷¹ The alleged crimes may be considered to have been committed 'within the context' of an armed conflict irrespective of whether they took place contemporaneously with or proximate to intense fighting. The requirement that the acts of the accused must be closely related

¹⁶⁹ Appeals Chamber, 'Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'', ICC-01/11-01/11-547-Red, 21 May 2014, para. 62.

¹⁷⁰ This is a requirement of the war crimes of torture under Article 8(2)(a)(ii)-1 and Article 8(2)(c)(i)-4; inhuman treatment under Article 8(2) (a)(ii)-2; and cruel treatment under Article 8(2)(c)(i)-3

¹⁷¹ See Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', 21 March 2016, ICC-01/05-01/08 ('Bemba TC Judgment'), para. 142; Trial Chamber II, *Prosecutor v. Germain Katanga*, 'Judgment pursuant to article 74 of the Statute', 7 March 2014, ICC-01/04-01/07, para. 1176 and the authorities cited in footnote 2733.

to the armed conflict is not negated if the crimes were geographically remote from the actual fighting.¹⁷²

179. The Chamber further erred in finding that ‘the alleged war crimes whose victims were captured outside Afghanistan fall outside the Court’s jurisdiction due to the lack of a nexus with an internal armed conflict’.¹⁷³ It also erroneously held that ‘the relevant nexus between the conflict and the alleged criminal conducts required by the Statute is only satisfied when the victims were captured within the borders of Afghanistan’.¹⁷⁴

180. The Statute, Rules or Elements of Crimes do not require that the victim must have been captured on the territory where the armed conflict is taking place for the Court to be able to exercise jurisdiction. Capture of the victim on the territory of the armed conflict is not a precondition to the exercise of jurisdiction. Such a limitation constitutes a legal error.

181. The Chamber erroneously relied upon a part of common Article 3 to the Geneva Conventions, which provides that ‘[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.’¹⁷⁵ The Chamber ruled that ‘[b]oth the wording and the spirit of common article 3 to the Geneva Conventions are univocal in confining its territorial scope within the borders of the State where the hostilities are occurring’.¹⁷⁶ It cited no support for this interpretation. The Chamber also failed to clearly articulate why it was relying on common article 3. Violations of common article 3 are not *per se* crimes under the Statute.

182. The Chamber’s reliance on common article 3 is inapposite. The wording of common Article 3 expressly provides that, while there must be a conflict ‘in the territory of’ one of the High Contracting Parties, certain acts, including torture, ‘remain prohibited at any time and *in any place whatsoever*’ (emphasis added). As for the spirit of common article 3, the International Court of Justice confirmed that it reflects ‘elementary considerations of humanity’.¹⁷⁷ The ICTY Appeals Chamber has held that common article 3 applies ‘outside the narrow geographical context of the

¹⁷² See Bemba TC Judgment, para. 144, citing ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al.*, ‘Judgement’, 12 June 2002, IT-96-23/1-A, para. 57; and ICTY, Appeals Chamber, *Prosecutor v. Stakic*, ‘Judgement’, 22 March 2006, para. 342.

¹⁷³ Decision, para. 55.

¹⁷⁴ Decision, para. 53.

¹⁷⁵ Decision, para. 53.

¹⁷⁶ Decision, para. 53.

¹⁷⁷ International Court of Justice, *Nicaragua v. United States*, 1986, para. 218.

actual theatre of combat operations.’¹⁷⁸ The United States Supreme Court rejected a narrow reading of the scope of common article 3. Notably, it did not confine ‘its territorial scope within the borders of the State where the hostilities are occurring’, as the Chamber did.¹⁷⁹ The United States Supreme Court instead confirmed that the fair trial guarantees of common article 3 apply to persons detained in Guantanamo Bay (geographically remote from the actual fighting), and noted that ‘the scope of [common article 3] must be as wide as possible’.¹⁸⁰ Common article 3, then, is a set of minimum standards of broad scope which applies to any person captured anywhere, provided there is a nexus with the armed conflict.

183. If upheld on appeal, the Chamber’s narrow interpretation of torture would have the effect of limiting the Court’s jurisdiction over torture. This would be inconsistent with the *jus cogens* nature of the prohibition against torture. The ICTY Trial Chamber in *Furundžija*, in a passage subsequently quoted with approval by the UK House of Lords in *Pinochet*,¹⁸¹ said:

Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force [...] Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international

¹⁷⁸ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’, 2 October 1995 (‘Tadic Jurisdiction AC Judgement’), para. 69.

¹⁷⁹ Decision, para. 53.

¹⁸⁰ United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), relying on *inter alia* GCIV Commentary 51 (‘[N]obody in enemy hands can be outside the law’); U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, *Law of War Handbook*, (2004), p. 144 (Common Article 3 ‘serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’), citing International Court of Justice, *Nicaragua v. United States*, 1986, para. 218; *Tadic Jurisdiction AC Judgement*, para. 102.

¹⁸¹ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, at pages 383-384.

community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.¹⁸²

184. The Chamber has given no indication that it would depart from its restrictive interpretation of the Court's jurisdiction over torture and related crimes, if this matter is remanded to it by the Appeals Chamber. In respect of allegations of the infliction of torture on the territory of States Parties other than Afghanistan, it is in the interest of the victims of those crimes, and the States Parties involved, that they have a clear ruling from the Appeals Chamber as to whether the Court can exercise jurisdiction over such crimes.

185. For these reasons, the Appeals Chamber should correct the Pre-Trial Chamber's erroneous interpretation of the Court's jurisdiction over torture and other crimes which require a nexus to an armed conflict. The Appeals Chamber should clarify that the Court's investigative jurisdiction can encompass crimes committed against persons *hors de combat* captured on the territory of Afghanistan or any other state, and subjected to severe physical or mental pain or suffering in Afghanistan or another State Party, provided that the conduct in question took place in the context of and was associated with the armed conflict in Afghanistan.

IV. RELIEF REQUESTED

186. For the reasons set out above, the Victims respectfully request the Appeals Chamber to rule that the present appeal is admissible, to reverse the Decision, and to authorise the commencement of an investigation into the situation in Afghanistan.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Dated this 30th day of September 2019
At The Hague, Netherlands, and Dublin, Ireland

¹⁸² ICTY, Trial Chamber, *Prosecutor v. Furundžija*, 'Judgement', 10 December 1998, paras. 143-146 and 154.