



Original: **English**

No.: **ICC-02/17**
Date: **10 June 2019**

APPEALS CHAMBER

BEFORE: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmánski
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document, with Public Annexes

**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 Aghanistan"**

Source: Legal Representative of Victims

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Katherine Gallagher
Margaret L. Satherthwaite and Nikki Reisch
Megan Hirst and Tim Moloney, QC

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representative

Amicus Curiae

REGISTRY

Registrar

Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Nigel Verill, Chief

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach, Chief

Other

I. INTRODUCTION

1. The respective Legal Representatives for Victims (“LRVs”)¹ r/00751/18, r/00750/18, r/00749/18, r/00635/18, r/00636/18 and r/00638/18 (“Victims”), who participated in the proceedings before Pre-Trial Chamber II in accordance with article 15(3) of the Rome Statute (“Statute”), hereby file this Notice of Appeal against Pre-Trial Chamber II’s “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” issued on 12 April 2019, together with the “Concurring and Separate Opinion” of the Presiding Judge, Judge Antoine Kesia-Mbe Mindua, issued on 31 May 2019, (“Decision”).²

2. This appeal is submitted pursuant to Article 82(1)(a) of the Statute, Rules 154, 156 and 158 of the Rules of Procedure and Evidence (“Rules”) and Regulation 64 of the Regulations of the Court (“Regulations”).

3. In accordance with Regulation 64(1)(c) of the Regulations, the Victims advise that this appeal is directed against the whole decision, and will challenge, in particular, the conclusions of the Pre-Trial Chamber with regards to jurisdiction and its application and interpretation of “interests of justice,” as set forth in Section IV, and most notably paragraphs 32-43; Section V, and most notably paragraphs 51-56; and Section VII of the Decision.

¹ The six Victims are represented by three separate legal teams: r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) by Katherine Gallagher and the Center for Constitutional Rights in New York; r/00749/18 (Mohammed Abdullah Saleh al-Asad) by Margaret Satterthwaite and Nikki Reisch of the Global Justice Clinic at New York University School of Law; and r/00635/18, r/00636/18 and r/00638/18 by Tim Moloney QC and Megan Hirst, instructed by Reprieve.

This filing has been agreed jointly by the LRVs, and the LRVs will continue to seek common positions to the extent possible in order to ensure expedition and efficiency in the proceedings. However they emphasize that the representation of these two groups of clients remains separate and will not be combined under a “common legal representation” scheme and that joint filings cannot be guaranteed in every instance.

² ICC-02/17-33.

4. For reasons that will be provided in the subsequent appeal brief, the Victims request that the Appeals Chamber, pursuant to Rule 158(1) of the Rules, reverse the Pre-Trial Chamber's Decision, and either directly authorize the Prosecutor to open an investigation in this Situation that conforms to scope requested by the Prosecutor in her Request³ and the representations of victims to the Pre-Trial Chamber, including those of the Victims, or remand to the Pre-Trial Chamber with instructions to determine the issue on the basis of correct law.

II. Preliminary Matters in regards to Victims' Notice of Appeal

5. The Victims submit that this Notice of Appeal is timely under the circumstances of the issuance of the Decision; that they have standing to present the appeal; and that the Decision is one with respect to jurisdiction, such that it falls within the scope of Article 82(1)(a) of the Statute.

a. Time-Limit for a Notice of Appeal

6. Pursuant to Rule 154(1) of the Rules, an appeal taken under Article 82(1)(a) of the Statute must be filed within five days of notification of the impugned decision.

7. It is recalled that when the Decision was issued on 12 April 2019, it was done with the proviso that a "concurring separate opinion" of the Presiding Judge would be issued "in due course." A concurring separate opinion was subsequently issued, on 31 May 2019. This notice of appeal is filed within the five day limit from notification of that concurring separate opinion, which, it is submitted, is an integral part of the whole of the Decision.

