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**International
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Court**

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Date: **15 December 2022**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Marc Perrin de Brichambaut
Judge Gocha Lordkipanidze

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document

**Submissions on behalf of victims
pursuant to the “Order on the conduct of the appeal proceedings”
(No. ICC-02/17-200)**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) underlines the importance of allowing victims to present their views on the current issues on appeal. Indeed, the scope of the authorised investigation has a clear impact on the general interests of the victims and on their internationally recognised rights to truth, justice and eventually reparations. The grave and serious crimes committed in the Islamic Republic of Afghanistan (“Afghanistan”) warrants a full and proper investigation, and the corresponding recognition of the victimisation suffered by the victims. Accordingly, a victims’ perspective before the Appeals Chamber on the issues brought by the Prosecutor in his appeal is instrumental in protecting and duly taking into account their rights and interests, and for these to be reflected in future similar proceedings related to the proper scope of an investigation in line with the spirit and letter of the Rome Statute (the “Statute”).

2. The Principal Counsel agrees with the Prosecution’s position according to which the current appeal relates to matters of jurisdiction and admissibility, directly appealable before the Appeals Chamber in accordance with article 82(1)(a) of the Statute.

3. The Principal Counsel also supports the arguments developed by the Prosecution in its Appeal Brief¹ against Pre-Trial Chamber II’s decision authorising the resumption of the investigation into the Situation in Afghanistan (respectively, the “Pre-Trial Chamber” and the “Impugned Decision”).²

¹ See the “Prosecution appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)”, [No. ICC-02/17-198](#), 22 November 2022 (the “Appeal Brief”).

² See the “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (Pre-Trial Chamber II), [No. ICC-02/17-196](#), 31 October 2022 (the “Impugned Decision”).

4. In particular, she submits that the Pre-Trial Chamber erred in law by limiting – in paragraph 59 of the Impugned Decision – the scope of the resumed investigation in the Situation in Afghanistan disregarding the previous Appeals Chamber ruling which has already authoritatively issued a decision in the matter. The lack of clarity on the scope of the authorised investigation is very likely to cause victims stress, anxiety and concern – especially because the wording of paragraph 59 of the Impugned Decision suggests that the investigation may be limited in scope and time, therefore also limiting the nature and number of crimes eventually investigated.

5. The Judgment rendered by the Appeals Chamber in the matter is consistent with the principles constantly affirmed in the Court’s jurisprudence in defining the scope of its jurisdiction in other situations. The Pre-Trial Chamber’s erroneous interpretation of the scope of the authorised investigation impacts on the legitimate interest of victims in broad-scope authorisations covering the full extent of their victimisation; conflicts with the Prosecutor’s duty to investigate objectively, in order to establish the truth, pursuant to article 54(1) of the Statute; and have a detrimental effect on an efficient and effective investigation.

6. The Principal Counsel also agrees with the Prosecution that the Pre-Trial Chamber erred in fact by referring in paragraph 59 of the Impugned Decision to the “Islamic State-Khorasan Province” as an example of a “new party to the conflict” since said group was explicitly referred to at different junctures in the Prosecutor’s Request under article 15(3) of the Statute (the “Prosecutor’s Request”).

II. PROCEDURAL BACKGROUND

7. On 5 March 2020, the Appeals Chamber issued its “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan” (the “Appeals Chamber Judgment”), authorising *inter alia*, the Prosecutor to commence an investigation “in relation to alleged crimes

*committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002”.*³

8. On 15 April 2020, the Prosecutor notified the Pre-Trial Chamber that the Government of the Islamic Republic of Afghanistan requested a deferral of the investigation, pursuant to article 18(2) of the Statute.⁴

9. On 27 September 2021, the Prosecution requested authorisation to resume its investigation under article 18(2) of the Statute (the “Prosecutor’s Application”).⁵

10. On 31 October 2022, the Pre-Trial Chamber issued its “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (the “Impugned Decision”).⁶

11. On 7 November 2022, the Prosecutor submitted his Notice of Appeal of the Impugned Decision.⁷

12. On 22 November 2022, the Prosecution filed its Appeal Brief.⁸

³ See the “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan” (Appeals Chamber), [No. ICC-02/17-138](#), 5 March 2020 (the “Appeals Chamber Judgment”), p. 3 and para. 79. See also, 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 (the “Prosecutor’s Request”).

