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**International
Criminal
Court**

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Date: **22 October 2019**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
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

OPCV Consolidated Submissions pursuant to the “Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters” (No. ICC-02/17-72-Corr)

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I. INTRODUCTION

1. Given the complex and novel nature of the present proceedings, the Principal Counsel urges the Appeals Chamber (the “Chamber”) to adopt an approach that takes into full account the victims’ internationally-recognised rights to truth, justice and reparation, and bridges any existing gap in fighting impunity.

2. The Principal Counsel, having supported the Prosecution’s request for leave to appeal the Impugned Decision on the basis that the three proposed issues fulfilled the requirements set out in article 82(1)(d) of the Rome Statute (the “Statute”),¹ posits that said Decision deals with a matter of jurisdiction *sensu lato* and is thus also subject to appeal pursuant to Article 82(1)(a). More broadly, the Principal Counsel respectfully invites the Chamber to consider arguments raised, or to be raised, by all parties and participants in the present appellate proceedings, irrespective of its conclusion as to the appropriate legal basis for appeal.

3. The Principal Counsel underlines that the interests of victims are fundamentally affected by a decision not to open an investigation and that their independent voice and role in the proceedings should be recognised and given effect by the Chamber, consistent with the Court’s mandate as a victim-centred institution. The Court’s legal framework must thus be interpreted – and, if necessary, supplemented – so as to meaningfully further the victims’ internationally-recognised rights, including the right to equal and effective access to justice, the right to a thorough and effective investigation and the right to a remedy.

4. Against this background, the Principal Counsel reiterates the Office of Public Counsel for Victims’ (the “Office” or the “OPCV”) long-standing position that, in appropriate circumstances, victims may qualify as a ‘party’ and accordingly fall within the ambit of Article 82(1) for the purposes of specific proceedings. It is open to the Chamber to recognise the extent of the victims’ standing to appeal in the present

¹ In the present submissions, the term ‘Article’ refers to the Rome Statute unless otherwise indicated.

case, either in general terms or only by reference to proceedings relating to authorisations to open an investigation under Article 15, which are exceptional in several respects. The recognition of victims' standing to appeal would be in line with the evolving practice before the Court and other international *fora*, which points towards the increased recognition of victims' prerogatives, including in the context of appeal proceedings. Alternatively, the application of rule 93 of the Rules of Procedure and Evidence,² in conjunction with the appropriate exercise of the Chamber's broad discretion, could at least partly give effect to the victims' interests in the present circumstances.

5. As for the merits of the appeal, the Principal Counsel submits that Pre-Trial Chamber II (the "Pre-Trial Chamber"): (a) erred in law and abused its discretion in reviewing the Prosecutor's 'interests of justice' determination; (b) abused its discretion in identifying and weighing factors relevant to the 'interests of justice' assessment; (c) erred in law in arbitrarily restricting the scope of a potential authorisation to investigate; and (d) erred procedurally and abused its discretion in failing to seek submissions from the Prosecutor and the Victims on material points.

II. PROCEDURAL HISTORY

6. On 20 November 2017, the Prosecution submitted the "Request for authorisation of an investigation pursuant to article 15", seeking authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan.³

7. On 12 April 2019, the Pre-Trial Chamber issued 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" (the "Impugned Decision"),⁴ rejecting the Prosecution's request to authorise the opening of an investigation on the

² In the present submissions, the term 'Rule' refers to the Rules of Procedure and Evidence unless otherwise indicated.

³ See the "Public redacted version of 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, ICC-02/17-7-Conf-Exp", [No. ICC-02/17-7-Red](#), 20 November 2017.

⁴ See 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" (Pre-Trial Chamber III), [No. ICC-02/17-33](#), 12 April 2019 (the "Impugned Decision").

ground that “an investigation into the situation in Afghanistan at this stage would not serve the interests of justice”.⁵ On 31 May 2019, Judge Mindua issued his concurring and separate opinion.⁶

8. On 7 June 2019, the Prosecution filed the “Request for leave to appeal the Article 15 Decision”,⁷ seeking leave to appeal in respect of three issues arising from the Impugned Decision.

9. Subsequently, Legal Representatives of various groups of individual victims and organisations filed submissions in the proceedings, including, *inter alia*, by way of requests for leave to appeal under Article 82(1)(d)⁸ and direct appeals to the Appeals Chamber under Article 82(1)(a).⁹

10. On 12 July 2019, having been authorised by the Pre-Trial Chamber to appear,¹⁰ the OPCV filed its “Submissions in the general interest of the Victims on the Prosecution’s Request for Leave to Appeal”,¹¹ observing that the three issues raised

⁵ *Idem*, p. 32.

⁶ See the “Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua”, [No. ICC-02/17-33-Anx](#), 31 May 2019.

⁷ See the “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’”, [No. ICC-02/17-34](#), 7 June 2019.

⁸ See the “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’”, [No. ICC-02/17-37](#), 10 June 2019.

⁹ See the “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’”, [No. ICC-02/17-36](#), 10 June 2019; the “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’”, [No. ICC-02/17-38](#), 10 June 2019; the “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)”, [No. ICC-02/17-40-Corr](#), 12 June 2019; and the “Victims’ Appeal Brief”, [No. ICC-02/17-53](#), 24 June 2019.

¹⁰ See the “Decision on the ‘Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan’ (ICC-02/17-35) and on the ‘Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ (ICC-02/17-39)” (Pre-Trial Chamber II), [No. ICC-02/17-43](#), 12 June 2019.

¹¹ See the “Submissions in the general interest of the Victims on the Prosecution’s Request for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (ICC-02/17-34)”, [No. ICC-02/17-59](#), 12 July 2019.

by the Prosecution should be certified for appeal as they fulfil the requirements of Article 82(1)(d).

11. On 17 September 2019, the Pre-Trial Chamber issued its “Decision on the Prosecutor and Victims’ Requests for Leave to Appeal”,¹² partially granting the Prosecution’s request for leave.

12. On 20 September 2019, the OPCV requested leave to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court in relation to the two issues which the Prosecution had been granted leave to appeal.¹³

13. On 27 September 2019, the Chamber issued an order, *inter alia*, scheduling a hearing from 4 to 6 December 2019 and inviting the OPCV to file consolidated written submissions not exceeding 35 pages on the Prosecution and victims’ appeal briefs, as well as on the victims’ standing to appeal under Article 82(1)(a), by 22 October 2019.¹⁴

14. On 30 September 2019, the Prosecution and the Legal Representatives of various groups of individual victims and organisations filed their respective appeal briefs.¹⁵

¹² See the “Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’” (Pre-Trial Chamber II), [No. ICC-02/17-62](#), 17 September 2019.

¹³ See the “Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, [No. ICC-02/17-67 OA4](#), 20 September 2019.

¹⁴ See the “Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters”, [No. ICC-02/17-72-Corr OA OA2 OA3 OA4](#), 27 September 2019.

¹⁵ See the “Prosecution Appeal Brief”, [No. ICC-02/17-74](#), 30 September 2019; the “Corrigendum of Updated Victims’ Appeal Brief”, [No. ICC-02/17-73-Corr OA OA2 OA3 OA4](#), 1 October 2019; and the “Corrigendum of Victims’ Joint Appeal Brief 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’ of 30 September 2019, ICC-02/17-75”, [No. ICC-02/17-75-Corr OA2 OA3](#), 1 October 2019.

III. SUBMISSIONS

1. Nature of the Appeal

15. The Principal Counsel recalls that, appearing before the Pre-Trial Chamber,¹⁶ she supported the Prosecution's request for authorisation to lodge an appeal under Article 82(1)(d) since that was the avenue chosen by the Prosecution in the circumstances. Indeed, the issues raised by the Prosecution fulfilled the requirements set out in Article 82(1)(d), as they constitute appealable issues arising from the Impugned Decision, impacting on the fair and expeditious conduct of proceedings or their outcome, and whose immediate resolution may materially advance the proceedings.¹⁷

16. However, the Principal Counsel posits that the Impugned Decision deals with a matter of jurisdiction *sensu lato* and is therefore better qualified as a "*decision with respect to jurisdiction or admissibility*" within the meaning of Article 82(1)(a). In this regard, the Principal Counsel notes that the four sub-paragraphs of Article 82(1) are not necessarily alternative or mutually exclusive – in particular, a "*decision with respect to jurisdiction or admissibility*" under Article 82(1)(a) may involve one or more "*issue[s] that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*", as required by Article 82(1)(d). The drafting of Article 82(1) confirms as much, in light of the absence of the conjunction "*or*" indicating that the subparagraphs are to be understood as alternatives, and the reference within Article 82(1)(d) to "*a decision*" as opposed to "*any other decision*" or similar language indicating that said provision is intended to cover scenarios *other than* those addressed in Article 82(1)(a) to (c).

