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No: **ICC-02/17**  
Date: **15 November 2019**

**THE APPEALS CHAMBER**

**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*

**SUBMISSIONS ON BEHALF OF VICTIMS OF CROSS BORDER AERIAL  
BOMBARDMENT**

**Source:      Reprieve/Foundation for Fundamental Rights Pakistan**

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

1. These submissions are made on behalf of a group of victims (“**the Cross-Border Victims**”) pursuant to the decision by the Appeals Chamber, of 24 October 2019,<sup>1</sup> in which it granted permission to file observations on three issues. These were identified in paragraph 12 of their application to participate:
  - 1.1. *First*, submissions on the question of the standing of the Cross-Border Victims to participate in an appeal such as the present in respect of an authorization decision by a Pre-trial Chamber.
  - 1.2. *Second*, the scope of the Pre-trial Chamber’s power under Article 15 (4) and 53(1) (c) of the Statute. In particular, whether articles 15(4) and 53(1)(c) require or permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice and, relatedly, whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors.
  - 1.3. *Third*, in response to material submitted by the Legal Representatives of Victims,<sup>2</sup> submissions on the legal effect and scope of a decision to authorize an investigation and, in particular, whether an authorization limits a future prosecutorial investigation to investigate those crimes specifically mentioned in the Prosecutor’s request.
2. A list of the victims on behalf of whom these submissions are made is set out in the Annex to these submissions.<sup>3</sup>

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<sup>1</sup> *Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the Cross-Border Victims* ICC-02/17 OA OA2 OA3 OA4

<sup>2</sup> *See Updated Victims Appeal Brief*, 30 September 2019, §§ 144 et seq.

<sup>3</sup> It is important to note that, at this stage, these victims are representative of many hundreds of other civilians based in Pakistan who have been killed or injured (or who are close family members of persons killed or injured) in cross-border air strikes launched into Pakistan from Afghan territory in connection with the Afghan conflict.

## **B: Background**

3. In February 2014 the Cross-Border Victims submitted a substantial dossier to the Prosecutor which contained evidence of crimes within the jurisdiction of the ICC, committed in Pakistan but launched from Afghanistan, in connection with the conflict in that country.

3.1. As detailed in the dossier provided to the Prosecutor hundreds of civilians have been killed in these strikes, which have included strikes on schools, funerals, markets and civilian gatherings in Pakistan. In the period between 2004 and 2013, it is estimated that between 2,537 and 3,646 people were killed by aerial bombardment, including between 416 and 951 civilians.<sup>4</sup> In many of these strikes no military target or person “directly participating in hostilities” is apparent. On any view, disproportionate civilian casualties have been caused in many incidents. For example, in a single incident on 30 October 2006, some 81 civilians were killed in a drone strike on an educational facility at Chinagi, Tehsil Mamund. This was recorded by the Pakistan government in official documentation as “80 children, 1 man, all civilian”.<sup>5</sup> Similarly, on 17 March 2011, a drone strike on a jirga (a tribal assembly of village elders), was recorded as having killed 41. The Pakistan government noted that “it is feared that all [those] killed were local tribesmen”.<sup>6</sup>

3.2. As regards evidence, the Cross-Border Victims’ dossier included detailed legal submissions providing a reasonable basis to believe that the drone strikes involve crimes within the jurisdiction of the court, supported by hundreds of pages of primary and secondary evidence pertaining to such strikes, providing information on location, timing, targets and the very large number of civilians killed in such strikes (numbering in the hundreds). This evidence was gathered by Reprieve and the Foundation of Fundamental Rights, a Pakistani human rights NGO, and included, *inter alia*: official documentation prepared by Pakistani authorities regarding drones strikes in Pakistani territory; statements from eye-witnesses; objective evidence gathered by a wide range of reputable international and local NGOs providing detailed accounts of such strikes, and findings by such groups

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<sup>4</sup> See Dossier Vol 1, Annex III, page 29.

<sup>5</sup> See Dossier Vol 1, Annex III, page 1.

<sup>6</sup> See Dossier Vol 1, Annex III, page 43.

that drones strikes violated applicable international humanitarian law. The Cross-Border Victims also offered to give further evidence at the Seat of the Court or elsewhere in accordance with Article 15(2) of the Statute. There has been no response to this request by the Prosecutor.

