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

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding**
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public with public annexes

***Amicus Curiae* Observations**

Source: Armanshahr/OPEN ASIA, International Federation for Human Rights ("FIDH"), Afghanistan-Transitional Justice Coordination Group ("TJCG"), European Center for Constitutional and Human Rights ("ECCHR"), Human Rights Watch ("HRW"), No Peace Without Justice ("NPWJ"), The Center for Justice & Accountability ("CJA"), REDRESS, Women's Initiatives for Gender Justice.

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

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I. INTRODUCTION

There should be accountability. The ones who killed my family should be punished. I am mad at the people in my village. They are the easiest target. Everyone- the Taliban, the Americans, the government-kills them like sheep, and they don't react at all. They are used to it.[1]

1. Afghanistan has experienced decades of war, marked by successive and relentless periods of conflict since 1978. Over the years, incalculable numbers of people have been caught in the hopeless grind of conflict, resulting in countless war crimes and crimes against humanity against civilians. Afghanistan has become a country in which core human rights values have been replaced by a culture of violence, gross human rights violations and impunity.[2] The combined debilitating factors of a weak domestic judicial system, collapsed state institutions, limited access to justice and a failed provisional peace agreement between the United States of America ("US") and the Taliban mean that for the vast majority of Afghan victims, the International Criminal Court ("ICC" or "Court") remains their last hope for justice. Victims have expressed to the *Amici* that without investigations, trials and prosecution by the ICC 'justice will be an empty slogan' and the raison d'être of the Court will 'disappear' should it fail to act in Afghanistan.[3] Afghans remain expectant that an investigation by the ICC will at the very least have a deterrent effect and help to curtail the incessant cycles of impunity in the country.[4]

II. SUBMISSIONS

Victims have standing to bring an appeal under article 82(1)(a) of the Rome Statute in exceptional circumstances

2. The *Amici* submit that article 15(3) of the Rome Statute reflects the drafters' intention to provide victims with a specific statutory right, granting victims procedural standing in this process for triggering the jurisdiction of the Court. This right is independent of the victims'

[1]Statement by Masih Ur-Rahman Mubarez, whose wife, seven children and four other relatives were killed in an US-airstrike in September 2019 in Wardak Province. See New York Times, print edition, Sept. 18, 2019, Section A, Page 8, 'Survivors Share Views On Stalemate In Peace Talks', available online at: https://www.nytimes.com/2019/09/16/world/asia/afghanistan-war-victims.html

[2]See report by Armanshahr/Open Asia, 'How and why truth and justice have been kept off the agenda: A review of transitional justice in Afghanistan, available at: https://openasia.org/en/g/wp-content/uploads/2016/04/FULL-REPORT-NOV-2016.pdf

[3]See the Public Annex II where the views and concerns of two victims and seven members of Afghan civil society regarding the importance of investigations by the ICC in Afghanistan were collected by FIDH, Armanshahr and the Afghanistan-Transitional Justice Coordination Group (TJCG).

[4]*Ibid*.

participatory rights under article 68(3) of the Statute and grants them direct access, exceptionally, to the Appeals Chamber at this very specific stage of the proceedings.[5]

3. The *Amici* argue that from this specific and exceptional right conferred upon victims by article 15(3) flow all the other rights that victims have under the Rome Statute framework, including the right of victims to participate in proceedings as well as their right to reparations.[6]
4. The importance of granting victims the right to bring an appeal under article 82(1)(a) of the Statute is further underlined by the arguments presented by the Prosecutor and the Victims in these appeal proceedings. While the Prosecutor concentrated her appeal on a limited number of issues,[7] the grounds of appeal submitted by the Legal Representatives for Victims ("LRVs") are much broader in scope,[8] especially regarding the position conferred on victims by article 15(3) of the Statute. It is, therefore, indispensable that their views are included in their entirety at this stage of the proceedings. Any decision to the contrary would be detrimental to the rights of victims, especially if the Prosecutor's Second Ground of Appeal is not granted by the Appeals Chamber.
5. The LRVs raise several other grounds of appeal which are collapsed within the Prosecutor's Second Ground of Appeal. The Prosecutor has incorporated several of the points raised by the LRVs in separate parts in its second ground of appeal, namely the scope of the investigation; the exercise of jurisdiction over torture; state cooperation; the passage of time and the prospects for securing relevant evidence and apprehending any identified suspects. However, the *Amici* submit, that these additional grounds of appeal raised by the LRVs are not secondary issues and should be considered in depth by the Appeals Chamber on their merits.
6. Based on the foregoing, it cannot be reiterated enough that the victims will be left without recourse should the Chamber only grant the Prosecutor's First Ground of Appeal, or decide that the Prosecutor is not allowed to raise before it the ground related to the scope of the investigation for which Pre-Trial Chamber II denied leave to appeal,[9] or other issues which were not presented by the Prosecutor for leave to appeal before Pre-Trial Chamber II, such as the exercise of jurisdiction with regard to the crime of torture.

