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PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

**Public Document
With Public Annex**

**Submissions in the general interest of the Victims on the Prosecution'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"
(ICC-02/17-34)**

Source: Office of Public Counsel for Victims

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) submits that the general interests of the Victims are directly affected by the Decision of Pre-Trial Chamber II (the “Chamber”) not to authorise the opening of an investigation in the Situation in the Islamic Republic of Afghanistan (the “Impugned Decision”)¹ and by the issues identified by the Prosecution in its request for leave to appeal said Decision (the “Request”).² Indeed, victims of the crimes allegedly committed in Afghanistan, along with their families, have a personal interest in fair and expeditious proceedings, to obtain justice and to uncover the truth about the events they suffered from.

2. The International Criminal Court is first and foremost a “*victim-centered Court*”³ and its application and interpretation of Victims’ rights “*must be consistent with internationally recognized human rights*”.⁴ The right to truth and justice needs to be reflected in the present and future proceedings related to the opening of an investigation and within the relevant assessment of the notion of ‘interests of justice’. In this regard, the Principal Counsel posits that it is in the interest of the Victims that the Prosecution’s Request for leave to appeal the Impugned Decision be granted. The present submissions are filed with a public annex in which personal details are redacted.

¹ See 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” (Pre-Trial Chamber III), [No. ICC-02/17-33](#), 12 April 2019 (the “Impugned Decision”).

² See the “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”, [No. ICC-02/17-34](#), 7 June 2019, (the “Request”).

³ See the “Concurring and Separate Opinion of Judge Kesia-Mbe Mindua”, [No. ICC-02/17-33-Anx-Corr](#), 31 May 2019 (the “Concurring Opinion”), para. 50.

⁴ See article 21(3) of the Rome Statute (the “Statute”).

II. PROCEDURAL BACKGROUND

3. On 20 November 2017, the Prosecutor submitted the “Request for authorisation of an investigation pursuant to article 15”, seeking authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan.⁵

4. On 12 April 2019, the Chamber issued the Impugned Decision, rejecting the Prosecution’s request to open an investigation in the Situation in the Islamic Republic of Afghanistan.⁶ On 31 May 2019, Judge Mindua issued his concurring and separate opinion.⁷ On 7 June 2019, the Prosecution filed a Request⁸ seeking leave to appeal the Impugned Decision.

5. On 10 June 2019, the OPCV filed the “Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”,⁹ seeking authorisation to appear before the Pre-Trial Chamber on the three issues identified in the Request and directly affecting the Victims’ rights. On 12 June 2019, the Chamber granted authorisation,¹⁰ ordering, *inter alia*, the OPCV to file its written submissions by 12 July 2019.

III. SUBMISSIONS

6. The Principal Counsel notes that the general interests of the Victims are affected by the Impugned Decision and by the Request insofar Victims of the crimes allegedly committed in Afghanistan, along with their families, have a personal interest in obtaining justice and knowing the truth about the events they suffered from. Their interests are intertwined with those of all Victims of crimes within the jurisdiction of the Court.

⁵ See the “Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Conf-Exp”, [No. ICC-02/17-7-Red](#), 20 November 2017.

⁶ See the Impugned Decision, *supra* note 1.

⁷ See the Concurring Opinion, *supra* note 3.

⁸ See the Request, *supra* note 2.

⁹ See the “Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, [No. ICC-02/17-39](#), 10 June 2019 (the “OPCV Request”).

¹⁰ See the “Decision on the ‘Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan’ (ICC-02/17-35) and on the ‘Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ (ICC-02/17-39)” (Pre-Trial Chamber II), [No. ICC-02/17-43](#), 12 June 2019.

7. In this regard, the Issues identified by the Prosecution in its Request (the “Issues”) – namely 1) the assessment of the interests of justice (the “First Issue”); 2) the Pre-Trial Chamber’s exercise of discretion (the “Second Issue”); and 3) the Pre-Trial Chamber’s understanding of the scope of any authorised investigation (the “Third Issue”) – trigger questions of importance for the Victims who have a fundamental interest in advocating for an interpretation of the relevant statutory provisions which properly takes into account their rights to truth and justice.

8. In order to demonstrate how the interests of the Victims are affected, the Principal Counsel will address, in turn, the requirements under article 82(1)(d) of the Statute from the Victims’ perspective.

9. At the outset, the Principal Counsel notes that the merits of the Impugned Decision should not be considered when deciding whether to grant leave to appeal under article 82(1)(d).¹¹ However, as recently clarified by the present Pre-Trial Chamber: “[...] while a determination pursuant to article 82(1)(d) of the Statute is not an opportunity to examine arguments on the merits of the decision, the Chamber will do so, to a certain extent, when such arguments have a bearing on the criteria set out in article 82(1)(d) of the Statute”.¹²

10. Therefore, the Principal Counsel will address arguments pertaining to the merits of the Impugned Decision only to the extent that they are relevant to the assessment of whether the criteria set out in article 82(1)(d) of the Statute are met.