8. The Statute, Rules or Regulations do not provide for the issuance of separate and/or dissenting opinions for Pre-Trial Chambers. (The Statute explicitly provides for majority/minority opinions at the trial and appellate stage. *See* Articles 74(5) and 83(4))

³ *See* ICC-02/17-7.

of the Statute, respectively.) Moreover, nothing in the legal texts of the Court set forth the possibility for a Judge to issue a separate or a dissenting opinion *after* the “decision” of the Chamber,⁴ let alone seven weeks after – a period of time that exceeds not only the five days in which to file a notice of appeal, but the 21-day time-limit for filing the appeal brief. To the extent that the legal texts of the Court do not provide any time-line to appeal when there is a “concurring separate opinion,” the Victims respectfully submit that those participating in the proceedings should not be penalized because of the resulting legal uncertainty.⁵

9. Indeed, the Concurring and Separate Opinion, seems to be not only a concurring opinion but also, in part, a dissenting – or minority – opinion: the Presiding Judge explicitly states his disagreement with his two colleagues on the crucial issue of the scope of an authorization to investigate, which is an issue the Victims will address in their appeal.⁶

10. In this regard, Victims respectfully submit that a first instance decision should not be considered complete before all Judges have provided their opinions and the time limit for appeals should only start when those opinions are known to those participating in the proceedings. It is only when *all* the opinions of the Judges

⁴ Article 74(5) provides that the Trial Chamber “shall” issue “one decision,” and that “decision shall contain the views of the majority and the minority.” Article 83(4) contains the same language with regards to a “judgment” from the Appeals Chamber.

⁵ The Victims’ position that the deadline to file an appeal runs from the notification of the Concurring and Separate Opinion is consistent the statements and actions of various organs of the Court: 1) the Prosecutor announced at a meeting at the United Nations Headquarters in early May that the time limit to appeal would start to run after the issuance of the Concurring and Separate Opinion and filed her Request for Leave to Appeal the Decision with the Pre-Trial Chamber on 7 June 2019, in accordance with that announcement; 2) the Registry informed the Legal Representative and other victims in an email sent on 16 May that “the notification of the Concurring Separate Opinion will constitute the starting point for the deadline to appeal the decision”; and 3) the Concurring and Separate Opinion itself affirms the continued existence of the prospect for an appeal to be lodged (para. 50: “the Prosecutor may appeal”).

⁶ 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”).

composing a chamber are known that there is a possibility to take an informed decision on whether or not to appeal, and the scope of any such appeal. This Chamber recently acknowledged as much when it allowed the time limit for an appeal brief to run from the notification of the Separate Opinion by Judge Perrin de Brichambaut.⁷

11. This is especially true in the present circumstances where the Presiding Judge seeks to provide “more details” or elucidation on the novel “interests of justice” interpretation or seems, particularly in paragraphs 50 to 53 of the Concurring and Separate Opinion, to speak on behalf of the entire Chamber rather than on behalf of himself or: instead of using “I”, he suddenly switches to formulas like the “Chamber”, the “Pre-Trial Chamber” or the “Judges of the Chamber.” There are conclusions in those paragraphs, which seem to complement the earlier conclusions of the Chamber, especially with regard to victims, which will be addressed in the Victims’ appeal brief.⁸

12. For the foregoing reasons, the Victims submit that the instant notice of appeal has been presented within the prescribed time limit.⁹

b. Victims Standing to Submit a Notice of Appeal

13. Following the Prosecutor’s notice to the President of her Office’s intention to request judicial authorization to open an investigation into the situation of Afghanistan under Article 15(3) of the Statute, and the assignment of the Situation of the Islamic Republic of Afghanistan to Pre-Trial Chamber III, the Pre-Trial Chamber (as then composed) issued an order concerning the submission and collection of victims’

⁷ Decision on Mr Saif Al Islam Gaddafi’s ‘Application for extension of time to file the Appeal Brief, ICC-01/11-01/11-668-Corr, 18 April 2019.

⁸ Indications of issues to be raised in Victims’ appeal brief are without prejudice to specific grounds of appeal and the legal and factual reasons for each ground that will be filed before this Chamber, in accordance with Regulation 154 (2) of the Regulations.

⁹ Should the Appeals Chamber disagree with the Victims’ reasoning, in light of the particular circumstances of the issuance of the Decision, the Legal Representative respectfully requests that the Appeals Chamber find that “good cause” exists to grant an extension of time in accordance with Regulation 35(2) of the Regulations.

representations. In that “Order to the the Victims Participation and Reparation Section Concerning Victims’ Representations,”¹⁰ the Pre-Trial Chamber instructed that victims be notified of their ability to make representations and noted that, pursuant to Rule 50(4), it may decide on additional matters, including in regards to victims’ representations.¹¹

14. All five Victims, by and through their respective Legal Representatives, participated in the proceedings before the Pre-Trial Chamber, as provided for in Article 15(3) of the Statute. Annexes I and II contains the signed Victims’ Representation Forms for r/00750/18 and r/00751/18,¹² as well as a 55-page Victims’ Representation, which sets forth out:

- i. the factual and contextual background for the United States Detention and Interrogation Program in Afghanistan and Other States Parties;¹³
- ii. a factual summary of the arrest, detention and torture of the Victims;¹⁴
- iii. representations regarding the crimes that fall within the scope of the investigation;¹⁵

¹⁰ ICC-02/17-6, 9 November 2017.

