

INTRODUCTORY NOTE TO SITUATION IN THE ISLAMIC REPUBLIC OF  
AFGHANISTAN (INT’L CRIM. CT. APP. CHAMBER)  
BY RYAN VOGEL\*  
[March 5, 2020]

## Introduction

On March 5, 2020, the Appeals Chamber of the International Criminal Court (ICC) delivered its unanimous Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan.<sup>1</sup> The decision came after an appeal of the Pre-Trial Chamber II’s unanimous decision in April 2019 rejecting the Prosecutor’s request to proceed with an investigation. The Appeals Chamber’s decision allows the prosecutor to immediately begin 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.”<sup>2</sup>

## Background

In 2006, the Prosecutor began a preliminary examination of the situation in Afghanistan, consulting over the next decade with parties to the conflict, alleged victims, and others to collect initial information. The preliminary examination went through four “phases”: (1) an initial assessment to analyze the seriousness of information received; (2) a jurisdictional analysis to determine whether there was “a reasonable basis to believe that the alleged crimes fall within the subject matter jurisdiction of the Court”; (3) an admissibility determination to review whether the gravity of the crimes was sufficient and whether domestic investigations were genuine enough to preclude the need for ICC involvement; and (4) a determination as to whether an investigation would serve the “interests of justice.”

Phases 1 and 2, focused on jurisdictional questions, were never really in doubt—the alleged crimes in Afghanistan after 2003 were serious and well documented, and clearly fell within the subject matter competency of the Court. Phases 3 and 4, focused on admissibility issues, were where the real debate existed, concerning whether the alleged crimes were sufficiently grave, whether there had been genuine investigation of the alleged crimes, and whether a potential investigation would serve the interests of justice.

Afghanistan acceded to the Rome Statute on February 10, 2003, giving the ICC jurisdiction over its territory and nationals after May 1, 2003. The Prosecutor therefore focused the preliminary examination on alleged crimes after this date by the Taliban and other armed groups, Afghan forces, U.S. forces and the CIA, both in the territory of Afghanistan as well as the territories of other state parties.<sup>3</sup>

Having concluded the preliminary examination on November 20, 2017, the Prosecutor requested authorization from the Pre-Trial Chamber to commence an investigation into the situation in Afghanistan.<sup>4</sup> Sixteen months later, on April 12, 2019, the Pre-Trial Chamber II rejected the Prosecutor’s request, denying authorization for an investigation on the grounds that the investigation would not benefit the interests of justice.<sup>5</sup> As was expected, the Prosecutor appealed the decision of the Pre-Trial judges to the Appeals Chamber.

## The Appeals Chamber’s Decision

From December 4–6, 2019, the Appeals Chamber held hearings to consider the Prosecutor’s appeal of the Pre-Trial Chamber’s decision. The Appeals Chamber focused primarily on the roles of and relationships between the Prosecutor and the Pre-Trial Chamber in *proprio motu* cases. In this decision, the Appeals Chamber reviewed five major issues.

First, the Appeals Chamber assessed whether the Pre-Trial Chamber erred in law by seeking to make a positive determination of the interests of justice.<sup>6</sup> The Appeals Chamber agreed with the Prosecutor that Article 15 of the Statute

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governed in this instance where the Prosecutor was seeking an investigation *proprio motu*, and not Article 53(1), which applied to referrals by a Member State or the UN Security Council.<sup>7</sup> The Appeals Chamber concluded that under Article 15, the Pre-Trial Chamber is limited to determining (1) whether there is a reasonable factual basis to proceed with an investigation” and (2) “whether the potential case(s) arising from such investigation would appear to fall within the Court’s jurisdiction.”<sup>8</sup> Admissibility issues, including whether the interests of justice were satisfied, could be raised and considered at a later stage in the investigation.<sup>9</sup>

Second, because the Appeals Chamber found that the Pre-Trial Chamber erred in considering the interests of justice, it only briefly assessed whether the Pre-Trial Chamber abused its discretion in assessing the interests of justice.<sup>10</sup> The Appeals Chamber characterized the Pre-Trial Chamber’s conclusions related to the interest of justice as “cursory,” “speculative,” lacking in supportive information, and ignoring the gravity of the crimes and the interests of victims.<sup>11</sup>