### **C: Relevant Procedural Background**

4. The Cross-Border Victims have set out the relevant procedural history regarding the present application in their application to participate, which is not repeated here for reasons of brevity.<sup>7</sup> However, the following points are briefly noted.
  - 4.1. In the years which followed their initial submission, the Cross-Border Victims received no substantive acknowledgement or response from the Prosecutor in respect of its February 2014 submissions, nor confirmation that this material would be considered as part of the Prosecutor's preliminary investigation.
  - 4.2. On 31 January 2018 the Cross-Border Victims filed '*Submissions on Behalf of Victims of Cross Border Aerial Bombardment in The Afghan Conflict*' to the Pre-Trial Chamber making representations on behalf of the Cross-Border Victims regarding flaws in the Prosecutor's Request for Authorization in respect of the Afghan Situation, and the failure to address, in any way, the material submitted by the Cross-Border Victims.
5. On 12 April 2019 the Pre-Trial Chamber issued 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan', refusing the Prosecutor's request to initiate an investigation ("**the PTC Decision**"). This decision did not address the issues raised by the Cross-Border Victims, including on the question of investigative scope. Nor did the PTC consider the position of the Cross-Border Victims as regards the interests of justice test (notwithstanding the fact that officials from states which do fully cooperate with the ICC may be implicated in Pakistan drone strikes by providing intelligence as well as logistical and operational support).<sup>8</sup>

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<sup>7</sup> Application on behalf of Victims of Cross-Border Aerial Bombardment in the Afghan conflict to make written and oral submissions, 11 October 2019, ICC-02-17, §§ 4 - 13.

<sup>8</sup> The Cross-Border Victims recognize that the nature and extent of such support will require further investigation, although there is substantial publicly available information regarding the nature of such support. However, this support would be required from states which are party

## D: Submissions

### (1) Standing

6. Unlike other Victims in this matter, the Cross-Border Victims have not asserted any right to appeal pursuant to Article 82(1)(a) of the Statute. Rather, the Appeals Chamber has kindly acceded to a request<sup>9</sup> on behalf of the Cross-Border Victims to participate in this appeal pursuant to Rule 93 of the Rules,<sup>10</sup> for which the Cross-Border Victims extend their appreciation.
7. However, the approach adopted by the Cross-Border Victims should not be interpreted as acceptance that Victims do not have standing to appeal pursuant to Article 82(1)(a). On the contrary, the unique position of the Cross-Border Victims illustrates just why it is so important that Victims do have the right to challenge, by way of appeal, a decision by the PTC to refuse a Prosecutor's request to initiate an investigation.
8. As prefaced above, notwithstanding the detailed and comprehensive dossier submitted to the Prosecutor on behalf of the Cross-Border Victims, the Prosecutor's 'Request for authorization of an investigation pursuant to article 15'<sup>11</sup> made no reference to them or the crimes they had sustained. To remedy that position the Cross-Border Victims made submissions to the PTC highlighting flaws in the Prosecutor's approach.<sup>12</sup> It is respectfully submitted that from that point, whatever the decision of the PTC, whether allowing the Prosecutor's Request or not, the Cross-Border Victims were a party within the meaning of Article 82(1), with the concomitant right to appeal. In this regard the Cross-Border Victims respectfully adopt and support the submissions made by the other Victims.<sup>13</sup>

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to the Rome Statute and subject to its cooperation obligations. This issue was not considered by the PTC.

<sup>9</sup> Application on behalf of Victims of Cross-Border Aerial Bombardment in the Afghan conflict to make written and oral submissions, 11 October 2019, ICC-02-17

<sup>10</sup> Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, ICC-02-17 §§ 38-41

<sup>11</sup> Request, ICC-02/17-7-Conf-Exp, and public redacted version ICC-02/17-7-Red

<sup>12</sup> Submissions on Behalf of Victims of Cross Border Aerial Bombardment in The Afghan Conflict, 31 January 2018, ICC-02/17

<sup>13</sup> 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", 30 September 2019, ICC-17-75 §§ 6-41; and Corrigendum of Updated Victims' Appeal Brief, 2 October 2019 ICC-17-73 Corr §§ 32-87.