¹¹ Rule 50(4) provides, in part, that the Pre-Trial Chamber “*may request additional information* from the Prosecutor and *from any of the victims who have made representations*, and if it considers appropriate, may hold a hearing.” (emphasis added).

¹² Victim Representation of Sharqawi Al Hajj, r/00751/18, is attached hereto as Annex I. Victim Representation of Guled Hassan Duran, r/00750/18, is Attached hereto as Annex II. The LRV for Al Hajj and Duran provided those submissions on a confidential basis to the Pre-Trial Chamber, and has since made them publicly available.

Victims r/00635/18, r/00636/18 and r/00638/18 opt to retain the confidential *ex parte* status of their representations at their time, but have likewise submitted materials to the Victims Participation and Reparations Section (“VPRS”) which were duly forwarded to the Pre-Trial Chamber as representations from victims falling within rule 85 of the Rules.

¹³ The Victims’ Representation provides an overview of the two-prong response of the U.S. to the September 11th attacks, namely a military and counterterrorism response, and explains how those responses overlapped in time, space and objective. *See* Annex I, Victims Representation, paras. 13-53.

¹⁴ The Victims’ Representation advised the Pre-Trial Chamber that, in addition to being held and tortured in U.S.-run detention centers in Afghanistan, the two men were also detained in and/or held in two other States Parties, namely Jordan and Djibouti. *See, e.g.*, Annex I, Victims Representation, para. 109 (c) (“At a minimum, States Parties to the ICC with knowledge of, and evidence about, crimes within the jurisdiction of the Court, must cooperate with the Prosecution and provide information requested [once an investigation is initiated]. Art. 54(3)(c); Art. 86; Art. 87; Art. 93.”)

- iv. representations regarding the categories of persons who bear the greatest responsibility for the crimes;¹⁶
- v. representations on admissibility: gravity and complementarity; and
- vi. representations setting forth the reasons why the investigation is in the interests of justice.¹⁷

15. The LRV for Victims r/00750/18 and r/00751/18 submitted two updates to the Pre-Trial Chamber during the pendency of the Prosecutor's Request, on 4 April 2018 and 6 December 2018.

16. The Victims note that whereas Article 81(1) of the Statute clearly indicates who can appeal a decision of acquittal, conviction or a sentence, the same is not true with regard to Article 82(1) of the Statute. The *chapeau* of article 82(1) of the Statute only states that "either party" may appeal "any of the following decisions" without more. None of the four sub-paragraphs (a to d) in article 82(1) of the Statute elaborates further on who may lodge an appeal under that provision. The reference to "either party" is not defined in the Rules. Chapter 8 of the Rules on "Appeal and Revision" uses a broad formula "all parties who participate in the proceedings."¹⁸

17. Article 82(1) of the Statute refers to different types of procedure and the parties to those proceedings may vary according to the nature of those proceedings and the interests at stake. Therefore, the word "party" for the purposes of article 82(1) of the Statute cannot encompass solely the Prosecutor and the defence, as it seems to be the case for criminal proceedings *stricto sensu*.¹⁹ Leading commentators have noted that the

¹⁵ As will be addressed in Victims' Appeal Brief in response to paragraphs 51-56 of the Decision, Victims further developed the argument of the Prosecutor in relation to war crimes and also submitted that crimes against humanity should be included as part of the investigation of U.S. conduct.

¹⁶ Most notably, the Victims' Representation advised that private corporate contractors and senior former civilian officials should be included within the scope of the authorized investigation.

¹⁷ Victims' Appeal Brief will address the views put forth by the Victims, and the contrary conclusions in the Decision, at length.

¹⁸ See, e.g., Rule 156(2).

