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Before: **Judge Piotr Hofmański, Presiding**
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

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

Source: **Legal Representatives of Victims**

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

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"I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong."[1]
- **Kofi Annan, Former Secretary-General of the United Nations**

I. INTRODUCTION

1. Since the very beginning of its existence the International Criminal Court ("Court") has been hailed for ushering in a new phase of international criminal justice in which – as the UN Secretary-General put it when opening the Rome Conference – the "overriding interest must be that of the victims."[2] This is to be achieved in part through providing victims with the explicit right, at the earliest stages of proceedings before the ICC, to meaningfully participate in and contribute to the article 15 process. It is that right which Victims r/60009/17 (Abd al-Rahim Hussayn Muhammad al-Nashiri), r/00751/18 (Sharqawi Al Hajj), r/00750/18 (Guled Hassan Duran), r/00749/18 (Mohammed Abdullah Saleh al-Asad), r/00635/18, r/00636/18 and r/00638/18 (collectively "the Victims") seek to vindicate through the present appeal. The decision to grant or deny a request to authorize an investigation under article 15 is of paramount interest to victims, as it determines whether they have any possibility of accessing justice through the Court.[3]

2. Pursuant to notices of appeal submitted on 10 June 2019[4] 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" ("Impugned Decision"),[5] this

[1] UN Secretary-General Declares Overriding Interst of International Court Conference must be that of Victims and the World Community as a Whole, Press Release SG/SM/6597 L/2871, 15 June 1998.
[2] *Ibid*.
[3] 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 ("Myanmar Decision"), para. 88.
[4] 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," ICC-02/17-38, 10 June 2019 ("Victims' Notice of Appeal-1"); Corrected version of the Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statue on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan," ICC-02/17-40-Corr, 12 June 2019 ("Victim's Notice of Appeal-2").
[5] 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, 12 April 2019; Concurring and separate

appeal brief is submitted jointly by the Legal Representatives for the Victims ("LRVs")[6] pursuant to article 82(1)(a) of the Rome Statute ("Statute"), rule 154(1) of the Rules of Procedure and Evidence ("Rules"), regulation 64(2) of the Regulations of the Court ("RoC"), and in accordance with the Appeals Chamber's "Order suspending the time limit for the filing of an appeal brief and on related matters"[7] and "Order scheduling a hearing before the Appeals Chamber and other related matters"[8] ("Scheduling Order"). The Victims address the issues of: (i) whether the Impugned Decision may be considered a 'decision with respect to jurisdiction or admissibility' within the meaning of article 82(1)(a) of the Statute; (ii) whether the Victims have standing to bring an appeal under article 82(1)(a) of the Statute;[9] and (iii) the merits of the appeal.

3. In the Impugned Decision, Pre-Trial Chamber II ("the Pre-Trial Chamber") refused to grant the Prosecutor's request to open an investigation of the Situation in Afghanistan. The Pre-Trial Chamber held, contrary to the conclusion of the Prosecutor and 680 victims' representations submitted pursuant to article 15(3) of the Statute,[10] including those of the Victims, that such an investigation would not serve the interests of justice.[11] The Impugned Decision forecloses the exercise of jurisdiction over the extensive crime-base set forth in the Prosecutor's 181-page Request for authorisation

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opinion of Judge Antoine Kesia-Mbe Mindua, ICC-02/17-33-Anx-Corr, 31 May 2019 (notified on 7 June 2019) ("Judge Mindua's Concurring and Separate Opinion").

[6] The seven Victims are represented by four separate legal teams: r/60009/17 by Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed; r/00751/18 and r/00750/18 by Katherine Gallagher of the Center for Constitutional Rights; r/00749/18 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 present 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.

[7] Order suspending the time limit for the filing of an appeal brief and on related matters, ICC-02/17-54, 24 June 2019, para. 7.

[8] Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019. The Scheduling Order was issued following Pre-Trial Chamber II's Decision on the Prosecutor and Victims' Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Inestigation into the Situation in the Islamic Republic of Afghanistan', ICC-02-17-62, 17 September 2019 ("Decision on Leave to Appeal").

[9] The LRVs herein address the second issue as relates to the Victims, and not "victims" *in abstracto*.

[10] Impugned Decision, para. 87.

[11] Impugned Decision, paras. 91-96.

to investigate ("the Request"), including those crimes committed against the Victims that fall squarely within the material, territorial, and personal jurisdiction of the Court and satisfy admissibility requirements.[12] The Decision also purports to restrict the scope of any authorized investigation to the incidents specifically enumerated in the Request. In so doing, it improperly precludes the exercise of jurisdiction over incidents that may come to light in the course of investigation and that satisfy statutory requirements regarding material and territorial or personal jurisdiction and admissibility. Moreover, the Impugned Decision contains express jurisdictional findings concerning the alleged crimes committed against the Victims and others subjected to the US torture program,[13] which excludes from the Court's jurisdiction the criminal conduct to which the Victims were subjected on the territory of States Parties that otherwise satisfies all requirements for jurisdicition *ratione materiae*, *ratione temporis* and *ratione loci*. These findings erroneously (and prematurely) exclude these acts from the Court's jurisdiction. They make clear that the Impugned Decision qualifies as one with respect to jurisdiction, subject to appeal under article 82(1)(a).

[12] Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp", ICC-02/17-7-Red, 20 November 2017 ("Request"). *See also* Annex I and II to Victims' Notice of Appeal-1, ICC-02/17-38.

[13] The Victims use "US torture program" throughout this brief to refer to the US rendition, detention and interrogation program, in all its facets, that was operationalized in the immediate aftermath of the September 11, 2001 attacks. This program was carried out on the territory of Afghanistan as well as on the territory of other States, including both States Parties (e.g., Lithuania, Poland, Romania, Jordan and Djibouti) and non-States Parties (e.g., Pakistan, the US). Both the US Department of Defense and the Central Intelligence Agency played a role in its establishment and operation. US civilians and military leadership, with the involvement of members of the DoD and CIA as well as private contractors, ran the US torture program. The program could not have and would not have had the reach and impact it did, including directly on the Victims, without the assistance of individuals from States Parties. This included the use of their territory for detention and interrogation operations where, it is submitted, crimes falling within the Statute were committed including against the Victims. Officials from other States Parties, such as the UK, participated in other ways, including by carrying out abductions. For a more detailed account, *see, e.g.*, ICC-02/17-38, Annex I and II, Victims' Representation, submitted on behalf of Sharqawi Al Hajj and Guled Hassan Duran, paras. 6-9, and Section II ("Factual and Contextual Background: The United States Detention and Interrogation Program in Afghanistan") and Section III ("Arrest, Detention and Torture of Victims Al-Hajj and Duran"); *see also* Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018, at 2-5, 13-14.

4. The Pre-Trial Chamber made numerous legal, procedural, and factual errors in the Impugned Decision that require review and reversal by the Appeals Chamber. These are addressed below under four identified Grounds of Appeal:[14]

Ground I: the Pre-Trial Chamber acted *ultra vires* in making a determination regarding the "interests of justice" and denying the Prosecution's request to investigate on that basis.

Ground II: Alternatively (without accepting that such an assessment of the interests of justice is statutorily permitted), the Victims submit that the Pre-Trial Chamber erred in its assessment**.** The Pre-Trial Chamber applied an erroneous standard of review; an incorrect definition of "interests of justice"; and irrelevant and inappropriate criteria, that were heretofore unknowable and unforeseeable, as they lack basis in the statutory text or precedent. Moreover, it made its determination without inviting the Prosecutor and victims to explicitly address the question of whether an investigation would serve the interests of justice, and without considering those views on the matter already expressed in the Request and victims' representations.

Ground III: The Pre-Trial Chamber erred by prematurely confining the scope of authorisation under article 15(4) of the Statute to the specific identified incidents and legal characeterizations of alleged crimes for which judicial authorisation is explicitly sought by the Prosecutor and granted, as well as other crimes which are "closely linked."[15]

Ground IV: The Pre-Trial Chamber committed legal error by misintepreting the "nexus" requirement for war crimes in a non-international armed conflict, such that crimes originating in, occuring in and/or completed in the territory of a State Party (including Afghanistan) were excluded from the scope of the investigation. In a confused analysis that conflates jurisdiction *ratione materiae* with jurisdiction

[14] The Grounds of Appeal, as formulated, are derived from the grounds for appeal set forth in the two notices of appeal filed by the Victims. *See, e.g.*, Victims' Notice of Appeal-1, ICC-02/17-38, paras. 3 38-40, and Victim's Notice of Appeal-2, ICC-02/17-40-Corr, paras 3, 24.
[15] Impugned Decision, paras 39-40, 68.

ratione loci, the Pre-Trial Chamber misconstrued and misapplied both the elements of crimes and the Court's territorial jurisdiction to categorically bar investigation into crimes committed against individuals subjected to the US torture program, including the Victims.

5. This appeal is properly brought to the Appeals Chamber by the Victims, who all participated in the article 15(3) proceedings. The rights and interests of the Victims are directly affected by the Impugned Decision, which denies them access to justice through the Court.

II. VICTIMS HAVE STANDING TO APPEAL

6. It is appropriate to consider victims a "party" for the purposes of lodging an appeal from the Impugned Decision pursuant to article 82(1)(a). This standing stems from the uniquely strong, and statutorily recognized, procedural and substantive rights, and inherent and unequivocal personal interests, of victims in article 15 proceedings. Article 15(3) itself and article 53(1)(c) of the Statute as well as rules 50(1), 50(3), 59(4) and 50(5) of the Rules set out the framework for victims' participatory rights at this initial stage of proceedings before the Court.[16]

7. There may well exist circumstances in which it is proper to recognise victims' standing to lodge an appeal at other stages of proceedings. But the Appeals Chamber need not reach that issue here. Because the current appeal concerns only proceedings relating to article 15, the Appeals Chamber's ruling can be confined to that context.

[16] *See* Victims' Notice of Appeal-1, ICC-02/17-38, para. 19 and Victim's Notice of Appeal-2, ICC-02/17-40-Corr, para. 6 (explaining the particular rights that arise from victim participation at the preliminary examination stage pursuant to articles 15(3) and 53(1)(c) and Rule 50(4)). *See also* Christopher Staker in Triffterer (1999), p. 1031, para. 7: decisions appealable under 82(1)(a) "would be primarily those under Part 2 of the Statute (articles 5-21). […] Other decisions in that Part appealable under this provision would include those under article 15 para. 4 […];" Prosecution's response to the request by the Office of Public Counsel for the Defence for leave to appear before the Appeals Chamber, ICC-02/17-71, 26 September 2019, para. 10 ("[A]rticle 15(3) of the Statute is unequivocal in demonstrating that the rights of victims, by contrast [to Defence], *are* engaged in judicial proceedings under article 15.") (emphasis is original).

8. By a vote of 2-1, with the Presiding Judge, Antoine Kesia-Mbe Mindua dissenting, the Pre-Trial Chamber determined that victims do not have standing to appeal under article 82(1)(d) of the Statute.[17] That decision is not binding on the Appeals Chamber. Nor is it persuasive. The majority's conclusion that victims do not have standing to appeal the Impugned Decision is based on five erroneous findings or assumptions:

a. that victims participating in article 15 processes are only "potential victims" and therefore are not parties to proceedings prior to a decision to authorise a *priopro motu* investigation;[18]

b. that victims are not "parties" to the article 15 process within the meaning of article 82(1)[19] and that therefore, absent other express provisions, the Statute does not permit victims who submitted representations to appeal the resulting article 15 decision;[20]

c. that permitting victims' appeals in article 15 proceedings would interfere with the Prosecutor's role as the "driving engine" of the investigation;[21]

d. that allowing victims to appeal might result in "unduly broadening – and possibly subverting – the overall stsatutory framework when it comes to appeal proceedings";[22] and

e. that denying victims' standing is consistent with international human rights norms.[23]

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[17] Decision on Leave to Appeal; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, ICC-02/17-62-Anx, 17 September 2019 ("Judge Mindua's Partially Dissenting Opinion").
[18] Decision on Leave to Appeal, paras. 20-21.
[19] Decision on Leave to Appeal, para. 21.
[20] Decision on Leave to Appeal, para. 20.
[21] Decision on Leave to Appeal, para.24. The Victims find it particularly noteworthy that the Pre-Trial Chamber concluded, "the Prosecutor is meant to act as the driving engine of the investigations, *enjoying exclusive responsibility when it comes to assess the feasibility of investigations*" (emphasis added), in light of the Pre-Trial Chamber itself opining that the requested investigation is "not feasible and inevitably doomed to failure" and substituting its views for those of the Prosecutor as to where and how her budget is best spent. *See* Impugned Decision, paras. 90 and 95.
[22] Decision on Leave to Appeal, para. 22.
[23] Decision on Leave to Appeal, para. 25.

9. The reasoning of the majority of the Pre-Trial Chamber is erroneous and should be rejected. In support of this contention and the Victims' position that they qualify as a "party" for purposes of this appeal, the Victims incorporate in full the arguments set forth in their notices of appeal[24] and in the "Victims' response to the Prosecutor's 'Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15.'"[25] Specifically, the Victims maintain that they enjoy the procedural and substantive rights of a "party" under article 82(1)(a) because: (i) article 15 explicitly provides a role for victims to participate in this proceeding, without qualification; (ii) victims' participation in the authorization process was included in the Statute so that victims provided their views on the potential investigation, including *but not limited* to whether it was in the interests of justice; (iii) victim participation at this stage is formalized and has been authorized by a process set forth in a series of decisions taken in this Situation by the Pre-Trial Chamber (as originally composed), implemented by the Registry, and relied on by the Victims, with victims' representations having been conveyed to the PTC after an initial Registry vetting;[26] (iv) there is no defendant at the preliminary examination/authorization of investigation stage; and (v) without a defendant as a participant in article 15 proceedings, "[e]ither party" in article 82(1) cannot be understood to be equivalent to "Prosecutor" and "Defence."[27] The Victims do not seek to repeat herein the arguments set out in their prior submissons and respectfully refer the Appeals Chamber thereto. Instead they supplement and expand upon those arguments in response to the reasoning of the Pre-Trial Chamber's majority in the Decision on Leave to Appeal.

[24] Victims' Notice of Appeal-1, ICC-02/17-38, paras. 13- 30; and Victim's Notice of Appeal-2, ICC-02/17-40-Corr, paras. 6-21.

[25] Victims' response to the Prosecutor's 'Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15', ICC-02/17-50, 19 June 2019 (notified 20 June 2019), paras. 15-36.

[26] It is recalled that certain victims representations were rejected by the VPRS. *See* Annex I, Public Redacted, ICC-02/17-29-AnxI, 20 February 2018, ("Registry Report on Victims' Representations"), para. 17.

[27] *Compare* Rules of Evidence and Procedure of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 8 July 2015, Rule 2: Definitions. "Parties: The Prosecutor and the Defence."

Article 15 explicitly provides a role for victims to participate in the preliminary stage, without qualification

10. Article 15(3) provides that following the submission of a request for authorization of an investigation by the Prosecutor, "[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence." Rule 50 sets out the framework for such representations. Victims' participation in the preliminary examination and article 15 process is explicitly provided for in the Statute so that victims could and would opine on the potential investigation, including but not limited to, whether it was in the interests of justice.

11. Participatory rights at this preliminary stage include: the right to be informed by the Prosecutor about the fact that she would seek authorisation of an investigation (rule 50(1) of the Rules), the right to make representations to the Chamber in writing (rule 50(3) of the Rules), the possibility for those victims to provide additional information to the Chamber, including at a hearing (rule 50(4) of the Rules), and the Chamber's obligation to notify these victims about the decision taken pursuant to article 15(4) of the Statute (rule 50(5) of the Rules).

12. Through article 15 proceedings, victims have been asked to provide their connection to the events set forth in the Prosecutor's request and specific information about the harms they suffered, express their interest in the opening of an investigation, and give their views on the scope of a potential investigation.[28] Victims' representations are intended – and have been recognized in the jurisprudence – to inform a chamber's decision on the scope of an authorized investigation.[29]

13. Any natural person who has experienced harm because of a crime linked to the Situation in Afghanistan can be a "victim" in article 15 proceedings, pursuant to rule 85 of the Rules. In this case, pursuant to the Pre-Trial Chamber's instructions, the

[28] These matters have been set out in forms designed by the Registry and endorsed by the Court. See for example, the Victims Represenation: Afghanistan form for Sharqawi Al Hajj, ICC-02/17-38-AnxI.

[29] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, ("Kenya Article 15 Decision"), paras. 204-205.

Victims Participation and Reparations Section reviewed all victims' representations and excluded those that did not meet the conditions set forth in Rule 85.[30] There is no requirement, in order to participate in article 15 proeedings, that a "victim" be granted status pursuant to a formal rule 89(1) application process. The LRVs respectfully submit that the Pre-Trial Chamber's concept of "potential victim" has no basis in the Court's texts or in the Court's jurisprudence. Indeed, it runs counter to the principles of victim participation which are core to this Court.

