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**International
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Court**

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No.: **ICC-02/17**
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THE APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

with Confidential Annex I

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'

Source: **Legal Representatives of Victims**

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

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence**Legal Representatives of Victims**

Fergal Gaynor
Nada Kiswanson van Hooydonk

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for Participation/Reparation****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States Representative****Amicus Curiae****REGISTRY****Registrar**

Peter Lewis, Registrar

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill, Chief

Detention Section**Victims Participation and Reparations Section**

Philipp Ambach, Chief

Other

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 notice of appeal pursuant to Article 82(1)(a) of the Rome Statute ('Statute'), Rule 154 of the Rules of Procedure and Evidence ('Rules'), and Regulation 64 of the Regulations of the Court ('Regulations'). The Victims are victims of crimes allegedly involving: (i) anti-government groups including the Taliban; (ii) Afghan armed forces; and (iii) United States armed forces.
2. Regulation 64 of the Regulations requires that a notice of appeal shall state *inter alia* whether the appeal is directed against the whole decision or part thereof, the specific provision of the Statute pursuant to which the appeal is filed, and the relief sought.
3. The Victims appeal Part IV, V.2.I and Part VII of the Pre-Trial Chamber'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 The Decision pertains directly to jurisdiction.
4. Confidential annex I provides the Appeals Chamber with letters of appointment of counsel by the Victims and two organizations. Annex I describes the approach adopted by the legal representatives in obtaining the letters of appointment in light of the current security situation in Afghanistan.
5. As the Decision is exceptionally detrimental to the Victims' rights, the Victims have also filed on 10 June 2019 before the Pre-Trial Chamber request for leave to appeal the Decision, pursuant to Article 82(1)(d) of the Statute, in order to fully preserve their rights. The Victims respectfully assure the Appeals Chamber, the Pre-Chamber, and the Prosecution of their willingness to work constructively in order to ensure that any appeal of the Decision is heard expeditiously.
6. For reasons that will be provided in their appeal brief, the Victims will request the Appeals Chamber, in accordance with Article 83(2) of the Statute, to reverse the Decision and to authorize the commencement of an investigation into the situation in Afghanistan.

¹ ICC-02/17-33. 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.

II. PROCEDURAL BACKGROUND

7. On 30 October 2017, the Office of the Prosecutor ('Prosecution') informed the Presidency of its decision to request judicial authorisation to commence an investigation into the situation in Afghanistan pursuant to Regulation 45 of the Regulations.²
8. On 9 November 2017, Pre-Trial Chamber III noted that '[v]ictims may make representations to the Pre-Trial Chamber' in accordance with Article 15(3) of the Statute. Pre-Trial Chamber III ordered the Victims Participation and Reparations Section ('VPRS') to receive and collect victims' representations and transmit victims' forms to it.³
9. On 20 November 2017, the Prosecution submitted a 'Request for authorisation of an investigation pursuant to article 15' ('Prosecution's request') to Pre-Trial Chamber III.⁴ On the same day, the Prosecution issued a public notice informing victims of their right to make representations on whether an investigation on the alleged crimes should be opened.⁵
10. Between 20 November 2017 and 31 January 2018, the Court received representations on a rolling basis.⁶ A total of 699 representation forms were transmitted to Pre-Trial Chamber III on behalf of 6,220 individuals, 1,690 families, several millions of victims including 26 villages and one institution.⁷ The Victims were among those that submitted representation forms.
11. On 20 February 2018, the Registry submitted its final report on victims' representations to Pre-Trial Chamber III.⁸
12. On 12 April 2019, Pre-Trial Chamber II ('Pre-Trial Chamber') delivered the Decision, in which it noted that 680 out of the 699 victims' representations welcomed the prospect of an investigation.⁹ It also found, based *inter alia* on the victims' representations,¹⁰ that the jurisdiction and admissibility requirements were met. Notwithstanding, the Pre-Trial Chamber

² Presidency, 'Annex I to the Decision assigning the situation in the Islamic Republic of Afghanistan. Notice pursuant to Regulation 45 of the Regulations of the Court', 3 November 2017, ICC-02/17-1-Anx I.