¹⁹ The participation of victims during those criminal proceedings – after an accused has been subject to a warrant of arrest – is provided for in Article 68(3) of the Statute. In that regard, the Appeals Chamber has

distinction drawn by some judges between “parties” and “participants,” which has been used to limit victims’ participation, in fact has no basis in the legal texts of the Court.²⁰ Indeed the term “party” is used in numerous places in the Court’s texts in the context of procedural steps which are now routinely open to victims according to the practice of the Court.²¹ Moreover, in some instances, failing to read “party” or “parties” as including victims would lead to absurd and clearly unintended results – for example in relation to article 70(1)(b) of the Statute which creates the offence of “[p]resenting evidence that the party knows is false or forged.”²² It is clear therefore that the term “party” or “parties” in the texts of the Court must be understood within the context of the specific procedural rights or obligations conferred in a given provision

18. The specific statutory right provided for victims in article 15(3) of the Statute is clearly distinct from the one provided for in Article 68(3) of the Statute: it applies at a stage (i.e., the preliminary examination stage) before any criminal proceedings have been initiated – when there is no defendant - and it is not subject to any of the restrictive

ruled that “participating victims are not parties to the proceedings; under Article 68(3) of the Statute, they may only present their “views and concerns”, and this only if their personal interests are affected.” Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 22 January 2010 entitled “Decision on the Modalities of Victim Participation at Trial,” ICC-01/04-01/07-2288, 16 July 2010, para. 39. As the Prosecutor and the defence are the sole parties to the criminal proceedings, quite logically, at the end of those criminal proceedings before the Trial Chamber, Article 81(1) of the Statute reserves the right to appeal to the Prosecutor and the defence.

²⁰ Gilbert Bitti, “A Court for Victims?” in FIDH, *Victims At the Centre of Justice: From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, December 2018, p10 at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/victims-at-the-center-of-justice-reflections-on-the-promises-and-the>.

²¹ For example: Articles 64(6)(d), 64(8)(b) and 69(3) of the Statute regarding submission of evidence; Article 64(9) of the Statute on applications concerning the admissibility of evidence; Rule 132(2) of the Rules concerning status conferences; Rules 132bis(4) and 132bis(5)(a) of the Rules regarding work plans and disclosure; Rules 155(2) and 157 regarding notifications in appeal proceedings.

²² Other examples include: Rule 17(2)(a)(iv) of the Rules, which defines the mandate of the Victims and Witnesses as including “[m]aking available to the Court and the parties” trainings on trauma, sexual violence, security and confidentiality; and Rule 34(1)(a) of the Rules which establishes as a ground for the disqualification of a judge, the Prosecutor or a Deputy Prosecutor the existence of any of several kinds of relationships with “any of the parties”.

conditions set forth in Article 68(3) of the Statute; among others, victims do not have to show under Article 15(3) of the Statute that their personal interests are affected as the drafters of the Statute considered that victims should have an unconditional right to participate in that particular procedure due to its consequences for the victims.

19. Furthermore, the Rules underline the role of victims in this process: Rule 50(4) indicates that the Pre-Trial Chamber may request additional information from the Prosecutor and from any of the victims. Victims are not limited in the material they may present to the Chamber. Indeed, even the Decision itself recognises that the “victims’ representations usefully complement and supplement the information provided by the Prosecutor.”²³ The Concurring and Separate Opinion further underlines the importance of the material submitted by victims when stating that upon “consideration of the inherent qualities as well as authoritativeness of the information received from the Prosecutor and the victims, the Chamber is satisfied – at this stage- that there is a reasonable basis to believe that the incidents underlying the Request have occurred.”²⁴

20. As this is the first denial of a Request under Article 15 (3), there is no jurisprudence directly on point vis-à-vis victims filing an appeal under Article. 82(1) of the Statute. The jurisprudence has accepted that the reference to “either party” in Article 82(1) may cover other actors in the proceedings other than Prosecutor and the defence. Most notably, States have been recognized for the purposes of proceedings related to jurisdiction or admissibility.²⁵

21. Of particular significance, in February 2018, Pre-Trial Chamber II granted leave to appeal in the Omar Al Bashir case, pursuant to Article 82(1)(d) of the Statute, to

²³ See Decision, para. 28.

²⁴ Concurring and Separate Opinion, para. 2.

²⁵ See, e.g., 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-Red, 21 May 2014. It is recalled in this regard that States may initiate proceedings with regard to jurisdiction and admissibility in accordance with article 19(2) of the Statute

Jordan²⁶ for proceedings unrelated to admissibility or jurisdictional issues. The Appeals Chamber recently issued its judgment on that appeal recognising that a State could be considered a “party” to the proceedings for the purposes of Article 82(1) of the Statute.²⁷ This was apparently justified by the fact that the “interests” of Jordan were at stake during the Article 87(7) proceedings, although nothing in that article suggests that the “interested” State has standing to participate in proceedings, let alone to appeal a decision issued following an Article 87(7) procedure. It is only the Regulations of the Court that prescribe that a Chamber shall “hear from” the requested State before issuing its decision.²⁸ Nothing in the applicable texts provides that this should give a right to the interested State to appeal the decision issued after having presented its views. This is precisely what was permitted vis-à-vis Jordan.