[5]For a comprehensive review of arguments relating to victims' right to appeal in exceptional circumstances please see Annex: *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/17-5811 June 2019, paras. 72-96.
[6]See Situation in the Democratic Republic of the Congo (ICC-01/04), Decision on applications for Participation in the proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, 17 January 2006, para. 62: "'the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered."
[7]Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019.
[8] ICC-02/17-73-Corr, 02 October 2019; ICC-02/17-75-Corr, 01 October 2019.a
[9] ICC-02/17-62, paras 40-41.

7. The Prosecutor argues that granting victims the right of appeal 'would open the door to a significantly more cumbersome judicial process'[10] and that meaningful participation for victims cannot equate to 'the need for victims to have procedural rights as a "party" to the litigation.'[11] However, the *Amici* would like to impress upon the Appeals Chamber the truly exceptional nature of the present proceedings. As the Prosecution states 'proceedings under article 15(3) and (4) … will be most frequently resolved in favour of investigation.'[12] Therefore, the probability that victims will seek recourse to appeal a decision in the context of article 15(3) and (4) of the Rome Statute in the future is extremely low.
8. The Rome Statute does not provide any definition of the term 'party'. Neither is a definition contained in the Rules of Procedure of Evidence or the Elements of Crimes. According to Judge Mindua '[S]ometimes "party" means either the prosecutor or the defence, and sometimes, it simply means any "participant" who has a personal interest in the judicial process, *like the victims*.'[13]
9. Victims' participatory rights as enshrined in the Rome Statute and the Rules of Procedure and Evidence are nebulous and the manner in which victims can participate in proceedings is largely left to the Court to determine, taking into consideration the rights of the defence. The *Amici* submit that given the lack of clarity regarding the procedural rights of victims to appeal a decision in the context of article 15(3), the Appeals Chamber must adopt a 'living instrument'[14] approach to the Rome Statute, whereby its general provisions must be capable of evolving with broader developments in human rights law.
10. The *Amici* submit that the Appeals Chamber must consider the intent and purpose of article 15(3) of the Rome Statute and indeed the intention of the drafters of the Rome Statute when they insisted on the inclusion of participatory rights for victims within the Rome Statute system.
11. In some ways the Court may be described as a pioneer of victims' rights in international criminal proceedings, an inability to ensure that these rights are meaningful in practice to

[10]Consolidated Prosecution Response to the Appeals Briefs of the Victims, ICC-02/17-92, 22 October 2019, para. 29.
[11]ICC-02/17-92, para. 31.
[12]ICC-02/17-92, para. 29.
[13]Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, CC-02/17-62-Anx, 17 September 2019, para.20. Emphasis added.
[14]An analogy can be drawn here with the International Convention on all Forms of Racial Discrimination ("ICERD") which was adopted on 21 December 1965, whilst many geopolitical, legal and social changes have emerged since its adoption, the CERD Committee has adopted a "living instrument" approach to the ICERD in order to take into account emerging issues that were not conceptualised at the time of the drafting of ICERD. See generally, P.Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary, 2016, Oxford Commentaries on International Law.

victims would be a great disservice to victims and give credence to the often cited critique regarding the instrumentalisation of victims by this Court.[15]