³ Pre-Trial Chamber III, 'Order to the Victims Participation and Reparations Section concerning Victims' Representations', 9 November 2017, ICC-02/17-6.

⁴ The Prosecutor, 'Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'', 7 June 2019, ICC-02/17-7-Red.

⁵ The Office of the Prosecutor, 'Public Notice of the ICC Prosecutor', 20 November 2017.

⁶ Decision, para. 9.

⁷ Decision, para. 27.

⁸ Registry, 'Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017', 20 February 2018, ICC-02/17-29.

⁹ Decision, para. 87.

¹⁰ Decision, para. 43.

decided that an investigation into the situation in Afghanistan would not serve the interests of justice and rejected the Prosecution's request. The Pre-Trial Chamber ordered the VPRS to notify victims that made representations to the Pre-Trial Chamber of the Decision.¹¹

13. On 31 May 2019, the 'Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua ('Separate Opinion') was issued.¹² Representatives of the Victims received an email from VPRS informing them of the Separate Opinion on 4 June 2019.
14. On 7 June 2019, the Prosecution requested leave to appeal the Decision.¹³ The Victims support that request.

III. PRELIMINARY MATTERS

i. Time limit for submission of a notice of appeal

15. The victims submit this notice of appeal within five days of the date of notification of the Separate Opinion.
16. Time limits relating to separate opinions to decisions issued by a Chamber are not addressed in the Statute, the Rules of Procedure, or the Regulations. Rule 154 of the Rules of Procedure and Evidence sets out the procedure to appeal a decision pursuant to Article 82(1)(a) of the Statute. According to Rule 154, a party must file its appeal no later than five days from the date upon which the party filing the appeal is notified of the decision.
17. Article 74(5) applies to decisions by Trial Chambers. The principle it encompasses is that a 'decision' includes *all* the views of the judges. It would be unfair and unreasonable to require parties wishing to appeal a decision by a Pre-Trial Chamber to request leave to do so before all views have been notified. It is after consideration of all views that parties have a full understanding of the decision and, on that basis, are able to make a fully informed decision as to whether to seek leave to appeal and to formulate the appealable issues.
18. It would be unfair and unreasonable to require parties wishing to appeal a decision by a Pre-Trial Chamber to decide whether to do so before all majority and minority views have been notified to them. It is after consideration of all views that parties have a full understanding of

¹¹ Decision, page 32.

¹² 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').

¹³ ICC-02/17-34, 7 June 2019.

the decision and, on that basis, are able to make a fully informed decision as to whether to appeal.

19. The Appeals Chamber in *Prosecutor v. Saif Islam Al Gaddafi* noted that “[f]airness and due process dictate that Mr Gaddafi should be provided with an opportunity to consider the Minority Opinion before filing his appeal brief in order for him to be able to properly formulate his grounds of appeal.”¹⁴ This further stresses the point that a party cannot be required to seek leave to appeal without having been notified of the decision in full.
20. In the present case, the Separate Opinion clarifies central aspects of the Decision. In particular, Judge Mindua set out in detail his views concerning two issues of core relevance to this appeal: the Pre-Trial Chamber’s competence to review the Prosecutor’s ‘interests of justice’ assessment where the Prosecutor has decided that all conditions for an investigation are met;¹⁵ and the interpretation of the ‘interests of justice’.¹⁶ Both issues are of considerable importance but were dealt with briefly in the Decision itself.¹⁷ The Separate Opinion is therefore of significant assistance to understanding the Chamber’s view on two important issues. Furthermore, Judge Mindua set out his disagreement with the Chamber’s assessment of the scope of an authorisation.¹⁸ His views have assisted the victims’ representatives presenting this notice in deciding whether to appeal.
21. The time limit for submitting a notice of appeal should therefore run from the notification of the filing of the Decision as a whole, including the Separate Opinion. This interpretation is consistent with the position taken by Judge Mindua, who acknowledged, at the time that he issued the Separate Opinion, that ‘the Prosecutor may appeal’ the Decision.¹⁹
22. For these reasons, the Victims respectfully submit that the time limit to submit a notice of appeal of the Decision runs from the date of notification of all separate opinions to the Decision.