Third, the Appeals Chamber considered what would constitute appropriate relief in this case. Because the Pre-Trial Chamber found that there was a reasonable basis to believe that the incidents underlying the Request occurred<sup>12</sup> and that all relevant requirements were met for jurisdiction,<sup>13</sup> the Appeals Chamber determined that the decision did not need to be remanded to the Pre-Trial Chamber. Instead, in the interests of “judicial economy,” the Appeals Chamber simply amended the decision and authorized the investigation.<sup>14</sup>

Lastly, the Appeals Chamber reviewed the geographic scope of the authorization, holding that “the Pre-Trial Chamber’s finding regarding the nexus requirement was incorrect” and that there is “no reason to limit the Prosecutor’s investigation in the manner envisaged by the Pre-Trial Chamber.”<sup>15</sup> Resolving specific jurisdictional issues was “pre-mature” at this stage, the Appeals Chamber concluded, and was unnecessary in deciding whether to authorize the investigation.<sup>16</sup>

Importantly, the Appeals Chamber left many questions to be answered after the commencement of the investigation. In addition to some of the jurisdictional issues already referenced, the Appeals Chamber indicated that state parties might later raise admissibility arguments to defer the investigation based on the state’s undertaking its own investigations of the issues at hand.<sup>17</sup> States might also challenge the Court’s jurisdiction based on the existence of pre-existing treaty obligations and other international agreements, such as those under Article 98 of the Statute.<sup>18</sup> Although these disputes did not prevent the Appeals Chamber from authorizing the investigation, they might affect the investigation’s efficacy going forward.

## Conclusion

The decision from the Appeals Chamber has largely been welcomed by the international legal community. Proponents of the Appeals Chamber’s decision have argued that the Pre-Trial Chamber’s decision, “had it stood, could have imperiled much of the future work of the ICC, by essentially suggesting that where investigations could be unsuccessful or pose political challenges or other such factors, the Prosecutor should simply refrain from conducting an investigation.”<sup>19</sup> The conflict in Afghanistan has witnessed an array of high-profile crimes and abuses, and failing to proceed with an investigation may have fatally undermined the Court’s legitimacy in the eyes of the international community.

However, even some proponents who have welcomed the decision have still argued that the Appeals Chamber erred in concluding that the Pre-Trial Chamber cannot review the interests of justice at all when deciding whether to authorize a *proprio motu* investigation, likely undermining “the careful balance of power between the [Office of the Prosecutor] and [Pre-Trial Chamber] that states negotiated at Rome, without which many states would have refused to give the [Office of the Prosecutor] *proprio motu* power in the first place.”<sup>20</sup> To that point, in a Separate Opinion, Judge Carranza concurred with the result but disagreed that the “Prosecutor has absolute discretion” in deciding on the “interests of justice” in *proprio motu* investigations, arguing that “any decision, be it from the Prosecutor or first instance Chambers must be subject to judicial review.”<sup>21</sup> A major outcome of the Appeals Chamber’s decision is the indisputable expansion of the powers of the Prosecutor.

Now that the Prosecutor is cleared to proceed with an investigation in Afghanistan, the challenging and complex work begins. The governments of the United States and Afghanistan, along with the Taliban and other non-state armed groups, are unlikely to cooperate or provide meaningful assistance. Because the security situation in

Afghanistan is still hazardous, the Prosecutor will likely be hindered in collecting evidence. Funding will be scarce. It will be a difficult road ahead. In the end, although the Pre-Trial Chamber was determined to have erred in considering the likelihood of success in authorizing this investigation, the Pre-Trial judges might be proven right on the challenge of serving the interests of justice in this situation.

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## ENDNOTES

- 1 Situation in the Islamic Republic of Afghanistan (Judgment on the Appeal) ICC-02/17 OA4, Decision Pursuant to Art. 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, (Mar. 5, 2020) [hereinafter Decision].
- 2 *Id.*
- 3 Press Release, Int'l Crim. Ct., The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.
- 4 Request for authorisation of an investigation pursuant to article 15, ICC-02/17-7-Conf-Exp, ¶ 1 (Nov. 20, 2017) [hereinafter Request].
- 5 Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Art. 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, (Apr. 12, 2019) [hereinafter Impugned Decision].
- 6 Decision, IV.A.
- 7 *Id.* ¶ 45.
- 8 *Id.* ¶ 39.
- 9 *Id.* ¶¶ 43–44.
- 10 ¶ 48.
- 11 ¶ 49.
- 12 Impugned Decision, ¶¶ 48, 60.
- 13 *Id.* ¶ 96.
- 14 Decision, ¶ 54.
- 15 *Id.* ¶ 77.
- 16 *Id.* ¶ 78.
- 17 *Id.* ¶ 43.
- 18 *Id.* ¶ 44.
- 19 Jennifer Trahan, *The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation*, OPINIO JURIS (Mar. 10, 2020), <http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation>.
- 20 Kevin Jon Heller, *The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong*, OPINIO JURIS (Mar. 9, 2020), <http://opiniojuris.org/2020/03/09/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong>.
- 21 Separate Opinion of Judge Ibáñez Carranza, ¶ 2.

