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APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Victims' Joint Consolidated Response to the Written Observations of the "Cross-Border" Victims and Amici Curiae, including the Office of Public Counsel for the Defence

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. This filing is submitted pursuant to the Appeals Chamber's order of 27 September 2019,¹ on behalf of seven Victims by their respective legal representatives ("Legal Representatives of the Victims" or "LRVs").² It sets out a consolidated response to the "cross-border" victims,³ the Office of the Public Counsel for the Defence ("OPCD"),⁴ and the *amici curiae* who made written submissions.⁵

2. The LRVs observe that although no interested State took up the Appeals Chamber's invitation to file observations or indicate by 15 November 2019 whether it would attend the hearing (set for 4 December to 6 December 2019),⁶ one State, Afghanistan, was subsequently granted an extension of time to file such observations (now due 2 December 2019), and the right to participate in the hearing.⁷

¹ [ICC-02/17-72-Corr](#), Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, 27 September 2019 ("Scheduling Order for Hearing"); see also [ICC-02/17-97](#), Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, para. 51 ("Decision on participation of amici et al.").

² The seven Victims are represented by four separate legal teams: r/60009/17 by Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed; r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) by Katherine Gallagher of the Center for Constitutional Rights; r/00749/18 (Mohammed Abdullah Saleh al-Asad) by Margaret Satterthwaite and Nikki Reisch of the Global Justice Clinic at New York University School of Law*; and r/00635/18, r/00636/18 and r/00638/18 by Tim Moloney QC and Megan Hirst, instructed by Reprieve. [*Communications from clinics at NYU School of Law do not purport to represent the school's institutional views, if any.] This joint filing has been agreed to by the LRVs, in order to ensure expedition and efficiency in the proceedings. See Victims' request for extensions of time and of page limit, ICC-02/17-52, 24 June 2019. However, they emphasize that the representation of named clients remains separate and does not imply collective representation.

³ See ICC-02/17-116 ("Cross-Border' Victim Observations").

⁴ See ICC-02/17-110 ("OPCD Observations").

⁵ See ICC-02/17-115 ("QUB Observations"); ICC-02/17-109 ("Trahan Observations"); ICC-02/17-117 ("Mackintosh and Sluiter Observations"); ICC-02/17-108 ("Ambos and Heinze Observations"); ICC-02/17-114 ("INGO Observations"); ICC-02/17-112 ("AI Observations"); ICC-02/17-111 ("Rona Observations"); ICC-02/17-113 ("Former Prosecutors Observations").

⁶ Scheduling Order for Hearing, para. 20.

⁷ ICC-02/17-121, Decision on request for extension of time, 26 November 2019. The LRVs further observe that one of the *amici* which will present oral submissions at the hearing, the European Centre for Law and Justice, see [ICC-02-17-98](#), has publicly held out – through its American branch (the American Center for Law and Justice) – that it in some way represents the position of the United States government. See [BREAKING: ACLJ Fights for US Soldiers Under Attack at the International](#)

3. The LRVs, like the Prosecution, have streamlined and combined their responses into this single submission. Issues addressed in these submissions have been grouped thematically, and will focus largely on areas where the LRVs differ from the Prosecution, so as not to duplicate points already made. Moreover, the LRVs note that it may be useful for additional written submissions to be provided in the event that unforeseen matters arise during the upcoming hearing.

II. Issues relating to victims' standing

4. At the outset the LRVs note that among the *amici* who have addressed this question, there is unanimous support for victims' standing to seek review of a pre-trial chamber's decision taken under article 15(4).⁸ Despite not having themselves appealed, the Cross-Border Victims also support this position.⁹ The Prosecution is alone in its opposition to victims' standing to appeal.

A. Human rights principles support victims' standing

5. Several *amici* made submissions relating to the relevance of human rights principles to these proceedings, pursuant to article 21(3) of the Rome Statute, which requires that application and interpretation of law be consistent with human rights "without any adverse distinction."¹⁰ It is not only a guiding principle but a

[Criminal Court, 4 November 2019](#). ("[I]t is a rare situation that *because the US doesn't recognize jurisdiction it relies on the ACLJ or someone to stand up, we did*" (at 33:26); "[W]e're directly defending the interest of the U.S. military, men and women who served, our veterans, as well as our intelligence agencies...It is a unique opportunity to directly, *not just work with the US government in defending, but to be responsible directly in defending the US military's interest*" (at 34:27). Notably, the arguments that *amici* the European Centre for Law and Justice have stated they intend to address exceed the matters before the Appeals Chamber, whether under the LRVs article 82(1)(a) appeal or the Prosecutor's article 82(1)(d) appeal, and as set forth in the Scheduling Order for the Hearing and the Decision on participation of amici et al. *See also, id.* at para. 32.