A decision under article 15 of the Rome Statute is a decision on jurisdiction

12. The *Amici* maintain that a decision on the exercise of jurisdiction is a decision on jurisdiction pursuant to article 82(1)(a) of the Rome Statute and as such should be appealable as of right. Indeed, as stated by Judge Eboe-Osuji in his partially dissenting opinion:

> All this is to say that, by general linguistic usage, the term 'jurisdiction' would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court, as a matter of its mandate.[16]

13. A decision under article 15 of the Rome Statute is a decision on whether or not to commence an investigation and therefore should be considered as a decision on jurisdiction. This is even more so as a decision on article 15 refusing to authorise the initiation of an investigation is binding upon the Prosecutor, whereas a request under article 53(3)(a) simply asks the Prosecutor to reconsider her decision not to investigate.

The merits of the appeals filed by the Prosecutor and the victims

14. All of the issues on appeal presented by the Prosecutor[17] and the LRVs[18] are meritorious and deserve the benefit of appellate review.

a) The assessment under Article 53(1)(c)

15. The *Amici* submit that there is no legal basis for the Pre-Trial Chamber to review a decision of the Prosecutor to proceed with an investigation using the 'interests of justice' criteria. *Arguendo*, even if the Pre-Trial Chamber was seized of the power to undertake a secondary review to assess 'the interests of justice', the Pre-Trial Chamber, in exercising its discretion had

[15]See for example, S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 Law and Contemporary Problems (2014), 235-262, at 258; K.M. Clarke, 'Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims', in T. Keller and M.-B. Dembour (eds), Paths to International Justice: Social and Legal Perspectives (Cambridge University Press, 2007), at 134; and K.M. Clarke, Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa (Cambridge University Press, 2009), at 20-23; R. Killean and L. Moffett, 'Victim Legal Representation before the ICC and ECCC', 15 JICJ (2017) 713-740 and at R. Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials', in Clamp (ed) 175-177.
[16]Partially dissenting opinion Eboe-Osuji, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, para. 19, ICC-01/13-98-Anx, 2 September 2019.
[17]ICC-02/17-74, 30 September 2019.
[18]ICC-02/17-73-Corr, ICC-02/17-75-Corr.

an obligation to consider victims' representations and submissions of the Prosecution on this largely discretionary concept.[19]

16. Again, *arguendo*, the Pre-Trial Chamber would also have to assess the gravity of the crimes and the interests of victims to determine whether they acted as a counterweight to the 'interests of justice' criteria. The Pre-Trial Chamber failed to conduct such an assessment. Had the Pre-Trial Chamber adequately considered the gravity of the crimes and the interests of victims and given them the appropriate weight, it would not have found that the interests of justice outweighed the gravity of the crimes and interests of victims, which weigh in favour of commencing an investigation.

17. Although the Pre-Trial Chamber stated that the information disclosed to it met the gravity threshold, it failed to make any reference to this when it assessed the interests of justice under article 53(1)(c) of the Rome Statute. As stated by the Prosecutor, '[f]or an investigation to be opened at all, article 53(1)(b) requires the identification of at least *one* potential case of sufficient gravity arising from the situation.'[20] The Pre-Trial Chamber agreed with the Prosecutor that the information available disclosed multiple potential cases reaching the necessary standard.[21] Yet, it failed to adhere to its own findings as to the gravity of the identified crimes, nor did it consider the gravity of the crimes in its assessment of the interests of justice.

18. The *Amici* also concur with the Prosecutor that the Pre-Trial chamber failed to properly identify and give sufficient weight to the interests of victims in its assessment of the interests of justice. In particular, '[the Pre-Trial Chamber] failed to address (much less give any weight to) the *additional* ways in which victims may benefit from the initiation of an investigation at the Court.'[22]

19. Although the Pre-Trial Chamber recognised that '680 out of 699 applications from victims wishing to participate in the Court's proceedings'-approximately 97%- 'welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth', the Chamber assumed that because only a few victims would ever 'have the opportunity of playing a meaningful role as participants in the relevant proceedings' the 'victims' expectations will not go beyond little more than aspirations.'[23] This, according to the Pre-Trial

[19]For detailed and comprehensive submissions on the issue of the 'interests of justice', please see the Annex, paras. 11-71.
[20]Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019, para. 153.
[21]Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, ("Decision), para. 86.
[22]Prosecution Appeal Brief, ICC-02/17-74, para. 161.
[23]Decision, para. 96.

