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THE APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Victims' Consolidated Response to the Observations by the Cross-Border Victims and the *Amici Curiae*

Source: **Legal Representatives of Victims**

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

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I. INTRODUCTION

1. The legal representatives of 82 Afghan victims ('Victims') and two organisations submit this response to the observations made by cross-border victims[1] and the *amici curiae*,[2] in accordance with the Appeals Chamber's 'Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims' ('Decision on Participation').[3]
2. The Victims are grateful for the thoughtful written submissions presented by the *amici curiae* and the cross-border victims. They largely support the arguments made by the groups of victims in this case, as well as by the Prosecution, on the errors contained in the Impugned Decision, and in particular on Pre-Trial Chamber II's interests of justice assessment.
3. The Victims therefore agree with many of the arguments presented by the *amici curiae* and the cross-border victims, and have confined this response to issues where the Victims

[1] Victims, 'Submissions on behalf of victims of cross border aerial bombardment', ICC-02-17, 15 November 2019 ('Cross-border victims observations').
[2] Kate Macintosh and Goran Sluiter, 'Amicus Curiae Observations by Kate Macintosh and Goran Sluiter', ICC-02/17, 15 November 2019 ('Kate Macintosh and Goran Sluiter Observations'), Nina H.B. Jorgensen, 'Amicus Curiae Observations on behalf of Former Chief Prosecutors David M. Crane, Benjamin B. Ferencz, Richard J. Goldstone, Carla Del Ponte, and Stephen J. Rapp', ICC-02/17, 15 November 2019 ('Former Prosecutors Observations'); Armanshahr/OPEN ASIA, International Federation for Human Rights, Afghanistan – Transitional Justice Coordination Group, European Center for Constitutional and Human Rights, Human Rights Watch, No Peace without Justice, Women's Initiatives for Gender Justice, '*Amicus Curiae* observations', ICC-02/17, 15 November 2019 ('NGOs Observations'); Amnesty International, *'Amicus curiae* observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence', ICC-02/17, 15 November 2019 ('Amnesty Observations'); Queen's University Belfast Human Rights Centre, 'Queen's University Belfast Human Rights Centre as amicus curiae on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019', ICC-02/17, 15 November 2019 (QUB Observations'); Professor Dr. Dr. hc.c. Kai Ambos and Dr. Alexander Heinze, 'Written Submissions in the Proceedings Relating to the Appeals Filed 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' Issued on 12 April 2019 (ICC-02/17-33) and Pursuant to 'Decision on the participation of *amici curiae,* the Office of Public Counsel for the Defence and the cross-border victims issued on 14 October 2019 (ICC-02/17-97); Jennifer Trahan, 'Observations by Professor Jennifer Trahan as *amicus curiae* on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019, ICC-02/17, 15 November 2019; Professor Gabor Rona, 'Observations of Professor Gabor Rona on the Pre-Trial Chamber's Conclusion that Events Beyond the Territory of Afghanistan Lack Sufficient Nexus to the Armed Conflict There for Purposes of Application of Rome Statute War Crimes', ICC-02/17, 14 November 2019 ('Gabor Rona Observations').
[3] Appeals Chamber, 'Decision on the participation of *amici curiae,* the Office of Public Counsel for the Defence and the cross-border victims', ICC-02/17 OA OA2 OA3 OA4, 24 October 2019.

believe that further submissions will assist the Appeals Chamber in the proper determination of the issues in dispute.

II. SUBMISSIONS

No *amicus curiae* takes the view that the victims should not be permitted to appeal a decision refusing authorisation of an investigation

4. The *amici curiae* were requested by the Appeals Chamber to familiarize themselves with the appeals briefs and responses in the present appeals.[4] None of the written submissions support the Prosecution's position that the Appeals Chamber should not recognize the standing of victims to bring an appeal against a decision denying authorisation of an investigation into the crimes committed against them.
5. Queen's University Belfast ('QUB') stated that it is 'not suggesting that victims have a stand-alone right to appeal' and notes English law to the effect that victims do not have 'an unlimited right to appeal or review'.[5] The Victims agree.
6. None of the victims who have appealed have requested the Appeals Chamber to recognize a stand-alone right of appeal for victims generally, nor for an unlimited right of appeal. They argue that, as one of the two parties (the other being the Prosecutor) involved in the Article 15(3) proceedings before the Pre-Trial Chamber concerning authorization, they should be permitted to file an appeal under Article 82(1)(a) of the Statute.
7. QUB agrees that there are moments, the opening of an investigation being one of them, where victims have a particular interest and, on that basis, should be able to seek an effective remedy. QUB states:

> There are key junctures that for the purposes of transparency and confidence in the procedure and decision making of the Court merit an opportunity for victims to appeal a decision *outside of* reparations proceedings. Decisions not to commence an investigation being *made by the Chambers* should allow

[4] Decision on Participation, paras. 34 and 40.
[5] QUB Observations, para. 19.

