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**International
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PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

with Confidential Annex I

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'

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. The legal representatives for 82 victims ('Victims'), from the situation in the Islamic Republic of Afghanistan ('Afghanistan'), and two organizations that submitted representations on behalf of a significant number of victims, hereby respectfully seek 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' by Pre-Trial Chamber II of 12 April 2019 ('Decision'),¹ pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), Rule 155 of the Rules of Procedure and Evidence ('Rules'), and Regulation 65 of the Regulations of the Court ('Regulations'). The Victims are victims of crimes allegedly involving: i) anti-government groups including the Taliban; ii) Afghan armed forces; and iii) United States armed forces.
2. The Decision involves issues that significantly affect the fair and expeditious conduct of the proceedings, and the outcome of any trials that might result from an investigation, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
3. Confidential annex I contains letters of appointment of counsel by the Victims and two organizations. Annex I describes the approach adopted by the legal representatives in obtaining the letters of appointment in light of the current security situation in Afghanistan.
4. As the Decision is exceptionally detrimental to the Victims' rights, the Victims have also filed on 10 June 2019 before the Appeals Chamber a notice of appeal of the Decision, pursuant to Article 82(1)(a) of the Statute, in order to fully preserve their rights. The Victims respectfully assure the Pre-Chamber, the Appeals Chamber and the Prosecution of their willingness to work constructively in order to ensure that any appeal of the Decision is heard expeditiously.

II. PROCEDURAL BACKGROUND

5. On 30 October 2017, the Office of the Prosecutor ('Prosecution') informed the Presidency of its decision to request judicial authorisation to commence an investigation into the situation in Afghanistan pursuant to Regulation 45 of the Regulations.²

¹ ICC-02/17-33.

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

6. On 9 November 2017, Pre-Trial Chamber III noted that '[v]ictims may make representations to the Pre-Trial Chamber' in accordance with Article 15(3) of the Statute. Pre-Trial Chamber III ordered the Victims Participation and Reparations Section ('VPRS') to receive and collect victims' representations and transmit victims' forms to it.³
7. On 20 November 2017, the Prosecution submitted a 'Request for authorisation of an investigation pursuant to article 15' ('Prosecution's request') to Pre-Trial Chamber III.⁴ On the same day, the Prosecution issued a public notice informing victims of their right to make representations on whether an investigation on the alleged crimes should be opened.⁵
8. Between 20 November 2017 and 31 January 2018, the Court received representations on a rolling basis.⁶ A total of 699 representation forms were transmitted to Pre-Trial Chamber III on behalf of 6,220 individuals, 1,690 families, several millions of victims including 26 villages and one institution.⁷ The Victims were among those that submitted representation forms.
9. On 20 February 2018, the Registry submitted its final report on victims' representations to Pre-Trial Chamber III.⁸
10. On 12 April 2019, Pre-Trial Chamber II ('Chamber') delivered the Decision, in which it noted that 680 out of the 699 victims' representations welcomed the prospect of an investigation.⁹ It also found, based *inter alia* on the victims' representations,¹⁰ that the jurisdiction and admissibility requirements were met. Notwithstanding, the Chamber decided that an investigation into the situation in Afghanistan would not serve the interests of justice and rejected the Prosecution's request. The Chamber ordered the VPRS to notify victims that made representations of the Decision.¹¹

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

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

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

⁶ Decision, para. 9.

⁷ Decision, para. 27.

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

⁹ Decision, para. 87.

¹⁰ Decision, para. 43.

¹¹ Decision, page 32.