22. The Victims submit that the fundamental interests of victims are equally at stake in the procedure prescribed by Article 15(3) and (4) of the Statute. In case the Pre-Trial Chamber does not authorize the start of the investigation, the result for those victims who participated in the Article 15(3) procedure are devastating: as the ICC is a court of last resort precisely intended for those cases that national authorities are either unwilling or unable to prosecute, all the victims in the situation lose all their rights to have access to justice, to contribute to a process that seeks to end impunity and contribute to the prevention of crimes, to know the truth, and to request reparations – fundamental rights which have been acknowledged in the jurisprudence of this Court.²⁹ Such is the case for the Victims filing this Notice.³⁰

²⁶ Decision on Jordan’s request for leave to appeal, ICC-02/05-01/09-319, 21 February 2018.

²⁷ Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397, 6 May 2019.

²⁸ See Regulation 109(3).

²⁹ See, e.g., Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 88.

³⁰ In this regard, the Legal Representative emphasizes that there is no appeal against the Pre-Trial Chamber’s Decision that the Situation is admissible: indeed, certain of the Victims remain detained at Guantánamo Bay under an Executive who has not only threatened to “bring back a hell of a lot worse

23. It is respectfully submitted that such a decision is arguably the worst a Chamber of this Court can take with regard to victims. A decision under Article 15(4) with regard to the authorization to start an investigation is more crucial for victims than any other decision taken by a Chamber of this Court:³¹ in case the authorization is denied, the result of such a decision is the complete foreclosure of all their rights – and, in circumstances such as those in which the Decision was made, respectfully, it raises serious questions about the fundamental right of equality of all persons before the law.

24. In light of the impact of the Decision, the Presiding Judge’s declaration that the “ICC which is a victim-centred court organises both reparations and assistance in favour of victims,” is, at best, peculiar.³² Speaking apparently on behalf of the entire Chamber, he continues by stating that the “Chamber is very concerned about them.” With all due respect, this is difficult to believe: whereas the Court is more victim-centred than previous international criminal tribunals, the Decision cannot objectively be said to be so.

25. Furthermore, contrary to what the Presiding Judge seems to suggest, there can be no reparations proceedings before the Court without an investigation:³³ in accordance with Article 75(2) of the Statute, the Trial Chamber can make a reparation order only against a convicted person; obviously, there cannot be any conviction without first a prosecution and prosecutions are impossible without a prior investigation. Furthermore, contrary to what the Presiding Judge again seems to suggest, the Trust

than waterboarding,” but has recently promoted pardons for those who commit war crimes. *See* Gabor Rona, “Can a Pardon Be a War Crime? When Pardons Themselves Violate the Laws of War,” *Just Security*, 25 May 2019 at <https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/>.

³¹ Notably, Article 82(4) gives a right to the legal representative of victims to appeal a decision denying reparations to victims. A decision refusing the authorization to open an investigation – a necessary precursor to a case – puts the victims in a worse position as they lose the right to request reparations.

³² Concurring and Separate Opinion, para. 50.

³³ *See*, Decision on the “Application for Judicial Review by the Government of the Union of the Comoros,” ICC-01/13-68, 15 November 2018, para. 120.

Fund for victims, established in accordance with Article 79 of the Statute, has not done anything to date for victims in situations which are not under investigation by the Office of the Prosecutor. Therefore, to state in the Concurring and Separate Opinion, once again on behalf of the Chamber, that the “Chamber which is sensitive to the victims’ situation has taken such a decision also in their interests,”³⁴ is *profoundly* misguided, if not disrespectful and patronizing, even if the intent was otherwise. What appears is that the Chamber has wholly ignored or disregarded the representations made by the victims.

26. The circumstances of victims in the Situation in Afghanistan is even more tragic as the Pre-Trial Chamber in its Decision explicitly recognised that the Court had jurisdiction over the crimes allegedly committed,³⁵ that those crimes were grave, and that no prosecutions would proceed at the national level for those crimes, thereby leaving the victims of these most serious crimes denied access to justice, facing complete impunity and the very real risk of reoccurrence, if not continuation of suffering. Such a result is manifestly in contradiction not only with the internationally recognised human rights of victims but also with the object and purpose of the Statute, and runs contrary to the very reason for which this Court was created.