¹¹ See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 15; the “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), [No. ICC-01/04-135-tEN](#), 31 March 2006, para. 19; and the “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’” (Pre-Trial Chamber II), [No. ICC-01/09-02/11-253](#), 18 August 2011, para. 28.

¹² See the “Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-154](#), 21 March 2019, para. 14.

1. The Impugned Decision contains Issues which affect the interest of the Victims

11. The Principal Counsel recalls that, according to established jurisprudence, an “issue” for the purposes of article 82(1)(d) of the Statute is “[a]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹³ It is therefore constituted “[b]y a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹⁴ Furthermore, the identified issue must arise from the relevant decision and cannot refer to abstracts legal questions or hypothetical concerns.¹⁵

12. In relation to the First Issue, the Chamber – having established that both the jurisdiction and the admissibility requirements are satisfied¹⁶ – rejected the Prosecution’s request to investigate solely on the ground that an investigation into the situation in Afghanistan at the present stage “would not serve the interests of justice”, pursuant to article 53(1)(c) of the Statute.¹⁷ In reaching said conclusion, the Chamber clearly performed a positive assessment of whether the proposed investigation would be in the interests of justice.

13. As pointed out in the Request,¹⁸ in so doing the Chamber departed from the established jurisprudence of the Court in relation to the opening of investigations. In particular, the Principal Counsel recalls the Pre-Trial Chamber II’s findings in the Kenya situation clarifying that “[u]nlike sub-paragraphs (a) and (b) [of article 53], which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish

¹³ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

¹⁴ *Idem*.

¹⁵ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 8.

¹⁶ See the Impugned Decision, *supra* note 1, para. 87.

¹⁷ *Idem*, paras. 87-96.

¹⁸ See the Request, *supra* note 2, para. 10.

that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect”.¹⁹

14. Where there is a *reasonable basis* to believe that the requirements of jurisdiction are met and the case is or would be admissible, the Prosecution is called to fulfil its mandate to investigate and prosecute. It is only where there are *substantial reasons* to believe that an investigation would *not* serve the interests of justice that the Prosecution may decide not to proceed, inform the Pre-Trial Chamber and trigger the Chamber’s discretion to review the decision pursuant to article 53(3)(b) of the Statute. As developed *infra*, the Impugned Decision’s exceptional approach affects the Victims’ rights to truth and justice and calls for close judicial scrutiny in light of its impact on the Court’s core mandate of fighting against impunity for the most serious crimes, on the overall fairness of the proceedings, and on the possibility for Victims to exercise their rights.

15. In the same vein, the Second and Third Issues directly stem from the Chamber’s determination and weighing of the factors relevant to its assessment of the interests of justice, including, and in particular, its conclusion on the limited prospects for a successful investigation and prosecution and the unlikelihood that *“pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation”*.²⁰ The Third Issue especially arises from the majority’s understanding that an authorisation to commence an investigation pursuant to article 15(4) of the Statute would be limited in scope to the *“events or categories of events [...] identified by the Prosecution”* in its request for authorisation, as well as those *“closely linked”* thereto.²¹

16. Accordingly, each of the three Issues forms part of the *ratio decidendi* of the Impugned Decision. The Chamber rejected the request for authorisation based on its

¹⁹ See the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (Pre-Trial Chamber II), [No. ICC-01/09-19-Corr](#), 1 April 2010, para. 63 (the “Kenya Decision”).

²⁰ *Idem*, para. 96.

²¹ *Ibid.*, paras. 40-42. See also the Concurring Opinion, *supra* note 3, paras. 4-15.

conclusion that “*an investigation into the situation in Afghanistan at this stage would not serve the interests of justice*”²² (see the First Issue), since “*the prospects for a successful investigation and prosecution [are] extremely limited*”²³ (see the Second Issue), said prospects being assessed exclusively on the basis of “*incidents referred to in the Request*”²⁴ (see the Third Issue).

17. Far from being a mere subject of disagreement or conflicting opinion, the three Issues constitute concrete legal questions of impending concern whose resolution is essential for the determination of matters arising in the Afghanistan situation. More broadly, their determination is also crucial for clarifying the fundamental legal principles applicable to all instances in which the Prosecutor seeks to initiate an investigation *proprio motu* pursuant to article 15 of the Statute and the checks and balances mechanism between the relevant Chambers and the Prosecution in such instances.

2. The Issues arising from the Decision impact on the fair and expeditious conduct of the proceedings or their outcome and as such affect the interests of the Victims

18. The wording of article 82(1)(d) of the Statute, as well as the Court’s established jurisprudence,²⁵ indicate that leave to appeal must be granted where the relevant issue would affect *either* the fair and expeditious conduct of the proceedings *or* the outcome of the trial. In the present circumstances, both of these alternative requirements are fulfilled.