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

III. PRELIMINARY MATTERS

i. Time limit for submission of a request for leave to appeal

13. The Victims submit this request for leave to appeal to the Chamber within five days of the date of notification of the Separate Opinion.
14. Time limits relating to separate opinions to decisions issued by a Chamber are not specifically addressed in the Statute, the Rules or the Regulations. Article 74(5) of the Statute, however, requires that the Trial Chamber ‘*shall issue one decision. When there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority.*’ [Emphasis added]. While Article 74(5) applies to decisions by Trial Chambers, the principle it encompasses is that a ‘decision’ includes all the views of the judges. It would be unfair and unreasonable to require parties wishing to appeal a decision by a Pre-Trial Chamber to request leave to do so before all views have been notified. It is after consideration of all views that parties have a full understanding of the decision and, on that basis, are able to make a fully informed decision as to whether to seek leave to appeal and to formulate the appealable issues.
15. The necessity that parties submit an *informed* request is emphasised in Rule 155, which requires a party submitting a request for appeal to set out the reasons for the request, and in Regulation 65(1) of the Regulations, which specifies that the applicant ‘shall specify the legal and/or factual reasons in support thereof’. Regulation 65(2) requires that the applicant ‘specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.’
16. The Appeals Chamber in *Prosecutor v. Saif Islam Al Gaddafi* noted that ‘[f]airness and due process dictate that Mr Gaddafi should be provided with an opportunity to consider the Minority Opinion before filing his appeal brief in order for him to be able to properly formulate

¹² Pre-Trial Chamber II, ‘Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua’, 31 May 2019, ICC-02/17-33-Anx-Corr (‘Separate Opinion’).

¹³ ICC-02/17-34, 7 June 2019.

his grounds of appeal.’¹⁴ This further emphasises the point that a party cannot be required to seek leave to appeal without having been notified of a decision in full.

17. In the present case, the Separate Opinion clarifies central aspects of the Decision, and informed Victims in their decision to submit this request for leave to appeal. In particular, Judge Mindua set out in detail his views concerning two issues of core relevance to this appeal: the Pre-Trial Chamber’s competence to review the Prosecutor’s ‘interests of justice’ assessment where the Prosecutor has decided that all conditions for an investigation are met;¹⁵ and the interpretation of the ‘interests of justice’.¹⁶ Both issues are of considerable importance but were dealt with briefly in the Decision itself.¹⁷ Furthermore, Judge Mindua set out his disagreement with the Chamber’s assessment of the scope of an authorisation.¹⁸
18. The timeline for appeal should therefore run from the notification of the filing of the Decision as a whole, including the Separate Opinion. This interpretation is consistent with the position taken by Judge Mindua, who acknowledged, at the time that he issued the Separate Opinion, that ‘the Prosecutor may appeal’ the Decision.¹⁹
19. For these reasons, the Victims respectfully submit that the time limit to apply for leave to appeal the Decision runs from the date of notification of the Separate Opinion to the Decision.

ii. The Victims’ standing to seek leave to appeal

20. Article 82(1)(d) of the Statute enables ‘either party’ to seek leave to appeal ‘a decision that involves an issue 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.’
21. The expression ‘either party’ is ambiguous at the pre-authorisation stage, as there are no two obvious parties. It is inappropriate to interpret the provision as referring to Prosecution and Defence as there is no Defence at this stage. The only parties that submitted views to the

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

¹⁵ Separate Opinion, paras. 17-23.

¹⁶ Separate Opinion, paras. 24-50.

¹⁷ Decision, paras. 87-96.

¹⁸ Separate Opinion, paras. 4-15.

¹⁹ Separate Opinion, para. 50.

Chamber during the Article 15 process were the Prosecution and the victims.²⁰ To add to the ambiguity, Rule 155(2) of the Rules, which relates to Article 82(1)(d), refers to ‘all parties’ rather than ‘both parties’.