⁸ AI Observations, paras. 16-18; QUB Observations, paras. 18-20.

⁹ 'Cross-Border' Victim Observations, paras. 7-18 & n.13.

¹⁰ Rome Statute, art. 21(3); *see* INGO Observations, paras. 9-11; Mackintosh and Sluiter Observations; AI Observations, paras. 14-23; QUB Observations.

requirement that the application of sources of law listed in article 21(1)(a) and (b) of the Statute be consistent with internationally recognized human rights.¹¹

6. The LRVs agree that application of human rights by the Court should be contextualized. However, the “contextualisation” which Mackintosh and Sluiter advocate, must – as they note in their observations – be conducted with “great caution and restraint”¹² and have in mind, *inter alia*, “the principles and interests that the right in question is meant to protect.”¹³ Appropriate contextualization of human rights standards to the ICC must reflect the intent of the Rome Statute’s drafters to ensure victim agency in the Court’s proceedings: as reflected by the groundbreaking inclusion of provisions on victims’ participation.

7. As noted in some of the amicus observations, human rights treaties and jurisprudence vest victims with the right to an effective investigation into allegations of human rights violations, particularly in respect of torture and violations of the right to life.¹⁴ This goes beyond ensuring victims’ access to judicial remedy but also encompasses an independent right to “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”¹⁵ Moreover, Mackintosh and Sluiter rightly note that adaptation of the victims’ right to an

¹¹ AI Observations, para. 18.

¹² Mackintosh and Sluiter Observations, para. 7.

¹³ Mackintosh and Sluiter Observations, para. 11; *see also id.* at paras. 7-13.

¹⁴ Mackintosh and Sluiter Observations, paras. 15-23; QUB Observations, para. 16.

¹⁵ See: ECHR, *Al Nashiri v. Poland*, application no. 28761/11, Judgement of 24 July 2014, paras. 485-486, 547; ECHR, *Al Nashiri v. Romania*, application no. 33234/12, Judgement of 31 May 2018, paras. 638-641, 706; ECHR, *Aksoy v. Turkey*, application no. 21987/93, Judgement of 18 December 1996, paras. 93-95, 98-99; ECHR, *Armani da Silva v. the UK*, application no. 5878/08, Judgement of 30 March 2018, paras. 229 -231; IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, Judgement of 25 October 2012, paras. 242-244; IACHR, *Gómez-Palomino v. Peru*, Order of 22 November 2005, paras. 78-79. See also ICC-02/17-75-Corr, “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” or 30 September 2019”, paras. 38-41.

investigation, and the corresponding duty to investigate, occurs through the application of the admissibility criteria provided for in article 17(1) of the Statute.¹⁶

8. Although Mackintosh and Sluiter limit their observations to the relevance of these human rights standards in assessing the “interests of justice,” the LRVs submit that human rights standards are also relevant to the question of victims’ standing to appeal. The fact that victims of grave crimes have a recognized human right to an investigation means that they have a fundamental individual interest in any decision affecting their ability to access such an investigation. Where a decision entirely *precludes* an investigation by the Court of last resort, it so fundamentally affects victims’ interests and so categorically forecloses their access to remedy, that human rights law requires affording them standing to assert their rights through appeal.

9. The LRVs also note that in addition to the international human rights standards referred to by the *amicus curiae*, the right to a fair trial is also relevant. Victims participating in criminal proceedings are entitled to fair trial guarantees where such proceedings are linked to the realization of civil rights (for example reparations).¹⁷ These rights must be applied and vindicated “without adverse distinction” to all persons, and all victims, regardless of their race, religion, political opinion, national origin or wealth, among other statuses.¹⁸ In a context where appeals are open to other parties, such fair trial guarantees support the possibility to appeal decisions, like the Impugned Decision, which are fundamentally determinative of victims’ access to a court and to reparations.

B. The Prosecutor and victims’ counsel have different and complementary roles

10. The observations filed by Queen’s University Belfast and the Human Rights Organisations both make the point that victims’ submissions can provide – or have in

¹⁶ Mackintosh and Sluiter Observations, para. 26.