14. The language which the Court adopts to refer to victims can be one of the most powerful ways in which it demonstrates its level of respect for victims. To use the term "potential victims" for persons who have *already* suffered harm as a result of the gravest international crimes, simply because the Court has not yet undertaken formal procedures for victim recognition *in a specific case*, undermines the experience and status of victims before the Court. It is therefore not only incompatible with rule 85, but also with the Court's very objectives concerning victims.

15. The term "potential victim" is found nowhere in the Statute or the Rules. Rather, the terminology used throughout the texts is "victim." Rule 85 defines "victims" for the purposes of the Statute and Rules as "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*" (rule 85(a)); but also as "*organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes*" (rule 85(b)).

16. Significantly, this definition is *substantive*, not *procedural*. Whether or not persons are victims within the meaning of rule 85 is a question of fact related to their personhood (natural or legal), whether they have suffered harm, and the cause and nature of that harm. Where these requirements are met, a person is a victim before

[30] Registry Report on Victims' Representations, ICC-02/17-29, para. 17.

there is a decision of the Court. A decision of the Court in relation to victimhood *recognizes* that a person is a victim. It does not *confer* upon a person the status of victim.

17. The LRVs do not dispute that in any proceeding there may be a distinct sub-set of victims who have been granted specific ongoing participatory rights pursuant to the process contained in Chapter 4, Section III, Subsection 3 of the Rules, and in particular rule 89(1).[31] However, this is not required in all proceedings.

18. Rule 93 of the Rules, for example, "allows [a] Chamber to seek the views of victims irrespective of whether they have made an application for participation in the proceedings before the Court or have been granted rights of participation, and, as such, embodies a process which is distinct from that of victim participation set out in rules 89-91."[32] It has been used by several Chambers of the Court to enable the participation of victims who have not been granted status under rule 89(1).[33] Indeed, in a number of places in the Court's legal framework victims are given standing rights in relation to specific types of legal proceedings. In these instances, particular rules (outside Chapter 4, Section III, Subsection 3 of the Rules) regulate victims' participation and do not make any reference to a prerequisite article 89(1) procedure. This is the case in respect of article 19(3) and rule 59, in relation to proceedings concerning jurisdiction or admissibility. The Court's jurisprudence on these provisions makes it clear that victims' participation in such proceedings does not require that status has been

[31] At the Special Tribunal for Lebanon ("STL"), which adopted the ICC's system of victim participation, the equivalent sub-set of victims is referred to by a specifically defined term in the STL's Rules of Procedure and Evidence: "victims participating in the proceedings" (in practice often referred to as "VPPs"). This is a subset of the broader category of "victims" which includes VPPs *as well as* persons who suffered harm as a result of a relevant crime but who have not, for any of a variety of reasons, been judicially granted the status of VPP.

[32] *Prosecutor v. Callixte Mbarushimana*, "Decision on 'Proposal on victim participation in the confirmation hearing", ICC-01/04-01/10-229, 10 June 2011, pp. 4-5; *see also Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, p. 22, n. 60; *Situation in the State of Palestine*, Decision on Information and Outreach for Victims of the Situation, ICC-01/18-20, 13 July 2018, p. 6, n. 16.

[33] This was the basis for a ruling most recently in the Myanmar Decision. *See* Myanmar Decision, ICC-RoC46(3)-01/18-37, para. 21.

formally granted pursuant to a rule 89 procedure.[34] This is equally the case in respect of article 15(3) and rule 50.

19. In order for a person to be heard under this form of participation, he or she must still be a "victim" within rule 85. None of the rules or jurisprudence relating to these standing rights uses the term "potential victim." The appropriate procedure to be used to verify that individuals *are* victims, and the extent of the standing accorded to them, is determined by the relevant chamber.

20. In the public article 15 processes undertaken to date, chambers have asked the Registry to review victims' information to ensure that, based on the intrinsic coherence of that information, the victims fall within the rule 85 definition– just as the Pre-Trial Chamber did in the case at hand.[35] In all five of the public article 15 processes initiated to date (including in the present situation) pre-trial chambers have permitted victims to be heard pursuant to article 15(3) and rule 50 without going through the rule 89(1) procedure.[36]

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[34] *See, e.g.*, *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, paras 46-49; *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06, a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, paras 93-94; *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, 21 October 2008; *Prosecutor v. Callixte Mbarushimana*, Decision requesting observations on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-377, 16 August 2011; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-31, 4 April 2011; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-02/11-40, 4 April 2011. Victims were also permitted to participate in jurisdictional proceedings in respect of Bangladesh/Myanmar without a rule 89(1) process, although there the chamber relied on rule 93 rather than rule 59 (see Myanmar Decision, ICC-RoC46(3)-01/18-37, para. 21).

[35] Order to the VPRS, ICC-02/17-6. *See also* Registry Report on Victims Representations, ICC-02/17-29.

[36] Order to the Victims Participation and Reparations Section Concerning Victims' Representations, ICC-02/17-6, 9 November 2017 ("Order to the VPRS"); *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 December 2009; *Situation in the Republic of Côte D'Ivoire*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-01/11-6, 6 July 2011; *Situation in the People's Republic of Bangladesh/Republic of the Union*

21. In fact, the process set out in rule 89(1) is now mostly used only in the context of specific *cases*, where a suspect has appeared at the Court and proceedings are able to progress. This makes sense: not only is the rule 89(1) process resource-intensive and time-consuming, but its adversarial nature means that it is best suited to use in proceedings where there is a defendant. At earlier stages of proceedings Chambers have specifically referred to their ability to make use of rule 93 (as opposed to rule 89) to hear victims at the "situation" level.[37] In article 15 proceedings in particular, rule 89(1) has never been used, with a simple Registry screening process being preferred.

22. Moreover, the individual representations Victims all provided to the Registry with included detailed information about their identities and the crimes and resulting harm they have experienced.[38] Therefore, the Pre-Trial Chamber's statement that it had "no access to the identity and other personal information of ["potential victims"] and hence no possibility for scrutiny as to the genuineness of their claims,"[39] is not applicable to the Victims on whose behalf this appeal brief is submitted.[40]

23. Requiring victims participating in an article 15 process to go through a rule 89(1) application process has no basis in the Court's legal texts and jurisprudence. Such "scrutiny" is unecessary for the purposes of fulfilling a pre-trial chamber's role under article 15(4). Moreover to impose it now, after the time granted for victims to make

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of Myanmar, Decision on the 'Registry's Request for Extension of Notice Period and Submissions on the Article 15(3) Process', ICC-01/19-6, 28 June 2019. (No order was issued in the Georgia situation; however the same procedure was followed by the Registry as in other situations: *Situation in Georgia*, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, ICC-01/15-11, 4 December 2015.)

[37] See for example: *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, 3 November 2010, para. 12; *Situation in the Democratic Republic of the Congo*, Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo, ICC-01/04-593, 11 April 2011, para. 10.

[38] Victims' Notice of Appeal-1, ICC-02/17-38, Annex I and II; Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018. *See also* Victims' Notice of Appeal-1, ICC-02/17-38, para. 15 (indicating that Victims al Hajj and Duran provided two updates to the Pre-Trial, including a detailed account of the declining health of Victim Al Hajj).

[39] Decision on Leave to Appeal, para. 19.

[40] The LRVs note that the Impugned Decision made no reference to any representations put forward by victims, let alone the detailed representations made by the Victims.

article 15(3) representations, would effectively deprive victims of the participation which the legal framework intends to grant them.

Victims' participatory role in an article 15 process implies their status as "parties" for the purposes of article 82(1) of the Statute

24. The use of the generic and undefined term "party" in article 82(1) is an exception within the Statute, indicating an intent to encompass the category of all persons with interests in a particular proceeding, in contrast to *every* other provision regarding appeal standing, which identifies specific persons with standing (e.g., "the Prosecutor," "convicted person", "State concerned," "legal reprentative of the victims"). The majority of the Pre-Trial Chamber rejected victims' standing to appeal by concluding the opposite: it surmised that if the drafters had intended to vest victims with a right of appeal, they would have done so explicitly, as in article 82(4).[41] The LRVs submit that this interpretation fundamentally misunderstands the relationship between the general term ("party") in article 82(1) of the Statute and the use of specific reference to participants who may appeal in other provisions of the Statute (such as the reference to victims in article 82(4) of the Statute).

25. The majority's reading of article 82(1) of the Statute seems to suggest an understanding that "party" in article 82(1) is a fixed category of persons with settled appeal rights (essentially the Prosecutor and defence)[42], while article 82(4) is unusual in granting appeal rights to a specific category of other person.[43] In fact, a review of the Statute as a whole reveals that it is article 82(1) which is unusual in using a generic term to encompass persons with appeal rights. Strikingly, *every* other provision in the Statute which refers to appeal standing specifies particular persons who can appeal: article 18(4) (the State concerned or the Prosecutor); article 56(3)(b) (the Prosecutor only); article 81(1)(a) (the Prosecutor only); article 81(1)(b) (the convicted person or the Prosecutor on that person's behalf); article 81(1)(c) (the Prosecutor or the convicted person); article 82(2) (the State concerned or the Prosecutor); and 82(4) (a legal

[41] Decision on Leave to Appeal, para. 23.
[42] Decision on Leave to Appeal, para. 30.
[43] Decision on Leave to Appeal, para. 23.

representative of victims, the convicted person, or a *bona fide* owner of property adversely affected).

26. This demonstrates the error by the majority of the Pre-Trial Chamber. The fact that legal representatives of victims are referred to expressly in article 82(4) (for the purposes of appealing a reperations order) does not mean they are intended to be excluded from appealing pursuant to article 82(1) for all other matters. By that logic, reference to "the convicted person" in article 82(4) or "the State concerned" in article 82(2) would also evidence an intention to exclude those categories of person from appeals under article 82(1). However that approach has not been taken. In fact, contrary to the Pre-Trial Chamber's reading, it is the *other* appeals provisions of the statute, which – by identifying an exhaustive list of which actors have standing – are intended to be *restrictive*. The key feature of article 82(4) is not that it includes victims, but rather that it *excludes* the Prosecutor. In contrast, the use of a single but general (and undefined) term – "party" – has the opposite effect as a tool of statutory construction: it suggests an intention to include, rather than exclude; to bestow rights on a broader category of persons rather than on specifically identified persons. If the drafters had intended article 82(1) to bestow rights of appeal exclusively on the Prosecutor and defence, they would surely have done so by the same method used in all of the Statute's other appeals provisions: by specifically listing them.

27. To be sure, article 82(1)'s use of the phrase "*either* party" (emphasis added), could suggest that "party" is a category of only two. That this was not the intended meaning is demonstrated by rule 155(2) of the Rules, which describes procedure applicable to interlocutory appeals initiated under article 82 and uses the phrase "all parties", indicating a multiplicity of potential parties, rather than a category which includes only the Prosecution and a Defence. Similarly, regulation 65 of the Regulations of the Court also applicable to interlocutory appeals initiated pursuant to article 82 of the Statute does not refer to "either party" or "party" at all but uses the term "participants."

28. In fact, the term "party" used in article 82(1) of the Statute is not an exhaustive category limited to the Prosecutor and a suspect or defendant.[44] The concept of "party" must be assessed on a case by case basis, taking into account the context of the decision in question and the interests of persons affected by that decision. This is made clear by the Court's more recent practice, which has enabled appeals from other persons:

States: In February 2018 Pre-Trial Chamber II granted leave to appeal to the state of Jordan, in respect of a decision made by the Court under article 87(7). No specific provision of the Statute or the Rules expressly grants standing to a State to appeal a decision under article 87(7). Nonetheless it is clear that a state's interests are affected by such a decision. Jordan was permitted to appeal on the basis of article 82(1)(d).[45]

Persons detained by the Court: Article 85 grants a right to compensation to a person who has experienced unlawful arrest or detention. The Statute makes no express mention of appeal rights extended to persons who seek such compensation but are refused. Nonetheless, in 2016, an appeal from such a decision was permitted, based on article 82(1)(d).[46] Although in that instance the appellant was also a defendant in ongoing proceedings, this was not the capacity in which the appeal was made. It would certainly create a paradoxical result if a person who has gone on to be a defendant in proceedings after their allegedly unlawful detention had rights to appeal an adverse article 85 decision while a formerly detained person against whom a case did not proceed had no such rights.

29. These examples demonstrate that the term "party" has not been treated as limited to the Prosecution and defence. Rather, it has been understood to encompass

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[44] See Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016), Commentary to article 82, p. 1956, para. 8.

[45] *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision on Jordan's request for leave to appeal, 21 February 2019, ICC-02/05-01/09-319; *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Chamber's Judgement in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr.

[46] *Prosecutor v. Jean-Pierre Bemba Gobo, Aimé Kilolo Musamba, Jean-Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Defence request seeking leave to appeal the "Decision on request for compensation for unlawful detention", ICC-01/05-01/13-1893, 13 May 2016; *Prosecutor v. Jean-Pierre Bemba Gobo, Aimé Kilolo Musamba, Jean-Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on Mr Mangenda's appeal against the "Decision on request for compensation for unlawful detention", ICC-01/05-01/13-1964, 8 August 2016.

all those whose legal interests are affected by a decision. The Statute would only need to expressly list certain categories of persons with exclusive standing to appeal specific types of decisions (see para. 25 above) if in the absence such a list judicial review may be initiated by any person whose legal interest has been, is or could be affected by a given decision. Therefore, the standing to appeal pursuant to article 82(1) of the Statute must be bestowed with all those whose legal interests are directly affected by an impugned decision in question.

30. In appeals from article 15 decisions, victims have a unique, statutorily recognized interest, which is arguably greater than that of any other party outside the Prosecution. The outcome of the article 15 decision determines any possible future realization of victims' rights and prerogatives envisaged by the Statute.[47] That interest qualifies victims as "parties" with a right to appeal article 15 decisions under 82(1).

The Prosecutor's role in article 15 proceedings does not foreclose victims' standing

31. The majority of the Pre-Trial Chamber further posited that because the Prosecutor has the exclusive power to trigger article 15 proceedings, it follows that only the Prosecutor can appeal the article 15 decision.[48] This interpretation is incompatible with other relevant provisions of the Statute and the rationale underlying article 15 processes.[49]

32. As the examples above illustrate, the factor determining standing to appeal is whether a party's interests are affected by the impugned decision – not whether a party initiated the underlying proceeding. First, it is clear that on other issues, standing to appeal is specifically granted under the Statute to persons who are not initiators of the specific legal procedures in question. One example is reparations: a convicted person, or an adversely affected property owner may appeal a decision on reparations (article 82(4)) of the Statute) although the latter may not initiate a reparations process and the

[47] Myanmar Decision, ICC-RoC46(3)-01/18-37, para. 88.
[48] Decision on Leave to Appeal, para. 24.
[49] Notably, the majority came to the conclusion that even the Prosecutor could appeal the Impugned Decision begrudgingly, seeming to call into question (or voice its disapproval of) *proprio motu* investigaitons. *See* Impugned Decision, paras. 29-33.

former is almost certain never to do so in practice. Another example is measures approved under article 57(3)(d), which would be requested by the Prosecutor, but can be appealed by a State (article 82(2)). Appeals can be made in respect of procedures which may only be begun by a Chamber acting *proprio motu* (article 82(1)(c) of the Statute). It is therefore not correct as a matter of principle to extrapolate that the person with exclusive interest or responsibility to trigger a procedural step necessarily has exclusive power to appeal a decision arising from it. To the contrary, even though many procedural steps may be triggered (as a matter of law or practice) by only one entity, they will almost certainly affect the interest of others, and those others may for this reason have standing to appeal.

33. Secondly, there is a policy argument to be made – quite contrary to the Pre-Trial Chamber's position – that victims' involvement in article 15 processes exists *precisely because* of the Prosecutor's role as the "driving engine of the investigation."[50] Providing victims with a role in this process which so dramatically affects their interests is necessary to ensure that the Prosecutor fulfils this role in an accountable manner. While the Prosecutor is independent, and enjoys a large margin of discretion in her work, she is nonetheless accountable to the Court's legal framework, including meaningful victim participation. The persons with an interest in ensuring that the Prosecutor complies with her obligations under that framework must be empowered to petition the Court to vindicate their statutory rights.

Recognising victims' standing to appeal the Impugned Decision would not 'unduly broaden' or subvert the appeals framework

34. To the extent that the Pre-Trial Chamber's Decision on Leave to Appeal rests on a fear that recognising victims' standing to appeal would open the floodgates, that concern is unjustified, both as a matter of theory and – based on experience in similar jurisdictions – as a matter of practice.

35. As a preliminary matter, the LRVs emphasize that correctly interpreting "party" as encompassing more than the Prosecution and Defence does not mean the

[50] Decision on Leave to Appeal, para. 24.

term has no bounds. Only those persons whose legal interests are directly affected by the decision in question may be considered a "party."