⁴ See “Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute”, [No. ICC-02/17-139-Anx1](#), 15 April 2020.

⁵ See the “Request to authorise resumption of investigation under article 18(2) of the Statute”, [No. ICC-02/17-161](#), 27 September 2021 (the “Prosecutor’s Application”).

⁶ See the Impugned Decision, *supra* note 2.

⁷ See the “Notice of Appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)”, [No. ICC-02/17-197](#), 7 November 2022 (the “Notice of Appeal”).

⁸ See the Appeal Brief, *supra* note 1.

13. On 23 November 2022, the Appeals Chamber issued its “Order on the conduct of the appeal proceedings”, inviting, *inter alia*, victims to submit their responses to the Appeal Brief by 15 December 2022.⁹

III. SUBMISSIONS

1. Nature of the appeal

14. Preliminarily, the Principal Counsel indicates that she shares the Prosecution’s position according to which the current appeal relates to a matter of jurisdiction and admissibility directly appealable before the Appeals Chamber in accordance with article 82(1)(a) of the Statute. Indeed, the Impugned Decision is a preliminary ruling on admissibility under article 18(2) of the Statute. As noted by the Prosecution, the Impugned Decision is a ruling on jurisdiction to the extent that its paragraph 59 appears to modify the jurisdictional parameters of the Situation in Afghanistan as previously confirmed by the Appeals Chamber Judgment.¹⁰

2. Observations on behalf of victims

15. The Principal Counsel submits that the issues on appeal trigger questions of general importance for the victims of crimes within the jurisdiction of the Court. Indeed, the questions of whether (i) “[t]he Pre-Trial Chamber erred in law in paragraph 59 of the [Impugned] Decision by limiting the scope of the Court’s jurisdiction to crimes pre-dating the article 15(4) decision”¹¹; and whether (ii) “[t]he Pre-Trial Chamber erred in fact in paragraph 59, and in particular footnote 109, of the [Impugned] Decision by misreading the

⁹ See the “Order on the conduct of the appeal proceedings” (Appeals Chamber), [No. ICC-02/17-200](#), 23 November 2022 (the “Appeals Chamber Order”). See also, the “Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’” (Appeals Chamber), [No. ICC-02/17-199](#), 23 November 2022.

¹⁰ See the Notice of Appeal, *supra* note 7, para. 3.

¹¹ *Idem*, p. 7. See also the Appeal Brief, *supra* note 1, p. 6.

Prosecution's article 15(3) application",¹² are both at the core of the victims' interests to truth and justice.

a) Ground One: The Pre-Trial Chamber erred in law by limiting the scope of the Court's jurisdiction to crimes pre-dating the Prosecutor's Request to open the investigation or the Appeals Chamber Judgment authorising the investigation

1. *The Appeals Chamber has already authoritatively issued a decision in the matter*

16. The Pre-Trial Chamber erred in law by limiting — in paragraph 59 of the Impugned Decision — the scope of the resumed investigation in the Situation in Afghanistan to *"only the crimes [and parties] falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it"*.¹³ This pronouncement disregards the Appeals Chamber's prior articulation on the scope of the Court's jurisdiction and the Prosecution's investigation in the Situation, and should be corrected.

17. Relevantly, while the Pre-Trial Chamber cited the Appeals Chamber Judgment in its ruling,¹⁴ it failed to mention relevant parts and disregarded certain operative paragraphs. The Appeals Chamber had *already* authorised the Prosecution's investigation in the Situation in Afghanistan and defined the scope of the Court's jurisdiction with reference to the parameters set out in the Prosecutor's Request,¹⁵ namely *"in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002"*.¹⁶ The effect of such a pronouncement was to expressly dismiss the Pre-Trial Chamber's understanding that any investigation

¹² *Idem*, p. 9. See also the Appeal Brief, *supra* note 1, p. 20.

¹³ See the Impugned Decision, *supra* note 6, para. 59.