9. However, the Prosecutor's failure to identify the Cross-Border Victims in her Request for Authorization perfectly illustrates just why victims must be afforded a right to appeal in and of their own right. Where the Prosecutor has not taken into account the interests of a category of victimization (in this case a very large category) in deciding whether to seek authorisation to investigate, and in determining the scope of that investigation, natural justice demands that they have some course for redress.
10. The Cross-Border Victims sought to reply to the Prosecutor's '*Request for Leave to Appeal*'.<sup>14</sup> The Prosecution were then granted leave to reply to the observations of the Cross-Border Victims.<sup>15</sup> In their Reply,<sup>16</sup> the Prosecution publicly acknowledged, for the first time, the existence of the Cross-Border Victims<sup>17</sup> and asserted that, by virtue of its preliminary examination and appeal, 'the interests of the Cross-Border Victims are protected'.<sup>18</sup>
11. Moreover, the Prosecution averred that the Prosecutor's request to the PTC under Article 15(3) was filed on the basis that it 'could potentially include *all* allegations falling within its geographic, temporal or other material parameters ... [t]his could potentially include the allegations by the Cross-Border Victims, if sufficiently grave, well founded and within the jurisdiction of the Court'.<sup>19</sup>
12. The Cross-Border Victims genuinely welcome this public acknowledgement by the Prosecutor of their existence, and are grateful for the indication by the Prosecutor that their interests are protected. However, the Cross-Border Victims respectfully submit that the Prosecutor's failure to identify and mention them in the Request for Authorization to the PTC gave them a legitimate cause for concern that their interests were potentially being overlooked.
13. The Cross-Border Victims submit that where there is a proper and legitimate concern that the interests of certain victim groups are being overlooked, such groups must be afforded an avenue for redress before the Court, whether that be before the PTC, or, as in this case, on appeal, with the opportunity, potentially, to initiate such appeal.

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<sup>14</sup> Response to the Office of the Prosecutor's: '*Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"*', 13 June 2019, ICC-02/17

<sup>15</sup> Order for Consolidated Responses §7

<sup>16</sup> Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims, 19 July 2019, ICC-02/17-60

<sup>17</sup> *Ibid* §§ 25-31

<sup>18</sup> *Ibid* § 27.

<sup>19</sup> *Ibid* § 30. Emphasis added.

14. It is acknowledged that, in certain circumstances, such as when the ‘safety, well-being and privacy of those who provided the information’ demand, it may be appropriate for the Prosecutor’s Office to protect the confidentiality of those who provide information and refrain from making public activities under Article 15 of that Statute.<sup>20</sup> However, where, as in the case of the Cross-Border Victims, information is publicly made available to the Office of the Prosecutor,<sup>21</sup> there is no justifiable or compelling reason for the Prosecutor not to identify them in any request for authorization. Any such failure to do so, especially absent any explanation as to why they are not identified, gives rise to an even greater need for the victims concerned to be able to participate in, but equally importantly, be able to raise a challenge to, any ensuing decision by the PTC.
15. In order for a proper determination by the PTC on any request for authorization under Article 15(4), there must be full transparency by the Prosecutor as to the full nature and scope of the crimes alleged. In the absence of such detail it is impossible for PTC to properly determine the issues and conduct the exercise envisaged under Article 15(4).
16. Victims, such as the Cross-Border Victims, will only be in a position to make meaningful representations, in accordance with Article 15(3) of the Statute, to the PTC if the Prosecution has fully and transparently set out its views as to the complaints they have made. In the absence of such transparency, the victims concerned must have standing to challenge any decision of the PTC not to authorize an investigation.

## **(2) The “Interests of Justice” Test**

17. The PTC determined, conclusively, that the potential cases arising from incidents presented by the Prosecution appeared admissible<sup>22</sup> and that the gravity threshold under article 17(1)(d) was met in respect of all ‘categories’ of crimes for which the Prosecution requested authorization to investigate.<sup>23</sup>
18. The PTC rejected the Prosecutor’s Request on the basis that it was not in the ‘interests of justice’ pursuant to Article 53(1)(c) of the Statute. In reaching this decision the PTC

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<sup>20</sup> See Regulation 28 of the Regulations of the Office of the Prosecutor.