¹⁷ ECHR, *Perez v. France*, application no. 47287/99, Judgement of 12 February 2004, para. 72; ECHR, *Sottani v. Italy*, application no. 26775/02, Decision of 24 February 2005.

¹⁸ Article 21(3) of the Statute.

these proceedings provided – views which are complementary to those of the Prosecution.¹⁹ The LRVs agree with this observation, but consider it useful to elaborate further regarding the reasons why submissions made by victims are often different – whether in focus or outcome – from those of the Prosecution, and thus why victims’ autonomous standing to appeal in cases such as the present is essential. In some instances, as here, victims and the Prosecution seek the same outcome, but on different bases. It cannot be assumed, however, that the interests of victims will always align with those of the Prosecution. Thus, the consonance of the LRVs’ and the Prosecution’s views on many aspects of this particular appeal should not be read as suggesting that victims’ standing to appeal article 15(4) decisions is superfluous. Indeed, the fact that victims may offer a different perspective than that of the Prosecution is the natural consequence of the differing roles played in the proceedings by Prosecution and victims’ counsel.

11. While the Prosecutor is required to consider victims’ views in her work,²⁰ such views are but one factor among many which the Prosecution must take into account. The Prosecutor’s mandate as set out in article 42(1) covers all work relating to the receipt of information about crimes and the conduct of investigations and prosecutions and makes no reference to victims. And crucially, even if the Prosecutor should *consider* the interests and well-being of victims, nowhere is she mandated to *represent* them. In litigation such as the current proceedings the Prosecution will have many strategic considerations in mind, stemming not only from these proceedings but other ongoing and future proceedings. It cannot be expected that the Prosecution’s positions will be those of victims.

12. A second reason is also relevant. As the Former Prosecutors note in their observations, the Office of the Prosecutor is accountable to the victims.²¹ Recognizing

¹⁹ QUB Observations, para. 14 ; INGOS Observations, para. 4-6

²⁰ Rome Statute, article 54(1)(b); Regulations of the Office of the Prosecutor, regulation 16.

²¹ Former Prosecutors Observations, para. 8.

victims' independent voice in the proceedings is one means by which this accountability is maintained.

13. These factors explain why there is an important difference between enabling victims to initiate an appeal and merely allowing them to respond to an appeal initiated by the Prosecution. In the latter case it is solely the Prosecutor who determines whether an appeal occurs, and what its scope is. This may well not permit victims' counsel to fully represent victims' independent interests; and *prevents* victims from holding the Prosecutor to account.

14. These considerations play out with particular importance in the context of an article 15 proceeding. In such proceedings, victims play a unique and central role. On this basis, the Prosecutor has resisted the intervention of other persons at this stage, explaining that: "[t]he procedure for authorisation of an investigation under article 15 of the Statute and rule 50 of the Rules is not adversarial but essentially *ex parte* in nature: it does not envisage the participation of any State, organisation or person other than the Prosecutor and the victims."²² This reflects, on the one hand, the importance of this process to victims: It is victims' individual rights to truth and to a remedy that are vindicated through any investigation and prosecution; to relegate them to a role subordinate to the Prosecution in appeals from negative Article 15 decisions implies that the Prosecutor has a greater stake in the investigation than the victims themselves. Moreover, the absence of other parties in this process only strengthens the need for victims to be fully heard in order to ensure the Prosecutor's accountability.

C. Recognizing victims' standing in these proceedings will not open the floodgates

15. The Human Rights Organisations underscore that the current proceedings are exceptional, and the probability of a flood of victim appeals is low.²³ The LRVs agree with this analysis, which is also consistent with arguments they have previously

²² *Situation in Bangladesh/Myanmar*, Motion to Set Aside, ICC-01/19-20, 29 October 2019, para. 11.

²³ INGOs Observations, para.7.

made.²⁴ However, there are additional reasons why the “floodgates” argument should be rejected.

16. One is that, just as classically occurs in domestic contexts when the spectre of the “floodgates” is evoked,²⁵ no actual evidence has been presented to substantiate the suggestion that when victims are granted standing in certain proceedings, they react by aggressively overusing that standing. The experience at the ICC in respect of victims’ standing at first instance has been notably otherwise: victims’ lawyers have only rarely and exceptionally taken the step of seizing the chamber with a matter themselves, and instead, are generally able to vindicate victims’ rights and interests through a responsive posture. Again, this is not coincidental: this aligns with victims’ strong interest in seeing proceedings concluded in a timely fashion, unless unusual circumstances mandate otherwise.