¹⁶ See the "Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", [No. ICC-02/17-39](#), 10 June 2019; and the "Decision on the 'Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39)", *supra* note 10.

¹⁷ See the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", *supra* note 11.

17. Said approach is also consistent with the object and purpose of Article 82(1),¹⁸ whose sub-paragraph (d) was envisioned to give the court *a quo* – the Pre-Trial or Trial Chamber – a filtering role so as to limit the number of interlocutory appeals reaching the Appeals Chamber, while identifying a selected group of decisions, referred to in sub-paragraphs (a) to (c), for which no such leave is required and appeal lies as of right.¹⁹ Accordingly, while the Principal Counsel regards the Impugned Decision as one “*with respect to jurisdiction*” under Article 82(1)(a),²⁰ for which leave to appeal is not required, it qualifies *a fortiori* for appeal since said leave has been sought and granted by the Pre-Trial Chamber.²¹

18. The Principal Counsel is mindful that the two issues certified for appeal by the Pre-Trial Chamber based on the Prosecution’s request are similar to but not fully co-extensive with those raised by the Legal Representatives of Victims in their respective appeals under Article 82(1)(a).²² She also notes, however, that the Chamber has the power to “*consider [...] arguments [...] outside the scope of the appeal if they [are]*

¹⁸ See article 31(1) of the [Vienna Convention on the Law of Treaties 1969](#), providing 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*”.

¹⁹ See *mutatis mutandis* ICTY, *Delalić*, Case No. IT-96-21, [Decision on Application for Leave to Appeal](#) (Appeals Chamber), 14 October 1996, para. 16.

²⁰ See *e.g.* NERLICH (V.), “Article 82: Appeal against other decisions”, in TRIFFTERER (O.) and AMBOS (K.) (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, Hart and Nomos, 2016, para. 10. See also BRADY (H.J.), “Brief review of the appeal regime in the Rome Statute”, in LEE (R.S.K.) (Ed.), *The International Criminal Court: elements of crimes and rules of procedure and evidence*, Transnational Publishers, 2001, pp. 578-579.

²¹ See the “Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’”, *supra* note 12. The Principal Counsel notes that the Chamber’s reasoning in the *Lubanga* case, where it rejected as inadmissible an appeal filed pursuant to Article 82(1)(d) rather than Article 82(4), is easily distinguishable from the present circumstances. In fact, that appeal concerned a reparation order which, pursuant to Article 82(4) and Rules 150 to 153, is subject to an intrinsically different appeal procedure than that for appeals under Article 82(1), which are governed by Rules 154 to 158. See the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings” (Appeals Chamber), [No. ICC-01/04-01/06-2953 A A2 A3 OA21](#), 14 December 2012.

²² See the “Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters”, *supra* note 14, para. 16.

'intrinsically linked' to the issue on appeal".²³ Further, the Appeals Chamber may clarify or amend issues as certified for appeal by the relevant chamber *a quo*,²⁴ and has held that *"participating victims may make observations as to alleged errors [...] even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims' personal interests and remain within the ambit of the Prosecutor's grounds of appeal"*.²⁵ Accordingly, the Principal Counsel respectfully invites the Chamber to consider arguments raised, or to be raised, by all parties and participants, regardless of its conclusion as to the appropriate legal basis for appeal.

2. The standing of victims to bring an appeal

19. The victims' *locus standi* to appeal in the context of a decision denying authorisation to open an investigation is a novel and complex issue. In light of the central role given to victims in the framework of the Statute, the Principal Counsel advocates for an interpretation of the statutory provisions which takes into full account the victims' rights to truth and justice and bridges any existing gap in fighting impunity.

a) *The interests of victims are affected by the present proceedings*

20. The Principal Counsel underlines that the interests of the victims are undeniably affected by a decision denying authorisation to open an investigation,²⁶

²³ See the "Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016" (Appeals Chamber), [No. ICC-01/04-02/06-1817-Red OA04](#), 8 March 2017, para. 85; and the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" (Appeals Chamber), [No. ICC-02/11-01/15-744 OA08](#), 1 November 2016, paras. 13 and 19.

²⁴ See *e.g.* the "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'" (Appeals Chamber), [No. ICC-01/04-01/07-476 OA02](#), 13 May 2008, para. 46; and the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'" (Appeals Chamber), [No. ICC-01/04-01/07-2288 OA11](#), 16 July 2010, paras. 56-57 and 88-90.

²⁵ See the "Decision on the Participation of Victims in the Appeal against Trial Chamber II's 'Jugement Rendu en Application de l'Article 74 du Statut'" (Appeals Chamber), [No. ICC-01/04-02/12-30 A](#), 6 March 2013, para. 41.

²⁶ See *e.g.* the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", *supra* note 17.

as evidenced by the specific role granted to victims in Article 15 proceedings.²⁷ As recognised by the Pre-Trial Chamber,²⁸ the Prosecution,²⁹ the Legal Representatives of Victims³⁰ and the *Amicus Curiae*,³¹ the Impugned Decision fundamentally impacts on the interests of victims, to the extent it precludes the opening of an investigation and hence the pursuit of their internationally recognised rights to truth, justice and reparation.

21. The Appeals Chamber has consistently recognised that issues such as whether proceedings in a given case should be stayed³² and whether an accused should stand trial³³ affect victims' personal interests because – depending on their resolution – victims may be denied any opportunity to uncover the truth, present their views and concerns throughout the proceedings, ensure those responsible for the crimes are

²⁷ See *e.g.* Articles 15(3), 15(4) and 53(1)(c) and Rule 50.

²⁸ See *e.g.* the Impugned Decision, *supra* note 4, para. 96. See also *e.g.* the “Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, ICC-01/17-X-9-US-Exp, 25 October 2017” (Pre-Trial Chamber III), [No. ICC-01/17-9-Red](#), 9 November 2017, para. 190.

²⁹ See *e.g.* the “Prosecution’s response to the request by the Office of Public Counsel for the Defence for leave to appear before the Appeals Chamber”, [No. ICC-02/17-71](#), 26 September 2019, para. 10; and the “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber)”, [No. ICC-02/17-42](#), 12 June 2019, para. 10.

³⁰ See *e.g.* the “Corrigendum of Updated Victims’ Appeal Brief”, *supra* note 15, paras. 55-56; the “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)”, *supra* note 9, paras. 11-12; the “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’”, *supra* note 9, paras. 22-28; and the “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’”, *supra* note 9, paras. 29-31.

³¹ See *e.g.* the “Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan”, [No. ICC-02/17-57](#), 11 July 2019, para. 31.

³² See *e.g.* the “Decision on the Participation of Victims in the Appeal” (Appeals Chamber), [No. ICC-01/04-01/06-1453 OA12](#), 6 August 2008, para. 9; and the “Decision on Victim Participation in the Appeal on the Stay of Proceedings due to an Abuse of Process” (Appeals Chamber), [No. ICC-01/04-01/06-2556 OA18](#), 18 August 2010, para. 9.

³³ See the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’ of Trial Chamber III” (Appeals Chamber), [No. ICC-01/05-01/08-857 OA4](#), 18 August 2010, para. 10; and the “Decision on the Participation of Victims in the Appeal against the ‘Decision on Applications for Provisional Release’ of Trial Chamber III” (Appeals Chamber), [No. ICC-01/05-01/08-1597 OA7](#), 14 July 2011, para. 10; and the “Decision on the victims’ request to participate in the appeal proceedings” (Appeals Chamber), [No. ICC-01/09-02/11-1015 OA5](#), 24 April 2015, para. 11.

held accountable and claim reparation. *A fortiori*, victims' interests are impacted by decisions denying authorisation to open an investigation, precluding the possibility of *any* defendant facing proceedings before the Court in respect of the relevant crimes, as well as any prospect of realising those victims' rights which could be achieved by the opening of an investigation, irrespective of whether it results in trials.³⁴ Indeed, the interest in seeing that the Court is seized with a matter and that an investigation proceeds has been regarded as "*the most essential of all victims' interests*".³⁵

22. The Principal Counsel reiterates that, in the context of Article 15 proceedings, like in other instances, victims have often similar but distinct interests from the Prosecution, hence the importance of their participation in the proceedings as autonomous actors,³⁶ with an "*independent voice and role*".³⁷ The non-recognition of said interests would result in irreparable prejudice to the victims awaiting justice. Not only would they have awaited the opening of an investigation into the crimes they have suffered from and possibly the prosecution of the persons allegedly responsible for many years, but their reasonable expectation to seek and obtain justice would be buried, with no realistic alternative forum for redress available to them.

b) The procedure to challenge decisions denying authorisation to open an investigation should take into due consideration the interests of victims

23. The Principal Counsel notes that the Statute does not set out a specific procedure for the challenge of decisions under Article 15(4) denying authorisation to

³⁴ See *infra* para. 54.