> victims' standing to request a review in order to ensure an inclusive decision-making process that will impact those most affected by international crimes.[6]

8. Amnesty International also supports the view that victims have standing to appeal decisions denying authorization to investigate 'in their own right'.[7]
9. Human Rights Watch, FIDH, and other highly distinguished human rights NGOs ('NGOs'), many of whom helped establish the Court and have supported it since its inception, also argue that a legal basis for such standing exists in Article 82 of the Statute.[8]

The *amici curiae* do not support the Prosecution's 'floodgates' argument

10. None of the submissions which have been received from the *amici curiae* support the Prosecution's repeatedly-expressed argument that recognizing a right of victims to appeal a decision to deny authorisation to commence an investigation would 'encourage speculative appeals by a variety of actors, in a fashion which may be detrimental to the fair and expeditious functioning of the Court' (referred to hereafter as the 'floodgates' argument).[9]
11. To the contrary, Amnesty International said that it 'strongly supports the compelling arguments made in the victims' appeal briefs and in a partially dissenting opinion by Judge Antoine Kesia-Mbe Mindua interpreting Article 82 of the Rome Statute to grant victims standing to appeal the Impugned Decision in their own right, without having to rely on the Prosecution to appeal.'[10]
12. The NGOs have also rejected the Prosecution's floodgates argument:

> The Prosecutor argues that granting victims the right of appeal 'would open the door to a significantly more cumbersome judicial process and that meaningful participation for victims cannot equate to 'the need for victims to have procedural rights as a "party" to the litigation.'

[6] QUB Observations, para. 20. Emphasis added.
[7] Amnesty Observations, para. 17.
[8] NGOs Observations para. 8.
[9] Prosecution, 'Consolidated Prosecution Response to the Appeal Briefs of the Victims', ICC-02/17, 22 October 2019 ('Prosecution's Response to Victims' Appeal Briefs'), paras. 50-55.
[10] Amnesty Observations, para. 17.

> However, the Amici would like to impress upon the Appeals Chamber the truly exceptional nature of the present proceedings. As the Prosecution states 'proceedings under article 15(3) and (4) … will be most frequently resolved in favour of investigation.' Therefore, the probability that victims will seek recourse to appeal a decision in the context of article 15(3) and (4) of the Rome Statute in the future is extremely low.[11]

13. The Victims agree with the concern expressed by QUB that victims 'must be able to demonstrate a *prima facie* personal interest in the crimes within the preliminary examination or situation, are brought in good faith and not vexatious claims.'[12] This concern of ensuring that 'strangers in the proceedings' are not permitted to participate is related to the Prosecution's floodgates argument. This concern is effectively addressed by proper application of the principle of standing.
14. The Prosecution has previously presented to the Appeals Chamber a fair and balanced summary of the principle of standing, based on a decision of the United States Supreme Court. The Prosecution argued in *Lubanga*:

> Standing refers to the interest a person must have in order to obtain the right to participate in a particular step in a proceeding. The interest must be sufficient and it must be real rather than hypothetical. It also requires a recognized procedural status in the case. Persons who are not parties or participants in a case before the Court cannot claim standing to appeal decisions rendered in that case on the basis that such decision may also adversely affect their interest in other cases or proceedings. There are strong, practical reasons for limiting the scope of participation, as without restrictions on who can participate in a given procedure, Courts would be flooded with

[11] NGOs Observations para. 7.
[12] QUB Observations, para. 20.