17. Secondly, and perhaps more importantly, the Court has other, and better, means at its disposal to ensure judicial economy than a blanket prohibition on victim appeals in *all* instances. An element of judicial discretion and control is involved in almost all forms of victims’ participation at the ICC; the submission of article 15 representations is one notable exception. Judges routinely make case-by-case assessments of whether, in a given instance, a particular form of victim participation is appropriate.²⁶ There is no reason why the initiation of appeals should be dealt with differently. Judicial economy can be achieved to avert any flood of litigation – and in a way which *also* upholds the victims’ rights which are so often proclaimed as central to the ICC system – by the exercise of judicial discretion. To instead impose a

²⁴ Victims’ Joint Appeal Brief, ICC-02/17-75-Cor, at paras. 34-37.

²⁵ See judicial statements to this effect in *McLoughlin v O’Brian* [1983] 1 AC 410, per Lord Wilberforce at p421, Lord Edmund-Davies at p425, Lord Bridge of Harwich at p442; and in *Byron Environment Centre Incorporated v The Arakwal People & Ors* [1997] 78 FCR 1 per Justice Lockhart, who wrote: *If it be said that this is too broad an analysis and that the floodgates will open, then I must say that over the past eighteen years on the Bench of this Court I have never seen the floodgates open in any matter, despite dire predictions to the contrary* (p19).

²⁶ This is most explicitly reflected in article 68(3) of the Statute, which permits participation “at stages of the proceedings determined to be appropriate by the Court.”

wholesale rule against victims' appeals motivated by floodgates fears would not only imply that judicial economy must always prevail absolutely over victims' voices; it would also ignore the other means available to the Court's chambers to ensure judicial economy.²⁷

18. It may well be that there is a narrow and exceptional category of proceedings which, by their nature, so fundamentally affect victims' interests that judicial discretion will usually favour the recognition of standing to appeal. If that is the case then article 15 proceedings are the archetype of such a category. They not only involve an unqualified right for victims to make representations at first instance, *without* the Chamber weighing victims' participation against other considerations. But for the reasons highlighted above they are also among the proceedings most fundamentally determinative of victims' rights.

III. Interests of Justice

A. There is broad support for the view that the chamber acted *ultra vires*

19. Several *amici* concur with the LRVs that the Pre-Trial Chamber acted *ultra vires*.²⁸ Specifically, they agree that the Pre-Trial Chamber had no statutory basis to "review" the *absence* of a finding by the Prosecutor of any substantial reasons an investigation would *not* serve interests of justice, and acted *ultra vires* in substituting its own, *de novo* assessment of whether the investigation *would* serve the interests of justice.²⁹

²⁷ See the observation of Justice Kennedy in *Dulieu v White & Sons* [1901] 2 K.B. 669 at p681 that reliance on the "floodgates" argument "*involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth.*"

²⁸ OTP Consolidated Response, ICC-02/17-119, at para.10

²⁹ See Nina Jorgensen et al., ICC-02/17-113, at paras. 10-12; Cross-border Victims, ICC-02/17-116, 15 November 2019, at paras. 19-25; Observations by Queen's University Belfast Human Rights Centre as *amicus curiae* on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019, ICC-02/17-115, 15 November 2019, at paras. 3-4; Observations by Professor Jennifer Trahan as *amicus curiae* on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the

20. Only one *amicus* submission, that of Ambos and Heinze, contends that all aspects of a prosecutor's decision to investigate can be reviewed, including a determination on the interests of justice "*whether positive or negative.*"³⁰ They claim that the drafting history of article 53 supports that view and go on to claim a supposed rationale for preventing judicial review of decisions *not to prosecute* while enabling review of decisions *to prosecute*.³¹ The reasoning behind this position is unclear. The *amicus* appears to conflate the question of whether a chamber may "substitute... its own prosecution" with the question of whether a chamber may *review* a decision not to investigate.³² Article 53 make very clear that a *is* empowered to review a decision by the Prosecutor not to investigate. In fact, both the plain language of article 53, and the drafting history as explained by Trahan,³³ makes clear that the position is precisely the opposite of what the *amicus* appears to advocate: it is decisions *not to investigate* which may be reviewed by a Pre-Trial Chamber; decisions *to investigate* may not be so reviewed. The LRVs also disagree with the *amicus'* interpretation of the *Georgia* and *Burundi* decisions. In both instances the Chamber merely followed the position of the Prosecutor and victims, undertaking no review. ("Since the Prosecutor has not determined that initiating an investigation in the Georgia situation "would not serve the interests of justice" and also taking into account the representations of victims..."³⁴) Even if a different interpretation could be put on those decisions, the Appeals Chamber should not give this such weight as to displace the plain meaning and clear objects of article 53, particularly in the absence of any analysis or reasoning in the decisions explaining why such an approach was taken. In any event, even if Ambos and Heinze are correct that a Pre-Trial Chamber may review a Prosecutor's