36. As set forth above, the Victims' have a specific interest and right under the Statute and Rules to participate in article 15 proceedings. Victims' interests at this stage of proceedings are marked. The article 15(4) decision will determine which, if any, victims are able to access justice in any form in respect of the situation: by having allegations publicly recognised by the issue of warrants; by having suspects tried and convicted persons punished; by the possibility of accessing reparations under article 75 in the event of a conviction; and even by accessing the support and assistance of the Trust Fund for Victims acting under its second mandate. While victims have interests at many stages of an ICC proceeding, there are few rulings which fundamentally affect them as much as an article 15(4) decision. Moreover – and no doubt reflecting this special interest – the wording of article 15 makes clear that at this stage victims have an unqualified legal right to be heard: victims "may make representations". This is in contrast to victims' standing at most other stages of proceedings (under the general provision in article 68(3)) which are subject to the discretionary views of a chamber on whether participation "determined to be appropriate". These factors demonstrate that in article 15 proceedings, victims have a strong interest which justifies their inclusion in the concept of "party". However numerous other interlocutory proceedings occur before the Court in which victims' interests will be substantially less significant. Chambers have the inherent power to review the extent of victims' interests in respect of any given decision and to restrict appeals to those instances where victims' interests are clearly affected.

37. Additonally, experience from other international jurisdictions shows that, in practice, no problematic consequences flow from recognizing victims' standing to appeal. Aside from the Court, the two international jurisdictions in which victims have established participatory rights are the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). At the STL, victims' right

to appeal decisions which affect their interests has been recognized,[51] but in practice rarely exercised. Indeed, no victims' appeal has been requested at the STL since the 2013 decision which established victims' standing to appeal. At the ECCC, a limited category of decisions can be appealed before the final trial judgment[52] and these procedures can be initiated by participating victims ("civil parties"). In the nearly 10 years of proceedings since the Closing Order in Case 002, the lawyers representing the consolidated group of victims in that case have brought only one appeal. [53]

Human rights standards compel recognition of Victims' standing

38. Article 21(3) of the Statute states clearly that the Statute and the Rules must be applied and interpreted consistently with internationally recognized human rights. This includes the rights of victims.[54] Interpretation of article 82(1) of the Statute in compliance with internationally recognized human rights standard requires inclusion of victims' legal interests in the context of the Impugned Decision. Article 82(1) of the Statute therefore must be interpreted in this instance as allowing victims' standing to seek judicial review of the Impugned Decision. Such interpretation of article 82(1) of the Statute, contrary to the Pre-Trial Chamber's position,[55] does not extend the statutory instruments but rather ensures compliance with internationally recognized human rights standards.

39. Denying victims standing to appeal a decision that forecloses their access to justice at the Court, as the Impugned Decision did here, deprives the Victims of their right to effective remedy, enshrined in multiple international human rights treaties.[56]

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[51] Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al.*, Decision on Appeal by Legal Representative of Victims against Pre-Trial Judge's Decision on Protective Measures, Case No, STL-11-01/PT/AC/AR126.3, 10 April 2013 ("the STL Decision").

[52] ECCC Internal Rules, rule 104(4).

[53] See for example *Case 002/02*, Decision on Civil Parties' Immediate Appeal Against the Trial Chamber's Decision on the Scope of Case 002/02 in Relation to the Charges of Rape, E306/7/3/1/4, 12 January 2017. This appeal was declared inadmissible because it was out of time, however no question was raised about the victims' standing to initiate the appeal.

[54] Myanmar Decision, ICC-RoC46(3)-01/18-37, para. 88.

[55] Decision on Leave to Appeal, para. 25.

[56] See, e.g., article 2, International Covenant of Civil and Political Rights; article 13, European Convention on Human Rights; article 47, EU Charter of Fundamental Rights; article 1 and 25 of the American Convention on Human Rights. UN Human Rights Committee (HRC), *General comment no. 31 [80], The*

That right encompasses the right to an effective investigation,[57] in which victims (or successors) may participate to the extent necessary to safeguard their legitimate interests,[58] and the right to truth.[59] As the Special Rapperteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, noted in his report of 4 February 2009 "[t]*he human rights obligations of States, in particular the obligation to ensure an effective remedy, require that such legal provisions* [concerning secrecy provisions and public interest immunities] *must not lead to a priori dismissal of investigations, or prevent disclosure of wrongdoing, in particular when there are reports of internaitnoal crimes or gross human rights violations.*[60] This certainly applies to victims of most grave human rights violations, amounting to crimes within the jurisdiction of the Court.

40. The EU "Victims' Directive" requires EU jurisdictions to implement the right to an effective remedy. It addresses specifically the rights of victims to in the event of a decision not to prosecute. According to article 11 of the Victims' Directive "*Member*

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nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 15, available at: https://www.refworld.org/docid/478b26ae2.html. See also: UN Committee Against Torture (CAT), *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012, para. 2, available at: https://www.refworld.org/docid/5437cc274.html; UN General Assembly, *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: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, available at: https://www.refworld.org/docid/4721cb942.html; UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 7 September 2015, A/HRC/30/42, available at: https://www.refworld.org/docid/55f7ec874.html.

[57] *See* European Court of Human Rights, Judgement in the case of *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania [GC], No. 47848/08*, 17 July 2014, para. 149 (discussing the right to "a thorough and effective investigation capable of leading to the identification and punishment of those responsible").

[58] European Court of Human Rights, Judgement in the case of *Al Nashiri v. Poland*, application no. 28761/11, 24 July 2014, paras 485-486; Denis Vasilyev. v. Russia, no. 32704/04, 17 December 2009, para. 157; Judgement in the case of *Ognyanova and Choban v. Bulgaria*, application no. 46317/99, 23 February 2006, para. 107; Judgement in the case of *Khadzhialiyev. and Others v. Russia*, no. 3013/04, 6 November 2008, para. 106.

[59] Human Rights Council Resolution 9/11 on the Right to the truth, A/HRC/RES/9/11, 18 September 2019.

[60] A.HRC/10/3, para. 60. The report refer here to: the Judgement of Inter-American Court of Human Rights Judgement in the *Myrna Mack-Chang v. Guatemala* case of 25 November 2003, para. 180; European Court of Human Rights Judgement in the case of *Imakayeva v. Russia* of 2 November 2006.

States [of the EU] *shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute.*"[61] The LRVs recognize that this Directive is applicable in the EU jurisdictions, however, they implement internationally recognized human rights standards and therefore should be taken into consideration also by the Court.

41. Indeed, domestic regulations of many State parties to the Rome Statute recognise victims' particular legal interests specifically in requesting review of a decision not to investigate. Victims of crime can challenge such decision by various ways, including by for example: supervision by a judge, claim to a superior prosecutor, lodging a direct appeal to a judge or by initiating separate proceedings.[62] Such possibilities exist, for example, in Austria, Chile, England and Wales, France, Germany, Guatemala, Lithuania, Poland and Portugal, among other jurisdictions.

III. THE IMPUGNED DECISION IS A "DECISION WITH RESPECT TO JURISDICTION" APPEALABLE UNDER 82(1)(a)

42. The Decision qualifies as one with respect to jurisdiction, subject to appeal under article 82(1)(a).[63] The Impugned Decision determined the exercise of the Court's jurisdiction in the Situation in Afghanistan and made express findings with regard to the Court's territorial, subject matter and temporal jurisdiction over alleged crimes addressed in the Prosecutor's request.

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[61] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ("Victims' Directive"). The Victims' Directive was to be implemented by the EU Member States into their national regulations by 16 November 2016 (article 27(1) of the Victims' Directive).

[62] For an overview of victims' rights in criminal proceeding in the EU Member States see: https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do; for legislation transposing the Victims' Directive in EU Member States see: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32012L0029. See also *Victims' Participation in Criminal Law Proceedings, Survey of Domestic Practice for Application to International Crimes Prosecution*, Redress, ISS, September 2015, pp. 44-45, available at: https://redress.org/wp-content/uploads/2017/12/September-Victim-Participation-in-criminal-law-proceedings.pdf.

[63] *See* Victims' Notice of Appeal-1, ICC-02/17-38, paras. 31-43; Victim's Notice of Appeal-2, ICC-02/17-40-Corr, paras. 3, 23-24.

43. The Appeals Chamber has previously addressed the question of when a decision is a "decision with respect to jurisdiction or admissibility" which is therefore appealable under article 82(1)(a). The central principal is set out in the Kenya Situation ("Kenya Admissiblity Decision").[64] Although that decision concerned admissibility, the Appeals Chamber addressed the scope of article 82(1)(a) generally, including in respect of jurisdiction. It explained that:

> *…the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.*[65]

44. The Appeals Chamber went on to explain that this means that a decision is appealable under article 82(1)(a) where it is a "ruling specifically on the jurisdiction of the Court or the admissilbity of the case" as opposed to a decision on a different matter, which may indirectly have an *impact* on jurisdiction or admissibility.[66]

45. The LRVs submit that this test is clearly met in the present appeal. The Pre-Trial Chamber's decision to foreclose any investigation—let alone prosecution—of alleged crimes that otherwise satisfy the statutory requirements of jurisdiction and

[64] *Situation in the Republic of Kenya*, Decision on the Admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence,'" ICC-01/09-78, 10 August 2011 ("Kenya Admissibility Appeal Decision"). Although the Victims submit that they meet the standard put forward in the Kenya Admissibility Decision, they note that this is a test crafted for a very different circumstance: whether a request for cooperation bootstrapped to a separate Article 19(6) challenge is appealable under the "admissibility" prong of article 82(1)(a) to the current situation. State Party requests for assistance, submitted under article 93(10) of the Statute, fall within Part 9 of the Statute ("International Cooperation and Judicial Assistance"). As such, the issue for appeal in the Kenya Admissibility Decision– denial of a request for assistance – was not and could not constitute a matter "with respect to jurisdiction or admissibility," because such matters fall within Part 2 of the Statute. ("Jurisdiction, Admissibility and Applicable Law"). Indeed, the Appeals Chamber itself has opined that decisions "rejecting challenges on the grounds that they are not proper jurisdictional challenges are subject to different considerations to those" set forth in the Kenya Admissibility Decision which was asked to situate a decisions as one of "admissibility" rather than "jurisdiction" for purposes of article 82(1). Judgment on the Appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9," ICC-01/04-02/06-1225, 22 March 2016 ("Ntaganda First Jurisdiction Appeal Judgment"), para. 20.

[65] Kenya Admissibility Appeal Decision, ICC-01/09-78 para. 15.

[66] *Ibid*., paras. 16-17, 20.

admissibility under articles 11, 12 and 17 is not a decision with only an "indirect or tangential link" to jurisdiction;[67] it *is* jurisdictional *in nature*. This is for two reasons.

The decision concerns the exercise of jurisdiction under article 13

46. First, the Impugned Decision is a decision which concerns whether, and to what extent (that is, within which scope), the Court may exercise jurisdiction over the situation pursuant to article 13. Relevant to and, Victims submit, dispositive of the question of whether the Impugned Decision and the current appeal is one "with respect to jurisdiction," the subject matter of the Impugned Decision and of this appeal – *proprio motu* investigations by the Prosecutor in accordance with article 15 – falls squarely within Part 2 of the Statute. It is fundamentally different in nature from other decisions which the Court has held to be too "indirect or tangential" to be appealable under article 82(1)(a).[68] The Impugned Decision determines that the Prosecutor may not exercise jurisdiction over any incidents and crimes underlying the Request.

47. The LRVs note that article 82(1)(a) does not define what is meant by "jurisdiction." The term is used in various ways within Part 2 of the Statute. Article 5 sets out the crimes which are within the jurisdiction of the Court. Article 11 concerns

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[67] *Ibid.*, para. 17.

[68] *See Ibid*, paras. 18, 21 (finding the impugned decision solely related to a request by Kenya for assistance in its investigation and thus did not constitute a decision with respect to admissibility); *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Admissibility of the "Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2011, para. 11 (holding that the impugned decision concerned Ms. Hosseinioun's request to submit observations and "did not even consider" admissibility); *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on "Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi of 10 April 2012'", ICC-01/11-01/11-126, 25 April 2012, para. 14 (finding that the impugned decision only concerned a request for postponement of surrender and therefore did not relate to admissibility); *Prosecutor v. Germain Katanga*, Decision on the Admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350", ICC-01/04- 01/07-3424, 20 January 2014, para. 34 (holding that the impugned decision related to the Court's competency to rule on the release of witnesses and so "did not pertain to a question of the jurisdiction of the Court"); *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the Admissibility of the Prosecutor's appeal against the "Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", ICC-01/13-51, 6 November 2015, para. 50 (finding that the impugned decision simply provided reasons for the Pre-Trial Chamber's request to the Prosecutor to reconsider her decision not to initiate an investigation and as such did not pertain to admissibility).

jurisdiction *ratione temporis*. Article 12, titled "preconditions to the exercise of jurisdiction," relates to the requirements of a link to a State Party via territoriality or nationality. Article 13, titled, "exercise of jurisdiction," relates to the so-called "trigger mechanisms" of a referral or article 15 process.[69] Articles 15*bis* and 15*ter* deal with the exerercise of jurisdiction over the crime of aggression.

48. Notably, articles 5 and 11(1) refer to matters in respect of which the court "has jurisdiction." In contrast, articles 11(2), 12, 13, 15*bis*, and 15*ter* all refer to situations in which the Court may "exercise jurisdiction." The LRVs submit that *both* having jurisdiction and exercising jurisdiction are matters which are fundamentally jurisdictional in nature within the meaning of the term "jurisdiction" in article 82(1)(a).

49. Decisions concerning whether (and to what extent) the Court may exercise jurisdiction pursuant to article 13 have been previously considered as "jurisdictional" in nature and therefore capable of litigation under article 19. In *Mbarushimana*, a defence challenge concerned the question of whether the case fell within the scope of the situation referred by the DRC to the Court under article 13(a). The Court held that the challenge was brought as a jurisdictional challenge within article 19.[70] Although that decision was not appealed, the link between article 19 and article 82(1)(a) in the Appeals Chamber's jurisprudence indicates that matters which are "jurisdictional" for the purpose of article 19 are also subject to appeal under article 82(1)(a).[71]

50. Morover, previous decisions have already indicated that a decision concerning the "exercise of jurisdiction" is a decision "with respect to jurisdiction" and is thus appealable under article 82(1)(a). In *Lubanga*, the Appeals Chamber accepted as admisible an article 82(1)(a) appeal from a decision denying a defendant's request that the Court "refrain from exercising its jurisdiction in the matter at hand," noting that

[69] The initiation of such *proprio motu* investigations are one of three ways that the exercise of the Court's jurisdiction is activated. *See* article 13 ("Exercise of jurisdiction") and specifically, article 13(c) of the Statute.
[70] *Prosecutor v. Callixte Mbarushimana*, Decision on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-451, 26 October 2011 ("Mbarushimana Jurisdiction Decision"), para.11.
[71] Kenya Admissibility Appeal Decision, ICC-01/09-78, para. 16.

the appeal went to the "exercise of jurisdiction."[72] In that case, the arguments raised as to why exercise of jurisdiction should be barred were not even specifically grounded in articles 5 or 11 to 13. In the present case the centrality of jurisdiction is even clearer.

51. The sole purpose of the article 15 process, and of a decision issued under article 15(4), is to determine whether or not the Prosecutor may exercise jurisdiction pursuant to article 13(c) (and if so, to determine the scope of that exercise). The process serves no other purpose. It exists exclusively to resolve the question of whether or not jurisdiction may be exercised. This makes clear that a decision under article 15(4) can never be said to have merely an "indirect or tangential link" to jurisdiction, *every* article 15(4) decision is fundamentally *jurisdictional in nature* since it determines whether or not the Court may excercise jurisdiction pursuant to article 13 in a given situation. The decision is jurisdictional in nature both as concerns the part of the decision which determines *whether* jurisdiction may be exercised at all; but also as concerns the part which decides what is the "scope" of a permitted exercise of jurisdiction. That the latter question is jurisdiction is made clear from the decision in *Mbarushimana* cited above, which concerned the same question arising in the context of a state referral.

The decision concerns questions of jurisdiction under articles 5 and 12

52. Secondly, the Impugned Decision contains express jurisdictional findings that exclude certain categories of crimes, perpetrators, and victims from the jurisdiction of the Court based on the concepts set out in articles 5 and 12 of the Statute. The Impugned Decision includes a section titled "Jurisdiction," with sub-sections on "Jurisdiction *ratione loci*" and "Jurisdiction *ratione materiae*."[73] In this part of the Impugned Decision, which the LRVs challenge,[74] the Pre-Trial Chamber categorically excluded crimes committed against the Victims from the jurisdiction of the Court—an erroneous legal determination which must be subject to appellate review. Specifically,

[72] *Prosecutor v. Thomas Lubanga Dyilo*, Judgement 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, ICC-01/04-01/06-772, 14 December 2006, paras 24-25. *See also id.* at paras 10-12.