<sup>21</sup> Dossier Vol 1. The complaint to the Prosecutor is available online here:

[https://reprise.org.uk/wp-content/uploads/2015/04/2014\\_02\\_20\\_PUB-ICC-drones-complaint.pdf](https://reprise.org.uk/wp-content/uploads/2015/04/2014_02_20_PUB-ICC-drones-complaint.pdf)

<sup>22</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, §79

<sup>23</sup> *Ibid* § 86



considered *inter alia*: (i) the availability, or otherwise, of evidence;<sup>24</sup> (ii) the prospects of securing meaningful cooperation from relevant authorities;<sup>25</sup> and (iii) the adverse impact on the Court's resources (both financial and human), potentially to the detriment of other scenarios.<sup>26</sup>

(i) *Neither Articles 15(4) nor 53(1)(c) require or permit the PTC to make a positive determination of whether or not an investigation would be in the 'interests of justice'.*

19. Article 15(4) provides that a PTC shall authorize the commencement of an investigation where (i) there is a reasonable basis to proceed, and (ii) the case appears to fall within the jurisdiction of the Court. The 'reasonable basis' test is 'purely evidentiary and not one of appropriateness'.<sup>27</sup> The application of the standard should primarily be steered by the underlying purpose of 'providing a judicial filter which will protect the Court from the damaging effects of frivolous or politically motivated charges'.<sup>28</sup>
20. The assessment of whether a case 'appears to fall within the jurisdiction of the Court' requires a simple determination of whether there is any indication that the Court does not have jurisdiction over the case.<sup>29</sup> If there is no indication during this examination that the Court does not have jurisdiction, the PTC should be able to conclude that the case 'appears' to fall within the jurisdiction of the Court.<sup>30</sup>
21. A plain reading of Article 53(1)(c) demonstrates that determination of whether an investigation would 'not serve the interests of justice' is a matter solely for the Prosecutor. Article 53(3)(b) only provides the PTC scope to review a decision of the Prosecutor not to proceed solely on the basis of either Article 53(1)(c) or (2)(c). Thus, there was plainly no proper basis upon which the PTC could take into consideration what it perceived as the 'interests of justice' in itself determining not to authorize the investigation.

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<sup>24</sup> *Ibid* § 93

<sup>25</sup> *Ibid* § 94

<sup>26</sup> *Ibid* § 95

<sup>27</sup> Triffterer, *Commentary on the Rome Statute of the International Criminal Court* 1999, p. 370, para. 27

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* at para. 26

<sup>30</sup> *Ibid*.

22. The ‘interests of justice’ language seems to have been first proposed by the United Kingdom during negotiations on the Rome Statute.<sup>31</sup> It was accompanied by the following explanation: ‘The reference to “in the interests of justice” is intended to reflect a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, eg if the suspected offender was very old or ill or if, otherwise, there were good reasons to conclude that a prosecution would be counter-productive’.<sup>32</sup> Thus, Article 53(2)(c) provides that “a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator”.
23. It is obvious, it is respectfully submitted, that it falls exclusively to the Prosecutor to determine whether or not, in the first instance, it is in the interests of justice for an investigation to proceed. The matters taken into account by the PTC are self-evidently matters best taken into consideration and determined by the Prosecutor, rather than the PTC.
24. The Prosecutor is best placed to evaluate the future availability of evidence and prospects for future cooperation. More to the point, the Prosecutor is best placed to determine the impact of an investigation on finances and human resources, taking into account other situations and investigative opportunities.
25. It is the Prosecutor, rather than the PTC, who receives communications regarding complaints of crimes and other potential situations within the jurisdiction of the Court. Thus, the Prosecutor is in a unique position to determine the full resource implications of proceeding with one investigation rather than any other. The Prosecutor is in the best position to evaluate the overall impact of an investigation, within the broader context of all her work, in a way in which the PTC simply cannot.
26. Even so, it is submitted on behalf of the Cross-Border Victims that the PTC must play an important supervisory role pursuant to Article 53(3)(b) where the Prosecutor has decided not to proceed with an investigation on the basis that it would ‘not be in the interests of justice’.
27. It is therefore imperative that the Prosecution set out in any request pursuant to Article 15 full details of those communications it has received, subject to Reg. 28 of the Regulations of

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<sup>31</sup> Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Second Edition) p. 836, referring to *UK Discussion Paper, International Criminal Court, Complementarity*, 29 March 1996

<sup>32</sup> *Ibid* at para. 50. Emphasis added.

the Office the Prosecutor, and whether or not it has decided to proceed with an investigation into crimes alleged by certain victims. And if not, the basis upon which it has decided not to do so. In the absence of any indication from the Prosecution as to its attitude towards the complaint of the Cross-Border Victims, how could, it is asked rhetorically, the PTC exercise its important supervisory role under Article 53(3)(b)?