22. The Statute does not define ‘party’. Nor do the Elements of Crimes, the Rules, or the Regulations.²¹ The Victims submit that the term should, in the present exceptional circumstances, where an entire investigation has been denied notwithstanding affirmative findings on jurisdiction and admissibility, be interpreted to include victims.
23. Article 81 of the Statute explicitly allows appeals by ‘the Prosecutor’ and or ‘the convicted person’. As Article 82(1) is not confined to the Prosecutor and Defence, the term ‘party’ in Article 82(1) can encompass a broader range of participants in the proceedings, as the circumstances require.
24. This interpretation is consistent with the Court’s jurisprudence. Pre-Trial Chamber II granted Jordan leave to appeal a decision in accordance with Article 82(1)(d)²² and the Prosecution did not object.²³ The Appeals Chamber heard and ruled on the merits of an appeal by the Government of Côte D’Ivoire brought under Article 82(1)(a).²⁴
25. Just as States have interests which should be respected in exceptional circumstances by providing an avenue to appeal under Article 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision that goes to the core of their interests. That is the case here. The Decision pertains directly to jurisdiction and resulted in the denial of authorisation of an entire investigation that negatively affects the prospect of justice for millions of victims.
26. The Statute recognizes that victims have a particular interest in a decision on admissibility and jurisdiction. Article 19(3) of the Statute permits victims to make observations to the Court in proceedings concerning jurisdiction and admissibility. In a recent pre-authorisation decision in

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

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

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

²³ *Ibid*, para. 4

²⁴ The Appeals Chamber, ‘Judgment on the appeal of Côte D’Ivoire against the decision of the Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte D’Ivoire’s Challenge to the admissibility of the case against Simone Gbagbo”, ICC-02/11-01/12 OA, 27 May 2015.

Myanmar, Pre-Trial Chamber I accepted observations made by victims of the situation pursuant to Article 19(3) of the Statute.²⁵

27. The centrality of victims' interests at the pre-authorisation stage is reflected in Article 15(3) which expressly provides that, following a request by the Prosecutor to open an investigation, '[v]ictims may make representations to the Pre-Trial Chamber'.²⁶ Rule 50 further reflects the victims' standing at the pre-authorisation stage. No such standing is provided to any other person or to States. Furthermore, the Prosecutor is required to consider 'the interests of victims' when assessing the interests of justice under Article 53(1)(c) prior to a decision not to investigate. It is also reflected in Rule 93, which enables a Chamber to seek the views of victims or their legal representatives, to Rules 107 and 109, which concern prosecutorial decisions not to investigate or prosecute. Such decisions have the same impact on victims as the Decision.
28. In short, the Statute recognizes that the victims have a strong interest in the process of authorizing an investigation under Article 15(3), and in the 'interests of justice' assessment under Article 53(1)(c).
29. On any reasonable view, the Victims should have standing to appeal. The Victims have a recognized interest to have their views taken into consideration at the pre-authorisation stage. The victims' views were communicated to the Chamber during the Article 15 process²⁷ and the Chamber acknowledged that the Victims suffered serious crimes.²⁸ In addition, at issue are the Victims' rights to truth, justice, and to reparation.
30. The Decision represents a concrete, actual threat to the Victims' interests: without active investigation by the Prosecution, there can be no trials at the Court and those responsible for the crimes will not be held accountable. Furthermore, the Court will make no declaration of truth at the conclusion of any trial and reparations cannot take place in the absence of conviction. It is *only* through investigation by the Prosecution that there will be a realistic prospect of trial, and reparations. A favourable decision for the Victims on appeal would enable the Prosecution to use all powers conferred upon it by the Statute in order to ensure an effective

²⁵ Pre-Trial Chamber, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-37, 6 September 2018, para. 21.

²⁶ See Rule 50(3) of the Rules.

²⁷ Decision, para. 9.

²⁸ Decision, paras. 80 to 86.

investigation and prosecution, which is the *only* avenue for redress available, given the inability or unwillingness of governments, including the governments of Afghanistan and the United States, to meaningfully investigate and prosecute the crimes under consideration.