Islamic Republic of Afghanistan' of 12 April 2019, 15 November 2019, at pp. 1-3; INGO Observations, para.15.

³⁰ Ambos and Heinze, ICC-02/17-108, paras. 15-19 (emphasis added).

³¹ Ambos and Heinze, ICC-02/17-108, paras. 18-19

³² Ambos and Heinze, ICC-02/17-108, para. 18.

³³ Trahan, 109, pp1-2.

³⁴ Georgia Article 15 Decision, ICC-01/15-12, 27 January 2016 para.58; See also Burundi Article 15 Decision, ICC-1/17-9-Red, 9 November 2017, para. 190.

decision that the interests of justice do not preclude an investigation, the question remains as to what the applicable standard of review is. The LRVs maintain that the Pre-Trial Chamber's review powers would be limited. The Pre-Trial Chamber would not be permitted to substitute its own views for those of the Prosecutor. It could only review the reasonableness of the Prosecutor's assessment as Trahan emphasizes.³⁵

B. Standard of Review in the present appeal

21. The OPCD in its submissions addresses two standards of review which can apply in appellate proceedings at this Court. It correctly identifies that one standard applies regarding errors of law; and a second regarding discretionary decisions.³⁶ The LRVs agree with the OPCD's description of these standards, as a general matter, but disagree regarding which is applicable to these proceedings.

22. The OPCD erroneously assumes, without justification, that the Pre-Trial Chamber's decision involved the exercise of *its* discretion, and that therefore the appropriate standard of review for *this* chamber on appeal is the test of abuse of discretion.³⁷ In fact, although the Pre-Trial Chamber purported to be exercising a discretion, it had no *discretion* on this issue; at most it had the power to *review* the Prosecutor's exercise of discretion. For reasons set forth in the Victims' appeal,³⁸ the Pre-Trial Chamber was at most permitted to apply an abuse of discretion standard to the *Prosecutor's* request, asking if it was reasonable for her to draw the conclusions she did.

23. However even if, *arguendo*, the Pre-Trial Chamber had authority to conduct its own, *de novo* assessment of the interest of justice factors—and the LRVs maintain that it did not—leading to the conclusion that it *did* have discretion in that process, the

³⁵ Trahan, p. 3,

³⁶ OPCD, paras. 18-21.

³⁷ OPCD, paras. 24, 66 [but mostly they say it in the headings]

³⁸ 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, 1 October 2019, ICC-02/17-75-Corr., at paras. 79-83.

Appeals Chamber should conclude that this discretion was abused. For the reasons stated in Victims' brief,³⁹ the Pre-Trial Chamber's interests of justice assessment was marred by the consideration of factors inapposite at this stage; the unreasonable weight given to speculative factors, and the failure to give sufficient weight to the gravity of the crimes at issue or victims' interest. Those errors constitute a clear abuse of discretion.

C. Concerns about fair trial rights do not justify foreclosure of an entire investigation

24. The LRVs acknowledge the fundamental importance of fair trial rights and agree with the OPCD that "guaranteeing accused's rights is central to the object and purpose of the Statute."⁴⁰ All prosecutions pursued by the Office of the Prosecutor and all trials conducted by the Court must accord with the rights of the accused.⁴¹ These observations, however, are inapposite to the question of whether to authorize an entire *investigation* as opposed to a particular *prosecution*. Moreover, the considerations raised by the OPCD do not accurately reflect the Pre-Trial Chamber's reasoning. Even if concerns about fair trial had animated the Pre-Trial Chamber's analysis—and there is no indication that they did—it would neither rehabilitate nor justify the Impugned Decision.

25. The OPCD's emphasis on fair trial rights and the rights of the accused, and the particular factors it asserts jeopardize these rights, is, at best, *premature*. The LRVs agree that that the concept of "interests of justice" can include considerations concerning a fair trial. However all the statutory protections of the rights of the accused cited by the OPCD are activated at a later stage of proceedings.⁴² The OPCD appears to have equated the decision that was before the Prosecutor about whether to an *investigation* was in the interests of justice (art. 53(1)(c)) with a decision about

³⁹ Victims Appeal Brief, at paras. 84-99.