> submissions by persons who have only a passing or general interest in the issue but no clear status and cognizable personal interest at stake.[13]

15. The Prosecution relied on a test by the United States Supreme Court in *Lujan* that identifies three requirements that collectively establish sufficient personal interest to confer standing:

> (i) the plaintiff must have suffered an "injury in fact," or, an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent", not "conjectural" or "hypothetical"; (ii) there must be a causal connection between the injury and the conduct complained of; and (iii) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision".[14]

16. The Victims satisfy this test. First, the victims have recognized status. They participated in the Article 15(3) process, which required them to identify themselves to the Registry, and to describe the harm that they suffered, and the party that they believed to be responsible for that harm. As the Appeals Chamber has noted, Rule 50(3) of the Rules 'highlights the importance of victim participation in the procedure for authorisation of investigations'.[15] The Victims have suffered serious crimes in Afghanistan that allegedly involve anti-government groups such as the Taliban, Afghan government forces, United States forces and other international forces. At issue are their rights to truth, to justice, reparation, and an effective remedy. The decision to deny investigation represents a concrete, actual threat to those interests which is not conjectural or hypothetical: those rights will be totally extinguished without active investigation by the Prosecution. A favourable decision for the Victims would require the Prosecution to use all powers conferred upon it in order to ensure an effective investigation and prosecution, which is the only avenue for redress available,

[13] Prosecution, *Prosecutor v. Lubanga*, 'Prosecution's Submissions further to the Appeals Chamber's 'Directions on the conduct of the appeal proceedings'', para. 34.
[14] Prosecution, *Prosecutor v. Lubanga*, 'Prosecution's Submissions further to the Appeals Chamber's 'Directions on the conduct of the appeal proceedings'', para. 35.
[15] Decision on Participation, para. 39.

given the inability or unwillingness of the Governments of Afghanistan and the United States to investigate.

17. The *Lujan* decision cited above merits careful consideration. In that case, the U.S. Supreme Court considered a case concerning applications by wildlife conservation and other environmental organizations, who sought a declaratory judgment that a new regulation was invalid. The litigation concerned whether those environmental non-governmental organisations had standing by establishing, *inter alia*, that they had suffered a concrete and particularized, actual or imminent invasion of a legally protected interest. The Court ruled that they had not. The test, as set out by the U.S. Supreme Court, is:

> The irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly. . . trace[able] to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [16]

18. The application of a reasonable, proportionate test for standing such as this test deals adequately with any concerns raised by the 'floodgates argument', and to the possibility of vexatious claims that QUB refers.
19. In this context, it must be emphasised that the Prosecution's concerns about opening up the appeals process to 'inter-governmental organisations, NGOs, witnesses', as well as 'counsel, amicus curiae, even members of the public who might nurse a grievance'[17] simply has no foundation under the Statute.
20. The Statute is already constructed in a way so as to limit the intervention of strangers to the proceedings. The Statute recognizes only four principal actors: the Prosecutor; the

[16] *Lujan*, United States Supreme Court, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), Internal citations omitted.
[17] Prosecution's Response to Victims Appeal Briefs, para. 52.

defence (whether as suspect, accused, or convicted person); States (States Parties, States which have accepted the Court's jurisdiction, and States acting collectively through the UN Security Council (on behalf of all UN Member States, in accordance with Article 24 of the UN Charter) or the Assembly of States Parties); and victims. Each has different participatory rights, depending on the stage of the proceedings and the matter at issue. Other actors who wish to participate can do so, but only when expressly permitted, as *amici curiae* in accordance with Rule 103.

21. There is no reasonable basis to believe that recognizing the standing of victims who have participated in an Article 15(3) to appeal a Pre-Trial Chamber decision to deny investigation will result in a rise in frivolous or vexatious litigation by strangers to the proceedings, or will be otherwise detrimental to the fair and expeditious functioning of the Court.

Standing of victims to request a Chamber to review a decision to cease active investigation has been recognised by the Court, with no detrimental results on expeditiousness

22. QUB referred to a finding by the English Court of Appeal that failure to allow victims to review a decision not to prosecute is disproportionate, as a decision not to prosecute represents a final decision to the victims.[18] QUB also discussed whether victims have standing to request the Pre-Trial Chamber to conduct a review where a decision has been made to not prosecute or to commence an investigation.[19]
23. The standing of victims to request a Pre-Trial Chamber to review a decision by the Prosecutor to cease active investigation has already been recognised. The victims of the crimes charged in the *Kenyatta* case, following the collapse of that case and the cessation of active investigation by the Prosecutor, made an application to the Pre-Trial Chamber for a review. They argued that the Prosecution had *de facto* ceased to investigate in the situation in Kenya on the grounds of the interests of justice (as there was no other legal basis for its cessation of active investigation). They asked the Pre-Trial Chamber to review