[73] Impugned Decision, paras 45-66.

[74] *See* Ground IV. *infra.*

the Pre-Trial Chamber stated that "the alleged war crimes whose victims were captured outside Afghanistan fall out of the Court's *jurisdiction.*"[75] Moreover, the Pre-Trial Chamber erred as a matter of law in concluding that, "for the Court to have *jurisdiction* on the crime of torture, it is necessary that the alleged conduct of 'inflicting severe physical or mental pain' … takes place at least in part in the territory of a State Party; provided that the victims were captured in Afghanistan."[76] By their plain language, as well as their substance, these erroneous findings are jurisdictional in nature. As elaborated below in the context of Ground IV. of this appeal, the Pre-Trial Chamber's reasoning to some extent confuses questions of jurisdiction jurisdiction *ratione materiae* (article 5) and jurisdiction *rationae loci* (article 12). Nonetheless it is clear that either or both of these jurisdictional questions are addressed in paragraphs 52 to 56 of the Impugned Decision.

53. The Appeals Chamber has previously characterized decisions to exclude categories of acts and/or victims from the ambit of the Court as jurisdictional in nature. In *Ntaganda*, the Appeals Chamber found that "the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is *jurisdictional in nature.*"[77] The Chamber explained that were it to determine, as a matter of law, that "rape and sexual slavery of child soldiers in the same armed group as the perpetrator" was "per se exclude[d]" from the Court's ambit, then the Court would lack jurisdiction *ratione materiae*.[78] Just like in the *Ntaganda* proceedings, the Impugned Decision makes essential legal findings that *per se* exclude certain categories of victims and certain alleged criminal conduct from the Court's jurisdiction – namely, the Victims and acts of torture and other grave abuses committed as part of the US torture program outside the territory of Afghanistan.[79] The Impugned Decision's exclusion of certain incidents

[75] Impugned Decision, para. 55 (emphasis added).
[76] Impugned Decision, para. 54 (emphasis added).
[77] Ntaganda First Jurisdiction Appeal Judgment, ICC-01/04-02/06-1225, para. 40 (emphasis added).
[78] *Ibid*.
[79] Impugned Decision, paras. 53, 54 (emphasis added).

from the Court's jurisdiction is also not "an abstract legal question"[80] but rather an erroneous legal determination that goes to the heart of the Prosecutor and Court's jurisdiction over the crime base, which should be reviewed by the Appeals Chamber. The Pre-Trial Chamber's findings relating to jurisdiction *ratione materiae* and *ratione loci*, cannot be insulated from appellate review simply because the Chamber went on to dismiss the entire Request on the basis of "the interest of justice." To allow this would improperly deprive the Appeals Chamber of its opportunity to correct errors of law regarding the interpretation and application of the Court's Statute, the Rules, and elements of crimes. It must be recalled that article 15(4) mandates that a pre-trial chamber examine whether an investigation appears to fall within the Court's jurisdiction and be admissible – the same two criteria specified in article 82(1)(a). It cannot be that the Appeals Chamber is foreclosed from reviewing a decision that negates examination of jurisdiction and admissibility.

54. Moreover, in the event that this Chamber reverses the Pre-Trial Chamber's *ultra vires* and erroneous "interest of justice" analysis,[81] the conclusions in the Impugned Decision with regard to the scope of the authorization and the Court's jurisdiction over the alleged criminal conduct described in the Prosecutor's request would remain. In the event that the Appeals Chamber were to remand the matter (although the LRVs request that it does not), the Pre-Trial Chamber can be expected to reach the same conclusions on these matters unless they are now disturbed by the Appeals Chamber. Necessitating a separate appeal at that point would lead to unnecessary delays. Therefore, notwithstanding the Pre-Trial Chamber's own characterization of its jurisdictional analysis as non-essential and not the operative part of its decision,[82] it serves judicial economy to address all errors of law with respect to jurisdiction in this appeal.

[80] Impugned Decision, para 41.
[81] *See* Grounds I and II *infra*.
[82] Decision on Leave to Appeal, para. 41.

IV. GROUNDS OF APPEAL

Ground I: The Pre-Trial Chamber acted ultra vires in assuming the power to assess the "interests of justice"

55. The Pre-Trial Chamber erred in holding that *it* had the power to make a determination that the investigation would be contrary to the "interests of justice,"[83] and to deny the Request on this basis. The Statute nowhere empowers a pre-trial chamber to consider whether a requested investigation *is* in the interest of justice. A pre-trial chamber is empowered to review this question only in respect of a Prosecutor's decision *not* to initiate an investigation.[84]

56. This is the view which has been taken by other pre-trial chambers, when issuing decisions under article 15(4); that a review of the article 53(1)(c) requirement is "unwarranted"[85] when the Prosecutor requests authorisation to investigate. In each such prior decision, the relevant pre-trial chamber took the view that it was not to assess the interests of justice:[86]

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[83] Specifically, it erred when it considered that the "scrutiny mandated to the Pre-Trial Chamber in the proceedings under article 15 is not limited in determining whether there is a reasonable basis to believe that crimes under the Court's jurisdiction have been committed, but must include a positive determination to the effect that investigations would be in the interests of justice." Impugned Decision, para. 35. *See also* Impugned Decision, para. 33: "Also, and most critically, the mechanism makes it possible for the Court, through the filtering role of the Pre-Trial Chamber and *the requirement to determine that the investigation would serve the interests of justice*, to avoid engaging investigations which are likely to remain inconclusive" (emphasis added).

[84] Article 53(3) of the Statute.

[85] Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 63. *See also* Pre-Trial Chamber I, Decision on Application under Rule 103 (situation in Darfur, Sudan), 4 Feb. 2009, ICC-02/05-185, para. 21 ("the Chamber emphasizes 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").

[86] *See Situation in Georgia*, Deicision on Proseutor's request for authorization of an investigation, ICC-01/15-12, 27 January 2016 ("Georgia Article 15 Decision"), para. 58: "*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, received under article 15(3) of the Statute, which overwhelmingly speak in favour of the opening of an investigation*, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice." *See also Situation in the Republic of Burundi*, 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-01/17-9-Red, 25 October 2017 (public version issued on 9 November 2017) ("Burundi Article 15 Decision"), para. 190; *Situation in the Republic of Côte d'Ivoire*, 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", ICC-02/11-14-Corr, 15 November 2011 (Côte d'Ivoire Article 15 Decision), paras 207-208; Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 63.

> *[Unlike article 53(1)'s] sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is in the interests of justice. (emphasis added)*

57. Rather, she is to consider whether:

> *...[t]aking 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. (emphasis added)*

58. Thus, what is required to authorize an investigation is the *absence* of a finding *by the Prosecutor* that doing so would be contrary to the interests of justice – not an affirmative determination. And a pre-trial chamber cannot review the absence of a finding. In assuming a power to assess the interests of justice in circumstances *other* than to review the Prosecutor's discretionary decision *not* to investigate or prosecute, Pre-Trial Chamber II acted *ultra vires*. This position finds support in textual, contextual and purposive interpretations of the legal texts.

(i) Textual Interpretation

59. The plain language of article 15(4), which sets out the role of a pre-trial chamber in an article 15 process, makes no reference to "interests of justice." "Interests of justice" is referenced *only* in article 53(1)(c) and 2(c) of the Statute, as bases on which the Prosecutor may decide *not* to investigate or prosecute. The only reference anywhere in the Statute to a chamber having power of review in relation to this question is in article 53(3). That provision empowers such review where the Prosecutor has decided *not* to proceed with an investigation or prosecution.

60. As explained in the Court's first decision issued under article 15(4):

> *As for the assessment of "interests of justice" under article 53(l)(c), the Chamber considers that its review is* ***only*** *triggered when the Prosecutor* ***decides not to proceed on the basis of this clause****. [...] It is* ***only*** *when the Prosecutor decides that an investigation* ***would not be in the interests of justice*** *that he or she must notify the Chamber of the reasons for such a decision not to proceed, therefore triggering the review power of the Chamber.*[87]

[87] Kenya Article 15 Decision, ICC-01/09-19-Corr, n. 35 (emphasis added); *see also id.* para. 63.

61. Thus, the *only* role for a pre-trial chamber in relation to the "interests of justice" is *possible review* of a decision by the Prosecutor *not* to proceed, as set forth in article 53(3). A pre-trial chamber acting under article 15(4) never has authority to assess whether a given investigation serves the interests of justice, and to thereby substitute its discretion for that of the Prosecutor. Notably, the respective procedural mechanisms set out in articles 15(4) and 53(3) are framed in different ways. As Judge Mindua points out, article 15(4) makes no reference to the "interests of justice" question.[88] In contrast, article 53(3)(b) specifically grants a power to a pre-trial chamber to review a Prosecutor's conclusion under article 53(1)(c) that an investigation is *not* in the interests of justice.

(ii) Contextual interpretation

62. Other provisions in the Statute and the Rules also support this interpretation. For example, although the Statute itself does not address the relationship between articles 15 and 53, rule 48 mandates the Prosecutor to consider the factors set out in article 53(1)(c), including the "interests of justice."[89] Rule 48's drafting history demonstrates that the States Parties expressly turned their attention to the relationship between articles 15 and 53. In contrast, Rule 50, concerning the role of a pre-trial chamber in article 15 proceedings, did *not* create a link to article 53(1). Therefore, while it may be arguable – as per Judge Mindua's supposition[90] – that the Statute's approach on this issue is accidental, the same cannot be said for the Rules.

63. Further, the "interests of justice" language in article 53(2), regarding the Prosecutor's initiation of a prosecution, parallels that of 53(1), regarding initiation of an investigation: if the Prosecutor decides *not to proceed with a prosecution* on the grounds that it would not be in the "interests of justice," she must inform the Pre-Trial Chamber. Similarly, like article 15(4), article 58(1), which sets forth the judicial procedure for reviewing a request by the Prosecutor *to initiate* a prosecution with

[88] Judge Mindua's Concurring and Separate opinion, ICC-02/17-33-Anx-Corr, para. 17.
[89] Kenya Article 15 Decision, ICC-01/09-19-Corr, paras 23-24.
[90] Judge Mindua's Concurring and Separate Opinion, ICC-02/17-33-Anx-Corr, para.21.

issuance of a warrant of arrest or summons, makes no cross reference to article 53(2) or to the interests of justice. As commentators have pointed out,[91] when deciding on the issue of a warrant, it is not for a pre-trial chamber to consider whether the prosecution is in the "interests of justice." The parallel structure of the Statute demands a consistent approach regarding investigations.

(iii) Purposive interpretation

64. The rationale behind each of articles 15 and 53 also supports an interpretation that limits a pre-trial chamber's oversight regarding the "interests of justice" to decisions *not* to investigate. The Impugned Decision misconstrues the purpose of article 15 as imposing a "requirement" that a pre-trial chamber "determine that the investigation would serve the interests of justice, to avoid engaging in investigations which are likely to ultimately remain inconclusive." This reasoning suffers from at least two flaws.

65. First, while article 15 is intended to provide a judicial check on an otherwise independent Prosecutor, the key mechanism by which inappropriate prosecutions are prevented is the requirement of *admissibility*, not an "interests of justice" determination. The admissibility requirement prevents politically motivated investigations through complementarity; and prevents frivolous investigations by requiring that the prosecutor can only act where a gravity threshold is met. It is this mechanism of *admissibility*, rather than the "interests of justice" which enables a pre-trial chamber to block problematic investigation requests.

66. Secondly, the concern that led States Parties to include in the Statute a check on the Prosecutor's discretion to initiate investigations was *not* the possibility of "inconclusive" investigations (as the Pre-Trial Chamber assumed), but rather frivolous, vexatious or politically motivated investigations:

> *The same concerns surfaced in Rome that had been expressed in the Preparatory Committee . . . Some States feared '**an overzealous or politically motivated***

[91] *See* Gilbert Bitti, The Interests of Justice- where does that come from? Part II, *EJIL: Talk!*, 14 August 2019; https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/#more-17398.

Prosecutor targeting unfairly or in bad faith, highly sensitive political situations'.[92] *(emphasis added)*

67. As a solution, the States Parties decided to require that, before the Prosecutor can open an investigation *proprio motu*, a pre-trial chamber must review the Prosecutor's assessments on jurisdiction and admissibility. Nothing in the *travaux* of the Statute indicates that States had in mind a wider and more subjective assessment by the Pre-Trial Chamber, involving a review of the 'interests of justice'. Such an assessment would be unnecessary to prevent frivolous investigations, and – as the current proceedings indicate – may actually run *counter* to the provision's objective of ensuring that the Court is not subject to political pressure.

68. A purposive interpretation of article 53 leads to the same conclusion. As discussed above, article 53(1)(c) expressly applies *only* when the Prosecutor makes a *negative* assessment. It reflects the presumption – implicit in the Statute and consistent with its object and purpose—that investigations of criminal conduct subject to the Court's jurisdiction and consistent with admissibility requirements will be in the interests of justice. When, "all the relevant requirements are met as regards both jurisdiction and admissibility,"[93] as they were here, a pre-trial chamber may not upend this presumption. This presumption accords with the underpinning philosophy of the Court that international crimes should be investigated and prosecuted. Exceptions should be rare—hence the drafters' desire to require judicial review, by a pre-trial chamber, in the unusual case where the Prosecutor considers an investigation to be counter to the interest of justice. The ultimate intention of the Statute (subject to the protection provided by admissibility, as explained above) was to enable rather than inhibit the investigation and prosecution of the most serious crimes.

[92] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016), p. 694. *Seee also* Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor, 22 June 1998. Other states expressed similar concerns. *See* Balance of Investigative Authority and State Sovereignty Focus of Discussion in Preparatory Committee on Establishment of International Criminal Court, Press Release L/2795,13 August 1996.

[93] Impugned Decision, para. 96.

69. The LRVs therefore respectfully submit that in reviewing whether the requested investigation would serve the "interests of justice" the Pre-Trial Chamber acted contrary to the text of article 53(1)(c) and object of the Rome Statute, exceeded its review function, usurped the discretion afforded to the Prosecutor, and inverted the fundamental presumption on which the Court is based (that investigating alleged crimes that appear to fall with the jurisdiction of the court and appear to be admissible is presumed to be in the interest of justice). This error of law led the Pre-Trial Chamber to refuse the Request. The error therefore warrants reversing the Impugned Decision.

Ground II: Alternatively, the Pre-Trial Chamber erred, as a matter of law, procedure and in fact, in the way it undertook its assessment of "interests of justice"

70. The LRV's emphasize that they put this ground in the alternative to Ground I. Should the Appeals Chamber reject the arguments under Ground I, and conclude that the Pre-Trial Chamber was empowered to consider the interests of justice, it should examine the legal, factual and procedural errors made by the Pre-Trial Chamber in the course of that assessment. Ground II concerns the latter errors. The LRVs submit that in the process of considering the interests of justice the Pre-Trial Chamber adopted an erroneous definition and standard of review; applied inappropriate criteria; and failed to take into account the views of victims and the Prosecution.

(i) Erroneous definition of "the interests of justice"

71. The LRVs submit that the interpretation given to "the interests of justice" by the Pre-Trial Chamber is wrong in law.

72. The LRVs do not disagree with the Pre-Trial Chamber's view that the concept of "interests of justice" should be understood with reference to the Statute's object and purpose[94] (although they would add that this purpose also includes ensuring that trials are fair, and that victims' voices are heard). However, the Pre-Trial Chamber erred by interpolating into that object and purpose concepts which find no basis in the Statute, the Court's history or the *travaux préparatoires*. These include the notion that "an investigation would *only* be in the interests of justice if prospectively it appears suitable

[94] Impugned Decision, para.89.

to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame,"[95] and where the circumstances are such to make it a "success"[96] and not "inevitably doomed to failure.[97] It considered that an investigation could be rejected on the basis that it appeared to the Pre-Trial Chamber likely to be "predictably inconclusive."[98]

73. First, defining the interests of justice or the success or failure of an investigation, by reference to the *outcome* of proceedings (acquittal or conviction) alone, does not respect the rights of suspects and accused persons, or international human rights standards regarding the right to effective remedy, including truth-telling and satisfaction.