27. The Judges appear to suggest that their decision is temporary: the operative part of the Decision states that an investigation “in the current circumstances” would not serve the interests of justice and the Concurring and Separate Opinion, again on behalf of the Chamber, emphasizes that the “Chamber has not ruled out the investigation for ever.”³⁶ Referring to Article 15(5) of the Statute and the possibility for the Prosecutor to present a new request based on new facts or evidence – and presumably new crimes

³⁴ Concurring and Separate Opinion, para. 53.

³⁵ As Victims will address in their Appeal Brief, the Decision appears to exclude for its finding of jurisdiction criminal conduct committed on the territory of States Parties, including criminal conduct that Victims suffered on the territory of States Parties. *See* Decision, pars. 51-56.

³⁶ Decision, para. 96; Concurring and Separate Opinion, para. 50.

against other or even future victims, the Concurring and Separate Opinion comes to the conclusion that the “decision of the Chamber does not irreparably endanger the interests of victims.”³⁷ Such a conclusion is perplexing, if not disingenuous: the Judges did not need more evidence or additional facts to initiate an investigation over at least some of the incidents, as they were convinced by the facts and evidence submitted to them by the Prosecutor and the victims; this appears from their conclusions in Part V and VI of the Decision on jurisdiction and admissibility. It is therefore difficult to see which additional facts or evidence should be presented by the Prosecutor and the victims to convince the Pre-Trial Chamber to authorize an investigation, and particularly one that covers *these victims*.

28. Accordingly, victims should not be excluded from lodging appeals under Article 82(1), and more precisely, from bringing this appeal. Such an appeal would allow victims to vindicate their rights to have access to justice, to know the truth and to request reparations as the opening of an investigation is the condition *sine qua non* for the exercise of any of those rights.³⁸

29. Such an interpretation of Article 82(1) would be in conformity with Article 21(3) of the Statute and internationally recognised human rights taking into consideration the consequences for the victims as a result of the Decision.³⁹ In this regard, the Appeals

³⁷ Concurring and Separate Opinion, para. 50.

³⁸ See Decision on the “Application for Judicial Review by the Government of the Union of the Comoros,” ICC-01/13-68, 15 November 2018, para. 120.

³⁹ See, e.g., 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, adopted by the UN General Assembly on 16 December 2005 (A/RES/60/147) ; U.N. Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff A/HRC/30/42, 7 Sept. 2015; U.N. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 29 Mar. 2004 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/202/04/PDF/G1520204.pdf?OpenElement>; and U.N. Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States Parties, ¶ 2, U.N. Doc. CAT/C/GC/3, 19 Nov. 2012.

Chamber has mandated the Pre-Trial and Trial Chambers to interpret broadly Article 82(1)(d) of the Statute in accordance with internationally recognised human rights.⁴⁰ The same should apply to the Appeals Chamber under article 82(1)(a) of the Statute for the purposes of deciding who can bring an appeal. Therefore, for the purposes of interpreting the word “party” in the chapeau of article 82(1) of the Statute, should take into consideration internationally recognised human rights and especially the consequences of the Decision for the rights of victims.

30. Finally, the Victims’ submit that no further procedure should be followed to verify their status as “victims” under Rule 85 of the Rules than that which has already been undertaken. As is usual in proceedings under Article 15, the Pre-Trial Chamber adopted an “intrinsic coherence” test, which was applied by the VPRS.⁴¹ It is submitted that this is the appropriate approach at this stage of proceedings, including under appeal. Seeking formal applications and undergoing a lengthy process of observations at this stage would only delay proceedings and serve little purpose in the absence of a defence.

c. The Decision is Jurisdictional in Nature

31. At the outset, the Victims emphasize that the Decision, by its very nature and content, is determinative both on jurisdiction and admissibility: the titles of Part V and Part VI of the Decision, respectively dealing with issues related to jurisdiction and admissibility, refer expressly to the “Determinations of the Chamber.”⁴² In closing, the Pre-Trial Chamber reiterates that “all the relevant requirements are met as regards both

⁴⁰ Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015 », ICC-01/05-01/13-1533, 23 December 2015, para. 16.

⁴¹ “Order to the Victims Participation and Reparation Section Concerning Victims’ Representations,” ICC-02/17-6, 9 November 2017, para.14.

⁴² For the conclusions of the Chamber as to the jurisdiction *ratione materiae*, see Decision, para. 60; *c.f.* paras. 55-56. For the conclusions on admissibility, see Decision, paras. 79 and 86.

jurisdiction and admissibility”.⁴³ The Appeals Chamber should review for error of law, error in fact, or procedural error, which materially affected the Pre-Trial Chamber’s Decision. It is submitted that such error occurred.