⁴⁰ OPCD Observations, para.29.

⁴¹ See [ICC-02/17-75-Corr](#), para. 73.

⁴² OPCD paras. 27 -28

whether it is in the interests of justice to proceed with a particular *prosecution* (art. 53(2)(c)). The latter is a decision to be taken at a far later stage, on the basis of information gathered through the course of an investigation, and taking into account the specific circumstances of a particular case and a particular potential suspect. While the prospects of being able to ensure fair trial rights may, in some circumstances, be a reason to decline to pursue an individual prosecution, as contemplated in article 53(2)(c)), this consideration is far less relevant to the interests of justice concerning the opening of an *investigation*.

26. Even accepting that the rights of potential future defendants could be a factor relevant to the interests of justice, it is difficult to imagine any scenario in which concerns about the fair trial rights of as-yet unidentified accused would justify the refusal to authorize *an entire* investigation; that is, to categorically rule out the possibility of prosecuting *any* of the responsible actors. It would only make sense to refuse an *entire* investigation on this basis if it were shown that a fair trial was *impossible* for *any conceivable case* within the proposed investigation. This is patently not the case with respect to the requested investigation into the situation in Afghanistan. If the factors raised by the OPCD were a sufficient basis to preclude an investigation in Afghanistan, they would likely prevent the Prosecutor from exercising her power in almost any situation.

27. The LRVs reiterate that this submission does not mean that fair trial rights are, or would be, neglected. To the contrary, the very existence of the article 15 process is a guarantee which prevents frivolous investigations. Numerous other rights to protect the rights of suspects are protected at a subsequent stage in the proceedings. There is no need to foreclose entire investigations in order to protect fair trial rights.

D. “Feasibility” of the investigation factors do not outweigh the gravity of the crime and the interests of justice

28. The OPCD maintains that the passage of time, (speculative) concerns about the availability of evidence and (speculation regarding) the limited prospects for obtaining state cooperation bear on the ability of the defendant to receive a fair trial.⁴³ For the reasons already detailed in the LRVs’ Appeal Brief, these factors are not appropriate considerations when assessing the “interests of justice” at this stage, and certainly do not constitute “substantial reasons” to override the gravity of the crime or victims’ interests.⁴⁴ The LRVs fully agree with the conclusion in the Trahan Observations that the factors utilized by the Pre-Trial Chamber, and endorsed by the OPCD, “do not fit within the ordinary meaning of the phrase and set an unworkable standard for future ICC situations.”⁴⁵

29. Even if the factors OPCD relies upon were appropriate to consider, they do not render fair trial *impossible for any and all prosecutions that may arise* from an investigation. The OPCD overstates the importance of these factors generally, and fails to explain their applicability to the present stage of the proceedings.

30. A comment on the OPCD’s “public interest” considerations that could undercut fair trial rights or render evidence unavailable:⁴⁶ The LRVs represent Victims of the US torture program, who assert that they were, and in some cases continue to be, subjected to acts of torture, among other serious crimes. The *Victims* have all been subject to the conditions the OPCD warns about, i.e., provisional arrest or illegal arrest often following rendition, and unlawful or arbitrary detention.⁴⁷ Under the Rome

⁴³ OPCD Observations, at para. 23. *Compare* Ambos/Heinze Observations, paras. 7-8 (for interests of justice, countervailing considerations that weigh against gravity and victims’ interests must be “**thoroughly substantiated**”) (emphasis in original).

⁴⁴ Article 53(1)(c).

⁴⁵ Trahan Observations, at pp. 1, 4-5. *See also* Amnesty International Observations, para. 6 (“the PTC invented radically broad general criteria...that could be applied to bar most ICC investigations”).

⁴⁶ OPCD Observations, at para. 36.

⁴⁷ *See, e.g.*, ICC-02/17-38, Annex I and II. *See also* Central Intelligence Agency, Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2002-October 2003)*, 7

Statute, it is the Victims who have been denied all due process and fair trial rights, contrary to the Rome Statute.⁴⁸ There are no allegations – or concerns expressed – that any *potential accused* have been subjected to such treatment. It would pervert the cause of justice if even investigation of these Victims’ harms were denied due to speculative concerns.