31. As a result of the Decision, the message to millions of victims of crimes against humanity and war crimes is that the Court has found that the crimes against them are of appalling gravity, that the situation is admissible, and that the Court has jurisdiction, but that the investigation cannot be opened as the Court considers that it is ‘not feasible and doomed to failure’.²⁹ The framers of the Statute could not have intended victims to be without recourse in such a situation. To the contrary, victims at the Court are actors of international justice rather than its passive subjects.³⁰ Victims have a right to a just process, and to be treated fairly, at all stages of the proceedings.³¹
32. The framers of the Statute intended for victims to have an effective remedy for violation of their rights. The Court is required to promptly inform victims of a Prosecution decision not to investigate.³² Victims may make representations to the Chamber concerning an Article 15 request for authorisation of an investigation.³³ The Court must also permit victims to present their views and concerns at stages of the proceedings determined to be appropriate by the Court, and the Court is required to consider their position.³⁴ Moreover, Rule 86 provides that *inter alia* the Prosecution and the Chamber ‘in performing their functions under the Statute or the Rules, shall take into account *the needs of all victims* [...] in particular [...] victims of sexual or gender violence’ (emphasis added).
33. In respect of an appeal of a decision to stay the proceedings in a single trial, the Appeals Chamber said:

[...] Regarding their personal interests, the Appeals Chamber finds that a decision to stay the proceedings impacts the victims’ ability to present

²⁹ Decision, para. 90.

³⁰ See ‘Report of the Court on the Strategy in Relation to Victims’, 1 November 2009, ICC/ASP/8/45, para. 46.

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

³² Rule 92(2) of the Rules.

³³ Article 15(3) of the Statute, and Rules 50(3) and 50(4) of the Rules.

³⁴ Article 68(3) of the Statute.

their views and concerns and could ultimately preclude them from the opportunity to claim reparations, should the accused be convicted.³⁵

34. The impact of the Decision is far more drastic on the victims' rights than a decision to stay the proceedings in a single trial, as it prevents proper investigation from taking place in the situation as a whole, precluding the chance that *any* trial will take place.
35. In light of the ambiguity concerning the meaning of the terms 'either party' in Article 82(1) of the Statute and 'all parties' in Rule 155(2) of the Rules, the Chamber may rely on 'principles and rules of international law' and internationally recognized human rights pursuant to Article 21 of the Statute.
36. United Nations ('UN') principles, that encapsulate customary international law, require governments to undertake thorough, prompt, and impartial investigations and they provide that victims must have equal access to an effective judicial remedy for violation of their rights.³⁶
37. Similarly, the UN Human Rights Committee has said that "[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."³⁷ The aims of an effective investigation are to ensure as far as possible that the truth is established and that those responsible are tried and convicted.³⁸
38. The Court frequently looks to jurisprudence of the European Court of Human Rights ('ECtHR') in resolving ambiguities in the Statute. ECtHR jurisprudence concerning victims' rights confirms that a failure to adequately and effectively investigate or prosecute criminal conduct may constitute a violation of internationally recognized human rights, including the right to life,³⁹ the prohibition on torture,⁴⁰ and the right to an effective remedy.⁴¹

³⁵ Appeals Chamber, 'Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay Proceedings', 18 August 2010, ICC-01/04-01/06-2556 OA18, para. 9.

³⁶ See [The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), adopted on 16 December 2005, Articles 3- 4 and 11-12; [United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions](#), adopted 24 May 1989, Article 9.

³⁷ United Nations Human Rights Committee, '[General Comment 20: Article 7 \(Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment\)](#)', 10 March 1992.

³⁸ See [The Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](#), adopted in 1991.

³⁹ See ECtHR, [Akkum and Others v. Turkey](#), 24 June 2005.

⁴⁰ ECtHR, [Biser Kostov v. Bulgaria](#), 10 January 2010.

⁴¹ See ECtHR, [Aksoy v. Turkey](#), 18 December 1996.

39. Jurisprudence of the Court recognises that victims have three principal rights: (i) to have a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.⁴²
40. In the present case, not one of these rights has been realized, nor will they be realised if the Decision is permitted to stand. Consistent with the principle of *ubi jus ibi remedium*, there must be a remedy for this comprehensive breach of the Victims' rights. The rights of victims to an effective remedy and access to justice 'lie at the heart of victims' rights' at the Court.⁴³
41. Against this backdrop of applicable international human rights and customary law, it would be 'a result which is manifestly absurd or unreasonable'⁴⁴ to interpret the Statute as depriving the Victims of an effective means of challenging a decision by the Chamber not to permit an investigation, where the requirements of jurisdiction and admissibility have been met.
42. For these reasons, it is consistent with Article 21(1) and 21(3) of the Statute and the Court's jurisprudence on victims' rights to interpret Article 82 of the Statute to permit the Victims to challenge the Decision, in their own right.