74. Indeed, as other Pre-Trial Chambers have noted, the very purpose of an investigation is to answer open questions, and thereby commencing an investigation is especially important where there are perceived difficulties at the outset of such investigation:

> *In this regard, the Chamber considers that it does not follow that an investigation should not be opened where facts or accounts are difficult to establish, unclear, or conflicting. Such circumstances in fact call for an investigation to be opened, provided that the relevant requirements have been met.*[99]

75. Secondly, the Pre-Trial Chamber's view presupposes that the goals of fighting impunity and deterring further crimes can only be achieved where an accused is in custody, a trial able to proceed, and these steps were achieved within a short period of time after the completion of a crime. By this standard, the International Criminal Tribunal for the former Yugoslavia might also be considered as a "failure" and the

[95] Impugned Decision, para 89.
[96] Impugned Decision, paras 90, 95, 96.
[97] Impugned Decision, para.90.
[98] Impugned Decision, para. 34.
[99] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 30. See also Georgia Article 15, Decision, ICC-01/15-12, para 29 in which the pre-trial chamber stated that "*open questions should not preclude an investigation but should indeed be resolved as part of it.*"

prosecution of the highest ranking Serb leaders as contrary to "the interests of justice" (the arrests of Radovan Karadžić and Ratko Mladić took 13 years and more than 15 years respectively).

76. To the contrary, the Statute's objectives of addressing impunity and preventing atrocities can be served at *every* step throughout the process of investigation and trial, which signal to the perpetrators of crimes that their conduct can become the subject of the Court's focus. Deterrence has been recognised by a number of chambers of the Court as one it its objectives.[100] And while not every action undertaken by the Court will in itself contribute deterrence, there can be no deterrence through the work of the Court if investigations are not opened, particularly if this occurs as a consequence of state non-cooperation. Victims' interests can be served not only by seeing a conviction obtained and receiving reparations, but also by the international recognition that atrocities have occurred and that victims' accounts matter, which comes first from the opening of an investigation and then from the issuance of an ICC arrest warrant. Indeed, as Victims Sharqawi al Hajj and Guled Duran Hassan told the Pre-Trial Chamber in their representations, the investigation:

> *constitutes a much-needed first step to ending a cycle of impunity that has existed for crimes committed on the territory of Afghanistan for too long, and for the global impunity that U.S. officials have enjoyed for the last 15 years despite adopting torture as an official policy…such an investigation…will demonstrate that no one is above the law regardless of their power or position; that those who bear the greatest responsibility for serious international crimes will be held accountable and not enjoy global impunity; and that <u>all</u> victims of*

[100] *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169 (reclassified as public on 23 September 2008), 13 July 2006, paras 73-75; *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 23 May 2014, paras 37-38; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 67

serious crimes can and will have their claims be heard and adjudicated by an independent and impartial tribunal.[101] (emphasis in original)

77. In fact, there was no need for the Pre-Trial Chamber to invent the definition of "interests of justice" which it propounds in the Impugned Decision. The relevant provision of the Statute itself circumscribes the factors a Prosecutor must consider when analyzing the "interests of justice" factor. Whereas under article 53(2)(c), the Prosecutor can take all circumstances together for her assessment, under article 53(1)(c), she must *first* analyze the gravity of the crimes and the interests of victims – the criteria which weigh in favour of an investigation. In the current situation, the crimes are of utmost gravity, a fact that the Pre-Trial Chamber confirms, especially with regard to the crime of torture, "which is radically banned by international law."[102] The reason for the more restrictive drafting of article 53(1)(c) is clear: a decision by the Prosecutor not to even open an investigation permits complete impunity in the entire situation.[103]

78. Only after analysing those factors may *the Prosecutor* examine, as a countervailing consideration,[104] whether there are "nonetheless," "substantial reasons" to believe that an investigation would not serve the interests of justice.[105] The Pre-Trial Chamber commits additional error in failing to meet this threshold, which it acknowledges but then completely ignores in its analysis.[106]

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[101] ICC-02/17-38-AnxI, para. 114. *See also* Second Update to the Pre-Trial Chamber from Sharqawi Al Hajj, 6 Dec. 2018 *at* https://ccrjustice.org/sites/default/files/attach/2018/12/ICC%20Follow-Up%20Letter%206%20Dec%2018%20FINAL.pdf (after apprising the PTC of Mr. Al Hajj's continuing decline in health while detained without charge at Guantánamo, where he is on prolonged hunger strike and weighs only 48 kgs, stating that "[o]pening this investigation could provide hope to Mr. Al Hajj and give him a reason to believe justice is possible").

[102] Impugned Decision, paras. 84-85.

[103] For this reason, the Victims wholly agree with the Prosecutor that such a decision should be absolutely exceptional. Office of the Prosecutor, Policy Paper on the Interests of Justice, 2007.

[104] *See* Office of the Prosecutor, Policy Paper on the Interests of Justice, 2007.

[105] The text of article 53(1)(c) of the Statute is noteworthy in that it requires that the Prosecutor must provide "substantial reasons" for her belief that an investigation would not be in the interest of justice. This substantially higher threshold only applies to her "interests of justice" assessment and not for her determinations that a crime within the jurisdiction of the Court has been or is being committed (art. 53(1)(a)) or that a case would be admissible (art. 53(1)(b)), which both require only a "reasonable basis."

[106] See Impugned Decision, para. 87.

(ii) Procedural Error: Standard of review

79. Even if (contrary to the Victims' primary submissions) a pre-trial chamber is permitted to address the "interests of justice" requirement as part of an article 15 process, its examination is limited to *reviewing* the Prosecutor's discretionary determination – not substituting its own discretion for that of the Prosecutor. Given that an article 15 request for authorization to investigate is an exercise of the Prosecutor's discretion, any power by a pre-trial chamber to review must be limited to an "abuse-of-discretion" type standard: that is, to considering whether the Prosecutor's conclusion under article 53(1)(c) is tainted by a demonstrable legal error or is a conclusion which no reasonable Prosecutor could have reached in the circumstances.

80. The concept of a limited form of review, an "abuse-of-discretion" standard, is well known in international criminal law and before this Court. It has been most developed as a standard to be applied by an appellate chamber in respect of decisions by a first instance chamber which are fundamentally discretionary and in respect of which the first instance chamber was inherently better placed to determine matters of fact. In such instances an appellate chamber's review powers do not enable it to intervene simply because it would have reached a different conclusion; rather it may only determine whether the first instance chamber "properly exercised its discretion."[107] A decision will only be disturbed where it can be shown that "the particular finding was one which no reasonable tribunal of fact could have reached, or that it was invalidated by an error of law."[108] This approach has been followed in a

[107] *Prosecutor v. Slobodan Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Refusal to Order Joinder, 18 April 2002, paras 3-6; *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Assignment of Counsel, 1 November 2004, paras 9-10; *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, Decision on Modified Provisional Release, 10 March 2006, paras 21-23; *Prosecutor v. Gotavina et al*., IT-06-90-AR73.1, Decision on Conflict of Interest (Markač), 4 May 2007, para. 11 and from the ICTR: *Prosecutor v. Bagosora et al. (Military I),)*, ICTR-98-41-AR93, ICTR-98-41-AR93.2, Decision on exclusion of Evidence, 19 December 2003, para. 11, *Prosecutor v. Jean Uwinkindi*, ICTR-01-75-AR72(C), Decision on Indictment, 16 November 2011, para.6.

[108] *Prosecutor v. Slobodan Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Refusal to Order Joinder, 18 April 2002, para.6.

number of decisions of this Court.[109] The Appeals Chamber has clarified that an exercise of a discretion will only be disturbed under review when it "was so unfair and unreasonable as to constitute an abuse of discretion."[110]

81. The LRVs submit that if it is the case that a pre-trial chamber may review a Prosecutor's decision under article 53(1)(c), this same standard of review should be used by the pre-trial chamber. This flows from the nature of the Prosecutor's discretion under article 53(1)(c). A decision by the Prosecutor under article 53(1)(c) is clearly an exercise of discretion: it is a matter on which two decision-makers may legitimately reach different conclusions; a "power to make a decision that cannot be determined to be right or wrong in an objective way".[111] The Pre-Trial Chamber itself recognised that a determination under article 53(1)(c) involves prosecutorial *discretion*.[112] The position has also been clearly set out elsewhere:

> *The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself only in paragraph (c), i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require the application of exacting legal requirements.*[113]

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[109] *Prosecutor v. Joseph Kony et al*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009', ICC-02/04-01/05-408, 16 September 2009 ("Kony Admissibility Appeal Judgment"), paras 79-80; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2259, 12 July 2010, para. 34 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ICC-01/09-01/11-1066, 25 October 2013, para.60; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547, 21 May 2014 ("Gaddafi Admissibility Appeal Judgment"), paras 161-162; *Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"ICC-01/09-02/11-1032, 19 August 2015, para.25.

[110] Gaddafi Admissibility Appeal Judgment, ICC-01/11-01/11-547, para. 162.

[111] Defined by Lord Diplock of the UK House of Lords in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014, p1064.

[112] Impugned Decision, paras 88 and 89.

[113] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not

82. Other international tribunals have held that a prosecutor's discretionary decisions are subject to review by a chamber on much the same limited "abuse of discretion" basis as discretionary judicial decisions.[114] Indeed, the very same logic applied in the decisions cited above therefore applies to the exercise of this discretion by the Prosecutor. The Statute vests the discretionary power in the Prosecutor. The mere fact that a Pre-Trial Chamber may take a different view cannot enable to intervene in the Prosecutor's decision. To borrow the language of the Appeals Chamber: The Chamber should "not interfere with the… exercise of discretion… merely because [the Chamber], if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the [discretionary decision maker: here the Prosecutor]."[115] The LRVs respectfully submit that an abuse-of-discretion standard would allow a pre-trial chamber to address any concerns relating to Prosecutorial over-reach, while protecting the independence of the Prosecutor's office and the article 15 process from the risk of inappropriate interference by a pre-trial chamber.

83. In the present instance the Pre-Trial Chamber materially overstepped. It did not identify any error in the Prosecutor's decision regarding the interests of justice. Nor did it demonstrate that no reasonable Prosecutor could have reached that decision. Rather it undertook its own *de novo* assessment of the interests of justice, simply considering the issue afresh and substituting its own view for the Prosecutor's. Therefore, even if the Pre-Trial Chamber was empowered to review the "interests of justice", it did so according to an incorrect standard of review, and the outcome of its review was therefore tainted by error.

(iii) Consideration of Criteria Lacking Basis in Statute, Practice, or Precedent

84. Having established a flawed concept of "interests of justice", the Pre-Trial Chamber introduced into its analysis factors that have no basis in the statutory regime

to initiate an investigation, ICC-01/13-34, 16 July 2015 ("Comoros First Decision on Non-Prosecution"), para. 14.

[114] ICTY: *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga") (Čelibići Case")*, Judgement, 20 February 2001, paras 607-611.

[115] Kony Admissibility Appeal Judgment, ICC-02/04-01/05-408, para. 79.

of the Court, the policy paper of the Prosecutor, or precedent. Even more concerningly, several of the Pre-Trial Chambers' criteria leave the Court dangerously open to political interference and increased non-cooperation. This approach *undermines* rather than advances the object and purpose of the Statute.

85. In particular, the Pre-Trial Chamber erroneously considered whether state cooperation (from both states parties and non-states parties) could be assured,[116] as well as the budgetary impact of opening of an investigation in the context of the Court's limited resources.[117]

86. It is particularly noteworthy that no previous article 15(4) decision has suggested that non-cooperation, or even open obstruction, by a state should be a relevant consideration. Indeed, to the contrary, Pre-Trial Chamber III (which also at that time included Judge Mindua) authorized the Prosecutor to investigate in Burundi notwithstanding its findings, based on the Prosecutor's submissions that "the Government of Burundi has interfered with, intimidated, or harmed victims and witnesses. … In addition, the Government of Burundi is suspending international cooperation in connection with the alleged crimes," and that such circumstances could pose a risk to the integrity of the investigation.[118] Although such challenges of cooperation compare to, and may even exceed, those pertaining to the Afghanistan Situation, the Pre-Trial Chamber provided no explanation for the differing result reached in this case.

87. Not only does no previous practice or authority exist for using cooperation and funding as factors relevant to the "interests of justice", but strong reasons exist for rejecting these as relevant ones. The clear danger in the Pre-Trial Chamber's approach is that it sends a message to states that if they do not want to be subject to an investigation initiated *proprio motu* by the ICC Prosecutor, they need only refuse cooperation, obstruct the Court, or curtail funding. This would create a scenario which

[116] Impugned Decision, paras 91, 94.
[117] Impugned Decision, paras 88, 95.
[118] Burundi Article 15 Decision, ICC-01/17-9-Red, paras 13-14.

flagrantly shields some individulas from prosecution and denies access to legal remedy to some groups of victims, failing to establish a system of equal enforcement of criminal law which is essential for the rule of law[119] and the principle of equality before the law .[120] It is difficult to conceive of anything which is more directly in conflict with the object and purpose of the Statute, or more damaging not only to the Court's credibility but to "its very function and legitimacy," about which the Pre-Trial Chamber professed concern.[121]

88. In addition to referring to cooperation and funding, the Pre-Trial Chamber also relied on wholly speculative factors in opining that the investigation is "not feasible and inevitably doomed to failure"—citing nothing more than concerns about state cooperation and the passage of time.

89. The "scarce cooperation obtained by the Prosecutor" to date is irrelevant,[122] as States Parties have no obligation to cooperate at the stage of the preliminary examination. Moreover, that a significant amount of time has elapsed since the alleged crimes does not doom the investigation to failure. While the Victims would have certainly welcomed the commencement of proceedings much earlier, successful prosecutions of crimes committed during the second World War have been initiated decades after the war, as have prosecutions before the Extraordinary Chambers in the Courts of Cambodia. The Pre-Trial Chamber's prediction that relevant evidence may no longer be available is not only entirely speculative prior to the opening of an

[119] "The 'rule of law' is a concept at the very heart of the [UN's] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, *equally enforced* and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." (emphasis added): Report of the Secretary-General: The Rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 23 August 2004, para.6.

[120] Universal Declaration of Human Rights, article 7; International Covenant on Civil and Political Rights, article 14.

[121] Impugned Decision, para 34.

[122] Impugned Decision, paras. 91, 94.

investigation, but involves an assessment of the crime base which the Prosecutor is eminently better placed than the Pre-Trial Chamber to make.

90. Finally, the Pre-Trial Chamber improperly considered resource issues. Budgetary concerns are outside the remit of the Pre-Trial Chamber's mandated legal review and instead within the purview of the Assembly of States Parties. Moreover, the use of the Office of the Prosecutor's resources is entirely within the Prosecutor's discretion, in accordance with article 42(2) of the Statute.

(iv) Procedural Error: Failing to take account of the Prosecutor's and Victims' Views

91. In addition to adopting an erroneous conception of "the interests of justice," applying an incorrect standard of review and considering inappropriate factors, the Pre-Trial Chamber made an additional significant procedural mistake. It failed to take account of the views of victims that were before it; and on other issues failed to provide an opportunity to both the Prosecution and victims to be heard.

92. That the Pre-Trial Chamber is required to take account of victims' representations is implicit in the procedure established in article 15(3) of the Statute and rule 50 of the Rules. While a chamber cannot be required to *agree with* or *adopt* victims' views, the inclusion of an express statutory provision enabling a person to be heard must imply that material duly submitted under that provision must at least be considered by the decision-maker. Indeed, in his Partially Dissenting Opinion on the Decision on Leave to Appeal, Judge Mindua made precisely this point:

> *…if during preliminary examinations victims do not have any role before a Pre-Trial Chamber, the situation is completely different as soon as the Prosecutor has made a request for an authorisation to investigate. From that moment, victims of a situation have a statutory right to make representations before the Pre-Trial Chamber* ***and their views must be taken into account*** *in accordance with rule 50 of the Rules of Procedure and Evidence.*[123]

93. However, in the Impugned Decision the Pre-Trial Chamber *wholly ignored* the victims' representations, which overwhelmingly supported the opening of an

[123] Judge Mindua's Partially Dissenting Opinion, , ICC-02/17-62-Anx, para. 31.

investigation *regardless* of its duration or outcome—despite cursorily noting that 680 out of the 699 victim applications "*welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth*".[124]

94. The report submitted by the Registry clearly established that the vast majority of the victims support the opening of an investigation in this situation.[125] This is certainly the case for the Victims, who have been seeking justice in various national and regional courts for well over a decade, and have turned to the ICC as the court of last resort.[126] In this regard, the victims' "main motivating factors invoked are: investigation by an impartial and respected international court; bringing the perceived perpetrators of crimes to justice; ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims' voices to be heard; and protecting the freedom of speech and freedom of the press in Afghanistan."[127] In addition to their initial representations, urgent additional submissions were later made by two of the Victims represented by the LRVs in light of subsequent developments in the US.[128] These submissions also addressed, among other things, the importance of the investigation to the interests of justice.[129]

95. These victim perspectives are scarcely mentioned in the Impugned Decision. The Pre-Trial Chamber acknowledged the high number of victims who made

[124] Impugned Decision, para. 87.

[125] Registry Report on Victims' Representations, ICC-02/17-29, para. 39. (680 out of 699 victims' forms indicated that victims are in favour of the initiation of an investigation into crimes arising out of the situation in Afghanistan: Impugned Decision, para.87).