(i) Passage of Time and Availability of Evidence

31. To accept the OPCD’s assertion that the passage of time can be a basis for denying investigation would effectively convert longstanding impunity to *de facto* Court-sanctioned impunity, and negate the lack of a statute of limitations on grave international crimes.⁴⁹ The ad hoc and hybrid tribunals, as well as domestic courts prosecuting former Nazis, genocidaires or torturers under universal jurisdiction, make clear that fair prosecutions are possible after far longer delays than the Pre-Trial assumed exist for any or all three dimensions of the proposed investigation.⁵⁰

32. Moreover, before investigation it is entirely speculative whether evidence will be available to pursue *prosecutions*; there is, however, a “reasonable basis” to proceed with investigations, which is the only determination required at this stage.⁵¹ (

May 2004, available at <https://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf>.

⁴⁸ See art. 55(1)(d) (prohibiting arbitrary arrest or detention in the course of investigation) and art. 55(1)(b) (prohibiting *inter alia* the coercion of testimony under torture). See also *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 Nov. 1999.

⁴⁹ Art. 29.

⁵⁰ See, e.g., Former International Chief Prosecutors Observations, para. 16; *Nessar Case: Swiss Court orders Resumption of War Crimes Investigation*, 6 June 2018 (reopening an investigation into alleged war crimes in the context of a non-international armed conflict in Algeria in the early 1990s) at <https://trialinternational.org/latest-post/nezzar-case-swiss-court-orders-resumption-or-war-crimes-investigation/>; Reuters, France sentences two men to life in prison for 1994 genocide in Rwanda, 6 July 2016 at <http://news.trust.org/item/20160706181116-ozyjl>; Swiss Federal Council, International criminal law: first indictment filed in the context of the Liberian civil war, 26 March 2019 at <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-74457.html>.

⁵¹ Art. 15(3)). See, e.g., LRV 1 Updated Appeal Brief, paras. 136-139; LRV2/3 Joint Appeal Brief, para.89.

33. Pure speculation about the availability of evidence cannot constitute a “substantial reason” to reverse the presumption that an investigation would be in the interest of justice.⁵² In the event that evidence to sustain a prosecution is unavailable, then a case will not proceed to trial.

(ii) State Cooperation

34. As numerous *amici* affirmed, it is premature to assess the extent of state cooperation, as cooperation *obligations* under Part 9 are not triggered until an investigation has commenced.⁵³ Furthermore, it is inapposite to equate the powers of the ICC Prosecution, particularly in light of the commitment and obligations by Member States to cooperate, with efforts undertaken often under universal jurisdiction at the national level;⁵⁴ indeed it is precisely when national systems are “unable” to address the crimes in question that the ICC may act.

35. Allowing speculation about the prospects of state cooperation to override gravity and victims’ interests rewards obstructionism.⁵⁵ Notably, neither the Pre-Trial Chamber nor the OPCD accurately detail the expressions of cooperation by Member States with investigations and their rejection of the threats made against the Court by the US.⁵⁶ In light of those threats,⁵⁷ the LRVs endorse Trahan’s observations that considerations such as “examining the potential for state non-cooperation and ‘the political climate’” would “virtually *invite states not to cooperate*”.⁵⁸

⁵² See e.g. Ambos/Heinze Observations, paras. 11-14.

⁵³ See LRV1 Updated Brief, paras. 117-121; LRV 2/3 Joint Appeal Brief, para.88; OPCV, para.58.

⁵⁴ OPCD, paras. 34-45.

⁵⁵ LRV 1 Updated Appeal Brief, para.131; LRV 2/3 Joint Appeal Brief, para.87; OPCV, para.59.

⁵⁶ See, e.g., Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, 11-ASP/17/20, 12 Dec. 2018; Alex Moorehead and Alex Whiting, *Countries’ Reactions to Bolton’s Attack on the ICC*, Just Security 18 Sept, 2018.

⁵⁷ (ICC-02/17-7-Red), see, e.g., ICC-02/17-38, para. 43.

⁵⁸ Trahan Observations, pp. 9-10. In highlighting the eventual prosecutions of Radovan Karadžić and Charles Taylor, the Former International Chief Prosecutors affirm that continuing to pursue justice and accountability, rather than “making prematurely defeatist and speculative remarks about the likelihood of success” yields results. Former International Chief Prosecutors Observations, para. 16.