Chamber, 'would result in creating frustration and possibly hostility *vis-á-vis* the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.'[24]

20. The *Amici* agree with the Prosecutor that this view is unduly simplistic and of limited value, particularly as the victims were not given the opportunity to provide the Pre-Trial Chamber with their views on the value of an investigation even if there are no guarantees of securing a conviction. The recent decision authorising an investigation in Bangladesh/Myanmar is illustrative in this respect, where Pre-Trial Chamber III concluded that victims' representations supporting the commencement of an investigation in Myanmar reinforced the Prosecution's assessment of the interests of justice.[25]

21. In making this determination, the Chamber also failed to deliberate on relevant factors, several of which the victims themselves articulated as their main motivations for seeking an investigation,[26] including 'ending cycles of impunity, access to justice, positive complementarity or the possibility that an ICC investigation could act as a deterrent to parties engaged in ongoing violence in Afghanistan in its assessment of the 'interests of justice.''[27]

22. In addition, despite the fact that under Article 21(3) of the Rome Statute, 'human rights underpin the statute; every aspect of it, including the exercise of the jurisdiction of the Court,'[28] the Chamber failed to analyse the interests of justice and interests of victims through the lens of human rights law. For example, the Chamber failed to consider victims' right to a remedy in international human rights law, as recognised and developed in the Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations or International Human Rights Law and Serious Violations of International Humanitarian Law and a number of international human rights instruments.[29] This right recognises the inherent value to victims of a prompt, thorough, independent and impartial investigation. Human rights law recognises the duty to investigate as a duty of conduct, which is discharged if the investigation is carried out in

[24]Decision, para. 96.
[25]Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Repubic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019, para.119.
[26]Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6, 9 November 2018, ICC-02/17-29.
[27]Annex, para. 65.
[28]Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment 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, ICC-01/04-01/06-772, para. 37.
[29]*See Annex* paras. 91-95; *see also* Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations or International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR 60th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006) ("Basic Principles") para.3(b), 4, 12; UN Convention Against Torture, art. 12, UN Convention for the Protection of all Persons from Enforced Disappearances, arts. 3, 12, 13.

accordance with international law in a manner that was capable of leading to the identification and, if appropriate, the punishment of perpetrators.[30] The Chamber also failed to consider other rights, including the duty to gather and document relevant evidence, the victim's right to truth, and the victim's right to access justice.[31]

23. The *Amici* thus submit that, assuming *arguendo* that the Pre-Trial Chamber had the authority to undertake this assessment under Article 53(1)(c), by failing to adequately consider all the relevant factors the Pre-Trial Chamber's decision served to curtail rather than uphold not only the interests of victims but also the interests of justice.

b) Identifying conduct with a nexus to the armed conflict

24. The Pre-Trial Chamber erred in finding that 'the alleged war crimes whose victims were captured outside Afghanistan fall outside the Court's jurisdiction due to a lack of a nexus with an internal armed conflict'[32] and that 'the relevant nexus between the conflict and the alleged criminal conducts required by the Statute is only satisfied when the victims were captured within the border of Afghanistan.'[33]

25. The Elements of Crimes require that for the war crimes of torture and related crimes, the 'conduct took place in the context of and was associated with an armed conflict.'[34] By overly restricting the jurisdictional criteria applicable before the Court, the Pre-Trial Chamber excludes from the Court's scope of intervention crimes committed against victims captured outside Afghanistan but who are subject to abuses in a state party which are linked to the conflict.[35] In doing so, it seems to equate the territorial scope of the armed conflict with the nexus requirement for war crimes. Such equation, however, is erroneous. While the first matter is referring to issues of territorial jurisdiction relating to Afghanistan as a State Party, the latter