*(ii) Did the PTC properly exercise its discretion?*

28. It is respectfully submitted that the PTC plainly exercised its discretion incorrectly. The PTC had no discretion to unilaterally decide that it was not in the interests of justice to allow the Prosecutor's request. Again, the factors taken into consideration by the PTC, in particular the potential impact upon the Court's resources, were matters upon which the PTC simply did not have full knowledge or appreciation. There was no way upon which the PTC could make a proper or informed decision.
29. This was all the more so with respect to the position of the Cross-Border Victims. The failure of the Prosecution to address the PTC on the crimes alleged by the Cross-Border Victims resulted in a situation where the PTC was unable to fully and properly consider their position.
30. The Cross-Border Victims were able to, and did, avail themselves of the opportunity to inform the PTC of the crimes within the jurisdiction of the Court which they had brought to the attention of the Prosecutor. However, the PTC made its decision not to authorize an investigation in the absence of any input from the Prosecutor as to its view of the Cross-Border Victims complaint. It was therefore impossible for the PTC to fully and properly consider the matters it was obliged to consider pursuant to Article 15(4) and 53(3)(b) of the Statute.

**(3) Scope and Legal Effect of Decision to Authorize Investigation**

31. The final issue is whether the PTC authorization limits a future prosecutorial investigation to investigate those crimes specifically mentioned in the Prosecutor's request. In its decision, the PTC decided that "any and all conducts for which no authorization 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 judicial authorization is explicitly sought in the Request” (PTC Decision § 68).

31.1. This approach is inconsistent with the scheme created by the relevant provisions of the Statute and the RPE, as explained below.

31.2. Moreover, this misinterpretation of the Statute is of real concern to the Cross-Border Victims. The effect of such an interpretation is that where a PTC is faced with an authorization decision, the PTC will focus narrowly and restrictively on piece-meal specific incidents identified by the Prosecutor at a preliminary stage of the Prosecutor’s investigation, rather than considering categories of victimization arising from the authorization request more broadly in deciding whether the relevant tests are met.

32. The Cross-Border Victims agree with the joint submissions of the Legal Representatives of Victims as set out in the Appeal Brief §§ 100 - 116. The starting point in assessing the correct approach must, in accordance with Article 31 Vienna Convention on the Law of Treaties, be the relevant terms of the Statute and the Rules of Procedure and Evidence, interpreted in context.

32.1. As to this, Article 15 (3) and (4) of the Statute provides:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

32.2. Rule 50 (5) of the RPE provides:

The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations.

33. The scheme created by these provisions is therefore that the Prosecutor submits a request to the PTC to authorize “an investigation”. The decision for the PTC is whether to “authorize the commencement of the investigation...” Several points arise from this.
- 33.1. **First**, the authorization decision pertains to “**the** investigation” requested by the Prosecutor (as opposed to “an” investigation) (see Article 15 (3) and (4) and Rule 50 (5), RPE). Subject to supervision and interrogation by the PTC as explained below, the Prosecutor may define the request broadly or narrowly.
- 33.2. **Second**, for its part, the role of the PTC under the Statute is to authorize “all or any part of the request by the Prosecutor” (Rule 50 (5), RPE). This does not afford a PTC the power to rewrite or reimagine the Prosecutor’s request. The request is “the request”. Thus, where (as will often be the case) the Prosecutor requests authorization to investigate categories of crime it is not open to the PTC to redefine the request as one pertaining to specific incidents, rather than categories of victimization. Such an approach is not to authorize “the investigation” requested by the Prosecutor (or part of it) but is instead to authorize an investigation reimaged by the PTC, with all the implications which this may have as regards Prosecutorial priorities to ensure the effective conduct of an investigation, which may include matters such as where to concentrate investigative resources to secure the greatest prospect of conviction.
- 33.3. Moreover, such a restrictive approach is not desirable in practice. By definition, the investigation sought by a Prosecutor under Article 15 will be at a preliminary stage. In this context, specific incidents referred to by the Prosecutor will almost inevitably be illustrative or exemplary of a broader category of victimization. Such examples will inevitably not reflect the wrongdoing which requires investigation, using formal powers of cooperation not available at the preliminary stage. In practice, the PTC’s approach would effectively front load a huge amount of investigative work to what should be the preliminary investigative stage in order to ensure that an adequate range of crimes obtain the specific authorization the PTC says is required.