¹⁴Appeals Chamber, ‘Decision on Mr Saif Al-Islam Gaddafi’s ‘Application for extension of time to file the Appeal Brief’, 18 April 2019, ICC-01/11-01/11-668-Corr OA 8, para. 6.

¹⁵ Separate Opinion, paras. 17-23.

¹⁶ Separate Opinion, paras. 24-50.

¹⁷ Decision, paras. 87-96.

¹⁸ Separate Opinion, paras. 4-15.

¹⁹ Separate Opinion, para. 50.

ii. The Victims' standing to appeal

23. Article 82(1)(a) of the Statute enables 'either party' to seek leave to appeal 'a decision with respect to jurisdiction or admissibility.'
24. The expression 'either party' is ambiguous at the pre-authorisation stage as there are no two obvious parties. It is inappropriate 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 Chamber during the Article 15 process were the Prosecution and the victims.²⁰ To add to the ambiguity, Rule 155(2) of the Rules, which relates to Article 82(1)(a), refers to 'all parties' rather than 'both parties'.
25. The Statute does not define 'party'. Nor do the Elements of Crimes, the Rules, or the Regulations.²¹ The Victims submit that the term should, in the present exceptional circumstances, where an entire investigation has been denied notwithstanding affirmative findings on jurisdiction and admissibility, be interpreted to include victims.
26. Article 81 of the Statute explicitly allows appeals by 'the Prosecutor' and or 'the convicted person'. As Article 82(1) is not confined to the Prosecutor and Defence, the term 'party' in Article 82(1) can encompass a broader range of participants in the proceedings, as the circumstances require.
27. This interpretation is consistent with the Court's jurisprudence. Pre-Trial Chamber II granted Jordan leave to appeal a decision in accordance with Article 82(1)(d)²² and the Prosecution did not object.²³ The Appeals Chamber heard and ruled on the merits of an appeal by the Government of Côte D'Ivoire brought under Article 82(1)(a).²⁴
28. 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 that goes to the core of their interests. That is the case here. The Decision pertains directly to jurisdiction and resulted in

²⁰ This emerges from the procedural history set out in the Decision at paras. 1-14.

²¹ See Rule 155 of the Rules and Regulation 65 of the Regulations.

²² See Pre-Trial Chamber II, 'Decision on Jordan's Request for Leave to Appeal', 21 February 2018, ICC-02/05-01/09.

²³ Ibid, para. 4

²⁴ The 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"', ICC-02/11-01/12 OA, 27 May 2015.

the denial of authorisation of an entire investigation that negatively affects the prospect of justice for millions of victims.

29. The Statute recognizes that victims have a particular interest in a decision on admissibility and jurisdiction. Article 19(3) of the Statute permits victims to make observations to the Court in proceedings concerning jurisdiction and admissibility. In a recent 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.²⁵
30. The centrality of victims' interests at the pre-authorisation stage is reflected in Article 15(3) which expressly provides that, following a request by the Prosecutor to open an investigation, '[v]ictims may make representations to the Pre-Trial Chamber'.²⁶ Rule 50 further reflects the victims' standing at the pre-authorisation stage. No such standing is provided to any other person or to States. Furthermore, 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. It is also reflected 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. Such decisions have the same impact on victims as the Decision.
31. In short, the Statute recognizes that the victims have a strong interest in the process of authorizing an investigation under Article 15(3), as well as with respect to decisions on jurisdiction and admissibility and an 'interests of justice' assessment under Article 53(1)(c).
32. The Appeals Chamber has 'clarified that 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.'²⁷ The Appeals Chamber in that decision, as well as Pre-Trial Chamber I in *Myanmar*,²⁸ relied on Article 68(3) of the Statute to permit views by victims. The *Myanmar* Pre-Trial Chamber also noted that 'rule 93

²⁵ The Pre-Trial Chamber, 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-37, 06 September 2018, ('Myanmar Decision'), para. 21.