¹⁴ *Idem*, para. 58 (footnote 107) and para. 59 (footnote 108).

¹⁵ See the Prosecutor's Request, *supra* note 3, para. 1.

¹⁶ See the Appeals Chamber Judgment, *supra* note 3, para. 79.

would be limited to the incidents explicitly mentioned in the Prosecutor's Request, and those closely linked to said incidents.¹⁷

18. Moreover, as the Prosecution validly pointed out, the Appeals Chamber has already made a determination on the exact same issue in the exact same proceedings involving the very same actors — that is, the scope of the Court's jurisdiction in the Situation in Afghanistan. This determination is *res judicata* and the Pre-Trial Chamber is bound by it.¹⁸ Consequently, the Pre-Trial Chamber's erroneous view, which seeks to impermissibly narrow the scope of the investigation in disregard of the Appeals Chamber's determination needs to be addressed, as an incorrect determination has the potential to significantly impact on the interests of victims and their internationally recognised rights to truth, justice and eventually reparations.¹⁹

19. The jurisprudence of this Court has already established that victims have a right to know the truth, have access to justice, and to eventually request reparations.²⁰ It has already been recognised that within the Court's legal framework, the rights of victims to both participate in the proceedings and to claim reparations are *entirely dependent* on the Prosecutor initiating an investigation or requesting an authorisation to open an investigation.²¹ Moreover, the Court has an *obligation* to respect the internationally recognised human rights of victims in relation to the conduct and results of a

¹⁷ See the Appeal Brief, *supra* note 1, para. 12.

¹⁸ *Idem*, paras. 13, 24 and 27.

¹⁹ See the Inter-American Court of Human Right's jurisprudence: *La Cantuta v. Perú*, [Judgment \(Merits, Reparations and Costs\)](#), 29 November 2006, para. 222; *Vargas-Areco v. Paraguay*, [Judgment \(Merits, Reparations and Costs\)](#), 26 September 2006, para. 153; *Almonacid-Arellano et al v. Chile*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 26 September 2006, para. 148; *The Moiwana Community v. Suriname*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 15 June 2005, para. 204; and *Velásquez-Rodríguez v. Honduras*, [Judgment \(Merits\)](#), 29 July 1988, paras. 162-166 and 174. See also the European Court of Human Right's jurisprudence: *Hugh Jordan v. UK*, [Judgment](#), 4 May 2001, paras. 157 and 160; *Selmouni v. France*, [Judgment](#), 28 July 1999, para. 117; *Kurt v. Turkey*, [Judgment](#), 25 May 1998, para. 140; *Selçuk and Asker v. Turkey*, [Judgment](#), 24 April 1998, para. 96; *Aydın v. Turkey*, [Judgment](#), 25 September 1997, para. 103; and *Aksoy v. Turkey*, [Judgment](#), 18 December 1996, para. 98.

²⁰ See the "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'" (Pre-Trial Chamber I), [No. ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, (the "Decision on Article 19(3)"), para. 88.

²¹ *Ibid.*

preliminary examination, the phase before an investigation, “especially the rights of victims to know the truth, to have access to justice and to request reparations”.²² Such obligation also includes respecting the internationally recognised human rights of victims during criminal proceedings,²³ where the “outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them”²⁴ — as illustrated, for example, by the practice of the European Court of Human Rights²⁵ and of the Inter-American Court of Human Rights.²⁶ Said rights are inextricably connected to the ability of the Prosecutor to initiate an investigation, and is therefore imperative that victims can present their views on the matter. This is all the more critical because victims cannot trigger the commencement of an investigation before the Court.²⁷

20. Since the victims’ rights to both participate in the proceedings and to claim reparations within the legal framework of the Court are entirely dependent on the Prosecutor starting an investigation, or being authorised to do so by a Pre-Trial Chamber,²⁸ the proper scope of an authorised investigation clearly has an impact on the fundamental rights of victims to seek justice. As recognised by Judge Mindua:

“[t]he investigation is a very important phase whereby the Prosecutor aims to establish truth and justice through the selection of charges and perpetrators for trial. Victims’ participation is, here, a procedural right attaching to fundamental rights, such as the right to life. But also, victims have a right to substantive justice, which encompasses the outcomes of judicial processes. For victims, substantive justice involves redressing the harm they have suffered and the causes of victimisation, and it corresponds with an effective remedy in

²² *Ibid.* See also, the “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya” (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010, para. 5; and the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 13 May 2008, (the “Decision on the Rights of Victims”), paras. 31-44.