IV. APPEALABLE ISSUES

43. The Victims respectfully set forth six proposed issues. Each of them satisfies the requirements that '[o]nly an 'issue' may form the subject-matter of an appealable decision [and] that [a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.⁴⁵ The proposed issues "significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial [for which] immediate resolution by the Appeals Chamber may materially advance the proceedings" pursuant to Article 82(1)(d) of the Statute.

⁴² Pre Trial Chamber I, 'Decision on the 34 Applications for Participation at the Pre Trial Stage', 25 September 2009, ICC-02/05-02/09-121, para. 3. *See also* Pre Trial Chamber I, 'Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', 15 Mayo 2008, ICC-01/04-01/07-474, paras 31-44.

⁴³ Pre-Trial Chamber I, 'Decision on Information and Outreach for the Victims of the Situation', 13 July 2018, ICC-01/18, para. 9.

⁴⁴ [Vienna Convention on the Law of Treaties](#), Article 32(b).

⁴⁵ Appeals Chamber, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', 13 July 2006, ICC-01/04, para. 9.

44. The ‘fair and expeditious conduct’ requirement has been interpreted broadly.⁴⁶ The Appeals Chamber has noted that it may materially advance the proceedings where a decision, ‘unless remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel judicial process.’⁴⁷
45. By declining to authorize the investigation on the application of an erroneous legal test, the Chamber has prevented the Prosecution from accessing the full range of tools available to it in the Statute in order to uncover the full truth about the crimes committed, and the identities of those most responsible. This has the effect of depriving the Victims, for the foreseeable future, of any reasonable prospect of investigation and trial at the Court. Immediate resolution by the Appeals Chamber is warranted, to clarify the test to be applied by the Chamber, and to enable the investigation to proceed. It is also warranted to clarify the delimitation of powers between a Pre-Trial Chamber and the Prosecution.
46. Granting the present request would allow the Appeals Chamber to clarify the considerable uncertainty which has resulted from the Decision, particularly in respect of the applicable statutory regime for authorisation of investigation and with respect to the Pre-Trial Chamber’s powers to review the interest of justice assessment of the Prosecutor. It would enable the Appeals Chamber to “settle the matter [...] through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁴⁸
47. The first proposed issue is:

Whether the Pre-Trial Chamber has jurisdiction to review the Prosecutor’s assessment of ‘the interests of justice’, after the Prosecutor has determined that there is a reasonable basis to proceed with an investigation.

⁴⁶ Pre-Trial Chamber II, ‘Decision on Jordan’s request for leave to appeal’, 21 February 2018, ICC-02/05-01/09-319, para. 15

⁴⁷ Appeals Chamber, ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal’, 13 July 2006, ICC-01/04, para. 16.

⁴⁸ Appeals Chamber, ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s Decision Denying Leave to Appeal’, 13 July 2006, ICC-01/04-168, para. 14 and paras 15-18. *See also* Pre-Trial Chamber I, ‘Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros’, 18 January 2019, para. 43.