[18] QUB Observations, para. 19.
[19] *Ibid.*

the Prosecution's decision to cease active investigation, pursuant to Article 53(3)(b) of the Statute.[20]

24. The Prosecution asked the Pre-Trial Chamber to dismiss the victims' application *in limine*, on the ground that that the victims lacked standing to request the Chamber to exercise its discretion to carry out an interests of justice review.[21] In response, the victims argued that they did have standing, and cited the Prosecution's own test, based on that in *Lujan*.[22]
25. The Pre-Trial Chamber rejected the Prosecution's application to dismiss the victims' application *in limine*, as well as its argument that the victims had no standing. The Chamber accepted that the victims may request the Pre-Trial Chamber to review a decision not to investigate or prosecute.[23] The Chamber ultimately declined to carry out a review as it accepted the Prosecution's assurance that it had not ceased investigation in Kenya.[24]
26. Since that decision, nearly four years ago, recognizing the standing of victims to challenge a prosecutorial decision to cease active investigation, it appears that there has been not one similar application by victims for a Pre-Trial Chamber to review a situation where the Prosecution is not actively carrying out an investigation. This again demonstrates the Prosecution's overstatement of the 'floodgates argument'.
27. Recognising the standing of victims to seek judicial intervention at critical moments of the proceedings, where their rights are at extreme peril, such as a decision to deny investigation, is consistent with the centrality afforded to victims in the Rome Statute.

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[20] Victims, 'Victims' request for review of Prosecution's decision to cease active investigation', Situation in the Republic of Kenya, 3 August 2015.
[21] OTP, 'Prosecution's application to dismiss in limine the Victims' request for review of Prosecution's decision to cease active investigation, 25 August 2015.
[22] Victims, 'Victims' response to Prosecution's application to dismiss in limine the Victims' request for review', 15 September 2015, para. 8.
[23] The Pre-Trial Chamber held: "contrary to the submissions of the Prosecutor, the Chamber considers that one of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its *proprio motu* powers with respect to a specific issue affecting the victims' personal interests. … In the present case, the Chamber recognises that the Victims have a personal interest that those responsible for the alleged crimes against humanity committed in Nakuru between 24 and 27 January 2008 and in Naivasha between 27 and 28 January 2008 and which gave rise to the harm they allegedly suffered be held accountable. Therefore, the Chamber considers it appropriate to entertain the merits of the request, at least to the extent required to determine whether the circumstances at hand warrant judicial proceedings within the context of the present situation." Pre-Trial Chamber, 'Decision on the "Victims' request for review of Prosecution's decision to cease active investigation"', paras. 7 and 8.
[24] *Ibid*., paras. 27-28.

No *amicus curiae* contests that the Impugned Decision is a decision with respect to jurisdiction

28. The NGOs agree with Judge Eboe-Osuji that 'by general linguistic usage, the term 'jurisdiction' would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court, as a matter of its mandate.'[25] They therefore agree that the Impugned Decision is a decision with respect to jurisdiction and appealable under Article 82(1)(a) of the Statute.
29. In respect of torture and associated war crimes, Professor Gabor Rona has made detailed submissions concerning the errors in relation to territorial jurisdiction in the Impugned Decision, and has suggested 'reversal of the PTC's jurisdictional determination that conduct occurring beyond the boundaries of Afghanistan are necessarily beyond the scope of the Rome Statute's war crimes provisions.'[26]
30. Correcting errors concerning the Court's jurisdiction over Rome Statute crimes at an early stage of the proceedings is consistent with the approach of the Appeals Chamber in *Ntaganda*, which twice emphasized that 'issues as to the Court's jurisdiction should be resolved as early as possible in the proceedings'.'[27]
31. If the Appeals Chamber does not correct the Pre-Trial Chamber's errors on the territorial scope of the crime of torture and associated war crimes (and on the temporal, territorial and substantive scope of the Court's investigative jurisdiction in Afghanistan) this would be highly problematic. The Prosecution, or another party, might at a later stage of the proceedings seek appellate resolution on these issues, which might require the Prosecutor to begin afresh with an investigation into matters that it should have been investigating from the outset. This would be a poor use of the Court's limited resources. As the Appeals Chamber emphasized in *Ntaganda,* "resolution of such questions at an early stage is also important in terms of enhancing the efficiency of proceedings".[28]