²³ See Article 21(3) of the Statute which states that the “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]”

²⁴ See the Decision on the Rights of Victims, *supra* note 22, para. 41.

²⁵ See the European Court of Human Rights’ jurisprudence, *supra* note 19.

²⁶ See the Inter-American Court of Human Rights’ jurisprudence, *supra* note 19.

²⁷ See the “Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua” (Pre-Trial Chamber II), [No. ICC-02/17-62-Anx](#), 17 September 2019 (the “Partially Dissenting Opinion of Judge Mindua”), para. 32.

²⁸ See the Decision on Article 19(3), *supra* note 20, para. 88.

*human rights law, which has developed three rights for victims of gross violations: truth, justice, and reparations”.*²⁹

21. Accordingly, the proper interpretation of the scope of the authorised investigation is a matter that substantially impacts on the fundamental rights of, and the overall fairness of the Court’s proceedings for victims. Victims of the crimes allegedly committed in the Situation in Afghanistan, along with their families, have a personal interest in obtaining justice, the truth about the events they suffered from, and the right to a remedy.³⁰ Indeed, any instruction from the Pre-Trial Chamber that may result in an *“incomplete description of the relevant criminality in the situation”*,³¹ is a matter that directly impacts on their interests to see as well the extent of their victimisation recognised.

22. As pointed out by the Prosecution, the Pre-Trial Chamber’s finding regarding paragraph 59 of the Impugned Decision may *“cause confusion among States, affected communities, and most importantly victims about the scope of the Court’s investigation and the prospects for accountability”*.³² Similar to the importance the Prosecution puts on the value of judicial certainty for decisions pertaining to the Court³³, the victims whose rights and interests are directly at stake, need certainty and consistency regarding the measures the Court may legally take in the exercise of its functions. This potential confusion regarding the scope of the investigation, which is the initial step to upholding accountability and preventing impunity through prospective criminal proceedings, has the potential to impact on the interests of victims and their internationally recognised rights.³⁴ The lack of clarity on the scope of the authorised

²⁹ See the Partially Dissenting Opinion of Judge Mindua, *supra* note 27, para. 37.

³⁰ *Idem*, para. 47. See also, for example, the “Decision on Article 19(3)”, *supra* note 20, para. 88.

³¹ See the Appeal Brief, *supra* note 1, para. 29 and footnote 72, which refers to the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, [No. ICC-01/19-27](#), 14 November 2019, para. 130.

³² See the Notice of Appeal, *supra* note 7, para. 12 (emphasis added).

³³ See the Appeal Brief, *supra* note 1, paras. 26-27.

³⁴ 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

investigation is very likely to cause victims stress, anxiety and concern – especially because the wording of paragraph 59 suggests that the investigation may be limited in scope and time, therefore also limiting the nature and number of crimes eventually investigated. This has an impact on the legitimate expectations of the victims in terms of truth, justice and accountability.³⁵

2. *The Appeals Chamber Judgment is consistent with the principles constantly affirmed in the Court's jurisprudence*

23. The Principal Counsel further submits that the Appeals Chamber Judgment is in line with the approach of other Chambers in defining the scope of the Court's jurisdiction in other situations. In contrast, the Pre-Trial Chamber's narrow understanding of the scope of the authorised investigation in the Situation in Afghanistan does not reflect the principles consistently affirmed in rulings related to article 15(4) of the Statute. In this regard, recent decisions addressing the scope of the Court's jurisdiction in other situations define the temporal, territorial and material parameters for an investigation which are appropriate in light of the prevailing facts of each situation, and have emphasised the importance of allowing the Prosecution to fully investigate in accordance with its truth seeking function, as long as said

'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: "[V]ictims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms". 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, para. 31: "[T]he latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body". See also, para. 34 acknowledging that "when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings"; 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).