*The Need for Transparency and Proactive use of Rule 50 (4), RPE*

34. However, the Cross-Border Victims recognize the concern *underlying* the approach (wrongly) proposed by the PTC. This is to ensure that there is clarity – and proper scrutiny – in respect of those matters which may, eventually, form part of the Prosecutor’s investigation where the PTC is considering an Article 15 request. In its Reply to the Cross-Border Victims, the Prosecutor stated that its request for authorisation “was filed on the basis that any authorised investigation could potentially include *all* allegations falling within its geographic, temporal and other material parameters, as well as allegations which are sufficiently linked to those parameters”.<sup>33</sup>
35. Yet, in failing to even mention the position of the Cross-Border Victims in its request, the Prosecutor prevented the PTC from (a) forming a view as to whether this aspect of such an investigation was sufficiently linked to fall within its proper remit or (b) forming a view as to the interests of justice took the position of these victims into account.
36. This demonstrates the **particular importance** of the PTC proactively and robustly using its powers under Rule 50 (4) of the RPE which provides:

The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing.

37. The adoption of a proactive approach to ensure transparency on the part of the PTC is important for several reasons from the perspective of the Cross-Border Victims.
- 37.1. *First*, an essential difficulty in the present case was that the Prosecutor ignored the submissions and evidence they filed in its Afghan Request, with the result that it was entirely unclear whether any proper consideration had been given to the position of thousands of Pakistan-based victims in its preliminary enquiry.
- 37.2. *Second*, in its request the Prosecutor provided no indication as to how the Cross-Border Victims would be treated in its investigation; whether they were considered to fall outside the scope of the request (as appears to be the case) and, if so, why. The Cross-Border Victims submit that transparency is crucial.

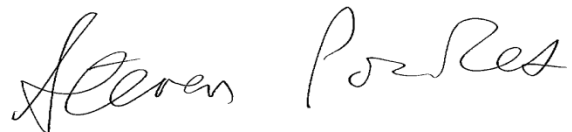
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<sup>33</sup> Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims, 19 July 2019, ICC-02/17-60 § 30.

37.3. *Third*, where (as here) a very large category of potential victims are ignored in the authorization request and information submitted by the OTP to the Chamber, the PTC cannot properly evaluate the Article 15 test and matters such as the interests of justice in deciding whether to authorize an investigation in a particular situation. As explained above, such an analysis requires broader consideration of the position of victims. Where the Prosecutor's position is unclear it is necessary for a PTC to play a proactive role in ensuring clarity as to the scope of an investigation, whether matters may fall within that scope and if not, the basis on which they have been excluded. Otherwise the PTC cannot properly exercise its mandate under Article 15 of the Statute.

**E: Conclusion**

38. The Cross-Border Victims urge the Appeals Chamber to reverse the PTC's finding that Articles 15(4) and 53(1)(c) of the Statute permit or require the PTC to make a positive assessment on the interests of justice when considering whether to authorize an investigation. The Appeals Chamber is invited to exercise its power under Article 83(2) of the Statute and enter its own finding, authorizing an investigation as required by Article 15(4) of the Statute.
39. The Appeals Chamber should further hold that Article 15 of the Statute does restrict the scope of an authorized investigation to the incidents expressly identified. However, the Cross-Border Victims urge the Appeals Chamber to direct that the Prosecutor provide clarity as to her intended approach with regards their complaints and whether and to what extent she intends to pursue an investigation into the crimes they have suffered.



**Steven Powles QC**

**Conor McCarthy**

**15 November 2019**

**London, United Kingdom**