19. Further, as noted by the Pre-Trial Chamber, the requirement that the identified issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial must be given a particularly extensive interpretation “*based on its object and purpose*” in cases where the “*issues significantly affect the Court’s ability to [...]*”

²² See the Impugned Decision, *supra* note 1, Disposition.

²³ *Idem*, para. 96.

²⁴ *Ibid.*, para. 93.

²⁵ See *e.g.* the “Decision on the Prosecutor’s request for leave to appeal the Decision on the Application for Judicial Review by the Government of the Union of the Comoros” (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019, para. 42 (the “Comoros Leave Decision”).

commence criminal proceedings stricto sensu".²⁶ This is precisely the scenario the Chamber is currently faced with.

a) Fairness

20. The Issues 'significantly affect' the fair conduct of the proceedings under article 82(1)(d) of the Statute, in the sense of having "[t]he potential [...] to significantly hinder, limit or otherwise have a considerable bearing on the scope and the exercise of the rights of the parties in pursuing their legitimate interests in the proceedings before the Court".²⁷ The notion of 'fair conduct of the proceedings' entails compliance with internationally recognised human rights²⁸ and requires that the relevant Chamber ponders the possible implications on the rights of all participants, including Victims, were the given issues wrongly decided.²⁹

21. The Principal Counsel recalls that said Issues arise from the Impugned Decision that departs from the prior consistent jurisprudence of the Court.³⁰ This, in itself, constitutes sufficient ground to grant the Request, as "*legal certainty is an indispensable element of fair proceedings*".³¹ As noted by the Pre-Trial Chamber: "[...] *for the principle of legal certainty to be respected, the outcome of the proceedings needs to be predictable to the parties to a degree that is reasonable in the circumstances of the case. As such, the [proposed issue] significantly affects the fairness of the proceedings since the settlement of this issue would clarify the statutory regime [...] and would ensure that this situation, and similar situations, can be resolved properly according to the law*".³²

²⁶ See the "Decision on Jordan's request for leave to appeal" (Pre-Trial Chamber II), [No. ICC-02/05-01/09-319](#), 21 February 2018, para. 15.

²⁷ See the "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision' filed by the Defence of Saif Al Islam Gaddafi" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-556](#), 10 June 2014, para. 22.

²⁸ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" *supra* note 13, para. 11.

²⁹ *Idem*, para. 13. Also see the Comoros Leave Decision, *supra* note 25, para. 41 and the "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *supra* note 11, para. 38.

³⁰ See *e.g.* the Request, *supra* note 2, paras. 17, 22 and 28.

³¹ See the Comoros Leave Decision, *supra* note 25, para. 48.

³² *Idem*.

22. Further, in light of the novel approach adopted in many material respects in the Impugned Decision, the Victims and the Prosecutor were not in a position to anticipate the legal and factual considerations which ultimately led the Chamber to reject the Request. While during the proceedings leading to the adoption of the Impugned Decision the Chamber relied on its powers under rule 50(4) of the Rules of Procedure and Evidence to request additional information from the Prosecutor on other topics,³³ it did not seek information or submissions on the factual and legal considerations underlying the Issues raised.³⁴ Both the Prosecutor and the Victims were therefore deprived of the opportunity to present submissions on these material points, including for instance the anticipated feasibility of the investigation and its impact on the interests of justice and the interests of Victims. The fact that they were prevented from presenting their views in full on the three Issues *per se* affects the fair conduct of the proceedings,³⁵ justifying therefore the granting of the Request.

23. Turning to the First Issue, it significantly affects the fair conduct of the proceedings to the extent it marks a departure from the Statute's framework for *proprio motu* investigations. Said framework, as interpreted to date, reflects the State Parties' agreement on the fight against impunity as the Court's core mandate and its very *raison d'être*.³⁶ It is based on a presumption that the investigation and

³³ See the "Order to the Prosecutor to Provide Additional Information" (Pre-Trial Chamber III), [No. ICC-02/17-8](#), 5 December 2017 and the "Second Order to the Prosecutor to Provide Additional Information" (Pre-Trial Chamber III), [No. ICC-02/17-23](#), 5 February 2018.

³⁴ Regulation 48(1) of the Regulations of the Court specifically empowers the Pre-Trial Chamber to "request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c)".

³⁵ See the "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" (Appeals Chamber), [No. ICC-02/04-01/15-251](#), 17 June 2015, para. 43. See also "Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-206](#), 24 May 2019, para. 21.