48. This goes to the heart of the jurisdiction of the Pre-Trial Chamber on one of its major functions: approving the opening of an investigation. The judicial review function of the Pre-Trial Chamber concerning the ‘interests of justice’ test is expressly limited by Article 53(3). That subsection enables the Pre-Trial Chamber only to review a decision of the Prosecutor *not* to proceed. It does not permit review of a decision to proceed. Further, the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed with an investigation where the Prosecutor determines that there are ‘substantial reasons to believe that an investigation would not serve the interests of justice.’ There is nothing in Article 53 to suggest that the Pre-Trial Chamber has discretion to review a decision of the Prosecutor to proceed with an investigation by applying an ‘interests of justice’ test.
49. Article 15(4) *compels* the Chamber to authorize an investigation if it ‘considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.’ The Chamber made positive determinations as to admissibility and jurisdiction in its Decision, and erroneously conducted an ‘interests of justice’ assessment.
50. The Chamber did not cite jurisprudence of the Court, nor the *travaux préparatoires* of the Statute, in support of its interpretation of Article 53(1). The Chamber’s interpretation of Article 53(1) is inconsistent with the Court’s jurisprudence.⁴⁹
51. Furthermore, any judicial review of an ‘interests of justice’ assessment by the Prosecutor must be an *informed* review. This principle is found in Regulation 48, which enables the Chamber carrying out the review to request the Prosecutor ‘to provide specific or additional information or documents in his or her possession, or summaries thereof in order for the Chamber to properly carry out’ its Article 53(3)(b) ‘interests of justice’ review. This is to say, the Regulations contemplate that the Pre-Trial Chamber will be fully informed of the reasons why the Prosecutor believes that an investigation or prosecution is not in the interests of justice before it reviews that assessment. Article 53(1)(c) of the Statute also requires the Prosecutor to take into account victims’ interests in deciding not to open an investigation. There is nothing in the Decision to suggest that the Chamber gave the Prosecutor an opportunity to fully explain

⁴⁹ See *e.g.* Pre-Trial Chamber II, ‘Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation of the Republic in the Kenya’, 31 March 2010, ICC-01/09-19 Corr, para. 63 and footnote 35.

its own interests-of-justice assessment, including its consideration of the victims' interests. Nor were the victims provided with any opportunity to make submissions on this assessment.

52. The first proposed issue significantly affects the fair and expeditious conduct of the proceedings, and the outcome of any trials. As submitted earlier, the Decision has brought the entire proceedings to a standstill, and no trials can take place as a result of it. There can be no fair and expeditious conduct of the investigation and further proceedings unless the Decision is reversed. Immediate resolution of this issue by the Appeals Chamber is necessary to enable the investigation to commence.

53. The second proposed issue is:

Whether the Pre-Trial Chamber may consider the extent of cooperation that the Prosecution has received from a State Party during a preliminary examination, before the duty to cooperate under Part 9 of the Statute has been fully triggered, in deciding whether to authorize an investigation.

54. The Chamber erred in its assessment of cooperation by Afghanistan and other States Parties.⁵⁰

The Chamber referred to 'the relevant political landscape in Afghanistan and in key States (both parties and not parties to the Statute)' and said that it is 'extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjecture gives any reason to believe that such cooperation can be taken for granted'.⁵¹

55. The Chamber did not refer to any specific incidents of non-cooperation, nor any part of the Prosecution's request, in making this assessment. Nor did it separately assess the prospects for cooperation from States Parties and other States or elaborate on the 'relevant political landscape in Afghanistan and in key States'.⁵² The lack of detailed reasoning or citation to specific incidents, means that it is not possible to understand in full the Chamber's reasoning.

⁵⁰ Decision, para. 94.

⁵¹ Decision, para. 94.

⁵² Decision, para. 94.