³⁵ See Human Rights Watch, [Commentary to the 2nd Preparatory Commission Meeting on the International Criminal Court](#), July 1999, p. 33. See also ECtHR, *Kaya v Turkey*, App. No. 22535/93, [Judgment](#), 28 March 2000, paras. 121-126 and IACtHR, *Mapiripán Massacre v Colombia*, Merits, Reparations and Costs, [Judgment](#), 15 September 2005, paras. 116 and 119.

³⁶ See the "Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", *supra* note 13, paras. 3 and 17.

³⁷ See the "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), [No. ICC-01/04-101-tEN-Corr](#), 17 January 2006, para. 51, referring to ECtHR, *Berger v. France*, App. No. 48221/99, [Judgment](#), 3 December 2002, para. 38 and ECtHR, *Perez v. France*, App. No. 47287/99, [Judgment](#), 12 February 2004, para. 68.

open an investigation,³⁸ nor does it conclusively identify the entities that can trigger such procedure. Therefore, she contends that the statutory framework should be interpreted so as to fill this *lacuna*³⁹ taking into due consideration the interests of victims, in accordance with the Court's mandate as a "*victim-centred*" institution.⁴⁰

24. The Principal Counsel recalls the Chamber's ruling that, to give effect to the spirit and intention of the Statute, the framework on victims' participatory rights must be interpreted "*so as to make participation by victims meaningful*".⁴¹ The Principal Counsel submits that it would be contrary to the spirit of the Statute not to recognise that in exceptional circumstances – such as those arising in the present appeal – victims have a clear interest in moving justice forward not only to uphold their rights to truth and justice, but also to preserve the Court's authority in the pursuit of its core objective to fight against impunity.

25. In this regard, the Chamber already found that, pursuant to Article 21(3), "*the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court*".⁴² Article 21(3) implies not only that statutory provisions shall be interpreted in accordance with international human rights law, or deemed inapplicable if they are incompatible with internationally-

³⁸ See *supra*, Section III.1.

³⁹ See the "Partially dissenting opinion of Judge Antoine Kesia-Mbe Mindua", [No. ICC-02/17-62-Anx](#), 17 September 2019, paras. 42 and 43.

⁴⁰ See the "Concurring and Separate Opinion of Judge Kesia-Mbe Mindua", *supra* note 6, para. 50.

⁴¹ See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97.

⁴² See the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006" (Appeals Chamber), [No. ICC-01/04-01/06-772 OA4](#), 13 December 2006, para. 37. The Court's obligation to respect the internationally recognised human rights of victims applies also with regard to the conduct and result of preliminary examination, "*especially the rights of victims to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of this Court*". See the "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'" (Pre-Trial Chamber I), [No. ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, para. 88. See also the "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya" (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010, para. 5; and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 3 May 2008, paras. 31-44.

recognised human rights,⁴³ but also produces “*generative effects*”, enabling rights not expressly mentioned in the Statute to be invoked before the Court.⁴⁴ For instance, the Appeals Chamber found that violations of a defendant’s core fair trial rights could justify a stay of proceedings, irrespective of the Statute’s silence in this respect.⁴⁵ Similarly, the Appeals Chamber concluded that while international human rights law does not require trial chambers to entertain ‘no case to answer’ motions in all cases, conducting such a procedure in appropriate circumstances is permissible even though the legal texts of the Court do not explicitly provide for it.⁴⁶

26. Therefore, the Principal Counsel submits that the Court’s legal framework must be interpreted – and, if necessary, supplemented – so as to respect and further the victims’ internationally recognised rights to truth, justice and reparation, which include *inter alia* the right to “*equal and effective access to justice*” and the right to a thorough, prompt, impartial and effective investigation.⁴⁷

27. The fundamental right to a remedy for victims of serious violations of international human rights law and international humanitarian law, explored in

⁴³ See PÉREZ-LEÓN-ACEVEDO (J.-P.), “Human Rights at the Reparations System of the International Criminal Court”, in SCHEININ (M.) (Ed.), *Human Rights Norms in ‘Other’ International Courts*, CUP, 2019, p. 169; DeGUZMAN (M.), ‘Article 21’, in TRIFFTERER (O.) and AMBOS (K.) (Eds.), *op. cit. supra* note 20, pp. 947-948; BITTI (G.), ‘Article 21 and the Hierarchy of Sources of Law before the ICC’, in STAHN (C.) (Ed.), *The Law and Practice of the International Criminal Court*, OUP, 2015, pp. 436-443; SCHABAS (W.), *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition, OUP, 2016, pp. 530-534; and PELLET (A.), ‘Applicable Law’, in CASSESE (A.), GAETA (P.) and JONES (J.R.W.D.) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, OUP, 2002, p. 1081.

⁴⁴ See PÉREZ-LEÓN-ACEVEDO (J.-P.), *op. cit. supra* note 43, p. 169; BAILEY (S.), “Article 21(3) of the Rome Statute: A Plea for Clarity”, *International Criminal Law Review*, vol. 14, 2014, pp. 535-536; and BITTI (G.), *op. cit. supra* note 43, p. 549.

⁴⁵ See the “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006”, *supra* note 42, paras. 37-39.

⁴⁶ See the “Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a ‘no case to answer’ motion’” (Appeals Chamber), [No. ICC-01/04-02/06-2026 OA6](#), 5 September 2017.

⁴⁷ See *e.g.* the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law, [UN Doc. A/RES/60/147](#), 16 December 2005 (the “Basic Principles”).

detail in the submissions already before the Chamber,⁴⁸ is enshrined in the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the “Basic Principles”),⁴⁹ as well as in international human rights instruments including the Universal Declaration of Human Rights,⁵⁰ the International Covenant on Civil and Political Rights⁵¹ and the International Convention on the Elimination of All Forms of Racial Discrimination.⁵² While, as noted by the Prosecution, this right is “*primarily opposable to States and requires measures under national law*”,⁵³ the drafters of the Basic Principles deliberately refrained from specifying, within the relevant provisions, the entity or entities owing the duty to provide a remedy.⁵⁴ Further, the right to a remedy under international human rights law pertains not only to domestic proceedings, but also to judicial proceedings before international and internationalised courts.⁵⁵

⁴⁸ See e.g. the “Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, *supra* note 13, paras. 19-21; the “Corrigendum of Updated Victims’ Appeal Brief”, *supra* note 15, paras. 64-77; and the “Corrigendum of Victims’ Joint Appeal Brief 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’ of 30 September 2019, ICC-02/17-75”, *supra* note 15, paras. 39-41.

⁴⁹ See the Basic Principles, *supra* note 47.

⁵⁰ See Article 8 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, [General Assembly resolution 217 \(III\)](#).

⁵¹ See Article 2(3) of the International Covenant on Civil and Political Rights, adopted by [General Assembly resolution 2200A \(XXI\)](#) of 16 December 1966.

⁵² See Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by [General Assembly resolution 2106 \(XX\)](#) of 21 December 1965.

⁵³ See the “Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims”, [No. ICC-02/17-60](#), 19 July 2019, para. 21.

⁵⁴ See APTEL (C.), “Prosecutorial Discretion at the ICC and Victims’ Right to Remedy: Narrowing the Impunity Gap”, *Journal of International Criminal Justice*, Vol. 10, 2012, p. 1369, citing ZWANENBURG (M.), “The Van Boven/Bassiouni Principles: An Appraisal”, *Netherlands Quarterly of Human Rights*, Vol. 24, 2006, p. 652; and Van BOVEN (T.), [The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International and Human Rights Law and Serious Violations of International Humanitarian Law: Introductory Note](#), UN Audiovisual Library, 2010, p. 3.

⁵⁵ See e.g. UN Commission on Human Rights, Report of the Independent Expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, 61st session, [UN Doc. E/CN.4/2005/102](#), 18 February 2005, para. 38; the “Decision establishing the principles and procedures to be applied to reparations” (Trial Chamber I), [No. ICC-01/04-01/06-2904](#), 7 August 2012, para. 185; and the “Separate Opinion of Judge Luz del Carmen Ibáñez Carranza”, [No. ICC-01/04-01/06-3466-AnxII A7 A8](#), 16 September 2019, paras. 60-61.