³⁶ See the Preamble of the Rome Statute, the States Parties affirming that "*the most serious crimes of concern to the international community as a whole must not go unpunished*" and determined "*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*". See also the Comoros Leave Decision, *supra* note 25, para. 51; and BENEDETTI (F.), BONNEAU (K.) and WASHBURN (J.L.), *Negotiating the International Criminal Court*, Martinus Nijhoff Publishers, 2014, p. 44.

prosecution of the most serious crimes of concerns to the international community as a whole, consistent with the victims' rights to truth, justice and reparation,³⁷ is *ipso facto* in the interests of justice. As the Prosecutor spelled out in its Policy Paper on the interests of justice, "*there is a presumption in favour of investigation or prosecution*".³⁸

24. As a narrow exception to said presumption, article 53(1)(c) of the Statute allows the Prosecutor to refrain from initiating an investigation – even though the applicable jurisdictional and admissibility requirements are met – should she consider that there are *substantial reasons to believe* it would *not* serve the interests of justice. Given the element of subjective appreciation inherent in the notion of 'interests of justice',³⁹ and the Statute's overall presumption in favour of accountability, it is only in these limited circumstances that – as a further guarantee against impunity – the Pre-Trial Chamber is entitled to review the Prosecutor's assessment that the interests of justice require not to pursue an investigation.⁴⁰

25. Beyond the above-mentioned scenario, the Pre-Trial Chamber has no power to assess the interests of justice. Article 15(4) of the Statute does not empower the Chamber to review the Prosecutor's 'interests of justice' determination, since a request for authorisation can only follow a prosecutorial assessment that there are no "*substantial reasons to believe that an investigation would not serve the interests of justice*".⁴¹ In this context, the Pre-Trial Chamber's review must be limited to the issues of jurisdiction and admissibility, as confirmed by the wording of article 15(4) of the Statute itself. Pre-Trial Chamber II, in its earlier composition, confirmed this approach in unequivocal terms in the context of the Kenya situation.⁴² As a result,

³⁷ See the OPCV Request, *supra* note 9, paras. 19-21.

³⁸ See the [OTP Policy Paper on the Interests of Justice](#), September 2007, p. 1. See also SCHABAS (W.), *A Commentary to the Rome Statute. Second Edition*, Oxford University Press, Oxford, 2016, p. 834.

³⁹ See e.g. JURDI (N.N.), *The International Criminal Court and National Courts: A Contentious Relationship*, Routledge, 2006, p. 90.

⁴⁰ See articles 53(1) and 53(3)(b) of the Statute.

⁴¹ See article 53(1)(c) of the Statute.

⁴² See the Kenya Decision, *supra* note 19, note 35 and para. 63 (references omitted). The Principal Counsel notes that the decisions authorising investigations in the Burundi and Côte d'Ivoire situations both referred to this specific paragraph of the Kenya Decision without expressing any reservations as to the reasoning adopted by Pre-Trial Chamber II. See the "Decision Pursuant to Article 15 of the

the Chamber acted *ultra vires* in refusing authorisation to open an investigation based on its assessment that said investigation would not serve the interests of justice.

26. Further, assuming *arguendo* that the Pre-Trial Chamber *was* entitled to address the interests of justice in the framework of article 15(4) of the Statute, which the Principal Counsel does not concede, its review should have simply ensured that the requirement set out in article 53(1)(c) was met to the requisite standard.⁴³

27. Consistently with the fundamental values underlying the Statute, article 53(1)(c) empowers the Prosecutor to refrain from opening an investigation where “*taking 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*”.⁴⁴ There must be *substantial reasons* indicating that the potential investigation would be *contrary to* the interests of justice, as confirmed by the Court’s jurisprudence.⁴⁵

28. The Impugned Decision departs from this standard in at least two ways. First, it requires a “*positive determination to the effect that investigations would be in the interests of justice*”.⁴⁶ Second, it appears to lower the applicable standard of proof. The wording adopted by the Chamber suggests it reached its conclusion on the ‘interests

Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi” (Pre-Trial Chamber III), [No. ICC-01/17-9-Red](#), 9 November 2017, note 484 (the “Burundi Decision”) and the “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” (Pre-Trial Chamber III), [No. ICC-02/11-14-Corr](#), 15 November 2011, note 321 (the “Côte d’Ivoire Decision”). See also the “Decision on the Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014” (Pre-Trial Chamber II), [No. ICC-RoC46\(3\)-1/14-3](#), 12 September 2014, para. 8.

⁴³ As confirmed in the Impugned Decision, “*in the context of proceedings under article 15 [...] [t]he Pre-Trial Chamber must consider [...] whether the requirements set out in article 53(1)(a) to (c) are met*”. See the Impugned Decision, *supra* note 1, para. 30.

⁴⁴ See article 53(1)(c) of the Statute (emphasis added).

⁴⁵ See *e.g.* the Burundi Decision, *supra* note 42, para. 190 and the “Decision on the Prosecutor’s request for authorization of an investigation” (Pre-Trial Chamber I), [No. ICC-01/15-12](#), 27 January 2016, para. 58 (the “Georgia Decision”). See also the Côte d’Ivoire Decision, *supra* note 42, para. 208.