32. As a result, the reasoning of the Appeals Chamber’s decision on the admissibility of the Prosecutor’s appeal in the situation on the Registered Vessels of the Union of the Comoros, *et al* cannot be transposed in the present situation: the Prosecutor’s appeal was declared inadmissible due to the peculiar nature of the proceedings under article 53(3)(a) of the Statute where the decision issued by the Pre-Trial Chamber was a request to the Prosecutor not to initiate an investigation but the ultimate decision on whether to do so was for the Prosecutor. Therefore, the Pre-Trial Chamber’s decision was “not by its nature a decision determining admissibility.”⁴⁴ As a consequence, the Appeals Chamber refused to introduce “an additional layer of review.”⁴⁵

33. The situation here is distinct, as the Decision, issued under Article 15(4) of the Statute, is binding on the Prosecutor who cannot open an investigation over the extensive crime-base put forward in the Request. Moreover, the determinations reached in the Decision with regard to issues on jurisdiction and admissibility are binding on the Prosecutor and the victims who, absent an appeal, would be left with no recourse: taking into consideration the limited prospect and effect of any request under Article 15(5) of the Statute, as explained above, the only remedy is appellate review. It is submitted that there is then a particular interest both for the victims and for the Court as a whole to have an appellate review of the Decision taking into consideration its importance.

⁴³ Decision, para. 96. *See also*, Decision, para. 87 (concluding “[h]aving determined that both the jurisdiction and the admissibility requirements are satisfied...”).

⁴⁴ *See* 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.

⁴⁵ *See Id.*, para. 60.

34. Although the investigation was not authorised by the Pre-Trial Chamber because it was of the view that it would not be in “the interests of justice,” the Victims submit that the decision remains jurisdictional in nature in that it *divests* the Prosecutor of jurisdiction over *these incidents and victims*, and for the victims, places them *beyond the reach* of the Court *despite* having suffered crimes that fall squarely within the temporal jurisdiction, jurisdiction *ratione loci* and jurisdiction *ratione materiae* of the Court, and that therefore an appeal under article 82(1)(a) is appropriate.

35. This is the first time in the history of the Court that a Pre-Trial Chamber refuses to authorize the Prosecutor to start an investigation, precluding any possible investigation and therefore prosecutions for *all* crimes allegedly committed in the entire Situation in Afghanistan, including those on other States Parties that have a nexus to the armed conflict in Afghanistan. As the Pre-Trial Chamber declared itself that there was no prosecution at the national level, this is the first time in its history that the Court decides that crimes are within its jurisdiction, that they meet all criteria established in article 17 of the Statute with regard to complementarity and gravity, but that nonetheless the Court will not take any action, therefore leaving hundreds of thousands of victims to face complete impunity – and their perpetrators, free to continue to commit serious violations of international law without fear of consequence. The Decision has stripped the Court of its critical deterrent function.

36. First, the Decision constitutes an absolute barrier for the exercise of jurisdiction by the Court for all crimes set forth in the Prosecutor’s Request and therefore remains jurisdictional in nature.⁴⁶ It has, notwithstanding its operative part referring to “interests of justice,” much more than an indirect link with jurisdiction.

⁴⁶ 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, para. 23.

37. Second, the Decision, although clearly determining that the Court has jurisdiction in this particular situation, declines to assume jurisdiction. In this regard, the Decision is comparable to a precedent from 2006 where the Appeals Chamber treated a decision where the crucial issue was not whether the Court had jurisdiction (which was not raised) as one with respect to "jurisdiction" for the purposes of Article 82(1)(a) of the Statute, but whether the Court should assume jurisdiction for reasons linked to human rights consideration.⁴⁷ Likewise, the Decision is founded on the premise that the Court has jurisdiction but should desist from assuming jurisdiction for reasons linked to what the Pre-Trial Chamber considers to be "interests of justice." Therefore, the legal representative is of the view that the Decision should equally be considered as a decision with respect to jurisdiction.

38. Third, the Victims will demonstrate in their appeal brief that the Pre-Trial Chamber, when it used "interests of justice" in order to deny the authorisation of an investigation was acting in violation of the Statute for three reasons, resulting in error of law and procedural error that materially affected its determination: a) it could not use the criterion of "interests of justice" to deny such an authorization;⁴⁸ b) it misinterpreted the criterion of "interests of justice" by, among others, resorting to considerations which are not foreseen in the Statute and by ignoring the representations made by the victims; and c) it acted unfairly by not inviting the Prosecutor and the victims to first present their views on this crucial issue before taking its Decision.

⁴⁷ 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, para. 20.