[30] *See, e.g., Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 7, at para.166 (July 21, 1989); *Finucane v. the United Kingdom* ECtHr, Judgment of 1 July 2003, para. 69.
[31] *See e.g.*, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, U.N. Doc. E/RES/1989/65 (May 24, 1989) para. 9, 16; Committee against Torture, Conclusions and recommendations on Colombia, UN Doc CAT/C/CR/31/1 (2004), para 10(f); *Finucane v the United Kingdom*, ECtHR, Judgment of 1 July 2003, paras. 69, 71; *Caracazo Case v Venezuela* (Reparation), I/ACtHR, Judgment of 29 August 2002, Series C No. 95, para 115;; Extrajudicial Executions and Forced Disappearances of Persons (Peru), I/AComHR, Case 10.247, 11 October 2001, para 243. *Bulacio v Argentina*, I/ACtHR, Judgment of 18 September 2003, Series C No. 100, paras 110-120; *Myrna Mack Chang v Guatemala*, I/ACtHR, Judgment of 25 November 2003, Series C No. 101, paras 272-277.
[32] Decision, para. 55.
[33] Decision, para. 53.
[34] ICC, Elements of Crimes, Article 8(2)(c)(i)-4, War Crime of Torture, para.(5).
[35] According to the Decision "for the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of 'inflicting severe physical or mental pain' - not its mere antecedents (ie, the fact of having been captured and abducted) - takes place at least in part in the territory of a State Party; provided that the victims were captured in Afghanistan." Decision, para. 54.

is a question to be discussed separately, as it determines the subject matter jurisdiction of the Court. With regard to the latter, the standard of proof applicable at this stage of the proceedings is one of reasonable grounds to believe. The Pre-Trial Chamber further erred in, first, restricting the application of common article 3 of the Geneva Conventions to the territory of a state, in this case Afghanistan and, second, in restricting the nexus requirement for war crimes to territorial aspects only.

26. The Geneva Conventions provide an indication, rather than a definitive determination on the question of the territorial scope of non-international armed conflicts. While common article 3 indicates a certain attachment to a territory ('armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'),[36] it does not clarify where the territorial borders of an armed conflict are to be drawn, and especially not if those borders need to be identical to the borders of a state.

27. The jurisprudence of the *ad hoc* tribunals provide guidance.[37] In respect of non-international armed conflicts, the Geneva Conventions apply only in the territory under the control of a party to the conflict, but their application is not limited to the areas of active combat only. Thus, the borders of a non-international armed conflict are not necessarily restricted by the borders of the state mainly affected by it, nor is it necessary that acts of combat are carried out in the area where the Geneva Conventions apply.

28. According to the Pre-Trial Chamber, this narrow interpretation of the territorial jurisdiction of the Court (dependent on the geographical scope of the armed conflict) is linked to the nexus requirement for war crimes. This definition of the nexus, however, is too narrow and could have serious implications beyond the present case. Modern warfare is not necessarily confined to territorial borders and the traditional limitations of the battlefield, so the protection purpose of the Geneva Conventions necessitates a wide interpretation of the nexus requirement.[38] Thus, it would be incorrect to conclude that the location of the commission of the crimes is dispositive of the true character of the circumstances. As pointed out by the Prosecution[39] and the LRVs[40],

[36] Similar formulation in Art. 1 of the First Additional Protocol: "which take place in the territory of a High Contracting Party" and Art. 1 I of the Second Additional Protocol: "situations referred to in Article 2 common"

[37] ICTY *Tadic*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, paras. 67ff, *Kordic* Judgment, 26 Feb 2001, para. 27, *Blaskic*, Trial Chamber Judgment, 3 March 2000, para. 64. See also See for example ICTY: Kunarac Judgement, 22 February 2001, para. 568; Tadic, Opinion and Judgment, IT.94-1-T, 7 May 1997, para. 573; *Tadi*c, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; *Delalic and Delic*, Judgment, 16 November 1998, para. 193; Stakic, 31 July 2003, para. 569; ICTR *Semanza*, Judgment and Sentence, 15 May 2003, Rn. 517; *Rutaganda*, Judgment, 26 May 2003, para. 570.

[38] See also Cassese, The Nexus Requirement for War Crimes, JICJ 10 (2012), 1395, 1404. This argument is also supported by German case law: Bundesverwaltungsgericht (Federal Administrative Court), Judgment 16 February 2010, 10 C7/09, paras. 31ff.; stating that functional nexus between act and armed conflict suffices.