⁴⁶ See the Impugned Decision, *supra* note 1, para. 35 (emphasis added).

of justice' based on notions such as reasonableness⁴⁷ and likelihood⁴⁸ – as opposed to 'substantial reasons to believe' standard prescribed in article 53(1)(c) of the Statute.⁴⁹ This lower standard would significantly expand the range of scenarios in which the Prosecutor may refrain from pursuing an investigation under said provision.

29. Further, in assessing whether said revised standard was met, the Pre-Trial Chamber engaged in a *de novo* review of the Prosecutor's determination of the 'interests of justice', rather than simply reviewing her assessment with the level of deference that is appropriate to any review of an exercise of prosecutorial discretion.⁵⁰

30. These departures from the Statute's framework as widely understood prior to the Impugned Decision significantly impact on the fulfilment of the Court's core mandate, both in Afghanistan and in all future situations. This is bound to affect – and indeed in many instances preclude – the Victims' exercise of their fundamental rights to truth, justice and reparation.⁵¹ Therefore, the First Issue clearly impacts the fair conduct of the proceedings.

⁴⁷ *Idem*, para. 94 ("it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper").

⁴⁸ *Ibid.*, para. 92.

⁴⁹ Pre-Trial Chamber II clarified the meaning of the term 'substantial' in the context of a confirmation of charges decision, noting that "the term 'substantial' can be understood as 'significant', 'solid', 'material', 'well built', 'real' and rather than 'imaginary'. The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that 'for the Prosecut[or] to meet [the] evidentiary burden, [he] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations". See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), [No. ICC-01/05-01-08-424](#), 15 June 2009, para. 29 (references omitted). See also the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (Pre-Trial Chamber I), [No. ICC-01/13-34](#), 16 July 2015, para. 13; and CROSS (M.E.), "The Standard of Proof in Preliminary Examinations" in BERGSMO (M.) and STAHN (C.) (Eds.), *Quality Control in Preliminary Examinations: Volume 2*, p. 251.

⁵⁰ See the Concurring Opinion, *supra* note 3, para. 40. See also "Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire", [No. ICC-02/11-15-Corr](#), 5 October 2011, para. 28; and the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (Pre-Trial Chamber I), [No. ICC-01/13-34](#), 16 July 2015, para. 14. Also see BERGSMO (M.), PEKIC (J.), and ZHU (D.), "Article 15", in AMBOS (K.) and TRIFFTERER (O.) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck – Hart – Nomos, 2016, p. 737.

⁵¹ See the OPCV Request, *supra* note 9, paras. 19-21.

31. The Second Issue, pertaining to the factors the Pre-Trial Chamber deemed relevant to its assessment of the interests of justice, also impacts the fairness of the proceedings, particularly with respect to Victims. As noted in the OPCV Request,⁵² the interests of justice are indissolubly linked to, and often overlap with, the interests of Victims and their internationally recognised rights to truth, justice and reparation.⁵³

32. The Impugned Decision adopted an unduly narrow reading of the interests of Victims in the present situation in finding that said interests were (i) either nullified or outweighed by competing, non-legal factors, such as the feasibility of the investigation, the prospects of cooperation by relevant states and the proper allocation of the Court's budget;⁵⁴ and (ii) effectively conditional on Victims' participation in specific trials before the Court,⁵⁵ which the Chamber deemed unlikely in the circumstances.⁵⁶

33. Relying on the feasibility of the proposed investigation and future proceedings as the determining factor of whether authorisation to investigate should be granted does not accord with the Court's jurisprudence and undermines the fundamental rights of Victims. This unprecedented approach rewards obstructionism, impunity and failure to cooperate by reluctant states. It further signals that the interests of Victims are only worth pursuing where justice is within

⁵² *Idem*.

⁵³ See the "Separate opinion of Judge Sang-Hyun Song" appended to the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), [No. ICC-01/04-01/06-925](#), 13 June 2007, para. 16. See also the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/07-474](#), 13 May 2008, paras. 31 and 34; the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97; the "Decision on victims' representation and participation" (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the "Decision on victims' representation and participation" (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; and the "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

⁵⁴ See the Impugned Decision, *supra* note 1, para. 95.

⁵⁵ *Idem*, para. 96.

⁵⁶ *Ibid.*, para. 90.

easy reach, oblivious to the fact that the history of Victims' rights – and of international justice as a whole – is punctuated by hard-fought victories against all odds and in challenging geo-political, security and humanitarian contexts. It also ignores the complementarity framework established by the Statute, which indicates that the Court's intervention is particularly crucial in instances where the relevant state is unwilling to pursue accountability.⁵⁷ Indeed, in the optic of the admissibility assessment of a case, the lack of cooperation by the relevant state would strongly militate *in favour* of the exercise of the Court's jurisdiction.