[126] *See, e,g.,* ICC-02/17-38-AnxI, paras. 112-113; Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018, at 1, 12-14; Complaint, *Al-Asad v. Djibouti*, Communication No. 383/2010, African Commission on Human and Peoples' Rights (2009), https://chrgj.org/wp-content/uploads/2016/11/Al-Asad_Complaint.-2009.pdf (dismissed in 2014; reinstated in 2016)"; European Court of Human Rights, Judgement in the case of Al *Nashiri v. Poland*, application no. 28761/11, 24 July 2014.

[127] Registry Report on Victims' Representations, ICC-02/17-29, para. 39. (680 out of 699 victims' forms indicated that victims are in favour of the initiation of an investigation into crimes arising out of the situation in Afghanistan: Impugned Decision, para.87).

[128] Specifically, the Victims brought to the Pre-Trial Chamber's attention the nomination of Gina Haspel to head the US Central Intelligence Agency ("CIA"). Ms Haspel played a key role in the CIA's' post 9/11 torture and rendition programme, including the use of secretive overseas prisons to torture terror suspects often using extreme techniques such as waterboarding, and was in charge of a "black site" in Thailand.

[129] *See, e.g.,* ICC-02/17-38-AnxI, paras. 114-116.

representations,[130] but the Impugned Decision never engages with the substance of those submissions in any way. The Pre-Trial Chamber merely notes that "the victims' representations usefully complement and supplement the information provided by the Prosecutor on the facts alleged in support of the Request."[131] The Decision makes no reference to the contents of the Registry report on victims' representations: it is simply ignored. The Pre-Trial Chamber not only fails to cite to any victim submissions in its analysis, it also goes further, dismissing victim representations wholesale by insisting that its determination under article 15(4) must be made "on the *exclusive* basis of information *made available by the Prosecutor*."[132]

96. The Appeals Chamber has already underlined the need for a Chamber to receive submissions from the parties in order to be able to assess properly the issues before it.[133] In this particular situation, the Pre-Trial Chamber (albeit as previously composed, prior to the assignment of Judges Akane and Aitala) twice requested additional information from the Prosecutor on comparatively minor issues.[134] Yet it failed to solicit the views of the Prosecutor or the victims on the highly contentious decision that was a marked a departure from the Court's practice, and one which in essence had the consequence of depriving victims of their rights to accountability, truth and reparations] question of whether it is empowered to review the "interests of justice", or to request their views on the particular factors it had identified (for the first time in the jurisprudence of the Court) as being relevant to that question.

97. In the final paragraph of the Impugned Decision the Pre-Trial Chamber took its disregard of victims' views a step further still. Having failed to take into account the

[130] Impugned Decision, para 27.
[131] Impugned Decision, para 28.
[132] Decision para 30 ("[T]he Pre-Trial Chamber is vested with a specific, fundamental and decisive filtering role in the context of proceedings under article 15. *The Pre-Trial Chamber must consider, on the exclusive basis of information made available by the Prosecutor*, whether the requirements set out in article 53(1)(a) to (c) are met.") (emphasis added).
[133] *Prosecutor v. Dominic Ongwen*, 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," ICC-02/04-01/15-251, 17 June 2018, paras. 41-43.
[134] Order to the Prosecutor to Provide additional Information, ICC-02/17-8, 5 Dec. 2017, and Second Order to the Prosecutor to Provide Additional Information, ICC-02/17-23, 5 Feb. 2018.

material which victims *did* put before it; and having further failed to solicit their views on the unprecedented approach that it proposed to take; in its closing comments the Pre-Trial Chamber itself presumed to express the interests of the same victims whose views it had hitherto disregarded:

> *It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.*[135]

98. It is deeply regrettable, that when it finally considered it relevant to speak in the names of the victims of crimes in the Afghanistan Situation, the Pre-Trial Chamber not only ignored what those victims had said in the hundreds of representations they had sent to the court, but substituted its own diametrically opposed opinion in order to legitimise its unprecedented decision. Such an approach unfortunately creates the perception that the Pre-Trial Chamber has sought to instrumentalise victims for its own aims. Finally, it is recalled that the decision was taken against a backdrop of intense political pressure aimed at the Court by the United States, which resulted in the revocation of the Prosecutor's visa just days before the Impugned Decision.[136] Against this backdrop, the subtext to the Pre-Trial Chamber's emphasis on State cooperation was striking – particularly as the obligations of States to cooperate are only triggered *after* an investigation is commenced, under Part 9 of the Statute. Most readers will have had no doubt as to the meaning of the Pre-Trial Chamber's passing reference to "subsequent changes within the relevant political landscape both in

[135] Impugned Decision, para. 96.

[136] *See, e.g.,* Complaint Against the United States of America: Interference with Judicial Proceedings at the International Criminal Court, filed by the Center for Constitutional Rights with the U.N. Special Rapporteur on the Independence of Judges and Lawyers, 5 June 2019 *at* https://ccrjustice.org/sites/default/files/attach/2019/06/5%20June%202019_Special%20Rapp%20letter%20ICC_final.pdf.

Afghanistan and in key States (both parties and non-parties to the Statute)."[137] Whether or not the Pre-Trial Chamber was in fact politically cowed into its conclusion, the *potential perception* was that intimidation and political influence swayed the Court. The Impugned Decision did nothing to dispel this perception. The Appeals Chamber must now do what it can to resurrect the Court's credibility, and to ensure that the deterrent effect of the Court's work is not weakened through surrender and inaction following a campaign of intimidation. To allow the Impugned Decision to stand would have the appearance of a victory for improper political pressures expressly aimed at undermining the Court's mandate and very existence.

99. The potential for such a perception was increased with the issuance of Judge Mindua's Opinion, some eight weeks after the majority opinion. Judge Mindua's explanation of his minority views on the important question of an investigation's scope justified a separate opinion, but that question covers less than four pages of his opinion. Fully thirteen pages are devoted to supporting the majority view on the "interests of justice," which had been the subject of intense public criticism for the intervening eight weeks.[138]

Ground III: The Pre-Trial Chamber erred by unduly restricting the scope of the investigation

100. The Pre-Trial Chamber committed legal error when it determined that "any and all conducts for which no authorisation to investigate is specifically requested fall outside the scope of the Chamber's judicial scrutiny, which is and should remain confined to the incidents for which the judicial authorisation is explicitly sought in the

[137] Impugned Decision, para. 94.

[138] *See* e.g.: https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/; https://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/; https://opiniojuris.org/2019/04/27/the-scope-of-the-aborted-afghanistan-investigation/; https://dovjacobs.com/2019/04/; https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/; https://hrij.amnesty.nl/the-prosecutors-next-steps-on-afghanistan-will-determine-the-future-of-the-international-criminal-court/; https://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan/; https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/icc-refuses-to-investigate-crimes-in-afghanistan-including-us-torture; https://www.afghanistan-analysts.org/icc-rejects-war-crimes-investigation-in-afghanistan-continuing-impunity-for-perpetrators-no-voice-yet-for-victims/

Request."[139] This runs contrary to the legal framework set forth in the Statute, Rules and RoC, and conflicts with established practice. Notably, Judge Mindua disagreed with his two colleagues on this question.[140]

101. More specifically, the LRVs submit that the Pre-Trial Chamber's approach is too limited, and incorrect, in three respects:

(a) Practice developed in the last three article 15 decisions accepted that in addition to the expressly defined scope of an investigation, the Prosecutor's investigation can include crimes which are *sufficiently linked* to that expressly defined scope.[141] The Impugned Decision abandoned this approach, though without clear justification, and opted instead for a new test, of whether crimes have a *close link* to the authorised scope.[142]

(b) The Impugned Decision also rejects the idea that the Prosecutor may investigate crimes which occur after the commencement of the investigation.[143] Although this view was expressed in the first article 15 decision in the *Kenya Situation* (notwithstanding that the issue did not appear to have been raised by the Prosecution in that situation)[144] it has since been expressly abandoned.[145]

(c) Perhaps most extremely, and for the first time in the Court's practice, the Impugned Decision treated the expressly authorised scope of the investigation

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[139] Impugned Decision, para. 68.

[140] See in particular paras. 3, 5 and 8 of the Concurring and Separate Opinion. ("I respectfully do not share my colleagues' views that when the opening of an investigation is authorised, the scope of this authorisation is so limited"; "I respectfully disagree").

[141] Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, paras 178-179, citing Mbarushimana Jurisdiction Decision, ICC-01/04-01/10-451 (in which see especially paras 16, 21, 41-42); Georgia Article 15 Decision, ICC-01/15-12, para. 64. The same approach was taken, although without using the specific words "sufficiently linked" in the Burundi Article 15 Decision, ICC-01/17-9-Red, at paras 192-194.

[142] Impugned Decision, para. 41; see also paras 40, 42 and 69.

[143] Impugned Decision, para. 68.

[144] Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 206.

[145] Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, para. 179; *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "Judge Fernández de Gurmendi's separate and partially dissenting opinion to the 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", ICC-02/11-15-Corr, 5 October 2011, ("Partially dissenting opinion of Judge Fernández de Gurmendi on Côte d'Ivoire"), paras 64-73; Burundi Article 15 Decision, ICC-01/17-9-Red, para. 192.

(to which any other investigated crimes must have a "close link") as constituted not by a generally defined *category* of crimes, but as exhaustively constituted by the *specific incidents* (and identified alleged offenders) identified in the Request.[146]

102. Despite the extent to which the approach of the Impugned Decision departs from the established practice of the Court in these three respects, it fails to provide any legal basis or principled justification for such a departure. In the following submissions the LRVs will address first the reason why the Pre-Trial Chamber's approach should be rejected as wrong in law; and secondly the way in which this erroneous approach led to incorrect conclusions on the facts.

(i) Legal error

103. The LRVs respectfully submit that the Pre-Trial Chamber's approach should be rejected, and the previously established approach endorsed by the Appeals Chamber. There are three broad reasons why the approach to scope in the impugned decision is problematic and cannot have been the approach intended by the Statute's drafters: (i) the approach fails to reflect the preliminary stage at which an article 15 request is made, and the very purpose of an investigation in uncovering hitherto unknown facts; (ii) the Court's most fundamental objectives are served effectively only if the Prosecution is able to investigate crimes which occur *after* authorization to investigate; and (iii) as a matter of practicality and certainty, the Court should avoid an approach which is likely to involve repeated article 15 requests in relation to a given situation, and potentially investigations with ever-changing scopes.

104. An article 15 request is generally made at an extremely early stage in the Prosecution's work. It concludes the preliminary examination stage, and – if successful – initiates the investigation stage. The correct approach in law to an article 15 decision must take this into account and reflect both the limitations of a preliminary

[146] Impugned Decision, para. 69.

examination, and the objectives of the investigation which is to follow an authorisation.

105. During the preliminary examination stage which precedes an article 15 request, the Prosecutor does not have the powers and obligations which would later arise in an investigation. Witnesses are not interviewed, other evidence is not collected, cooperation obligations are not fully engaged. The information available to the Prosecutor is therefore limited[147] and it is almost inevitable that the Prosecutor will *not* be in a position to identify all crimes which are alleged. The inevitably limited nature of the information which can be gathered during a preliminary examination has been recognised in previous article 15 proceedings. Judge Fernandez explained:

> *Necessarily, the information gathered by the Prosecutor for the purpose of the commencement of the investigation and presented to the Chamber is non-exhaustive. Indeed, as noted by the Majority in paragraph 24 of its decision. Pre-Trial Chamber II indicated, taking into account that the standard of "some reasonable basis" is the lowest evidential standard provided for in the Statute, that the information available to the Prosecutor is not expected to be "comprehensive" or "conclusive", which contrasts with the position once the evidence has been gathered during the investigation.*
>
> *For the same reason, the facts and incidents identified in the Prosecutor's request are not and could not be expected to be exhaustive either, but are intended solely to give concrete examples to the Chamber of the gravest types of criminality that appear to have occurred in the situation.*[148]

106. This state of affairs contrasts sharply with the Prosecutor's position once an investigation is authorised. Indeed, it is the very purpose of the investigation to ascertain the full set of facts as regards crimes committed, victims of such crimes and

[147] Elsewhere in the Impugned Decision, the Pre-Trial Chamber itself appears to have recognized that the Prosecution does not have full information at this stage of the proceedings: Impugned Decision, para. 71 ("This assessment is prognostic in nature and must be guided by the *indicative* lists of the most serious incidents and by the *preliminary lists of persons or groups* provided by the Prosecution.") (emphasis added).

[148] Partially dissenting opinion of Judge Fernández de Gurmendi on Côte d'Ivoire, ICC-02/11-15-Corr, paras 31-32.

who bears the greatest responsibility,[149] as well as to clarify or confirm facts about which conflicting evidence exists.[150]

107. It is for this very reason that previous article 15 decisions have emphasized that investigations should not be limited too closely in scope to material which has been uncovered during a preliminary examination. It is precisely the purpose of the investigation to identify the crimes in question. Pre-trial chambers have thus found, quite logically, "open questions should not preclude an investigation but should indeed be resolved as part of it."[151] In its decision on the situation of Burundi Pre-Trial Chamber III also noted that it is during an investigation that the Prosecutor's *obligations* to investigate arise:

> *the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes against humanity or other article 5 crimes, i.e. war crimes and genocide, as long as they remain within the parameters of the authorized investigation.* ***This complies with the Prosecutor's duty to investigate objectively, in order to establish the truth, pursuant to article 54(1)(a) of the Statute.***[152] *(emphasis added)*

108. Ensuring that these obligations are meaningfully implemented – for the benefit not only of victims but also of suspects who benefit from the obligation to investigate exculpatory material – requires that investigations are not limited.

109. Indeed, previously pre-trial chambers have not only granted the Prosecutor permission to exceed the scope of authorisation requested, but admonished her for

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[149] *See, e.g.,* Georgia Article 15 Decision, ICC-01/15-12, para. 37**:** "it must be borne in mind that the selection of persons or perpetrators as well as certain incidents which are likely to shape the Prosecutor's future case(s) at this stage is preliminary, and as such, this may change as a result of the investigation."
[150] *See, e.g.*, Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 50: "The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation."
[151] Georgia Article 15 Decision, ICC-01/15-12, para. 29.
[152] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 193. *See also* Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 75; Partially dissenting opinion of Judge Fernández de Gurmendi on Côte d'Ivoire, ICC-02/11-15-Corr, 5 October 2011, para. 34 ("it may well be that, upon investigation, the Prosecutor deviates from the request, both in relation to the crimes to be addressed and their legal characterisation, as is his prerogative").

"act[ing] too restrictively" in imposing "requirements on the material that cannot reasonably be met in the absence of an investigation":

> *The available information with regard to the degree of intensity of the armed confrontation may be univocal and the level of organization of the armed entities may be unclear,* ***but that is precisely the purpose of an investigation to provide such clarity and overcome doubts****.*[153] *(emphasis added)*

110. It is therefore clear that to limit the scope of an authorised investigation, in the ways which the Pre-Trial Chamber did, has the effect of undermining the very purpose of the investigation. As it was explained directly in the article 15 decision on the *Situation in Georgia*:

> *for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor's investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation.* ***To impose such limitation would be also illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information. It is precisely the purpose of the investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted.*** *Binding the Prosecutor to the crimes mentioned in the decision authorizing investigation would also conflict with her duty to investigate objectively, in order to establish the truth (cf. article 54(1) of the Statute).*[154] *(emphasis added).*

111. Additionally, there are compelling reasons – in line with the Statute's purpose – for the scope of investigations to include crimes which happen after the opening of an investigation. One reason is that an investigation must be capable of encompassing offences under article 70. Indeed, some of the offences contained in article 70 are only *capable* of being committed after an investigation is opened.[155] It is noteworthy that even though Pre-Trial Chamber II took the view, in its article 15 decision on the *Situation in Kenya*, that the scope of the authorised investigation could not include future crimes, nonetheless, article 70 crimes subsequently alleged *were* able to be

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[153] Burundi Article 15 Decision, ICC-01/17-9-Red, para. 141. *See also* Georgia Article 15 Decision, ICC-01/15-12, para. 35 (finding that the Prosecutor "acted too restrictively and has imposed requirements on the material that cannot reasonably be met in the absence of an investigation of which is precisely the issue at stake").

[154] Georgia Article 15 Decision, ICC-01/15-12, para. 63.

[155] In particular articles 70(1)(a) and (c) which relate to witness evidence, which is not gathered or heard before the start of an investigation.

included in the scope of the investigation.[156] There is also no reason to treat these offences under article 70 as different from the for the purposes of considering whether crimes initiated after an investigation should be capable of falling within its scope. It would be perverse, and run counter to the objective of establishing accountability for the most serious crimes, if the Court found itself able to prosecute article 70 offences occurring after the beginning of an investigation, but was prevented from prosecuting article 5 crimes which occurred or continued at the same time in the same factual context.