²⁶ See Rule 50(3) of the Rules.

²⁷ The 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, ICC-01/04 OA4 OA5 OA6, 19 December 2008, para 56.

²⁸ Myanmar Decision, paras. 20-21.

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.²⁹

33. On any reasonable view, the Victims should have standing to appeal. The Victims have a recognized interest to have their views taken into consideration at the pre-authorisation stage. The victims' views were communicated to the Chamber during the Article 15 process³⁰ and the Chamber acknowledged that the Victims suffered serious crimes.³¹ In addition, at issue are the Victims' rights to truth, justice, and to reparation.
34. The Decision represents a concrete, actual threat to the Victims' interests: without active investigation by the Prosecution, there can be no trials at the Court and those responsible for the crimes will not be held accountable. Furthermore, the Court will make no declaration of truth at the conclusion of any trial and reparations cannot take place in the absence of conviction. It is *only* through investigation by the Prosecution that there will be a realistic prospect of trial, and reparations. A favourable decision for the Victims on appeal would enable the Prosecution to use all powers conferred upon it by the Statute in order to ensure an effective investigation and prosecution, which 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.
35. 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 doomed to failure'.³² 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 subjects.³³ Victims have a right to a just process, and to be treated fairly, at all stages of the proceedings.³⁴

²⁹ Myanmar Decision, para. 21.

³⁰ Decision, para. 9.

³¹ Decision, paras. 80 to 86.

³² Decision, para. 90.

³³ See 'Report of the Court on the Strategy in Relation to Victims', 1 November 2009, ICC/ASP/8/45, para. 46.

³⁴ 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.

36. 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.³⁵ Victims may make representations to the Chamber concerning an Article 15 request for authorisation of an investigation.³⁶ The Court must also 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.³⁷ Moreover, 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* [...] in particular [...] victims of sexual or gender violence’ (emphasis added).
37. In respect of an appeal of a decision to stay the proceedings in a single trial, the Appeals Chamber said:
- [...] Regarding their personal interests, the Appeals Chamber finds that a decision to stay the proceedings impacts the victims’ ability to present their views and concerns and could ultimately preclude them from the opportunity to claim reparations, should the accused be convicted.³⁸
38. The impact of the Decision is far more drastic on the victims’ rights than a decision to stay the proceedings in a single trial, as it prevents proper investigation from taking place in the situation as a whole, precluding the chance that *any* trial will take place.
39. In light of the ambiguity concerning the meaning of the terms ‘either party’ in Article 82(1) of the Statute and ‘all parties’ in Rule 155(2) of the Rules, the Chamber may rely on ‘principles and rules of international law’ and internationally recognized human rights pursuant to Article 21 of the Statute.
40. United Nations (‘UN’) principles, that encapsulate customary international law, require governments to undertake thorough, prompt, and impartial investigations and they provide that victims must have equal access to an effective judicial remedy for violation of their rights.³⁹

³⁵ Rule 92(2) of the Rules.

³⁶ Article 15(3) of the Statute, and Rules 50(3) and 50(4) of the Rules.

³⁷ Article 68(3) of the Statute.

³⁸ Appeals Chamber, ‘Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Decision to Stay Proceedings’, 18 August 2010, ICC-01/04-01/06-2556 OA18, para. 9.