34. The Chamber's reference to the Court's limited budget and to the desirable allocation of the Prosecutor's resources is similarly unprecedented and introduces a novel element in the assessment of the interests of justice. Indeed, article 53(1)(c) of the Statute refers exhaustively to two fundamental factors to be taken into account when assessing the interests of justice, namely the gravity of the crimes and the interests of Victims. Practical and logistical issues fall thus outside the scope of said assessment, since the concept of the interests of justice is a purely victim-oriented factor.⁵⁸

35. Instead, the Chamber's approach makes the opening of an investigation conditional on the Prosecution's demonstration that the prospects of success in a given situation are higher than in other situations before the Court,⁵⁹ placing victims of relevant crimes in competition with one another, contrary to the fundamental values enshrined in the Statute.⁶⁰

36. In their representations before the Chamber, Victims articulated a number of different interests underlying their overwhelming support for the opening of an

⁵⁷ See article 17 of the Statute.

⁵⁸ In this sense, see ZAKERHOSSEIN (M. H.), [Conceptual Errors in the Judicial Decision on the Situation of Afghanistan](#), 22 April 2019.

⁵⁹ See the Impugned Decision, *supra* note 1, para. 95.

⁶⁰ The Preamble to the Statute provides, for instance, that “all peoples are united by common bonds, their cultures pieced together in a shared heritage” and that the Court was established “for the sake of present and future generations [...] with jurisdiction over the most serious crimes of concern to the international community as a whole”.

investigation in the Afghanistan situation.⁶¹ These included, ending the climate of impunity prevailing in relation to the relevant crimes, deterring further crimes, allowing Victims' voices to be heard and uncovering the truth.⁶²

37. Evidently, the interests of Victims in the present proceedings are much broader in scope and nature than mere participation at trial. Such interests can be pursued, and indeed fulfilled, by the opening of investigations, even where these occur in complex and volatile environments. The Chamber's finding that victims can only play a "*meaningful role*" in the context of their participation in specific cases brought before the Court is also antithetical to the clear wording of the Statute which mandates that the interests of victims be taken into account at all appropriate stages of the proceedings,⁶³ including – and crucially – in the context of a request for authorisation of an investigation under article 15(3),⁶⁴ well before any 'specific cases' are envisaged.

38. More broadly, the Principal Counsel submits that the interests of Victims represent the core determining factor of interests of justice and that only in the most exceptional circumstances will other factors relevant to the 'interests of justice' assessment outweigh the wishes and priorities expressed by victims of a given situation. The Pre-Trial Chamber's decision to deny authorisation based on its assessment of the anticipated challenges that may be encountered in a potential investigation unfairly disregards the interests and views expressed by the overwhelming majority of Victims before the Chamber.⁶⁵ Therefore, the Second Issue,

⁶¹ See the successive Registry transmissions of Victims' representations and successive reports on said representations: [No. ICC-02/17-10](#) and [No. ICC-02/17-11-Red](#); [No. ICC-02/17-15](#) and [No. ICC-02/17-16-Red](#); [No. ICC-02/17-17](#) and [No. ICC-02/17-18](#); [No. ICC-02/17-19](#) and [No. ICC-02/17-20-Red](#); [No. ICC-02/17-21](#) and [No. ICC-02/17-22-Red](#); [No. ICC-02/17-24](#) and [No. ICC-02/17-25](#); and [No. ICC-02/17-27](#) and [No. ICC-02/17-28](#).

⁶² See, in particular, the Public Redacted Annex I to the "Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-29-AnxI-Red](#), 20 February 2018, para. 47.

⁶³ See article 68(3) of the Statute.

⁶⁴ Article 15(3) provides that "*Victims may make representations to the Pre-Trial Chamber*". See also article 53(1)(c), providing that, in deciding whether to initiate an investigation, the Prosecutor shall take into account the interests of victims.

⁶⁵ See the Impugned Decision, *supra* note 1, para. 27.

and specifically the Pre-Trial Chamber's unduly narrow reading of the interests of Victims and its readiness to regard these as outweighed by non-legal factors, fundamentally affect the fairness of the proceedings.

39. As for the Third Issue, the majority found that the scope of the Chamber's scrutiny and, consequently, of any authorisation must be confined to the incidents or category of incidents referred to by the Prosecutor in her request to investigate.⁶⁶ This narrow understanding of the scope of a potential authorisation is at variance with the Court's well-established jurisprudence.⁶⁷ It significantly restricts the Prosecutor's mandate in the context of an investigation and precludes the fulfilment of her duties under article 54 of the Statute. Article 54(1)(a) provides, in particular, that: "*The Prosecutor shall [...] [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute*".⁶⁸

40. As noted by the Pre-Trial Chamber in the Georgia situation, "[i]t is precisely the purpose of the investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted".⁶⁹ The unconstrained and independent exercise of the Prosecutor's investigative powers in the context of a situation, and her ability to follow the evidence wherever it may lead, are instrumental to the realisation of the victims' internationally recognised rights to truth, justice and reparation.⁷⁰ In this sense, Victims have a substantial interest in advocating for the broadest approach possible, which would allow for an investigation that duly encompasses the full extent of their victimisation and the impact of the crimes on individuals and affected communities. As specifically recognised by the Pre-Trial Chamber in the Democratic

⁶⁶ *Idem*, para. 39. See also the Concurring Opinion, *supra* note 3, paras. 4-15.