112. Indeed, ensuring that a situation encompasses crimes which occur after the start date of the investigation is a means by which to ensure the fundamental objectives of the Court, one of which is to contribute to a deterrent effect. In objecting to the majority approach in the Cote d'Ivoire article 15 decision, which only left the temporal scope open as regarded *continuing* crimes, Judge Fernández de Gurmendi argued for a wider approach precisely for this reason:

> *[In Prosecutor v. Mbarushimana] Pre-Trial Chamber I established that a situation can include not only crimes that have already been or are being committed at the time of the referral, but crimes committed after that time, insofar as the crimes are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.*
>
> *This broader interpretation would have better served the declared objective of ensuring that the investigation covers those crimes whose commission extend past the date of the application, and enhance the preventative impact of the intervention of the Court in the situation at hand.*[157]

113. However, including future and continuing crimes within an investigation is clearly not possible if the investigation is limited to the specific incidents which the Prosecutor has been able to identify during her preliminary examination and include in her article 15 request. On the Pre-Trial Chamber's extremely limited approach, an

[156] Two cases have been initiated: *Prosecutor v. Walter Osapiri Barasa*, Warrant of arrest for Walter Osapiri Barasa, ICC-01/09-01/13-1-Red2, 2 August 2013 (public version issued on 2 October 2013); *Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", ICC-01/09-01/15-1-Red, 10 March 2015 (public version issued on 10 September 2015).
[157] Partially dissenting opinion of Judge Fernández de Gurmendi on Côte d'Ivoire, ICC-02/11-15-Corr, paras. 72-73.

investigation will never be able to include crimes which occur after its commencement. The LRVs submit that this undermines the basic objectives of the Court as well as its ability to prevent and punish crimes against the administration of justice.

114. Finally, the approach adopted the Pre-Trial Chamber would lead to cumbersome and inefficient procedures, and a problematic lack of certainty about the scope of investigations. According to the Impugned Decision, "investigation on incidents not closely related to those authorised would only be possible on the basis of a new request for authorisation under article 15, with a view to allowing the Chamber to conduct anew its judicial scrutiny…"[158]

115. It is inevitable that, through a thorough investigation, "the Prosecutor will discover new incidents."[159] As Judge Mindua rightly recognises, the Prosecutor should "in no way" be required "to revert to a pre-trial chamber each time his or her investigation uncovers new incidents."[160] Such "micro-management" of the exercise of the Prosecutor's investigative powers is not the purpose of article 15 of the Statute.[161] Ensuring comprehensive and meaningful investigations and prosecutions under such a scheme would necessarily involve repeated article 15 requests in respect of related factual matters. As the present situation illustrates clearly, this process is resource intensive and time consuming. It requires the commitment of significant resources from the Prosecution, Chambers and the Registry: the same resources which, as the Impugned Decision itself points out – are often in short supply at the Court. Beyond this practical concern, establishing a practice whereby a situation may be *expected* to regularly involve repeated article 15 processes would have other disadvantages. While the theoretical possibility – rarely used – for the Prosecutor to request an enlargement of a investigation's scope would create only limited and proportionate such certainty issues, the scheme implicitly proposed by the Pre-Trial Chamber would almost *require* repeated article 15 requests by the Prosecutor. This would leave stakeholders in the

[158] Impugned Decision, para. 42.
[159] Separate and Concurring Opinion, para. 8.
[160] Separate and Concurring Opinion, para. 6.
[161] Separate and Concurring Opinion, para. 9.

process (who anyhow have no access to the specificities of the scope of the Request set out in confidential annexes 2A-2C and 3B-3C), as well as the Prosecution itself, facing significant uncertainty about the scope of the situation. The Prosecutor would be in a poor state to plan and prioritise its activities. Victims – and indeed potential suspects – would be left not knowing what to expect. And the Trust Fund for Victims would have difficulty planning and implementing its second mandate with clarity.

116. For all of these reasons, the LRVs urge the Appeals Chamber to reject the approach taken by the Pre-Trial Chamber. Its implications demonstrate that it does not reflect the object and purpose of the Statute's drafters. Rather, under article 15, crimes for which a "reasonable basis" exists to investigate do "not have to be exhaustively defined"; indeed, one single crime may warrant authorisation of "the 'commencement' of the investigation."[162] Thereafter the authorised investigation includes any crimes which are "sufficiently linked"[163] to the authorised investigation, including crimes occurring after the investigation commences.[164] The findings to the contrary in the Impugned Decision constitute legal error.

(ii) Errors in determining scope on the facts

117. The Pre-Trial Chamber's unduly limited approach to the scope of an investigation is of material consequence to the Victims. Had the Pre-Trial Chamber not erred in respect of the "interests of justice" of the investigation it would have authorised, it would have improperly excluded crimes which are sufficiently linked to the situation in Afghanistan and which appear to fall clearly within the jurisdiction of the Court, whether classified as war crimes or crimes against humanity.[165] Notwithstanding the Pre-Trial Chamber's eventual decision to refuse authorisation to investigate overall, this remains of concern to Victims. This is because of the clear likelihood that – in the absence of direction from the Appeals Chamber to the contrary

[162] Separate and Concurring Opinion, para. 10.
[163] Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, paras 178-179 ; Georgia Article 15 Decision, ICC-01/15-12, para. 64; Mbarushimana Jurisdiction Decision, ICC-01/04-01/10-451, paras 16, 21, 41-42.
[164] Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, paras 178-179 and Partially dissenting opinion of Judge Fernández de Gurmendi on Côte d'Ivoire, ICC-02/11-15-Corr, paras 64-73.
[165] Impugned Decision, paras. 51-55.

– the error in respect of scope would be repeated in the event that the matter was remanded to the Pre-Trial Chamber.

118. The Pre-Trial Chamber's errors regarding jurisdiction are elaborated under ground IV. below. However, those errors are to some extent intertwined with the Pre-Trial Chamber's erroneous approach on scope: having determined that the scope of an investigation is defined by reference to specific incidents, the Chamber set out to attempt an assessment of jurisdiction on an unduly specific bases, attempting to establish jurisdiction *ratione loci* and *ratione materiae* in respect of specific categories of incidents. Such an assessment is premature. Specific crimes cannot be properly given a legal characterisation until they have been properly investigated and the facts established. Those facts are crucial to determining whether jurisdiction *ratione loci*, *ratione materiae* and *ratione personae* is established. It was thus premature for the Pre-Trial Chamber to have excluded certain crimes, arising out of the situation, from the investigation. Indeed, "at the preliminary examination stage, the presence of several plausible explanations for the available information does not entail that an investigation should not be opened into the crimes, but rather calls for the opening of such an investigation in order to properly assess the relevant facts."[166] This difficulty can be made clear with two specific examples:

119. First, regarding crimes alleged to have been committed by US forces and the CIA, the Chamber appears to have made this assessment on assumption that such crimes could only be categorised as war crimes. While this was characterisation proposed in the Request,[167] Victims submit that these crimes could constitute a crime against humanity. In fact, Victims r/00750/18, r/00751/18 and r/00749/18 argued in their representations that crimes against humanity should be included as part of the investigation of US conduct, including but not limited to imprisonment or other sever deprivation of liberty in violation of fundamental rules of international law; torture;

[166] Burundi Article 15 Decision, , ICC-01/17-9-Red, para. 138, citing Comoros Art. 53 Decision, para. 13 and Georgia Article 15 Decision, ICC-01/15-12, paras. 25 and 35.
[167] Request, ICC-02/17-7-Red, paras 187-252.

rape and other forms of sexual violence; persecution against any identifiable group on political, religious, racial, national and/or ethnic grounds; and enforced disappearance.[168] Ultimately, the difficulties which are evident in paragraphs 52 to 55 of the Impugned Decision (discussed further below in relation to ground IV) perhaps arose from attempting to analyse questions of jurisdiction without having complete information about the facts and therefore the correct legal characterisation of the crimes. If the cross-boundary conduct described in paragraph 54 of the Impugned Decision can be characterised as continuing crime (for example, most obviously, as a crime against humanity under article 7(1)(e)), then jurisdiction *ratione loci* should be established so long as at least one element has occurred within the territory of a State Party.[169]

120. A second example concerns the identity of alleged perpetrators: another factor which is relevant to jurisdiction but which may not be easily determined at the preliminary examination stage. Several of the Victims made representations to the Pre-Trial Chamber concerning the categories of alleged perpetrators who should be investigated. Victims r/00750/18, r/00751/18 and r/00749/18 advised the Pre-Trial Chamber that in addition to members of the US armed forces and CIA, the investigation should examine the role of civilian leadership and private military

[168] Annex, paras. 92-96, 99-108; Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018, at 2, 5, 14. Victims r/00750/18 and r/00751/18 also advised that the authorization should include the war crime of subjecting persons to medical or scientific experiments (art. 8(2)(e)(xi)).
Although the Pre-Trial Chamber declared that "victims' representations usefully complement and supplement the information provided by the Prosecutor on the facts alleged," Impugned Decision, para. 28., they made no mention of a single victim's representation as having informed their Article 15 analysis. This failure to engage with victims' representations runs contrary to the very purpose of victim engagement in the article 15 process, and threatens to turn a process, which Victims took seriously and other Pre-Trial Chambers have been consulted to inform the scope of the authorization, into an empty formality. Compare See Kenya Article 15 Decision, paras. 61, 129-131. See also Burundi Article 15 Decision, para. 21 (affirming that the Pre-Trial Chamber is "guided by the views expressed by the victims") and referring to victims' views as relates to its evaluation of crimes against humanity (ibid. at 33-39); war crimes (ibid. at 137-140); complementarity (ibid. at 149-153); gravity of the crimes (ibid. at 185-188); interests of justice (ibid. at 190); and scope of the investigation (ibid. at 190-194).
[169] Myanmar Decision, especially at para. 72.

contractors.[170] Victim r/00635/18 made detailed submissions about his mistreatment by UK authorities and specifically requested that the conduct of UK officials fall within the scope of the investigation. Victims r/00750/17, r/00751/18 and r/00749/18 made representations regarding their mistreatment in centres on the territory of other States Parties (Jordan and Djibouti).[171] The Pre-Trial Chamber itself acknowledged that at "this initial stage of the proceedings, which precedes investigations, it is to be expected that no specific information allowing the direct attribution of conducts for the purpose of determining individual criminal responsibilities is yet available to the Prosecutor."[172] It concluded that it was therefore not necessary to "identify at this stage the specific force or group" whose members were responsible for alleged crimes.[173] This illustrates precisely why the Pre-Trial Chamber fell into error in attempting to specifically define the scope of the investigation by reference to specific incidents at this stage, which were then used as a basis for assessing jurisdiction. The identity – and thus *nationality* – of alleged perpetrators may be essential in establishing jurisdiction *ratione personae*. Yet without having been in a position to assess these questions, the Pre-Trial Chamber undertook premature characterisations of the crimes and reached conclusions regarding jurisdiction.

121. Under previous article 15(4) decisions, which took a broad view on delimiting scope, investigation of a wide range of crimes or suspects (*including* those identified by the victims) would have been permitted, as would a recharacterization of criminal conduct as war crimes and/or crimes against humanity, based on the results of an investigation. By denying the Prosecutor such latitude for investigation, the Impugned Decision impedes full and fair consideration of the crime base. Moreover, it also effectively nullifies the contributions of victims under article 15(3), which mandates a

[170] Annex, para. 109(a) and (b); Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018, at 2, 13-14. Indeed, the Victims specifically offered to provide further information to the Pre-Trial Chamber in this regard, if of assistance…during this stage of review." Annex, fn. 214. *See* Rule 50(4) of the Rules.
[171] Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018.
[172] Impugned Decision, para. 57.
[173] *Ibid.*

pre-trial chamber to hear from and consider victims' representations at the authorisation stage.

Ground IV: The Pre-Trial Chamber misconstrued the elements of crimes and the Court's territorial jurisdiction to bar investigation into alleged war crimes committed against victims of the US torture program

122. The Pre-Trial Chamber prematurely and erroneously excluded from the Court's jurisdiction alleged criminal conduct arising out of the US torture program that occurred in whole or in part on the territory of States Parties, including acts of torture, rape or other war crimes, committed "in the context of and [..] associated with" the non-international armed conflict in Afghanistan.[174] The Pre-Trial Chamber's interpretation of this "nexus" requirement was unduly restrictive and allowed only for courses of criminal conduct which *commenced* on the territory of Afghanistan *only*. In misapplying this element for war crimes under articles 8(2)(c) and 8(2)(e) of the Statute, the Pre-Trial Chamber committed legal error when it held that the Court lacks jurisdiction over: (i) crimes committed against individuals "captured" outside Afghanistan regardless of whether they were subjected to acts of torture on the territory of a State Party; and (ii) crimes committed against individuals captured in Afghanistan within the context of the armed conflict but removed to the territory of a non-State Party and subjected to torture there.[175]

123. Both holdings arise out of a fundamental misunderstanding of principles of international humanitarian law and the nature of torture and other criminal acts committed against the Victims. With regards to the former, the Pre-Trial Chamber failed to appreciate that an animating purpose of this body of law, and Common Article 3 in particular, is to provide protections to those not actively participating in hostilities and should therefore be given broad protective effect including with respect to its geographic reach in the context of non-international armed conflicts, within the

[174] Impugned Decision, paras. 53-55.
[175] Impugned Decision, para. 54.

parameters that the nexus requirement demands;[176] As to the second point, the Pre-Trial Chamber suggests that the act of "capture" and the ensuing severe physical and mental pain and suffering are wholly distinct acts, as opposed to part and parcel of the same criminal conduct. As the Victims' represenatations made clear, the torture often began at the point of first detention, and continued throughout the course of detention and interrogation that often occurred on the territory of multiple States Parties, including but not limited to Afghanistan;[177] for a number of the Victims that same course of detention and interrogation continues to today on territory under the exclusive control of a non-State Party participating in the non-international armed conflict.

124. As will be explained below, the Pre-Trial Chamber's errors appear to be the result of it conflating jurisdiction *ratione materiae* with jurisdiction *ratione loci*, and misinterpreting both. By focusing its erroneous analysis on the location where a victim was captured or whether they were later subjected to crimes outside of the territory of a State Party, the Pre-Trial Chamber effectively excluded from consideration at the threshold *alleged criminal conduct occurring on the territory of States Parties* related to the US torture program.[178] The Pre-Trial Chamber's determination that the point of "capture" is determinative of whether there exists a nexus to an armed conflict is not only arbitrary, but it is wrong. The Pre-Trial Chamber neither provided support for its

[176] *See, e.g.*, ICRC, Commentary of the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Woudned and Sick in Armed Forces in the Field, 2d. Ed. (2016) ("2016 ICRC Commentary on Geneva Conventin (I)"), art. 3, para. 467 ("The object and purpose of common Article 3 supports its applicability in non-international armed conflict reaching beyond the territory of one State. Given that its aim is to provide persons not or no longer actively participating in hostilities with certain minimum protections during intense armed confrontations between States and non-State armed groups *[…], it is logical that those same protections would apply when such violence spans the territory of more than one State*") (emphasis added).

[177] *See, e.g.*, Victims' Notice of Appeal-1, ICC-02/17-38, Annex I, at paras. 54-72 (after the commencement of the international armed conflict in Afghanistan in 2001, Mr. Al Hajj went from Afghanistan to Pakistan, where he was detained by US and Pakistani forces, kept in solitary confinement before being transferred to detention in Jordan (2002-04), Afghanistan (2004) and Guantanamo (Sept. 2004- present); he alleges that he has been subjected to torture from his capture until today); "Victim Representation Form r/00749/18, submitted on behalf of Mohammed Abdullah Saleh al-Asad, 31 January 2018 (describing Mr. al Asad's incommunicado detention, interrogation and abuse in Djibouti (2003-2004) before being transferred to detention in Afghanistan (2004-2005))".

[178] Impugned Decision, para. 56.

position, nor engaged with the Prosecutor's detailed submission which concluded that victims of the US torture program were subjected to crimes on States Parties territory that arose "in the context of *and* associated with the non-international armed conflict" in Afghanistan.[179]

125. The Pre-Trial Chamber's determinations regarding alleged crimes committed under the US torture program deprive the Victims of access to justice, run contrary to the legal framework set forth in the Statute and the Elements of Crimes, conflict with prior precedent, and contradict the applicability of common article 3 to the Geneva Convention to contemporary non-international armed conflicts. Such flawed analysis leads to the dangerous conclusion that a Party to a non-international armed conflict occurring on the territory of a State Party can evade accountability at the Court for breaches of its obligations under common article 3 of the Geneva Conventions simply by being strategic about where it starts or ends its torture program.