28. Concerning the victims' *locus standi* to initiate appeals before the Chamber specifically, the Principal Counsel recalls the OPCV's long-standing position that, in appropriate circumstances, victims may qualify as a 'party' and accordingly fall within the ambit of Article 82(1) for the purposes of specific proceedings.⁵⁶ While Pre-Trial Chambers of the Court have denied requests for leave to appeal filed by the Office on that basis in the context of Article 82(1)(d),⁵⁷ said jurisprudence does not bind the Chamber. Nor is the Chamber bound to follow, for these purposes, interpretations adopted as to the meaning of the term 'parties' under the Statute in other contexts.⁵⁸ In fact, the Chamber has been prepared in the past to gradually expand the scope of prerogatives recognised to victims delineated in its earlier jurisprudence. In particular, the Chamber found that, in light of Article 21(2), it was not obliged to follow its previous interpretations of principles and rules of law through binding *stare decisis*, but rather it was vested with discretion as to whether to do so.⁵⁹

⁵⁶ See the "OPCV's Application for Leave to Appeal Against the Decision Rendered on 10 December 2007 on the Application Filed by the OPCV on 18 October 2007", [No. ICC-01/04-420-tEN](#), 17 December 2007; and the "*Demande du BCPV aux fins d'autorisation d'interjeter appel à l'encontre de la Décision rendue le 24 décembre 2007 relative aux demandeurs a/0047/06 à a/0052/06*", [No. ICC-01/04-426](#), 4 January 2008.

⁵⁷ See e.g. the "Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV" (Pre-Trial Chamber I), [No. ICC-01/04-437](#), 18 January 2008; and the "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation" (Pre-Trial Chamber I), [No. ICC-01/04-444](#), 6 February 2008.

⁵⁸ See e.g. the "Decision on the OPCV Request for Leave to Submit a Response to *Amicus Curiae* Observations" (Pre-Trial Chamber II), [No. ICC-01/05-01/08-462](#), para. 9; the "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" (Appeals Chamber), [No. ICC-01/04-556 OA4 OA5 OA6](#), 19 December 2008, para. 55; and the "Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application'" (Trial Chamber I), [No. ICC-01/04-01/06-2779](#), 4 August 2011, paras. 10-24.

⁵⁹ See the "Reasons for the 'Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo's detention (ICC-02/11-01/15-134-Red3)'" (Appeals Chamber), [No. ICC-02/11-01/15-172 OA6](#), 31 July 2015, para. 14, citing DeGUZMAN (M.), "Article 21: Applicable Law", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck – Hart – Nomos, 2008, p. 711 and the "Reasons for the 'Decision on the Participation of Victims in the Appeal against the 'Decision on the Interim Release of

29. It is thus open to the Chamber to recognise the extent of the victims' standing to appeal in the present case. In this regard, the Chamber may reach a broad conclusion concerning the victims' general standing to appeal within the framework of the Statute,⁶⁰ or confine its ruling to proceedings relating to authorisations to open an investigation under Article 15. Indeed, the Principal Counsel concurs with submissions advanced by other participants to the effect that Article 15 proceedings are exceptional based on the special role and status attributed to victims under the Statute in the context of said proceedings,⁶¹ on the fact that they do not involve any 'party' other than the Prosecutor and the victims,⁶² and because decisions denying authorisation under Article 15(4) preclude the opening of an entire investigation, with dramatic and pervasive effects on the rights to truth, justice and reparation of all victims of the potential situation.⁶³

30. The Pre-Trial Chamber itself recognised the exceptional nature of the present circumstances when, while expressing doubts as to the applicability of Article 82(1)(d) to decisions issued under Article 15(4), it nevertheless deemed it "*necessary and appropriate*" to partly grant the Prosecution's request for leave to appeal based on the "*novel and complex nature of the matter*" and the "*impact that a decision sanctioning*

Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), [No. ICC-01/05-01/08-566 OA2](#), 20 October 2009, para. 16.

⁶⁰ In this context, the Principal Counsel notes that the specific right to appeal reparation orders granted *expressis verbis* in Article 82(4) could be regarded as based on a conclusive presumption that such orders affect the interests of relevant victims, while in other contexts victims may be required to prove that their interests are impacted. The Principal Counsel also notes that the Appeals Chamber has concluded 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 from resolution*". See the "Judgment on Victim Participation in the Investigation Stage of the Proceedings", *supra* note 58, para. 56.

⁶¹ See *e.g.* the "Corrigendum of Victims' Joint Appeal Brief 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" of 30 September 2019", *supra* note 15, paras. 10-12 and the "Corrigendum of Updated Victims' Appeal Brief", *supra* note 15, para. 10.

⁶² See *e.g.* the "Corrigendum of Updated Victims' Appeal Brief", *supra* note 15, paras. 40-43.

⁶³ See *supra* paras. 20 and 22 and accompanying footnotes. See also the "Partially dissenting opinion of Judge Antoine Kesia-Mbe Mindua", *supra* note 39, paras. 48-49.

the inapplicability in limine of article 82(1)(d) may have in the context of these specific proceedings".⁶⁴

31. Said exceptional circumstances similarly justify the recognition of prerogatives that ensure that the interests of victims are duly heard and taken into account by the Chamber. This is all the more so in the present instance, where the interests of victims – as interpreted by the Pre-Trial Chamber and at variance, in many respects, with the views expressed by several victims in the proceedings⁶⁵ – form part of the core reasoning underlying the Impugned Decision.⁶⁶

32. Further, it can be argued that the recognition of victims' standing to appeal in the present circumstances would be in line with the evolving practice before the Court and other international *fora*, which points towards the increased recognition of victims' prerogatives in the context of international criminal proceedings, including appeals. In this regard, the Principal Counsel underlines that the Special Tribunal for Lebanon's (the "STL") has recognised the possibility for the legal representative of victims to file submission on his or her own initiative when the issue at stake affects the victims' personal interests.⁶⁷ Said possibility includes, in appropriate circumstances, the power to seek appeal certification.⁶⁸ Importantly, for the purposes of the present proceedings, in recognising the possibility for legal representatives to file submissions *proprio motu*, the STL Pre-Trial Judge quoted the ICC practice.⁶⁹

⁶⁴ See the "Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'", *supra* note 12, paras. 28-33.

⁶⁵ See *infra* para. 56.

⁶⁶ See the Impugned Decision, *supra* note 4, para. 96.

⁶⁷ See STL, *Ayyash et al.*, "Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings Before the Pre-Trial Judge" (Pre-Trial Judge), [No. STL-11-01/PT/PTJ, F0256](#), 18 May 2012, para. 31.

⁶⁸ See STL, *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 Measures" (Pre-Trial Judge), [No. STL-11-01/PT/PTJ, F0688](#), 30 January 2013, and "Public Redacted Version of 'Decision on the Motion of the Legal Representative of Victims seeking Certification of the 15 August 2013 Decision' dated 21 October 2013" (Pre-Trial Judge), [No. STL-11-01-PT-PTJ, F1164](#), 25 February 2014.

⁶⁹ See STL, *Ayyash et al.*, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings Before the Pre-Trial Judge, [No. STL-11-01/PT/PTJ, F0256](#), 18 May 2012, para. 31 and footnote 24.

Further, the practice of the Court itself increasingly recognises the role of victims in the context of appeal proceedings, with the Chamber accepting the OPCV's request to grant general and automatic rights of participation to victims and to depart from its previous jurisprudence requiring a separate authorisation in order for victims to participate in each interlocutory appeal.⁷⁰

33. In parallel with these developments, the Chamber has proved increasingly willing to entertain appeals from entities other than the Prosecution and the Defence. The Principal Counsel recalls the recent ICC practice in relation to the possibility for a State to appeal in the *Al Bashir* case, which appears to confirm that the term 'party' in Article 82 has to be interpreted as referring to an "entity having an interest in the matter at stake",⁷¹ as well as previous instances in which the Office of the Public Counsel for the Defence was recognised standing to appeal.⁷² The Principal Counsel also notes the developing practice, in several domestic legal systems, entitling victims to challenge decisions not to open investigations through various channels.⁷³

34. The Principal Counsel notes the divergence of views as to how the victims' internationally-recognised rights to truth, justice and reparation can be accommodated within the wording of the statutory provisions concerning appeals. Given the parties and participants' extensive submissions on said point, the Principal Counsel limits herself to recalling that, while the framework and general principles

⁷⁰ See the "Reasons for the 'Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo's detention (ICC-02/11-01/15-134-Red3)'"', *supra* note 59.

⁷¹ See the "Decision on Jordan's request for leave to appeal" (Pre-Trial Chamber II), [No. ICC-02/05-01/09-319](#), 21 February 2018. See also the "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011" (Appeals Chamber), [No. ICC-01/04-01/06-2799 OA19](#), 26 August 2011.

⁷² See *e.g.* the "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation", *supra* note 57 and the "Decision on Request for leave to appeal the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor'" (Pre-Trial Chamber I), [No. ICC-02/05-118](#), 23 January 2008.