⁴⁸ Apart from the decisions taken by Pre-Trial Chambers under Article 15 of the Statute, there is jurisprudence of this Court to the effect that the power of the Pre-Trial Chamber to review the interests of justice determination made by the Prosecutor is limited to the case where the Prosecutor decides not to proceed, *see* Decision on Application under Rule 103 (situation in Darfur, Sudan), 4 February 2009, ICC-02/05-185, paras. 19-29.

39. Therefore, if the Pre-Trial Chamber could not have resorted to reasons linked to “interests of justice” and thus its Decision should have been based *solely* on considerations related to jurisdiction and admissibility as mandated by article 15(4) of the Statute,⁴⁹ the question arises as to whether the Pre-Trial Chamber has illegally deprived the Appeals Chamber of its appellate jurisdiction with regard to questions on jurisdiction and admissibility, an appellate jurisdiction which is not subject to any leave.

40. Fourth, the Victims will demonstrate that the Pre-Trial Chamber erred as a matter of law and in application of the facts when it considered an issue that fell squarely within its jurisdiction *ratione loci* analysis, namely its assessment of the “nexus” requirement for war crimes (“in the context of and was associated with”).⁵⁰

41. Finally, article 21(3) requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.⁵¹ The Appeals Chamber emphasized that “[A]rticle 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court.”⁵²

42. In this sense a decision which precludes all victims within a situation to exercise their rights to know the truth, to have access to justice and to obtain reparation, while acknowledging that those rights have been ignored at the national level, must be considered as jurisdictional in nature. In such a case, the internationally recognised

⁴⁹ The Pre-Trial Chamber was obliged, taking into consideration its determinations with regard to jurisdiction and admissibility, to authorise the commencement of an investigation (see article 15(4) of the Statute: “it shall authorise the commencement of the investigation”).

⁵⁰ See Decision, paras. 51-56.

⁵¹ ICC-01/04-01/06-772, 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, 14 December 2006, para. 36.

⁵² ICC-01/04-01/06-772, 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, 14 December 2006, para. 37.

human rights of victims, grounded in the principle of non-discrimination and equality before the law, heavily weight in favour of the Court assuming jurisdiction in this situation, an aspect which was totally ignored by the Judges of the Pre-Trial Chamber.

43. Finally, the broader background to this filing outside the Court and its judicial proceedings cannot be ignored. Blatant attacks on the Court and those contributing to its work have been made at the highest levels, particularly by representatives of the United States government in reaction to the Prosecutor's Request. Such actions cannot but constitute an interference with the independence of the Court and the Prosecution.⁵³ More troubling still is the apparent suggestion in the Decision (para.94) that far from resisting such attacks, the Court has allowed itself to be cowed by them. Even if this was not the Pre-Trial Chamber's intended meaning, the perception that the Court has succumbed to political interference is in itself a cause for deep concern. They add to the Victims' concern that without a rectificatory ruling from the Appeals Chamber, efforts may persist to exclude from the Court's remit any actions of the United States government, its allies or others who adopt such tactics. It is therefore particularly vital that the Appeals Chamber address the jurisdictional issue raised in the present Notice of Appeal

III. Conclusion

44. For the foregoing reasons, the Victims submit that the present appeal under Article 82(1)(a) of the Statute should be declared admissible.

45. The Victims, through the Legal Representative, will file the appeal brief within 21 days of the notification of the Concurring and Separate Opinion of the Presiding Judge

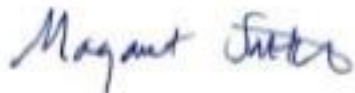
⁵³ See, e.g., Complaint Against the United States of America: Interference with Judicial Proceedings at the International Criminal Court, filed by the Center for Constitutional Rights with the U.N. Special Rapporteur on the Independence of Judges and Lawyers, 5 June 2019 at https://ccrjustice.org/sites/default/files/attach/2019/06/5%20June%202019_Special%20Rapp%20letter%20I%20CC_final.pdf.

of Pre-Trial Chamber II, in accordance with Regulation 64(2) of the Regulations, subject to any direction given by the Appeals Chamber.

Respectfully submitted,



Katherine Gallagher
Legal Representative for r/00751/18 and r/00750/18



Margaret Satterthwaite Nikki Reisch
Legal Representative for r/00749/18



Tim Moloney QC Megan Hirst
Legal Representatives for r/00635/18, r/00636/18 and r/00638/18

Dated this 10th day of June 2019,

at Kiev, Ukraine (permanently based in New York, US), New York, US, and London, United Kingdom.