56. The Court is not yet at a stage at which it can conclude that Afghanistan, or any other State Party, has not complied with its duty to cooperate under the Statute because the investigation has not yet begun. The Article 86 obligation on Afghanistan, Poland, Lithuania, Romania and all other States Parties to cooperate with the Court applies only to the investigation and prosecution stages. Where a State Party's non-compliance with its duties under the Statute are such as to prevent the Court from exercising its functions or powers, the correct remedy is referral to the Assembly of States Parties or (in the case of referral by the United Nations Security Council, to the Council) under Article 87(7). Deciding not to open an investigation due in part to a perception that States Parties are unlikely to comply with their obligations before the fact is unreasonable. It is worth noting that the government of Afghanistan has voiced its commitment to the international legal order and justice and to 'strengthen the Court by supporting its decisions.'⁵³
57. Additionally, the Statute makes specific provision for the situation where a State (including a non-party State) has information relevant to an investigation which it might be reluctant to disclose on national security grounds. Articles 72(5) and 72(7) set forth an expectation that the Prosecution will act in conjunction with the relevant Chamber and the State to seek to resolve the matter by cooperative means, and set forth specific steps that might be taken to protect the State's security interests while ensuring that the truth will emerge. The Pre-Trial Chamber has given no indication that it has considered the potential for access to relevant evidence that the Article 72 procedure envisages.
58. The second proposed issue significantly affects the fair and expeditious conduct of the proceedings in that it prevents the Prosecution from taking all the action that it can to secure the cooperation of State Parties and other States in respect of providing access to relevant witnesses and evidence. Immediate resolution of this issue by the Appeals Chamber would enable the investigation to commence, thereby enabling the triggering of the Article 86 cooperation obligation for all States Parties, and permitting the use of the procedure set out in Articles 72(5) and 72(7) in respect of all States.
59. The third proposed issue is:

⁵³ See [Statement by Ambassador of the Islamic Republic of Afghanistan to The Netherlands at the 17th session of the Assembly of States Parties](#), 2018.

Whether the Pre-Trial Chamber may deny a request for authorisation to investigate on the basis that it believes that the investigation is unfeasible.

60. The Pre-Trial Chamber's assessment that the investigation is 'not feasible and doomed to failure', and therefore should not take place, merits appellate scrutiny. Feasibility is not a factor mentioned anywhere in the Statute. The Statute does not envisage that investigations will take place only where it is easy to investigate. It foresees the opposite.
61. The Court deals exclusively with crimes of the utmost seriousness—genocide, crimes against humanity, war crimes and aggression⁵⁴—which inevitably take place in great turmoil. Post-conflict environments are typically un conducive to investigation. The Court can exercise jurisdiction over such crimes *only* where the State that has jurisdiction over them is unwilling or unable genuinely to carry out an investigation or prosecution.⁵⁵ The Statute recognises that in many—if not most—cases, the Court will be required to carry out investigations in challenging and risky environments, where the State itself might not be able or willing to assist. For example, Article 56 foresees that unique opportunities to take evidence will arise, which may not be available subsequently: Article 57(3)(d) envisages investigations on the territory of a failed state; and Article 87(7) foresees and provides a remedy for State non-cooperation.
62. By erroneously denying authorisation of the investigation due to the view that the investigation is doomed to fail, the Chamber has brought the proceedings to a halt. The proceedings cannot proceed expeditiously, or at all, and there will be no trials without investigation. The issue also significantly affects the fairness of the proceedings as it would clarify the substance and scope of an Article 15 authorisation process. Immediate resolution of this issue by the Appeals Chamber is necessary to enable the investigation to commence.
63. The fourth proposed issue is:

Whether the Pre-Trial Chamber may restrict the scope of the investigation to incidents specifically mentioned in the Prosecution's request, as well as those 'comprised within the

⁵⁴ See Article 5 of the Statute.

⁵⁵ See Article 17(1) of the Statute.

authorisation’s geographical, temporal, and contextual scope, or closely linked to it’, as opposed to authorizing an investigation into all crimes within the Court’s jurisdiction arising in the situation, including those committed after authorisation of investigation.