⁷³ See *e.g.* BRAUN (K.), *Victim Participation Rights* (Palgrave, 2019), pp. 91 *et seq.*; and STAHN (C.), OLÁSULO (H.) and GIBSON (K.), "Participation of Victims in Pre-Trial Proceedings of the ICC", *Journal of International Criminal Justice*, Vol. 4, 2006, footnote 43.

of victims' participation in the proceedings are enshrined in the Statute, the modalities of implementation of such rights have largely been left for jurisprudential development.⁷⁴ Said implementation has included, to date, the possibility for the Office to be appointed whenever the rights of victims are affected.⁷⁵

35. The Principal Counsel posits that victims in the present proceedings should not be penalised due to the novel nature of the circumstances before the Court, and the corresponding *lacuna* in its legal framework. The Chamber has been prepared in the past to take exceptional measures in similarly novel circumstances to ensure that victims are not unfairly deprived of an opportunity to participate for reason beyond their control.⁷⁶ For instance, when the issue of victims' participation in interlocutory appeals was first addressed in the context of the *Lubanga* case, the Chamber

⁷⁴ See the "Partially dissenting opinion of Judge Antoine Kesia-Mbe Mindua", *supra* note 39, para. 26. See also *e.g.* the "Directions for the conduct of the proceedings and testimony in accordance with rule 140" (Trial Chamber II), [No. ICC-01/04-01/07-1665-Corr](#), 1 December 2009, paras. 19-30; the "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), [No. ICC-01/05-01/08-2138](#), 22 February 2012, paras. 23-25 (on the victims' entitlement to call witnesses); and the "Decision on the participation of victims in the trial proceedings" (Trial Chamber IV), [No. ICC-02/05-03/09-545](#), 20 March 2014, paras. 34-38 (concerning access to confidential filings).

⁷⁵ See the "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-134](#), 1 February 2007, para. 13; the "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation" (Pre-Trial Chamber I), [No. ICC-01/04-374](#), 18 August 2007, para. 43; the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-320](#), 21 October 2008; the "Decision on the treatment of applications for participation" (Trial Chamber II), [No. ICC-01/04-01/07-933](#), 26 February 2009, p. 24; the "First Decision on Victims' Participation in the Case" (Pre-Trial Chamber II, Single Judge), [No. ICC-01/09-01/11-17](#), 30 March 2011, para. 23; the "First Decision on Victims' Participation in the Case", (Pre-Trial Chamber II, Single Judge), 30 March 2011, [No. ICC-01/09-01/11-23](#), para. 23; the "Decision on the Registry report on six applications to participate in the proceedings" (Trial Chamber IV), [No. ICC-02/05-03/09-231-Corr](#), 28 October 2011, para. 28; the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-134](#), 4 May 2012, para. 13; the "Decision on the conduct of the proceedings following Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (Pre-Trial Chamber I), [No. ICC-02/11-01/12-15](#), 15 November 2013, para. 10; and the "Decision on Victims' Participation" (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, para. 17.

⁷⁶ See BACHAROVA (T.), *The Standing of Victims in the Design of the International Criminal Court*, Brill Nijhoff, 2015, citing the "Decision on Victims' Participation" (Trial Chamber I), [No. ICC-01/04-01/06-1119](#), 18 January 2008 and the "Decision on the Treatment of Applications for Participation" *supra* note 75.

exceptionally granted the victims' right to participate in the appeal even though they had not previously applied to participate – as it was then required – noting that it was *“aware that this is the first time that it has considered the manner in which victims can participate in interlocutory appeals”*.⁷⁷ Therefore, the Principal Counsel invites the Chamber to be equally mindful of the importance of victims' participation in the present circumstances.

36. Alternatively, the Principal Counsel notes that other avenues are available to recognise and partly give effect to the victims' interests in the present circumstances. She underlines in particular the wording of Rule 93 which allows a Chamber to hear from victims on any matter relevant to their interests. This provision is not limited to victims participating in the proceedings, but also covers *“other victims, as appropriate”*.

37. The Chamber has found that, under Rule 93, *“[t]he views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber”*.⁷⁸ Further, the Pre-Trial Chamber has recently noted in the *Myanmar* proceedings 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”*.⁷⁹

38. In the context of the present appeal proceedings, the application of Rule 93, in conjunction with the Chamber's broad discretion to frame the issues under appeal and hear arguments thereon,⁸⁰ could at least partly give effect to the victims' interests.

⁷⁷ See the *“Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”* (Appeals Chamber), [No. ICC-01/04-01/06-824 OA7](#), 13 February 2007, para. 37.

⁷⁸ See the *“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”*, *supra* note 58, para. 48.

⁷⁹ See the *“Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”*, *supra* note 42, para. 21.

⁸⁰ See *supra* para. 18.

3. Merits of the Appeals

a) *The Pre-Trial Chamber erred in law and abused its discretion in reviewing the Prosecutor's 'interests of justice' determination*

The Pre-Trial Chamber's 'interests of justice' review was ultra vires

39. The Pre-Trial Chamber erred in law in finding that it was entitled to review the Prosecutor's determination that "*there are no substantial reasons to believe that an investigation would not serve the interests of justice*".⁸¹ The Impugned Decision departs in fact from the relevant statutory provisions which only provide for judicial review of a prosecutorial assessment of the interests of justice where these constitute the basis for a decision *not* to initiate an investigation or prosecution.

40. As confirmed in unequivocal terms by the jurisprudence of the Court:

"Unlike sub-paragraphs (a) and (b), 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. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation 'would not serve the interests of justice', which would prevent him from proceeding with a request for authorization of an investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber".⁸²

⁸¹ See the "Public redacted version of 'Request for authorisation of an investigation pursuant to article 15', *supra* note 3, para. 6.

⁸² See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), [No. ICC-01/09-19-Corr](#), 1 April 2010, para. 63. The Principal Counsel notes that the decisions authorising investigations in the Burundi and Côte d'Ivoire situations both referred to this specific paragraph of the Kenya Decision without expressing any reservations as to the reasoning adopted by Pre-Trial Chamber II. See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", *supra* note 28, note 484; and the "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" (Pre-Trial Chamber III), [No. ICC-02/11-14-Corr](#), 15 November 2011, note 18. See also the "Decision on the Request for review of the Prosecutor's

41. The legal framework of the Court reflects the State Parties' agreement on the fight against impunity as its core mandate and its very *raison d'être*.⁸³ Said framework is based on a presumption that the pursuit of accountability for the most serious crimes of concerns to the international community as a whole, consistent with the victims' rights to truth, justice and reparation,⁸⁴ is *ipso facto* in the interests of justice. Accordingly, as confirmed in the Prosecution Policy Paper on the Interests of Justice, "*there is a presumption in favour of investigation*".⁸⁵

42. As a narrow exception to said presumption, Article 53(1)(c) allows the Prosecutor to refrain from initiating an investigation – even though the applicable jurisdictional and admissibility requirements are met – should he or she consider that there are *substantial reasons to believe* it would *not* serve the interests of justice. Given the Statute's overall presumption in favour of accountability, and the element of subjective appreciation inherent in the notion of 'interests of justice',⁸⁶ the State Parties deemed it appropriate to provide for judicial review of prosecutorial decisions not to proceed on such basis. It is only in those limited circumstances that – as a further guarantee against impunity – the Pre-Trial Chamber is entitled to review the Prosecutor's "*highly exceptional*"⁸⁷ assessment that the interests of justice require him or her not to pursue an investigation.⁸⁸

decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014" (Pre-Trial Chamber II), [No. ICC-RoC46\(3\)-1/14-3](#), 12 September 2014, para. 8.

⁸³ See Preamble of the Rome Statute, the States Parties affirming that "*the most serious crimes of concern to the international community as a whole must not go unpunished*" and determined "*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*". See also the "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" (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019, para. 51; and BENEDETTI (F.), BONNEAU (K.) and WASHBURN (J.L.), *Negotiating the International Criminal Court*, Martinus Nijhoff Publishers, 2014, p. 44.

⁸⁴ See the "Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", *supra* note 16, paras. 19-21.

⁸⁵ See the [OTP Policy Paper on the Interests of Justice](#), September 2007, p. 1. See also SCHABAS (W.), *op. cit. supra* note 43, p. 834.

⁸⁶ See e.g. JURDI (N.N.), *The International Criminal Court and National Courts: A Contentious Relationship*, Routledge, 2006, p. 90.

⁸⁷ See the [OTP Policy Paper on Preliminary Examinations](#), November 2013, para. 71.

⁸⁸ See Articles 53(1) and 53(3)(b).

43. Beyond said scenario, the Pre-Trial Chamber has no power to assess the interests of justice. Article 15(4) does not empower a Pre-Trial Chamber to review the Prosecutor's 'interests of justice' determination, since a request for authorisation can only follow a prosecutorial assessment that there are no "*substantial reasons to believe that an investigation would not serve the interests of justice*".⁸⁹ In this context, the Pre-Trial Chamber's review must be limited to the issues of jurisdiction and admissibility, as confirmed by the wording of Article 15(4).