⁶⁷ See *e.g.* the Request, *supra* note 2, para. 27.

⁶⁸ See article 54(1)(a) of the Statute.

⁶⁹ See the Georgia Decision, *supra* note 45, para. 63.

⁷⁰ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 53, paras. 32-36. See also United Nations General Assembly Resolution 60/147 (2005), 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, [UN Doc A/RES/60/147](#), Principle 1 (establishing a duty to "[i]nvestigate violations effectively, promptly, thoroughly and impartially").

Republic of Congo situation: *“within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54”*.⁷¹

41. Accordingly, the Third Issue fundamentally affects the fairness of the proceedings to the extent it unduly restricts the Prosecutor’s exercise of her powers under article 54 of the Statute. More fundamentally, it impacts on the Court’s core mandate of fighting impunity for the most serious crimes by failing to provide appropriate means to investigate the full responsibility of alleged perpetrators and the full extent of the prejudice suffered by victims.

b) *Expeditiousness*

42. Each of the three Issues affects not only the fair conduct of the proceedings, but also their expeditiousness. The requirement of expeditiousness is *“[c]losely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*⁷² and is fulfilled where an issue could *“either shorten or lengthen the duration of the proceedings”*.⁷³

43. Said test set out in article 82(1)(d) of the Statute was developed primarily with interlocutory appeals in mind.⁷⁴ It requires the Pre-Trial Chamber to carry out a balancing exercise between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions to the first instance trial caused by recourse to interlocutory appeals.⁷⁵

⁷¹ See the “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, *supra* note 11, para. 39.

⁷² *Idem*, para. 18.

⁷³ See the Comoros Leave Decision, *supra* note 25, para. 41.

⁷⁴ For instance, in the Consolidated Draft prepared by the Preparatory Committee, the provision which would ultimately become Article 82 was titled “Appeal Against Interlocutory Decisions”. See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, [UN Doc. A/CONF.183/2/Add.1](#), 14 April 1998, “Article 81”, pp. 126-127.

⁷⁵ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial

44. However, as noted in the Request,⁷⁶ the Impugned Decision is much more similar to a ‘final decision’ than an interlocutory one. No balancing exercise is required in the circumstances since there are no pending proceedings before the chamber *a quo* that could be delayed by the proposed appeal.

45. On the contrary, granting the Request could only favour the expeditiousness of the proceedings. The only alternative to appeal proceedings that is open to the Prosecution in the present circumstances is the filing of a renewed application pursuant to article 15(5) of the Statute “*based on new facts or evidence*”.⁷⁷ This avenue is bound to entail a comparatively longer delay than the immediate resolution of the Issues by the Appeals Chamber.⁷⁸

46. Further, the filing of a renewed application under article 15(5) would require the performance of resource-intensive activities – including further engagement with the victims by the competent organs of the Court. Given the uncertainty surrounding each of the three Issues,⁷⁹ these efforts may ultimately be nullified by a subsequent decision by the Pre-Trial Chamber or Appeals Chamber clarifying the relevant principles. This is precisely the kind of waste of resources that the drafters of article 82(1)(d) of the Statute intended to avoid. As noted by the Chamber, in its earlier composition, “*a significant impact on the expeditiousness of the proceedings [...] is commonly understood [...] as existing whenever failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage*”.⁸⁰

Chamber II), [No. ICC-02/04-01/15-12](#), 19 August 2005, para. 19. Also see the “Partly Dissenting Opinion of Judge Eboe-Osuji”, [No. ICC-01/09-01/11-1313-Anx-Corr](#), 23 May 2014, para. 4.

⁷⁶ See the Request, *supra* note 2, para. 37.

⁷⁷ See the Concurring Opinion, *supra* note 3, para. 50.

⁷⁸ Note that the term ‘proceedings’ in article 82(1)(d) “*is not confined to the proceedings in hand, but extends to proceedings prior and subsequent thereto*”. See the “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-915](#), 24 May 2007, para. 12.

⁷⁹ See the Comoros Leave Decision, *supra* note 25, para. 48.

⁸⁰ See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecution’s Application for Warrants of Arrest under Article 58”, *supra* note 25, para. 36.