³⁹ See The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted on 16

41. Similarly, the UN Human Rights Committee has said that “[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”⁴⁰ 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.⁴¹
42. The Court frequently looks to jurisprudence of the European Court of Human Rights (‘ECtHR’) in resolving ambiguities in the Statute. ECtHR jurisprudence concerning victims’ rights 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,⁴² the prohibition on torture,⁴³ and the right to an effective remedy.⁴⁴
43. 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.⁴⁵
44. 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 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.⁴⁶
45. Against this backdrop of applicable international human rights and customary law, it would be ‘a result which is manifestly absurd or unreasonable’⁴⁷ 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.

December 2005, Articles 3- 4 and 11-12; United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions , adopted 24 May 1989, Article 9.

⁴⁰ United Nations Human Rights Committee, ‘General Comment 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)’, 10 March 1992.

⁴¹ See The Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted in 1991.

⁴² See ECtHR, *Akkum and Others v. Turkey*, 24 June 2005.

⁴³ ECtHR, *Biser Kostov v. Bulgaria*, 10 January 2010.

⁴⁴ See ECtHR, *Aksoy v. Turkey*, 18 December 1996.

⁴⁵ 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.

⁴⁶ Pre-Trial Chamber I, ‘Decision on Information and Outreach for the Victims of the Situation’, 13 July 2018, ICC-01/18, para. 9.

⁴⁷ Vienna Convention on the Law of Treaties, Article 32(b).

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

IV. SUBMISSIONS

iii. Appeal is against a decision with respect to jurisdiction pursuant to Article 82(1)(a) of the Statute

47. The nature of the Decision pertains directly to jurisdiction. In the Decision, the Pre-Trial Chamber found that 'all the relevant requirements are met as regards both jurisdiction and admissibility'⁴⁸ and declined to authorize the investigation on the basis of an interests of justice review.

48. The Appeals Chamber has ruled on the circumstances in which it will interfere with the discretion of a Pre-Trial Chamber in an appeal brought under Article 82(1)(a):

The function of the Appeals Chamber in respect of appeals brought under article 82 (1) (a) of the Statute is to determine whether the determination on the admissibility of the case or the jurisdiction of the Court was in accord with the law. In the case of a *proprio motu* determination under the second sentence of article 19 (1) of the Statute, the Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.⁴⁹

49. Similar considerations apply here. The Appeals Chamber's analysis should be confined to whether the Pre-Trial Chamber, in ruling that the Prosecutor cannot exercise investigative jurisdiction in the Afghanistan situation, committed an error of law, an error of fact, or a procedural error that materially affected its determination.

50. As the Victims will argue in their appeal brief, the Pre-Trial Chamber committed errors of law, fact and procedure. In particular, the interests of justice review which the Pre-Trial Chamber carried out was *ultra vires* as it was not within the powers granted to the Pre-Trial Chamber in

⁴⁸ Decision, para. 96.

⁴⁹ The Appeals Chamber, 'Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article (19)(1) of the Statute' of 10 March 2009', ICC-02/04-01/05 OA 3, 16 September 2009, para. 80.

Articles 15(3) and 53(3) of the Statute.

51. If the Pre-Trial Chamber had applied the correct test, it would have authorized 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) of the Statute. The Pre-Trial Chamber’s error of law materially affected its determination as it declined to authorize the investigation as a direct result of the application of the erroneous test.
52. Alternatively, if the Appeals Chamber considers that the Pre-Trial 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 Pre-Trial Chamber will carry out an interests of justice assessment *proprio motu* and present it as a basis for declining to authorise an investigation.
53. In either case, the Victims will argue that the Pre-Trial Chamber committed a procedural error by not inviting the Prosecutor, and other relevant participants, including the victims, to make full and reasoned submissions on the interests of justice prior to making its interests of justice assessment.
54. The Appeals Chamber has stated:

Article 82 (1) (a) of the Statute provides that either party may appeal "a decision with respect to jurisdiction or admissibility". The Appeals Chamber understands from the phrase "decision with respect to" that 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. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute.⁵⁰