[25] Partially dissenting opinion of Judge Eboe-Osuji, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, para. 19, ICC-01/13-98-Anx, 2 September 2019.
[26] Gabor Rona Observations, para. 16.
[27] Appeals Chamber, *Prosecutor v. Bosco Ntaganda,* 'Judgement on the appeal of Mr. Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"', ICC-01/04-02/06 OA2, 22 March 2016 ('Ntganda Appeals Judgement'), *see* paras. 18 and 41.

32. In *Ntaganda*, the Appeals Chamber addressed under Article 82(1)(a) of the Statute an issue similar to the issue presented here in respect of torture: the Court's jurisdiction over a specific crime. It concerned the Court's jurisdiction over rape and sexual slavery of child soldiers in the same armed group as the perpetrator. The Chamber ruled:

> In the context of the present case, the Appeals Chamber finds that the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature. If the Trial Chamber were to determine that the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute cannot, as a matter of law, cover rape and sexual slavery of child soldiers in the same armed group as the perpetrator, the necessary implication would be that article 8 (2) (e) (vi) of the Statute per se excludes from its ambit the acts of rape and sexual slavery against child soldiers as charged in this case … the appropriate result of such a legal finding would be that the Court lacks jurisdiction *ratione materiae* to prosecute the alleged acts as war crimes.[29]

33. The Appeals Chamber held that 'the question of whether the Court has subject-matter jurisdiction cannot be confined exclusively to an examination of whether the Prosecutor has successfully recited the elements of a crime listed under article 5 of the Statute' and 'that challenges, which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges.'[30]
34. It held that the decision in question was therefore one with respect to jurisdiction under Article 82(1)(a) of the Statute.
35. Here, the Appeals Chamber is seised *inter alia* of what are in substance challenges to the Court's jurisdiction over a specific crime. In particular, the question is whether 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. This is

[29] Ntaganda Appeals Judgement, para. 40.
[30] Ntaganda Appeals Judgement, para. 39.

a similar to the challenge in *Ntaganda* as it concerns the Court's jurisdiction over a specific crime. The matter is therefore appropriate for appeal in accordance with Article 82(1)(a), and should be resolved at this early stage of the proceedings.

No *amicus* supports the Prosecution's argument that right to a remedy is opposable to national jurisdictions only, rather than the Court

36. Numerous *amici curiae* have made submissions on the rights of victims under human rights law. For example, the NGOs note that international human rights law recognises that victims have a right to a prompt, thorough, independent and impartial investigation. Furthermore the NGOs also argue that the Pre-Trial Chamber failed to consider the duty to gather and document relevant evidence, the victims' right to truth, the right to access justice, and the right to a remedy, which 'recognises the inherent value to victims of a prompt, thorough, independent and impartial investigation.'[31]
37. Katie Mackintosh and Goran Sluiter note that when these rights are transferred to the International Criminal Court, they must be adapted, and that '[m]uch of the necessary adaptation of the victims' right to an investigation, and the corresponding duty to investigate, to this context occurs through the application of the admissibility criteria, screening out cases which are being properly investigated at the national level as well as those which are of insufficient gravity.'[32]
38. They add that 'To the persuasive authority of international human rights jurisprudence we can add common sense: the use of anticipated complexity of investigations to justify failure to comply with the obligation to investigate is open to abuse and could arbitrarily deprive victims of their right to a remedy. It could render this right theoretical and illusory.'[33]
39. None of the *amici curiae* support the Prosecution's arguments that the 'the internationally recognised right to a remedy is opposable to *national* jurisdictions, rather than the Court, which is merely one means by which States give effect to their obligations in this respect.'[34]
40. To argue, in effect, that the Victims' right to an effective remedy should be addressed to Afghanistan is misconceived. It is uncontested that States have primary responsibility to

[31] NGOs Observations para. 22
[32] Mackintosh and Sluiter Obervsations, para. 26
[33] Mackintosh and Sluiter Observations, para. 33.
[34] Prosecution's Response to Victims' Appeal Briefs, para. 48.

exercise jurisdiction over serious crimes under international law. But their repeated failure to do so is why the International Criminal Court exists. The victims in the present situation cannot pursue their right to an effective remedy in Afghanistan. As Pre-Trial Chamber II concluded, the situation in Afghanistan is admissible because relevant authorities are unwilling or unable to genuinely investigate and prosecute at the domestic levels.[35] The only forum before which they can pursue their right to an effective remedy is this Court.