44. The statutory provisions relating to the opening of an investigation reflect the framework regulating – in perhaps clearer terms – a decision not to proceed with the opening of a case under Article 53(2). While Article 53(2) empowers the Prosecutor to decide not to proceed with a prosecution on various grounds – including that said prosecution "*is not in the interests of justice*"⁹⁰ – he or she is not required to positively prove that the case *is* in the interest of justice when requesting an arrest warrant or summon to appear.⁹¹ As noted by Pre-Trial Chamber I:

"21. No matter whether the Chamber's review power under [article 53(3)(b)] is only applicable in relation to the Prosecution's decision to put an end to the investigation of a given situation, or whether it is also applicable in relation to each Prosecution's decision not to prosecute a specific individual, the Chamber emphasises that article 53(3)(b) of the Statute only confers upon the Chamber the power to review the Prosecution's exercise of its discretion when it results in a decision not to proceed.

22. In the view of the Chamber, article 53(3)(b) of the Statute does not entrust the Chamber with the power to review the Prosecution's assessment that the initiation of a case against a given individual through the issuance of an arrest warrant or a summons to appear would not be detrimental to the interests of justice.

23. Nor is such a power granted by either article 58(1) and (7) of the Statute, which provide that the Chamber "shall" issue a warrant of arrest or a summons to appear whenever it is satisfied that there are

⁸⁹ See Article 53(1)(c).

⁹⁰ *Ibid.*

⁹¹ See Article 58(1), setting out the requirements to be fulfilled in order for a Prosecution's request for the issuance an arrest warrant to be granted.

reasonable grounds to believe that the person subject to the Prosecution's request is criminally liable under the Statute".⁹²

45. As such, there is no question of the Pre-Trial Chamber being empowered to consider the interests of justice when deciding whether to issue a warrant or summon under Article 58.⁹³ Indeed, Article 15(4) indicates that the Pre-Trial Chamber's authorisation to open an investigation is "*without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case*".⁹⁴ The drafters' decision not to include any reference to the "*interests of justice*" in said provision confirms that the Pre-Trial Chamber has no power to review the Prosecutor's negative assessment in this respect, whether in the context of authorising the opening of an investigation or as part of subsequent proceedings in relation to the opening of a case.

46. Therefore, the Pre-Trial Chamber acted *ultra vires* in refusing authorisation based on its assessment that the proposed investigation would not serve the interests of justice. The Pre-Trial Chamber's error materially affected the Impugned Decision since it denied authorisation exclusively on said basis, having concluded that the applicable jurisdictional and admissibility requirements were satisfied.⁹⁵

The Pre-Trial Chamber misapprehended the applicable standard of review

47. Assuming *arguendo* that the Pre-Trial Chamber *was* entitled to address the interests of justice in the framework of Article 15(4), the standard it applied amounted to an error of law and an abuse of discretion. At most, said review should have simply ensured that the requirement set out in Article 53(1)(c) was met to the prescribed standard.⁹⁶ Consistent with the Statute's presumption in favour of

⁹² See the "Decision on Application under Rule 103" (Pre-Trial Chamber I), [No. ICC-02/05-185](#), 4 February 2009, paras. 21-23 (references omitted).

⁹³ See also BITTI (G.), "[The Interests of Justice – where does that come from? Part II](#)", *EJIL: Talk!*, 14 August 2019.

⁹⁴ See Article 15(4).

⁹⁵ See the Impugned Decision, *supra* note 4, para. 87.

⁹⁶ As confirmed in the Impugned Decision, "*in the context of proceedings under article 15 [...] [t]he Pre-Trial Chamber must consider [...] whether the requirements set out in article 53(1)(a) to (c) are met*". See the Impugned Decision, *supra* note 4, para. 30.

accountability, Article 53(1)(c) only empowers the Prosecutor to refrain from opening an investigation in limited circumstances, *i.e.* where “*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*”.⁹⁷ There must be *substantial reasons* indicating that the potential investigation would be *contrary* to the interests of justice, as confirmed by the jurisprudence of the Court.⁹⁸

48. The Impugned Decision departs from said well-established standard in at least two ways. First, it requires a “*positive determination to the effect that investigations would be in the interests of justice*”,⁹⁹ rather than simply proof that the opening of an investigation would not be contrary to the said interests. Second, the Pre-Trial Chamber misapplied the relevant standard of proof, reaching its conclusion on the ‘interests of justice’ based on notions such as reasonableness¹⁰⁰ and likelihood¹⁰¹ – as opposed to the “*substantial reasons to believe*” standard established in Article 53(1)(c).¹⁰²

⁹⁷ See Article 53(1)(c) (emphasis added).

⁹⁸ See *e.g.* the “Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, ICC-01/17-X-9-US-Exp, 25 October 2017”, *supra* note 28, para. 190 and the “Decision on the Prosecutor’s request for authorization of an investigation” (Pre-Trial Chamber I), [No. ICC-01/15-12](#), 27 January 2016, para. 58. See also the “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” *supra* note 82, para. 208.

⁹⁹ See the Impugned Decision, *supra* note 4, para. 35 (emphasis added).

¹⁰⁰ *Idem.*, para. 94 (“*it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper*”).

¹⁰¹ *Idem.*, para. 92.

¹⁰² Pre-Trial Chamber II clarified the meaning of the term ‘substantial’ in the context of a confirmation of charges decision, noting that “*the term ‘substantial’ can be understood as ‘significant’, ‘solid’, ‘material’, ‘well built’, ‘real’ and rather than ‘imaginary’.* The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that ‘*for the Prosecut[or] to meet [the] evidentiary burden, [he] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations*’. See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), [No. ICC-01/05-01-08-424](#), 15 June 2009, para. 29 (references omitted). See also the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (Pre-Trial Chamber I), [No. ICC-01/13-34](#), 16 July 2015, para. 13; and CROSS (M.E.), “The Standard of Proof in Preliminary Examinations” in BERGSMO (M.) and STAHN (C.) (Eds.), [Quality Control in Preliminary Examinations: Volume 2](#), p. 251.

49. Further, in assessing whether said revised standard was met, the Pre-Trial Chamber engaged in a *de novo* review of the Prosecutor's determination of the 'interests of justice', rather than reviewing her assessment with the level of deference that is appropriate to any review of an exercise of prosecutorial discretion.¹⁰³

50. The Pre-Trial Chamber's errors and abuse of discretion in the interpretation and application of the relevant standard would significantly expand the range of scenarios in which the Prosecutor may refrain from pursuing an investigation and the Pre-Trial Chamber may deny authorisation for its opening – impacting therefore the victims' fundamental rights to truth, justice and reparation.

51. In the specific circumstances of the present case, the errors mentioned *supra* materially affected the Impugned Decision. Had the Pre-Trial Chamber limited its review to assessing whether it was reasonable for the Prosecutor to conclude that there are no substantial reasons to believe an investigation would not serve the interests of justice, it would have in all likelihood authorised the investigation.

b) The Pre-Trial Chamber abused its discretion in identifying and weighing factors relevant to its 'interests of justice' assessment

52. The Impugned Decision was materially affected by the Pre-Trial Chamber's abuse of discretion in assessing the interests of justice. The Pre-Trial Chamber misinterpreted and gave limited weight to the interests of victims, which should have been the key element of its assessment, and relied on irrelevant factors such as the feasibility of the investigation and the appropriate allocation of the Prosecution's resources.

¹⁰³ See the "Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua", *supra* note 6, para. 40. See also "Corrigendum to 'Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire'", [No. ICC-02/11-15-Corr](#), 5 October 2011, para. 28; and the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", *supra* note 102, para. 14. See also BERGSMO (M.), PEKIC (J.), and ZHU (D.), "Article 15", in TRIFFTERER (O.) and AMBOS (K.) (Eds.), *op. cit. supra* note 20, p. 737.

The interests of victims

53. The Pre-Trial Chamber acted unreasonably in adopting an unduly narrow reading of the interests of victims in the present situation, finding that said interests were (i) effectively limited to and conditional on victims' participation in specific trials before the Court;¹⁰⁴ and (ii) either nullified or outweighed by competing non-legal factors, such as the feasibility of the investigation, the prospects of cooperation by relevant States and the proper allocation of the Court's resources.¹⁰⁵

54. The Principal Counsel reiterates that the interests of victims in the present proceedings are much broader in scope and nature than mere participation at trial.¹⁰⁶ In their representations before the Pre-Trial Chamber, victims articulated a number of different interests underlying their overwhelming support for the opening of an investigation in the Situation in the Islamic Republic of Afghanistan.¹⁰⁷ These included ending the climate of impunity prevailing in relation to the relevant crimes, deterring further crimes, allowing victims' voices to be heard and uncovering the truth.¹⁰⁸ Indeed, empirical research conducted in different war-torn regions confirms

¹⁰⁴ See the Impugned Decision, *supra* note 4, para. 96.