³⁵ See the Appeal Brief, *supra* note 1, para. 19.

investigation is *sufficiently linked* to the parameters that have been set, or are part of the context of the ongoing situation.

24. In supporting the analysis of the relevant case-law presented by the Prosecution in its Appeal Brief³⁶ on the importance of not unnecessarily narrowing the scope of authorised investigations, the Principal Counsel only elaborates on few aspects of the relevant practice, which further highlights *how* the general interests of victims are affected by the Pre-Trial Chamber's unilateral departure from prior and consistent jurisprudence.

25. In relation to the temporal scope of the investigation, Pre-Trial Chamber III, in authorising the investigation in Côte d'Ivoire, included "*continuing crimes*" that may be committed "*in the future [...] insofar as they are part of the context of the ongoing situation*".³⁷ In particular, the Pre-Trial Chamber found that it was necessary, due to the "*volatile environment*" in Côte d'Ivoire, to ensure the authorisation covered continuing crimes, extending past the date of the Prosecutor's request to open the investigation, provided the contextual elements of said crimes were the same for the authorisation granted.³⁸ Such an approach is applicable to the Situation in Afghanistan which is also characterised by an extremely "*volatile environment*".

26. On the unnecessary limitation of the Prosecutor's investigation, Pre-Trial Chamber I expressly stated that "*for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor's investigation to the crimes which are mentioned by the Chamber in its decision authorising investigation*".³⁹ Relevantly, said approach was

³⁶ *Idem*, para. 29.

³⁷ See 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 (the "*Côte d'Ivoire Decision*"), paras. 179 and 212.

³⁸ *Idem*, para. 179, stating that for the contextual elements to be the same, it must "*at least in a broad sense, involve the same attacks (crimes against humanity) or the same conflict (war crimes)*".

³⁹ See 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. 63.

deemed “*illogical*” because the information available to the Prosecutor at the time of the preliminary examination and to the Chamber at the time of its decision under article 15(4) of the Statute is “*inherently [...] limited*”.⁴⁰ It is indeed the purpose of the investigation to discover proper evidence to enable a determination on which crimes, if any, may be prosecuted.⁴¹ Accordingly, limiting the Prosecutor’s investigation would “*conflict with [the] duty to investigate objectively, in order to establish the truth*”, pursuant to article 54(1) of the Statute.⁴²

27. The Principal Counsel posits that this approach is correct and that victims can only realise their rights to truth and justice through the unconstrained and independent exercise of the Prosecutor’s investigative powers in the context of a situation.⁴³ As previously argued before the Appeals Chamber, victims have a keen interest in broad-scope authorisations which allow an investigation to properly cover the full extent of their victimisation, and the impact of the crimes on individuals and affected communities.⁴⁴

28. In this regard, Pre-Trial Chamber I underlined that “*the Prosecutor may investigate any crimes within the jurisdiction of the Court within the temporal and*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 13 May 2008, paras. 32-36. See also, the “Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law”, [UN Doc. A/RES/60/147](#), 16 December 2005, in which Principle II establishes a duty to “[i]nvestigate violations effectively, promptly, thoroughly and impartially” as part of the obligations of States to respect and implement international human rights law and international humanitarian law.

⁴⁴ See the “OPCV Consolidated Submissions pursuant to the ‘Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters’ (No. ICC-02/17-72-Corr)”, [No. ICC-02/17-93](#), 22 October 2019, para. 67. See also, the Appeals Chamber Judgment, *supra* note 3, para. 60 in which the Appeals Chamber underscored that the Prosecutor’s duty pursuant to article 54(1) of the Statute “*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, and, in doing so, investigate incriminating and exonerating circumstances equally*” and “*to [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court*”. See also, the “Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15(3) of the Statute” (Pre-Trial Chamber I), [No. ICC-01/21-12](#), 15 September 2021, para. 117.