[39] Paras. 98ff., ICC-02/17-74, 30 September 2019.

the test applicable to the nexus requirement should be one that is sensitive to the facts of the individual case when determining whether the conduct took place in the context of and was associated with the armed conflict. Such an interpretation is also in line with established jurisprudence of this Court, which held that the requirement for a nexus is fulfilled if the conduct is 'closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict.'[41]

29. The Pre-Trial Chamber thus erred in requiring that victims must have been captured in Afghanistan in order to establish the jurisdictional nexus.[42] If upheld by the Appeals Chamber, the Pre-Trial Chamber´s interpretation will largely limit the ICC´s jurisdiction over torture and other serious war crimes committed in states parties that have a nexus to an armed conflict under the court's jurisdiction.

30. It is thus indispensable that the Appeals Chamber corrects the Pre-Trial Chamber´s erroneous interpretation of the nexus requirement in determining the Court´s jurisdiction over the crime of torture and other war crimes.

c) Scope of the investigation

31. The *Amici* submit that the Pre-Trial Chamber erred in restricting the scope of an authorised investigation. The Pre-Trial Chamber ruled, by majority, that even if it authorised the investigation, the Prosecution would only be permitted to investigate 'the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the the authorisation's geographical, temporal, and contextual scope'[43] as well as those incidents which can be regarded as having a close link, rather than a 'sufficient' one, with one or more of the incidents specifically authorised by the Pre-Trial Chamber.[44]

32. The *Amici* concur with the Prosecutor that the Pre-Trial Chamber muddied the distinction between situations and cases by requiring the Prosecutor to prove each incident to the standard espoused under article 53(1) of the Rome Statute.[45]

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[40]Paras. 129ff., ICC-02/17-75-Corr, 01 October 2019.
[41]See Trial Chamber II, *Prosecutor v. Germain Katanga*, 'Judgment pursuant to article 74 of the Statute', 7 March 2014, ICC-01/04-01/07, para. 1176; reiterated by Trial Chamber III, Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment pursuant to Article 74 of the Statute', 21 March 2016, ICC-01/05-01/08 ('Bemba TC Judgment'), para. 142.
[42]Decision, para. 53.
[43]Decision, para. 40.
[44]Decision, para. 41.
[45]Prosecution Appeal Brief, para. 84.

33. This was clearly never the intention of the drafters of the Statute, and such a piecemeal regime for authorisation is not supported by the Court's jurisprudence.[46] Pre-Trial Chamber III, in its decision authorising an investigation in Bangladesh/Myanmar states as follows:

> [L]imiting the Prosecutor in her investigation to the incidents identified in the Request would have a negative impact on the efficiency of the proceedings and the effectiveness of the investigation. It would require the Prosecutor to request authorisation every time she wishes to add new incidents to the investigation, making the article 15 procedure highly cumbersome.[47]

34. Indeed, the proper role for the Pre-Trial Chamber is to broaden the scope of a potential investigation, rather than narrow it through a burdensome procedure. In the present case, at this early stage of the proceedings, it would be unreasonable for any investigation to exclude crimes such as those noted by the Prosecutor in paragraph 75 of the Prosecution Appeal Brief. Furthermore, the exclusion of the victims of these crimes would deny them the right to justice and accountability.

35. Indeed, narrowing the parameters of an investigation is antithetical to the Court's mandate and to the Prosecutor's independent duty to conduct objective, evidence-led investigations, and to select cases for prosecution. It would further prematurely prevent the crimes falling outside those parameters from being investigated and subsequently judged on the basis of proper and thorough investigations.

Respectfully submitted,

Alice Mogwe

President, FIDH, on behalf of the *Amici*

Dated this 15th day of November 2019

At Kabul, Afghanistan, Paris, France, The Hague, The Netherlands, Berlin, Germany, San Francisco, New York, United States

[46]See Burundi authorisation, ICC-01/17-X-9-US-Exp, para. 192; Georgia Decision, ICC-01/15, para. 64; Côte D'Ivoire Decision, ICC-02-11 para. 179.

[47]ICC-01/19-27, para.130.