64. As the Separate Opinion clarifies,⁵⁶ the Chamber was divided on this issue. Restricting the investigation to specific incidents identified by the Prosecution, and those closely linked to them,⁵⁷ would have a significant impact on the fair and expeditious conduct of the investigation—if investigation is permitted following appeal—and the outcome of any trials.
65. A desk-based preliminary examination is inevitably an imperfect probe of a situation. Given the size of Afghanistan, its geography, and its current instability, it is likely that there have been numerous crimes—including crimes involving sexual and gender-based violence—which are totally or in large part unknown to the Prosecution. It is similarly likely that crimes committed in relation to cases of rendition to other States Parties are not yet known to the Prosecution. It would be unfair to the victims of those crimes to exclude them from the justice process at the Court for reasons beyond their control.
66. The notion that crimes should be limited to those known to the Prosecution before the investigation has properly concluded has no place in the jurisprudence of the Court. It is inconsistent with the Court’s Article 69(3) function ‘to request the submission of all evidence that it considers necessary for the determination of the truth’, and the Prosecution’s strict duty in Article 54(1) ‘in order to establish the truth’, to extend the investigation to cover ‘all facts and evidence relevant to an assessment of whether there is criminal responsibility’. As there are no accused, there are no fair trial guarantees to be protected by needless limitation of the investigation to that which is known at the authorisation stage.
67. There is nothing in the extensive experience of the ICTY, ICTR and ECCC – all of which conducted trials based at least in part on events which came to light during, and as a result of, investigation – to warrant the limitation proposed by the majority of the Chamber. Immediate resolution by the Appeals Chamber is warranted in order to clarify the delimitation of powers

⁵⁶ Separate Opinion, paras. 4-15.

⁵⁷ Decision, para. 69.

between Prosecution and the Pre-Trial Chamber and the permissible bounds of any investigation that might result, if the Decision is reversed.

68. The fifth proposed issue is:

Whether the Pre-Trial Chamber may deny a request for authorisation on the basis that it believes that the Prosecutor should allocate its resources to other preliminary investigations, investigations or cases which have ‘more realistic prospects to lead to trials’.

69. The Chamber’s analysis of the ‘financial and human resources’⁵⁸ available to the Prosecution in determining whether to authorize the investigation is not envisaged in the Statute, Rules or Regulations. The Chamber did not analyse, nor cite, any of the budgetary documents discussed by the Assembly of States Parties, such as those prepared by the Court or Committee on Budget and Finance.

70. In any event, Article 42 gives the Prosecutor exclusively ‘full authority over the management and administration of the [Office of the Prosecutor] including the staff, facilities and other resources.’ The Prosecution is inevitably in a better position than the Chamber to address the sufficiency or otherwise of its own resources. This is particularly so, as the Prosecution is not obliged to make public, nor to disclose to the Chamber, all activities which it is undertaking in order to comply with its Article 54(1) duties across all its investigations and prosecutions.

71. For the Chamber to rule that the Prosecution cannot open an investigation as it would be an inappropriate allocation of its resources represents an unwarranted invasion of the Prosecution’s competence to determine how to best allocate the resources made available to it by the States Parties, and the Prosecutor’s discretion to prioritize situations and cases.

72. This issue significantly affects the fair and expeditious conduct of the proceedings as it relates to the scope and nature of a Pre-Trial Chamber’s authorisation review of a request to investigate. It also relates to the delimitation of powers between Prosecution and Chambers. This issue has also resulted in the halting of proceedings, and therefore the outcome of any

⁵⁸ Decision, para. 95.

trials, as the investigation has not been authorized. Immediate resolution by the Appeals Chamber is warranted, so that the investigation can commence.

73. The sixth proposed issue is:

Whether, for the Court to exercise jurisdiction over the war crimes of torture, cruel treatment and inhuman treatment, it is necessary that the infliction of severe physical or mental pain took place at least in part on the territory of a State Party, and whether the victim must have been captured within the borders of the State in which the armed conflict is taking place.

74. The Chamber's ruling, if uncorrected on appeal, will deprive the Court of jurisdiction over crimes of torture falling outside the Court's territorial jurisdiction, as interpreted by the Chamber.⁵⁹ The proceedings cannot proceed expeditiously, or at all, in respect of crimes which fall outside the territorial limits imposed by the Chamber. Immediate resolution of this issue by the Appeals Chamber is necessary to enable the investigation to commence, and for it to be focused on all victims of torture falling within the Court's territorial jurisdiction.⁶⁰

V. CONCLUSION

75. For the reasons above, the Victims respectfully request the Pre-Trial Chamber to certify the proposed issues for appeal.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Dated this 10th day of June 2019
At The Hague

⁵⁹ Decision, paras. 53 and 54.

⁶⁰ Prosecutor's Request, paras. 250-251.