*territorial/personal parameters of the situation as long as they are 'sufficiently linked' to the situation that triggered the jurisdiction of the Court".*⁴⁵ In fact, confining the Prosecutor's investigation to the incidents identified in the request to open an investigation "*would have a negative impact on the efficiency of proceedings and the effectiveness of the investigation*",⁴⁶ since it would require the Prosecutor to request authorisation every time new incidents were to be added to said investigation. The Appeals Chamber in the Situation in Afghanistan already stated that "[a]t this early stage" it is not possible for the Prosecutor to identify exhaustively or with great specificity each incident, crime or perpetrator that could be subject of the investigation.⁴⁷ This includes, in particular, the inability to identify crimes which may occur *after* the Prosecutor's request under article 15(3).⁴⁸ Therefore, if the Prosecutor is unable to carry out an investigation into the situation *as a whole*, his or her ability to fulfil the truth-seeking function pursuant to article 54(1) of the Statute will be impermissibly jeopardised.⁴⁹ In fact, the Appeals Chamber expressly stated that "*restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function*".⁵⁰

29. Therefore, the Principal Counsel agrees with the Prosecution that it is not logical to require that crimes, which *already* fall within the parameters of a previously

⁴⁵ See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar" (Pre-Trial Chamber III), [No. ICC-01/19-27](#), 14 November 2019 (the "*Bangladesh/Myanmar* Decision"), para. 129, citing the "Decision on the 'Defence Challenge to the Jurisdiction of the Court'" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-451](#), 26 October 2011, para. 16. See also, paras. 130-131, on the fact that a narrow interpretation of the temporal, territorial and personal parameters of a situation would be a detrimental approach.

⁴⁶ See the *Bangladesh/Myanmar* Decision, *supra* note 45, para. 130.

⁴⁷ See the Appeals Chamber Judgment, *supra* note 3, para. 59.

⁴⁸ *Ibid.*

⁴⁹ *Idem*, para. 60.

⁵⁰ *Idem*, para. 61. See also, the "Corrigendum of 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](#), 31 March 2010, para. 27 recognising that, due to the Prosecutor's limited powers at the early stage of preliminary examinations, the information available to him or her is not expected to be "*comprehensive*" or "*conclusive*" compared to the evidence gathered during the investigation.

authorised investigation or are sufficiently linked to the situation, be subject to a further request for authorisation as suggested by the Pre-Trial Chamber.⁵¹ Said approach will create a duplicative process impeding on prosecutorial independence and directly impacts on the general interests of victims by delaying the investigation unnecessarily. Additionally, the Appeals Chamber already observed that the Pre-Trial Chamber's alternative proposal that the Prosecutor may investigate incidents not authorised in the original request to open the investigation or closely related to those incidents if they are the subject of a new request for authorisation under article 15, is "*unworkable in practice*" — especially in the context of an inquiry into large scale crimes.⁵² Not only would it be difficult for the Prosecution to determine with accuracy, in the middle of an unfolding investigation, which incidents are "*closely linked*" to those authorised — but from a procedural perspective — this could necessitate the Prosecutor to submit multiple and even unnecessary requests for authorisation as new facts are discovered.⁵³

30. Such "*cumbersome and unwieldy*" procedures are not required by the Statute⁵⁴ and are likely to have a significant detrimental effect on an efficient and effective investigation⁵⁵. Said approach would also compel the Prosecutor to comprehensively and succinctly identify incidents, crimes and possible perpetrators at the time of the preliminary examination — which is not only an impossible task — but it also diminishes the victims' legitimate expectations to uncover the truth about the events they suffered from and will impact on efforts to close the impunity gap.⁵⁶

⁵¹ See the Appeal Brief, *supra* note 1, para. 20 referring to 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 II), [No. ICC-02/17-33](#), 12 April 2019, para. 42.

⁵² See the Appeals Chamber Judgment, *supra* note 3, para. 63.

⁵³ See the Appeal Brief, *supra* note 1, para. 22.

⁵⁴ See the Appeals Chamber Judgment, *supra* note 3, para. 63.

⁵⁵ *Ibid.* See also, for example, the *Bangladesh/Myanmar* Decision, *supra* note 45, para. 130 which states that "*limiting the Prosecutor in her investigation to the incidents identified in the Request would have a negative impact on the efficiency of proceedings and the effectiveness of the investigation*".