¹⁰⁵ *Idem*, para. 95.

¹⁰⁶ See the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", *supra* note 17, para. 36; and the "Prosecution Appeal Brief", *supra* note 15, para. 161. The Basic Principles, *supra* note 47, grants for example: "*b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities*".

¹⁰⁷ See the successive Registry transmissions of Victims' representations and successive reports on said representations: [No. ICC-02/17-10](#) and [No. ICC-02/17-11-Red](#); [No. ICC-02/17-15](#) and [No. ICC-02/17-16-Red](#); [No. ICC-02/17-17](#) and [No. ICC-02/17-18](#); [No. ICC-02/17-19](#) and [No. ICC-02/17-20-Red](#); [No. ICC-02/17-21](#) and [No. ICC-02/17-22-Red](#); [No. ICC-02/17-24](#) and [No. ICC-02/17-25](#); and [No. ICC-02/17-27](#) and [No. ICC-02/17-28](#).

¹⁰⁸ See, in particular, the Public Redacted Annex I to the "Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-29-AnxI-Red](#), 20 February 2018, paras. 39 and 47.

that “*the prevalent purpose [for victims] of taking action against the perpetrators is to reveal the truth about the past*”.¹⁰⁹

55. The interests mentioned *supra* can be pursued, and indeed fulfilled, by the opening of investigations, even where these occur in complex and volatile environments. The Pre-Trial Chamber’s finding that victims can only play a “*meaningful role*” in the context of their participation in specific cases brought before the Court is also antithetical to the clear wording of the Statute which mandates that the interests of victims be taken into account at all appropriate stages of the proceedings,¹¹⁰ including – and crucially – in the context of a request for authorisation of an investigation under Article 15(3),¹¹¹ well before any “*specific cases*” are envisaged.

56. More broadly, the Principal Counsel notes with concern the Pre-Trial Chamber’s readiness to depart from the views expressed by victims as part of the Court-ordered process of victims’ representations and to substitute its own assessment to said views. Effectively, the Pre-Trial Chamber assumed that victims submitting representations were oblivious to the challenges the Prosecution could face in the course of potential investigations in the Situation in the Islamic Republic of Afghanistan and decided instead that – contrary to their own representations – the victims’ interests militate against the opening of an investigation which may not lead to convictions, hence “*creating frustration [among the victims] and possibly hostility vis-a-vis the Court*”.¹¹² The Principal Counsel rejects said paternalistic approach, which also instrumentalises the role of victims, oversimplifies their experiences and

¹⁰⁹ See AMBOS (K.), “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC”, in AMBOS (K.), LARGE (J.) and WIERDA (M.) (Eds.), *Building a Future on Peace and Justice – Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice*, Springer, 2009, p. 26, citing KIZA (E.), RATHGEBER (C.) and ROHNE (H.-C.), *Victims of war. An empirical study on war-victimization and victims’ attitudes towards addressing atrocities*, Hamburger edition online, 2006, p. 126 and OHCHR, [Making peace our own – Victims’ Perception of Accountability, Reconciliation and Transitional Justice in Northern Uganda](#), 2007, p. 47.

¹¹⁰ See Article 68(3).

¹¹¹ Article 15(3) provides that “*Victims may make representations to the Pre-Trial Chamber*”. See also Article 53(1)(c), providing that, in deciding whether to initiate an investigation, the Prosecutor shall take into account the interests of victims.

¹¹² See the Impugned Decision, *supra* note 4, para. 96.

expectations, and underestimates their understanding of the justice process and of the broader geo-political context.¹¹³

57. The Principal Counsel further submits that the interests of victims, and their internationally recognised rights to truth, justice and reparation, represent the core determining factor of the ‘interests of justice’¹¹⁴ and that only in the most exceptional circumstances will competing factors outweigh the wishes and priorities expressed by the overwhelming majority of victims in relation to a potential situation.¹¹⁵ The Pre-Trial Chamber’s decision to deny authorisation based on its assessment of the anticipated challenges that may be encountered during a potential investigation unreasonably disregards the interests and views expressed by the victims before the Pre-Trial Chamber,¹¹⁶ ignoring their rights to justice and accountability for the crimes they have suffered from.

The feasibility of the investigation

58. The Impugned Decision’s assessment of the feasibility of the proposed investigation, as well as the Pre-Trial Chamber’s reliance on said assessment in deciding whether authorisation to investigate should be granted, was so unreasonable as to constitute an abuse of discretion. In particular, the Pre-Trial

¹¹³ The Principal Counsel, based on fifteen-year-long experience representing victims before the Court, concurs with the Prosecutor’s conclusion in her Policy Paper on the Interests of Justice, “[t]he experience of the Court to date proves that understanding the interests of victims in relation to the decision to initiate an investigation is a very complex matter”. See the [OTP Policy Paper on the Interests of Justice](#), September 2007, p. 5.

¹¹⁴ *Idem*, pp. 5-6 (noting that the interests of victims generally but not invariably weigh in favour of prosecution). See also the “Separate opinion of Judge Sang-Hyun Song” appended to the “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007” (Appeals Chamber), [No. ICC-01/04-01/06-925 OA8](#), 13 June 2007, para. 16; the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case”, *supra* note 42, paras. 31 and 34; the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, *supra* note 41, para. 97; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; and the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

¹¹⁵ See e.g. BITTI (G.), *op. cit. supra* note 93.

¹¹⁶ See the Impugned Decision, *supra* note 4, para. 27.

Chamber prematurely¹¹⁷ concluded that cooperation by relevant States would not be forthcoming¹¹⁸ and unilaterally assessed that the evidence of the earlier crimes within the scope of the Prosecutor's request was unlikely to be available, making the proposed investigation unfeasible and thus not in the "interests of justice".¹¹⁹

59. This unprecedented approach undermines the fundamental rights of victims only to rewards obstructionism, impunity and failure to cooperate by reluctant States. It further indicates that the interests of victims are only worth pursuing where justice is within easy reach, oblivious to the fact that the history of victims' rights – and of international justice as a whole – is punctuated by hard-fought victories against all odds and in challenging geo-political, security and humanitarian situations.

60. The Pre-Trial Chamber's approach also conflicts with the Statute and the established jurisprudence of the Court.¹²⁰ It ignores the complementarity principle established by the Statute, which indicates that the Court's intervention is particularly crucial in instances where the relevant State is unwilling to pursue accountability. Indeed, in the optic of the admissibility assessment of a case, the lack of cooperation by the relevant State would strongly militate *in favour of* the exercise of the Court's jurisdiction.¹²¹ More broadly, the international criminal justice framework as a whole is based on the premise that a given State's unwillingness to bring to justice the perpetrators of the most serious crimes committed on its territory or by its

¹¹⁷ The Principal Counsel notes that States' obligations to cooperate under Part 9 of the Statute are only triggered by the opening of an investigation. The Principal Counsel also notes that, as recognised by the Court, the prospects of cooperation from relevant States vary significantly over time. See the "Decision on the 'Victims' request for review of Prosecution's decision to cease active investigation" (Pre-Trial Chamber II), [No. ICC-01/09-159](#), 5 November 2015, para. 14.

¹¹⁸ See the Impugned Decision, *supra* note 4, para. 94.

¹¹⁹ *Idem*, para. 93.

¹²⁰ See *e.g.* Article 57(3)(d) concerning investigations on the territory of a failed state and Article 87(7) setting out a remedy for State non-cooperation.

¹²¹ See Article 17. As noted by the former UN Secretary-General, the very purpose of this clause, allowing the Court to intervene where a state is unwilling or unable to exercise jurisdiction, is "to ensure that mass-murderers and other arch-criminals can not shelter behind a state run by themselves or their cronies, or take advantage of a general breakdown of law and order". See UN Secretary General, Press Release: Secretary-General urges 'Like-Minded' States to Ratify Statute of International Criminal Court, [UN Doc. SG/SM/6686](#), 1 September 1998.

nationals does not mean that that the victims' rights to truth, justice and reparation for those crimes should be infringed. As confirmed by the UN Secretary General:

"[W]here domestic authorities are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial. The establishment and operation of the international and hybrid criminal tribunals of the last decade provide a forceful illustration of this point. These tribunals [...] have proved that it is possible to deliver justice and conduct fair trials effectively at the international level, in the wake of the breakdown of national judicial systems. More significantly still, they reflect a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law".¹²²

61. Finally, the Principal Counsel recalls that the Office has been contacted by victims and organisations representing victims who unanimously deplore that the Impugned Decision is only reinforcing the culture of impunity that prevails in Afghanistan and who, considering the past and current situation in the country, aver that the Court is their only hope to obtain justice.¹²³

The allocation of the Prosecution's resources

62. The Pre-Trial Chamber abused its discretion in opining on the appropriate allocation of the Prosecution's resources and inferring that the proposed investigation was not, as a result, in the interests of justice.¹²⁴ The Principal Counsel submits that such matters are not relevant to the assessment of the "interests of justice", which should be interpreted as a purely victim-oriented consideration.