55. The Victims will argue that the Pre-Trial Chamber refused to allow the Prosecutor to exercise investigative jurisdiction, and refused to allow the Court, as a whole, to exercise jurisdiction, on the basis of an erroneous legal test. The operative part of the Decision is that in which the Pre-Trial Chamber decided not to authorise investigation, notwithstanding its findings that all requirements relating to admissibility and jurisdiction had been satisfied. This relates *directly*

⁵⁰ The 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"', ICC-01/09-78, 10 August 2011, paras 15-16.

to the Court's ability to exercise jurisdiction in the situation in Afghanistan. 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: an appeal of the Decision therefore falls under Article 82(1)(a) of the Statute.

56. Further, the Victims will argue that the Pre-Trial Chamber erroneously restricted the temporal and territorial scope of the Prosecution's inquiry.⁵¹ This as an error relating to the exercise of the temporal and territorial jurisdiction of the Court. In its nature and in its effect, the Pre-Trial Chamber erroneously ruled that 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), would be limited in time to those crimes occurring before the request for authorisation was filed. Furthermore, an investigation would be limited in territorial scope to those identified in the Prosecution's request or closely linked to them.⁵² These are matters that pertain *directly* to the Court's ability to exercise jurisdiction over territories and time periods which are, the Victims will argue, within its territorial and temporal jurisdiction.
57. The Decision states that 'the alleged criminal conducts required by the Statute is only satisfied when the victims were captured within the borders of Afghanistan.'⁵³ The Victims will argue that this is a legal error. The Pre-Trial Chamber erroneously interpreted the provision in 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'. This directly pertains to the Court's territorial jurisdiction.
58. The Victims will also argue that the Decision contains further legal errors with regard to the territorial jurisdiction of the Court over certain war crimes,⁵⁴ which is at variance with the Prosecution's position.⁵⁵ The Decision, if uncorrected on appeal, will deprive the Court of jurisdiction over crimes falling outside the Court's territorial jurisdiction, as interpreted by the Chamber, applying an erroneous legal test.⁵⁶ Proceedings cannot proceed expeditiously, or at

⁵¹ 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."

⁵² Decision, para. 41.

⁵³ Decision, para. 53.

⁵⁴ Decision, paras. 53 and 54.

⁵⁵ Prosecution's request, paras. 250-251.

⁵⁶ Decision, paras. 53 and 54.

all, in respect of crimes which fall outside the territorial limits imposed by the Pre-Trial Chamber. The Appeals Chamber must address this issue in its appeal of the Decision, in order to enable the investigation to commence, and for it to be focused on all victims of torture falling within the Court's territorial jurisdiction.

59. In particular, there are two important territorial jurisdictional issues for the Appeals Chamber to address, in order for the Prosecutor's investigation – if it is authorized as a result of the appeal – to focus on crimes that are unambiguously within the Court's territorial jurisdiction. These concern *inter alia* the war crimes of torture under Article 8(2)(c)(i)-4 and Article 8(2)(a)(ii)-1; inhuman treatment under Article 8(2) (a)(ii)-2; and cruel treatment under Article 8(2)(c)(i)-3 of the Statute.
60. The two issues are whether, for the Court to exercise jurisdiction over the crime: (i) it is necessary that the infliction of severe physical or mental pain or suffering took place at least in part on the territory of a State Party; and (ii) the victim must have been captured within the borders of the State in which the armed conflict is taking place.


V. CONCLUSION

61. For the reasons set out above, the Decision may be appealed pursuant to Article 82(1)(a) of the Statute. In the appeal brief, the Victims will respectfully request the Appeals Chamber, pursuant to Article 83(2) of the Statute, to reverse the Decision and to authorize the commencement of an investigation into the situation in Afghanistan.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Dated this 10th day of June 2019
At The Hague