(iii) *Gravity of the alleged crimes and victims' views*

36. The OPCD contends that the PTC weighed the above against the gravity of the crimes and victims' views, citing cursory references to the words "gravity" and "victim." There is scant evidence the PTC meaningfully considered these elements.⁵⁹ Indeed, the coordinated, widespread and extensive criminal conduct to which the Victims were subjected is grave – not mere "excesses" by some U.S. soldiers.⁶⁰ In fact, the crimes were systematic, and "result[ed] from a plan or organised policy."⁶¹ The scale of the criminal activity in this situation, the length of time over which it occurred, and the level of depravity employed all warrant the ICC's attention .

IV. "Matters of jurisdiction" addressed in the Impugned Decision are material to the resolution of these proceedings

37. The OPCD appears to improperly characterize the "matters of jurisdiction" raised by the LRVs as issues ancillary to the present appeal proceedings that may be addressed at a later time.⁶² The OPCD purports to adopt the Prosecution's position that the "matters of jurisdiction" *ratione loci* raised by the LRVs are "*obiter dicta*" as they do not seem to arise from the Impugned Decision.⁶³ Therefore, it implies that the errors in the Pre-Trial Chamber's interpretation of the Court's jurisdiction *ratione loci* and *materiae* should not be dealt with at all in the present appeal. However, the OPCD misconstrues the OTP's submissions. The OTP did not characterize all the Pre-Trial Chamber's findings on these matters as "*obiter dicta*." To the contrary, the OTP's appeal is premised on the argument that the Pre-Trial Chamber's findings

⁵⁹ (see also Ambos/Heinze amicus, para.7).

⁶⁰ ICC Press Release, *ICC President delivers annual Lantos Rule of Law Lecture in Washington, D.C.* ICC-CPI-20191118-PR1497, 18 Nov. 2019 available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1497> (See, e.g., Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary*, Declassification Revisions 3 December 2014; ECtHR, *Abu Zubaydah v. Poland*, Appl. No. 7511/13, "Judgment," 24 July 2014; ECtHR, *Al-Nashiri v. Poland*, Appl. No. 28761/11, "Judgment," 24 July 2014.

⁶¹ Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), 2013, at para.64.

⁶² OPCD, para. 69.

⁶³ OTP's Consolidated Response to the Appeal Briefs of Victims, ICC-02/17-92-22, 22 October 2019, para. 74.

regarding subject matter and territorial jurisdiction affected its analysis of whether that investigation would serve the interests of justice, and thus are material to the outcome of the decision.

38. Moreover, the way the Impugned Decision is structured suggests that the Pre-Trial Chamber's determinations concerning admissibility and jurisdiction cannot be considered simple *obiter dicta*. The Impugned Decision does not have one clear section which could be identified as its "*ratio decidendi*" with a clear indication of the Chamber's resolution and its legal and factual basis, and from which all other parts can be distinguished as mere "*obiter*".

39. In assessing the Prosecutor's Request under article 15(4), the Pre-Trial Chamber considered each of the factors set out in article 53 (1)(a)-(c) of the Statute – namely existence of a crime within the Court's jurisdiction, admissibility (including complementarity and gravity), and the interests of justice⁶⁴ – *in turn*. Thus, in order to even reach a point where it considered the interests of justice, the Pre-Trial Chamber first had to make findings regarding the existence of a crime within the Court's jurisdiction (as well as admissibility).

40. According to Merriam Webster Dictionary, the meaning of the term "determination", when used in law, refers to: *judicial decision settling and ending a controversy*.⁶⁵ The LRVs submit that the Pre-Trial Chamber's "general remarks" on jurisdiction – as the Prosecutor and the OPCD suggest – are in fact legal determinations. Had the Pre-Trial Chamber decided that the investigation would serve the interests of justice, its remaining determinations on jurisdiction and admissibility would remain valid.

41. If uncorrected on appeal, the Impugned Decision will deprive the Court of jurisdiction over article 5 crimes falling within the Court's territorial jurisdiction – but

⁶⁴ Rule 48 Rules of Procedure and Evidence.

⁶⁵ See: <https://www.merriam-webster.com/dictionary/determination>, accessed 29 November 2019.

outside the erroneous territorial limits imposed by the Pre-Trial Chamber on the scope of the investigation, due to its misapprehension of the elements of article 8(2)(b) and (e) crimes.

V. Conclusion

42. For these reasons as well as those set out in previous submissions of the LRVs, the Appeals Chamber should grant the relief requested in the Victims' Appeal Brief.

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