63. The Principal Counsel notes that budgetary constraints and the exigencies of case-prioritisation are not concerns unique to the Court, nor indeed to international and hybrid courts. As noted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, "*in many criminal justice systems, the entity*

¹²² See Report of the Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, [UN Doc. S/2004/616](#), 23 August 2004, para. 40.

¹²³ See the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", *supra* note 17, para. 53.

¹²⁴ See the Impugned Decision, *supra* note 4, paras. 88 and 95.

responsible for prosecutions has finite financial and human resources".¹²⁵ The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence confirmed, however, that the relative scarcity of financial and human resources does not justify a denial of the victims' internationally-recognised rights to truth, justice and reparation:

"Refraining from prosecuting mass violations is not an option since this omission in itself constitutes a new violation of international human rights obligations. The question is how to muster and organize available resources — institutional, political, human and material — to maximize the impact of criminal justice measures [...]. Importantly, the use of inadequate or unjustified criteria in the distribution of prosecutorial resources can result in new or renewed ways of discrimination and rights violations, which may undermine the effort to overcome past violations and establish a new social order based on justice, equality and the rule of law. It may even provoke a renewal of violence by creating feelings of injustice and resentment against the institutions".¹²⁶

64. The general interests of victims before the Court require that the Prosecutor use her resources efficiently and adopt appropriate policies for the prioritisation of proceedings. The Principal Counsel, however, opposes the Pre-Trial Chamber's unreasonable attempt to externally direct the Prosecution's appropriate allocation of resources.¹²⁷

65. Crucially, from the victims' perspective, the Pre-Trial Chamber's approach makes the opening of an investigation conditional on the Prosecution's demonstration that the prospects of success in a given situation are higher than in other situations before – or potentially before – the Court.¹²⁸ Said approach implies that the interests of victims in relation to Afghanistan and their rights to truth, justice and reparation need to be weighed against those of victims of all other existing or

¹²⁵ See ICTY, *Delalić*, Case No. IT-96-21-A, [Appeal Judgement](#), 20 February 2001, para. 602.

¹²⁶ See OHCHR, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, [UN Doc. A/HRC/27/56](#), 27 August 2014, paras. 37-39.

¹²⁷ See in this respect Article 42(2), providing that "[t]he Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof".

¹²⁸ See the Impugned Decision, *supra* note 4, para. 95.

potential situations before the Court,¹²⁹ placing victims of relevant crimes in competition with one another, contrary to the fundamental values enshrined in the Statute.¹³⁰

c) *The Pre-Trial Chamber erred in law in arbitrarily restricting the scope of a potential authorisation to investigate*

66. The majority of the Pre-Trial Chamber erred in law in conducting its scrutiny of the interests of justice on the basis that an authorisation to commence an investigation pursuant to Article 15(4) would be limited in scope to the “*events or categories of events [...] identified by the Prosecution*” in its request for authorisation, as well as those “*closely linked*” thereto.¹³¹ This narrow understanding of the scope of a potential authorisation is at variance with the well-established jurisprudence of the Court.¹³² It significantly restricts the Prosecutor’s mandate in the context of an investigation and precludes the fulfilment of her duties under Article 54. Indeed, Article 54(1)(a) provides, in particular, that the Prosecutor “*shall [...] [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute*”.¹³³

67. As noted by Pre-Trial Chamber I in the situation in Georgia, “[i]t is precisely the purpose of the investigation to discover proper evidence to enable a determination which

¹²⁹ *Ibid.*

¹³⁰ The Preamble to the Statute provides, for instance, that “*all peoples are united by common bonds, their cultures pieced together in a shared heritage*” and that the Court was established “*for the sake of present and future generations [...] with jurisdiction over the most serious crimes of concern to the international community as a whole*”.

¹³¹ See the Impugned Decision, *supra* note 4, paras. 39-42. See also the “Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua”, *supra* note 6, paras. 4-15. The Principal Counsel notes that, while the Pre-Trial Chamber denied leave to appeal the Third Issue (see the “Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’”, *supra* note 12, paras. 40-41), arguments in this respect should be considered by the Appeals Chamber either as part of the Second Issue (see the “Prosecution Appeal Brief”, *supra* note 15) or pursuant to the Legal Representatives of Victims appeals and/or the Appeal’s Chamber power to clarify or amend issues as certified for appeal (see *supra*, para. 9).

¹³² See *e.g.* the “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’”, *supra* note 8, para. 27.

¹³³ See Article 54(1)(a).

crimes, if any, may be prosecuted".¹³⁴ The unconstrained and independent exercise of the Prosecutor's investigative powers in the context of a situation, and his or her ability to follow the evidence wherever it may lead, are instrumental to the realisation of the victims' internationally recognised rights to truth, justice and reparation.¹³⁵ Victims have a substantial interest in broad-scope authorisations allowing for an investigation that duly encompasses the full extent of their victimisation and the impact of the crimes on individuals and affected communities.¹³⁶ On the contrary, the Pre-Trial Chamber's misappreciation and unduly narrow reading of the scope of the investigation it was requested to authorise tainted its assessment of the feasibility of the investigation, thus materially affecting the Impugned Decision.¹³⁷

d) The Pre-Trial Chamber erred procedurally and abused its discretion in failing to seek submissions from the Prosecution and the Victims

68. The Principal Counsel recalls that the Impugned Decision departed from the prior consistent jurisprudence of the Court in many decisive respects.¹³⁸ As a result, the Victims and the Prosecution were not in a position to anticipate the legal and factual considerations which ultimately led the Chamber to deny authorisation to

¹³⁴ See the "Decision on the Prosecutor's request for authorization of an investigation", *supra* note 98, para. 63.

¹³⁵ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 42, paras. 32-36. See also the Basic Principles, *supra* note 47, Principle 1 (establishing a duty to "[i]nvestigate violations effectively, promptly, thoroughly and impartially").

¹³⁶ As specifically recognised by the Pre-Trial Chamber in the Democratic Republic of Congo situation: "*within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54*". See the "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), [No. ICC-01/04-135-tEN](#), 31 March 2006, para. 39.

¹³⁷ See the "Prosecution Appeal Brief", *supra* note 15, paras. 8-9.

¹³⁸ See the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", *supra* note 17, para. 22. See also *e.g.* the "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'", *supra* note 8, paras. 17, 22 and 28.

open an investigation in the Situation in the Islamic Republic of Afghanistan. While, during the proceedings leading to the adoption of the Impugned Decision, the Pre-Trial Chamber relied on its powers under Rule 50(4) to request additional information from the Prosecution on other topics,¹³⁹ it did not seek observations on the factual and legal considerations underlying the issues currently under appeal.¹⁴⁰

69. Both the Prosecution and the Victims were therefore deprived of the opportunity to present submissions on those points that proved decisive to the Pre-Trial Chamber's ruling in the Impugned Decision, including for instance the anticipated feasibility of the investigation and its impact on the interests of justice and the interests of victims. Said attitude amounts to an abuse of discretion¹⁴¹ and a procedural error¹⁴² on the Pre-Trial Chamber's part which had material effects on the Impugned Decision.

¹³⁹ See the "Order to the Prosecutor to Provide Additional Information" (Pre-Trial Chamber III), [No. ICC-02/17-8](#), 5 December 2017 and the "Second Order to the Prosecutor to Provide Additional Information" (Pre-Trial Chamber III), [No. ICC-02/17-23](#), 5 February 2018.

¹⁴⁰ Regulation 48(1) of the Regulations of the Court specifically empowers the Pre-Trial Chamber to "*request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c)*".

¹⁴¹ See *e.g.* the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'" (Appeals Chamber), [No. ICC-02/04-01/15-251 OA3](#), 17 June 2015, para. 43. See also the "Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-206](#), 24 May 2019, para. 21.

¹⁴² See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011'" (Appeals Chamber), [No. ICC-01/05-01/08-1937-Red2 OA9](#), 23 November 2011, para. 66.

IV. CONCLUSION

70. For the foregoing reasons, the Principal Counsel respectfully requests the Appeals Chamber to grant the appeals, reverse the Impugned Decision and authorise the investigation or remand the matter back to the Pre-Trial Chamber for it to authorise the opening of the investigation in the Situation in the Islamic Republic of Afghanistan.



Paolina Massidda
Principal Counsel

Dated this 22nd day of October 2019
At The Hague, The Netherlands