47. Accordingly, each of the three Issues significantly affects the expeditious conduct of the proceedings.

c) Outcome of the Trial

48. Further, or in the alternative, as averred in the Request,⁸¹ each of the three Issues affects the outcome of the trial, and indeed the very possibility that trials in the Afghanistan situation may take place at all. In this regard, the Appeals Chamber clarified that to determine whether an issue would significantly affect the outcome of the trial pursuant to article 81(1)(d), a Chamber “*must ponder the possible implications of a given issue being wrongly decided on the outcome of the case*”.⁸²

49. Each of the three Issues, if decided differently, would likely have led to a decision authorising the opening of an investigation in the Afghanistan situation,⁸³ and ultimately to the commencement of potential trials. Further, the Impugned Decision’s implications go well beyond the confines of the Afghanistan situation itself. As stressed by the Prosecution,⁸⁴ the proposed issues might indeed affect the outcome of *any* trial before the Court. The Chamber itself recognised that the assessment of the ‘interests of justice’ requirement has significant implications “*for paramount objectives of the Statute and hence the overall credibility of the Court*”.⁸⁵ Thus, were the Appeals Chamber to find that the issues have been wrongly decided, this could fundamentally affect the outcome of these proceedings and similar future proceedings before the Court.

3. The Appeals Chamber’s immediate resolution of the Issues may materially advance the proceedings in the interest of the victims

50. The Principal Counsel submits that certifying the Issues for appeal may – and indeed will – materially advance the proceedings.⁸⁶ The Appeals Chamber

⁸¹ See the Request, *supra* note 2, para. 36.

⁸² See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 28, para. 13.

⁸³ See *supra* paras. 14-16.

⁸⁴ See the Request, *supra* note 2, para. 36.

⁸⁵ See the Impugned Decision, *supra* note 1, para. 88.

⁸⁶ See the Request, *supra* note 2, paras. 37-38.

interpreted this requirement as a reference to “*mov[ing] forward*” by “*ensuring that the proceedings follow the right course*”.⁸⁷ It thus involves an assessment by the relevant Chamber as to whether the Appeals Chamber’s authoritative decision will rid “[t]he judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.⁸⁸

51. In light of the arguments presented *supra* in relation to the likely impact of the Issues on the fairness⁸⁹ and the outcome of the trial,⁹⁰ the Principal Counsel submits that the immediate resolution of said Issues would materially advance the proceedings in so far it would clarify whether, and on what basis, pre-trial chambers are required to review the Prosecution’s ‘interests of justice’ assessment in the context of proceedings under article 15(4) of the Statute, as well as the scope of any authorisation to commence an investigation based on that provision.

52. An immediate resolution of the Issues is particularly appropriate in the present instance given the nature of the Impugned Decision. While following a refusal of leave for interlocutory appeals parties can usually raise the relevant issues before the Appeal Chambers at a later stage, as part of the final appeal against the verdict,⁹¹ there would be no such opportunity in the present proceedings. Granting the Request will thus be particularly important to give the Appeals Chambers an opportunity to address issues of fundamental significance to the Court as a whole.

53. Finally, the Principal Counsel recalls that the Office has been contacted by victims and organisations representing victims who unanimously deplore that the Impugned Decision is only reinforcing the culture of impunity that prevails in

⁸⁷ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 28, para. 15.

⁸⁸ *Idem*.

⁸⁹ See *supra* paras. 20-41.

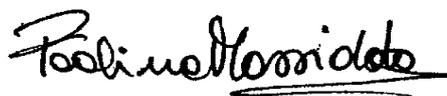
⁹⁰ See *supra* paras. 48-49.

⁹¹ See the “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” (Appeals Chamber), [No. ICC-02/04-01/05-408](#), 16 September 2009, paras. 46-47. See also the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), [No. ICC-01/04-02/12-271-Corr](#), 7 April 2015, paras. 3 and 247.

Afghanistan. Victims deeply resent that their quest for justice is being thwarted by the only jurisdiction they trusted would provide them with a remedy.⁹² They clearly have difficulties in understanding whose interests exactly is the Court aiming to serve, since its understanding of the ‘interests of justice’ is so disconnected from the interests of victims.⁹³ Finally, Victims strongly believe that *“the only path towards progress for Afghanistan requires confronting its culture of impunity, no matter how difficult that path may appear”* and that *“[t]he Court’s decision to shy away from the devastating and pervasive crimes committed in Afghanistan is a glaring stain on its record, and will only embolden those in a position of power to further shun institutions of international criminal justice”*.⁹⁴

54. The Principal Counsel also underlines the concerns of the victims and affected communities who have expressed dissatisfaction with regard to the short time provided for making representations to the Chamber. Indeed, the prevailing security situation in the field and the difficulty in reaching out specific categories of victims – in particular sexual and gender-based crimes victims – has impacted on the possibility of the victims’ voices being heard; therefore jeopardising their ability to genuinely contribute to the discussion of the matter at stake.

55. Therefore, the Principal Counsel submits that the identified Issues should be certified and entertained by the Appeals Chamber.



Paolina Massidda
Principal Counsel

Dated this 12th day of July 2019

At The Hague, The Netherlands

⁹² See the OPCV Request, *supra* note 9, para. 32.

⁹³ See the Women for Justice’s Press release, “International Criminal Court’s Decision to Reject the Prosecutor’s Request to Open Investigation”, May 2019, annexed to the present submissions.

⁹⁴ *Idem*.