⁵⁶ See the Appeals Chamber Judgment, *supra* note 3, para. 63.

31. Such potential consequences will inevitably equate to a delayed request for authorisation and the commencement of the investigation itself, which also risks being compounded with an incomplete description of the relevant criminality in the situation⁵⁷— directly and adversely impacting on the rights of victims. It is worth noting in this regard that, with respect to similar principles at a more advanced phase of the proceedings, in the *Said* case, Pre-Trial Chamber II – in the same composition as in the Situation in Afghanistan – stated that the confirmation decision “*addressed only what was necessary and sufficient to decide whether or not to confirm the charges based on the evidence available to the Chamber at that specific point in time*” and that “[s]uch examples therefore ought not to be understood as limitative or restrictive: the indication of examples is not a finding that there can be no further instances beyond those specifically mentioned”.⁵⁸ It is unclear why said principle was not applied *mutatis mutandis* to the situation at stake.

b) Ground Two: The Pre-Trial Chamber erred in fact by misreading the Prosecutor’s Request

32. The Principal Counsel agrees with the Prosecution that the Pre-Trial Chamber also erred in fact by referring in paragraph 59 of the Impugned Decision to the “*Islamic State-Khorasan Province*” as an example of a “*new party to the conflict*”. In this regard, said group was explicitly referred to at different junctures in the Prosecutor’s Request.⁵⁹ Accordingly, it seems that the Pre-Trial Chamber misread the request to resume the investigation and therefore erroneously qualified the “*Islamic State-Khorasan Province*” as a new party to the conflict.

33. For the victims, it is particularly concerning that, by virtue of said error, a potential perpetrator may be excluded from the investigation and prosecution of

⁵⁷ See the *Bangladesh/Myanmar* Decision, *supra* note 45, para. 130.

⁵⁸ See the “Decision on the ‘Prosecution’s application to amend the charges’” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-396](#), 8 July 2022, para. 16 (emphasis added). See also paras. 18 and 20.

⁵⁹ See the Prosecutor’s Request, *supra* note 3, paras. 19 and 63.

crimes falling within the Court's jurisdiction, and therefore not be held accountable. Again, said error results from the judicial oversight of the Pre-Trial Chamber which seeks to impermissibly narrow the scope of an authorised investigation.

34. In this regard, victims and organisations representing victims, both from within and outside of Afghanistan, reiterate that decades of impunity have showed that the interests of the powerful will always supersede their interests and their right to see those responsible held accountable for the crimes they suffered from. Limiting the scope of the authorised investigation is no different to arbitrarily rejecting part of the investigation involving alleged war crimes and crimes against humanity committed in Afghanistan. Victims expect the investigation to be broad in scope to enable a full and proper inquiry in the furtherance of their rights to truth, justice and eventual request for reparations. For them, the Pre-Trial Chamber's restrictive interpretation of the scope of the investigation, despite the Appeal Chamber's prior definitive ruling, only causes confusion, uncertainty, and undermines confidence in the Court. This is particularly concerning in a situation in which hundreds of victims have already made clear, in their representations before the Pre-Trial Chamber, that they strongly believe that an investigation in the Situation in Afghanistan is necessary and could contribute to the deterrence of further violations.⁶⁰

⁶⁰ See for example, "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. 46(f) referring to observations by one of the victims stating that "[a]ttempts in the country to ensure justice have not been successful, so it is better to give ensuring justice by the international mechanism". See also, for example "Annex I-Red to the Final consolidated report on Article 18(2) Victim Representations", [No. ICC-02/17-190-AnxI-Red](#), 25 April 2022 at para. 27 referring to observations by one of the victims stating that "[w]e feel strongly that the investigation should go forward as authorised by the Appeals Chamber and that allegations against all groups should be investigated".

IV. CONCLUSION

35. For the foregoing reasons, the Principal Counsel respectfully requests the Appeals Chamber grant the Prosecution's appeal by reversing the Impugned Decision, and confirm the scope of the Court's jurisdiction in the Situation in Afghanistan as determined by its previous ruling.



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Dated this 15th day of December 2022

At The Hague, The Netherlands