Transparency by the Prosecution towards all victims is important

41. The cross-border victims' submissions refer repeatedly to the problem of the Prosecution failing to keep them properly informed concerning its intentions regarding the crimes committed against them.[36]
42. In its most recent strategic plan, covering 2019-2021, the Prosecution stated that it would 'continue to develop its ability to effectively communicate with its stakeholders, with the victims and affected communities, and the general public. The Office recognises the importance of timely and clear communications so as to maximize transparency and ensure that its stakeholders, including the victims and affected communities, and the general public have an accurate and up-to-date picture of the Office's actions and decisions, including the progress of its investigations and prosecutions when appropriate.'[37]
43. The Prosecution also said that it would 'review and strengthen its capacities regarding decision-making, its interaction with victims, its communications with victims and their communities, and management of expectations, as well as other victim-related issues throughout all of its activities, from preliminary examination and through to the end of its engagement in a situation country'.[38]
44. The Victims encourage the Prosecution to take meaningful steps to significantly improve its interaction with victims. They endorse the views expressed by the cross-border victims concerning the importance of ensuring that 'the Prosecutor provide clarity as to her

[35] Impugned Decision, paras. 72-79, and 96.
[36] *See* for example Cross-border victims' observations paras. 15 and 16.
[37] OTP Strategic Plan 2019-2021, page 28.
[38] OTP Strategic Plan 2019-2021, para. 34.

intended approach with regards their complaints and whether and to what extent she intends to pursue an investigation into the crimes they have suffered.'[39]

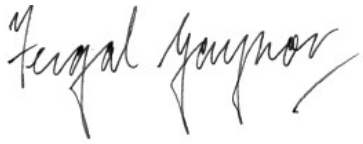
45. The preliminary examination of the Afghanistan situation lasted over a decade. This resulted in a considerable degree of frustration within victim communities. Against this background, it is critically important that the Prosecution takes genuine steps to keep victims meaningfully, candidly and regularly informed.

Mr. Stephen Rapp and Ms. Nina Jørgensen's request to appear at the hearing should be granted

46. The Appeals Chamber expressly invited any interested States to submit observations and indicate whether they will attend the hearing.[40] The only State that accepted this invitation to participate is Afghanistan.[41]
47. One *amicus* has made public statements which suggest that it represents the 'the United States and its interests.'[42] However, it appears that no *amicus* has been authorised to formally represent the United States in the current proceedings.
48. Mr. Stephen Rapp was the United States Ambassador at Large for War Crimes Issues from September 2009 to December 2015, as well as the Chief of Prosecutions at the ICTR from 2005 to 2007, and SCSL Chief Prosecutor from 2007 to 2009. Mr. Rapp and Ms. Nina Jorgensen have requested leave to participate in the hearing.[43] In view of their considerable experience in relation to the matters on appeal, the Victims support their request to appear.
49. The Victims also fully supports all efforts to ensure that the oral proceedings are focused on the matters in dispute in this appeal.

[39] Cross-border victims' observations, para. 39.
[40] Appeals Chamber, 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters;, ICC-02/17 OA OA2 OA3 OA4, 27 September 2019, para. 4.
[41] The Government of the Islamic Republic of Afghanistan, 'Application by the Government of the Islamic Republic of Afghanistan to Extend the Time Limit for Filing Submissions in the Appeal proceedings and to Make Oral Submissions at the Hearing of the Appeal', ICC-02/17, 25 November 2019.
[42] *See*, for example, this ACLJ undated press release relating to the upcoming hearings before the Appeals Chamber: https://aclj.org/us-military/breaking-aclj-fights-for-us-soldiers-under-attack-at-international-criminal-court
[43] Former Prosecutors' Observations, para. 19.

Respectfully submitted,



Fergal Gaynor

Nada Kiswanson van Hooydonk

Dated this 29th day of November 2019

In The Hague and Vence, France