(i) Ratione Materiae: The Pre-Trial Chamber conflated territorial with material jurisdiction and misconstrued the nexus with an armed conflict requirement

126. As a preliminary matter, the Pre-Trial Chamber, like the Prosecution, erred in framing the alleged crimes committed under the US torture program as committed against persons "*hors de combat*." Classifying all victims of the described conduct as "*hors de combat*" presupposes that they had been combatants or otherwise participated in hostilities. The Victims maintain that their status at the time of their capture and throughout their abuse and detention, was that of civilians taking no active part in hostilities.[180]

127. Although the Pre-Trial Chamber's discussion of the Court's jurisdiction over alleged crimes committed under the US torture program fell under the heading *ratione loci*, its reasoning reflects a misapplication of the element of war crimes that bears on

[179] *See* Request, paras. 246-252 (emphasis added).

[180] Victims further maintain that their civilian status, and detention and torture at the point of confluence of an armed conflict and counter-terrorism operations makes it appropriate for the Prosecution to investigate the crimes committed under the US torture program as crimes against humanity (*See* Ground III; Victims' Notice of Appeal-1, Annex I, at paras. 99-108). It is recalled that crimes against humanity do not require a nexus to an armed conflict.

whether alleged criminal conduct meets the "nexus" with the armed conflict. It held that alleged crimes committed against victims captured outside of Afghanistan do not – and cannot – satisfy the requisite nexus to a non-international armed conflict and thus fall out of the Court's jurisdiction *ratione materiae*.[181]

128. Accordingly, the Pre-Trial Chamber categorically ruled out the possibility that the Court could exercise jurisdiction over torture committed against someone who was captured outside of Afghanistan and later harmed on the territory of a State Party. The Impugned Decision provides no rationale, however, for its unprecedented conclusion that the Court's jurisdiction over war crimes turns on the location of the victim's *capture*.[182] Moreover, this categorical exclusion from the Court's jurisdiction of alleged crimes committed against the Victims and others subjected to the US torture program erroneously assumes, without analysis, that those crimes do not constitute other crimes subject to the Court's jurisdiction, such as crimes against humanity, and forecloses investigation under alternate legal characterizations.[183]

(a) The Pre-Trial Chamber erred in its assessment of nexus between the alleged criminal conduct in question and the conflict in Afghanistan

129. In evaluating the *nexus* between the conflict and the alleged criminal conduct, the Pre-Trial Chamber considered only whether the act of *capture* was committed "in the context of and was associated with" the conflict in Afghanistan, not whether the subsequent abuses to which victims were subjected were committed "in the context of" and "associated with" the conflict. It compounded its error of focusing only on capture by apparently interpreting "in the context of and was associated with" to mean no farther than the territory of Afghanistan.

130. Neither the Statute nor the Elements of Crimes define the phrases "in the context of" and "associated with" an armed conflict.[184] Therefore, case law of the Court

[181] Impugned Decision, para. 55
[182] *See* Impugned Decision, para. 53.
[183] Impugned Decision, para. 56.
[184] Commentators have explained that the *travaux préparatoires* make clear that the drafters wanted to include both reference to the area was committed ("in the context of") and provide a nexus between the

and of other international tribunals is highly relevant to the assessment of the nexus element.[185] The Impugned Decision, however, largely ignores prior jurisprudence.

131. The only source the Pre-Trial Chamber cites in support of its conclusion is a statement from the Appeals Chamber in the *Ntaganda* case that cautions against "any undue expansion of the reach of the law of war crimes."[186] The Pre-Trial Chamber failed to note, however, that the same paragraph of that judgment, following the ICTY Appeals Judgment in the *Kunarac et al case*, lists factors which may be taken into account in the assessment of the nexus element including: whether the victim is a member of the opposing party; whether the act may be said to serve the ultimate goal of a military campaign or whether the crime is committed as part of, or in the context of, the perpetrator's official duties.[187] Moreover, as the Appeals Chamber recently affirmed in the *Ntaganda* Judgment, there is a sufficient nexus with an armed conflict provided the armed conflict "played a substantial role in the perpetrator's ability to commit the crime, in his decision to commit it, the purpose of the commission, or the manner in which it was committed."[188] Notably, none of these factors concern the territory on which an act involved in or preceding the crime took place.

132. The Pre-Trial Chamber failed to consider, let alone apply, the nexus factors as regards the allegations of torture and cruel treatment, rape and sexual violence, and outrages upon personal dignity committed against individuals that the US claimed were suspected terrorists associated with the Taliban or Al-Qaeda – the opposing party in the armed conflict in Afghanistan. Had it done so, as requested by the Prosecutor, it would have found that a nexus was established sufficient to conclude a reasonable

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armed conflict and the conduct of the perpetrator ("was associated with"). Eve LaHaye, *War Crimes in Internal Armed Conflicts* (Cambridge: 2008), pp. 112-113.

[185] *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, 26 September 2008, para. 381.

[186] Impugned Decision, para. 53.

[187] *The Prosecutor v. Bosco Ntaganda*, Judgement on the appeal of Mr. Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1962, 15 June 2017, para. 68; *Prosecutor v. Kunarac et al*, "Judgement," 12 June 2002, IT-96-23 & IT-96-23/1-A, paras. 58-59.

[188] *The Prosecutor v. Bosco Ntaganda,* Judgment, 8 July 2019, ICC-01/04-02/06, para. 731. Although this Judgment post-dates the Impugned Decision, it relies upon well-established jurisprudence, including the 2002 ITCY Judgment in *Kunarac*.

basis exists for the commission of war crimes against individuals subjected to the US torture program.

133. At the same time, it is not possible to conclusively assess the above factors with regard to the incidents in question before conducting an investigation. As noted by Pre-Trial Chamber III "at the preliminary examination stage, the presence of several plausible explanations for the available information does not entail that an investigation should not be opened into the crimes concerned, but rather calls for the opening of such an investigation in order to properly assess the relevant facts."[189] Pre-Trial Chamber I determined in the Georgia Article 15 Decision that at the authorisation stage "open questions [concerning material jurisdiction – protected status of peacekeeping forces] should not preclude an investigation but should indeed be resolved as part of it."[190]

134. The Pre-Trial Chamber therefore erred in law by failing to apply the factors necessary to determine if a nexus exists between the incidents in question and the conflict, and instead proceeding to conclusively determine that the conduct did not meet the requirement based on an impermissibly narrow read of "in the context of and was associated with." It conducted its assessment *in abstracto*, without regard to individual incidents during which alleged criminal conduct related to the US torture program took place and without allowing the Prosecutor to investigate these acts which would be necessary for their proper legal characterisation. In light of the specific character of the acts and the armed conflict in question, an accurate assessment of existence of a nexus of these acts with the armed conflict can be done only on a case-by-case basis with regard to each incident concerned.

[189] *See* Burundi Article 15 Decision, ICC-01/17-9-Red, para. 138; Comoros First Decision on Non-Prosecution, ICC-01/13-34, para. 13.
[190] Georgia Article 15 Decision, ICC-01/15-12, para. 29.

(b) The Pre-Trial Chamber erroneously confined the scope of application of common article 3 of the Geneva Conventions to the territory of Afghanistan to justify categorically excluding crimes committed against victims captured outside of Afghanistan

135. The Pre-Trial Chamber correctly determined that the "occurrence in Afghanistan of a conflict of non-international character at the time of the alleged criminal conducts, is met."[191] This determination is in line with the view of the ICRC, according to which, since 19 June 2002 the conflict in Afghanistan is an armed conflict of a non-international character. The fact that third States intervene on the side of the government against non-state armed groups, whose activities extend beyond the borders of Afghanistan, does not change this qualification.[192]

136. The Pre-Trial Chamber erred fundamentally, however, in interpreting the geographic scope of common article 3 of the Geneva Conventions in relation to such non-international armed conflicts. The Impugned Decision asserts a flawed textual reading of common article 3, which interprets the provision's reference to a conflict "occurring in the territory of a one of the High Contracting Parties" as confining its application to the State in which the hostilities are actually takes place.[193] That simplistic reading has been rejected as inconsistent with the drafting history and purpose of the provision, and incompatible with contemporary conflicts.[194] As the ICRC has explained, "While common Article 3 does not deal with the conduct of hostilities, it provides an indication of its territorial scope of applicability by specifying certain acts as prohibited 'at any time and in any place whatsoever.' International jurisprudence has, in this vein, explicitly confirmed that 'there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. *The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the*

[191] Impugned Decision, para. 65.
[192] O. Triffterer, K. Ambos (eds), Rome Statute, Commentary to article 8(ii)(c) of the Statute, para. 844.
[193] Impugned Decision, para. 53.
[194] *See, e.g.,* 2016 ICRC Commentary on Geneva Conventin (I) paras. 46-474 ; *Prosecutor v.Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 86-93.

whole territory under the control of a party to the conflict, whether or not actual combat takes place there."[195]

137. Despite the multiplicity of actors involved in the conflict in Afghanistan and the cross-border nature of hostilities, the Pre-Trial Chamber failed entirely to grapple with the particularities of the geographic scope of international humanitarian law's application to this conflict. The Impugned Decision includes no explanation of what considerations the Pre-Trial Chamber used to reach its conclusions on a matter. And, as stated above, the Pre-Trial Chamber did not engage with the factors set forth in the jurisprudence of this Court and international tribunals for determining whether a nexus exists.

138. In such instances, contrary to the Pre-Trial Chamber's determination, the scope of Common Article 3 of the Geneva Conventions cannot simply be assumed to be confined to the territory of the State Party in which the conflict *primarily* takes place. It is well-recognized that non-international armed conflicts "may spill over" into neighboring States and the rules of intenational humanitarian law – both the obligations and protections - may apply beyond the territorial boundary of the State where the conflict is centered.[196] In this case, victims of the US torture program detained on the territory of Afghanistan over the course of hostilities, as well as the territory of other States Parties in connection with the purposes of the United States involvement in the armed conflict in Afghanistan, should enjoy the full protections of Common Article 3, such that the acts committed against them constitute war crimes under article 8(2)(c) and 8(2)(e) of the Statute.

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[195] International Review of the Red Cross, International humanitarian law and the challenges of contemporary armed conflicts, Document prepared by the International Committee of the Red Cross for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8–10 December 2015.

[196] 2016 ICRC Commentary on Geneva Conventin (I), at para. 470, 474. *See, e.g.*, Michael N. Schmitt, "Charting the Legal Geography of Non-International Armed Conflict," 90 Int'l L. Stud. 1 (2014). The Victims emphasize that this conclusion applies with regards to the reach of Common Article 3 to ensure the the minimum protections can have the furthest protective effect; considerations regarding the use of force and targeting decisions beyond the area of hostilities necessarily require a restrictive interpretation.

(ii) Ratione Loci: The Pre-Trial Chamber's overly narrow construction of the Court's territorial jurisdiction ignores the continuing, cross-border nature of the crimes committed against Victims

139. The Pre-Trial Chamber compounded its legal error regarding the Court's jurisdiction *ratione materiae* over war crimes, by also holding that the Court lacked jurisdiction *ratione loci* under article 12(2) over torture committed against individuals captured *in* Afghanistan when their subsequent abuse continued on the territory of a non-State party.[197] The Chamber did not base its erroneous conclusion on the ground that such conduct lacks sufficient nexus to the conflict to constitute a war crime under article 5 and article 8(2)(c) – nor could it plausibly do so. Instead the conclusion appears to have rested on the flawed reasoning that capturing, abducting and detaining a victim *incommunicado* before sending him to be tortured in another location does not itself amount to a form of torture or initiate the crime of torture, (characterizing those acts as mere "antecedents" to the crime[198]) or that the specific acts of abuse to which victims of the US torture program were subjected outside of Afghanistan, including on the territories of non-State parties, were not part of a continuing crime commenced in Afghanistan or on the territory of another State Party, but separate and distinct acts that fell wholly outside the Court's territorial jurisdiction.

140. The Pre-Trial Chamber's conclusion is at odds with its own acknowledgment that "[t]he Court has jurisdiction if the conduct was either completed in the territory of a State Party *or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party* or vice versa."[199] The Court's jurisdiction *ratione loci* is engaged under article 12(2) where at least one element of a crime occurs within the territory of a State Party.[200]

[197] Impugned Decision, para. 54. These continuing crimes should form part of the investigation. *See The Prosecutor v. Nahima et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, para. 22; Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 Mich. J. Int'l L. 653 (2004).
[198] Impugned Decision, para. 54.
[199] Impugned Decision, para. 50.
[200] *See, e.g.*, Myammar Decision.

141. The continuous nature of the alleged criminal conduct committed under the US torture program is evident in the CIA Background Paper on CIA's Combined Use of Interrogation Techniques ("CIA Background Paper") concerning the so called High Value Detainees ("HVD").[201] The latter provides: "Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systemic, and cumulative manner to influence to influence HVD behavior, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence." According to this document "the interrogation process can be broken into three separate phases: Initial Conditions; Transition to Interrogation; and Interrogation".[202] What is more, the CIA Background paper explicitly states that the "Initial Conditions" phase concerned "capture shock", "rendition" and "reception at Black Site." It explains that the "capture" is designed to "contribute to the physical and psychological condition of the HVD prior to the start of interrogation".[203] Furthermore, under "rendition" it explains also that "a medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods ...."[204]

142. These excerpts from the CIA Background Paper indicate that the very act of "capture" of victims under the CIA rendition program constituted torture or at the very least humiliating or degrading treatment amounting to outrage upon personal dignity.

143. At the same time, the LRV's submit that at this stage of proceedings it is may not be possible to conclusively determine whether some categories of conduct concerning the US torture program that fall within the scope of the investigation will ultimately fall under the Court's jurisdiction, or do so as war crimes or crimes against

[201] Background Paper on CIA's Combined Use of Interrogation Techniques, 30 December 2004, available at: https://www.thetorturedatabase.org/document/fax-cia-olc-providing-generic-description-cias-combined-use-various-interrogation-technique (accessed 26.08.2019). See also ECHR Judgement in the case of *El Masri v. "The former Yugoslav. Republic of Macedonia"*, application no. 39630/09, § 124.
[202] CIA Background Paper, p. 1.
[203] Ibid., pp. 1-2.
[204] *Ibid*., p. 2.

humanity, as this depends on further factual circumstances that can be established only in the course of an investigation and their subsequent legal characterization.

144. The consequence of the Pre-Trial Chamber's flawed analysis is not only the premature determination that these categories of crimes fall outside the Court's jurisdiction, and their exclusion from the scope of the Prosecutor's investigation, if such were to be authorised. It is also the facilitation of impunity, by effectively incentivizing parties in a conflict to engage in rendition, to "outsource" or "export" abuses outside the conflict zone. The Pre-Trial Chamber's Impugned Decision suggests that merely by transporting an individual outside of the State territory where active hostilities are occurring, a party to an armed conflict can ensure that abuses it commits against that individual, which would otherwise qualify as war crimes, escape the jurisdiction of the ICC. Likewise, the plain language of the Impugned Decision implies that when a party to an armed conflict forcibly transports an individual to the territory of a State Party where the conflict is occurring and subjects them to torture in that theater of war, the conduct cannot constitute a war crime subject to prosecution by the ICC *because the individual was captured elsewhere*.[205]

145. This error requires review by the Appeals Chamber. When States become States Parties to the Rome Statute, pursuant to article 12(1) of the Statute, they grant the Court jurisdiction over their territory with respect to the crimes in article 5. The Pre-Trial Chamber's decision to place war crimes committed on the territory of States Parties beyond the reach of the Court's jurisdiction not only runs contrary to plain-language of the Statute, it threatens the very objective of the Rome Statute system.

[205] Decision, paras. 53-54 ("[T]he relevant nexus between the conflict and the alleged criminal conducts required by the Statute is *only satisfied when the victims were captured within the borders of Afghanistan* … [F]or the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of 'inflicting severe physical or mental pain' - not its mere antecedents (ie, the fact of having been captured and abducted) - takes place at least in part in the territory of a State Party; *provided that the victims were captured in Afghanistan*.").

V. RELIEF SOUGHT

146. The Victims seek a prompt resolution to this matter which will enable an investigation to be opened without further delay. They request that the Appeals Chamber exercise its power pursuant to rule 158 to reverse the Impugned Decision. There is no need for the matter to be remitted to the Pre-Trial Chamber. Its role under article 15(4) involved no exercise of discretion, but merely an application of the law. The Appeals Chamber is in a position to correct the legal errors made and issue its own decision. Doing so, rather than remitting the matter, would enable the investigation to proceed expeditiously.

147. In light of the above submissions, the Victims respectfully request the Appeals Chamber to:

a. Find that the Victims have standing to appeal the Impugned Decision;

b. Find that the Impugned Decision concerned issues of jurisdiction and therefore that this appeal is admissible under article 82(1)(a);

c. Reverse the Impugned Decision and to authorise the Prosecutor to open an investigation in the situation of Islamic Republic of Afghanistan as set forth in the Request and including any alleged crimes sufficiently linked thereto,

Respectfully submitted,

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Dated this 30th of September 2019

At New York, USA; London, UK; Albuquerque, USA; Warsaw, Poland.