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN  
(INT'L CRIM. CT. APP. CHAMBER)\*  
[March 5, 2020]

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-02/17 OA4**

**Date: 5 March 2020**

**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 document**

**Judgment on the appeal against the decision on the authorisation of an  
investigation into the situation in the Islamic Republic of Afghanistan**

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**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:****The Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

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**Legal Representatives of Victims**

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Ms Spojmie Nasiri  
Mr Luke Moffett  
Mr David J. Scheffer  
Ms Jennifer Trahan  
Ms Hannah R. Garry  
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**States Representatives**

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**REGISTRY****Registrar**

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019 (ICC-02/17-33),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

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' is amended to the effect that the Prosecutor is authorised 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'.

## REASONS

### I. KEY FINDINGS

1. Article 15(4) of the Statute requires a pre-trial chamber to determine whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and that potential case(s) arising from such investigation appear to fall within the Court's jurisdiction. The pre-trial chamber is not called under article 15(4) of the Statute to review the Prosecutor's analysis of the factors under article 53(1)(a) to (c) of the Statute.
2. The pre-trial chamber's authorisation of an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's request under article 15(3) of the Statute and incidents that are 'closely linked' to those incidents.

### II. INTRODUCTION

3. Pursuant to article 15 of the Statute, the Prosecutor may initiate an investigation *proprio motu* (on her own motion), without having received a referral from a State Party to the Rome Statute or the Security Council of the United Nations. However, in such a case, the investigation must be authorised by a pre-trial chamber. The present appeal concerns a situation where the Prosecutor's request for authorisation was rejected on the ground that an investigation would not serve the interests of justice.
4. On 20 November 2017, the Prosecutor filed a request for authorisation of an investigation into crimes allegedly committed in the Islamic Republic of Afghanistan (hereinafter: 'Afghanistan') since 1 May 2003, as well as related crimes allegedly committed in other States Parties since 1 July 2002<sup>1</sup> (the 'Request'). The Request involved: (i) the Taliban and affiliated groups for crimes against humanity and war crimes;<sup>2</sup> (ii) the Afghan National Security Forces for war crimes;<sup>3</sup> and (iii) the armed forces of the United States of America (the 'United States') and its Central Intelligence Agency (the 'CIA') for war crimes.<sup>4</sup>
5. On 12 April 2019, Pre-Trial Chamber II (the 'Pre-Trial Chamber') decided to reject the Prosecutor's Request and not to authorise an investigation by the Prosecutor into the situation in Afghanistan (hereinafter: 'Impugned Decision').<sup>5</sup> Pursuant to article 15(4) of the Statute, the Pre-Trial Chamber was required to determine whether there was a reasonable basis to proceed with an investigation, and whether the case appeared to fall within the jurisdiction of the Court, in deciding whether to authorise the commencement of the investigation. In the Impugned Decision, the Pre-Trial Chamber concluded that, 'notwithstanding the fact that all the relevant requirements are met as regards both jurisdiction and admissibility, an investigation into the situation in Afghanistan would not serve the interests of justice'.<sup>6</sup>

6. The Prosecutor raises two grounds of appeal, namely that the Pre-Trial Chamber erred in law in seeking to make a positive determination of the interests of justice (first ground of appeal),<sup>7</sup> and, further or alternatively, that the Pre-Trial Chamber abused its discretion in assessing the interests of justice (second ground of appeal).<sup>8</sup>

7. The Appeals Chamber, in addition to reviewing all the written submissions from the Prosecutor, victims, and other participants, held a hearing for three days to hear oral arguments on the issues regarding, *inter alia*, the present appeal.<sup>9</sup>

### III. PROCEDURAL HISTORY

#### A. Proceedings before the Pre-Trial Chamber

8. On 20 November 2017, the Prosecutor submitted the Request.

9. On 12 April 2019, the Pre-Trial Chamber rendered the Impugned Decision rejecting the Request.<sup>10</sup>

10. On 17 September 2019, the Pre-Trial Chamber dismissed, *in limine*, the request of the legal representatives of 82 victims and two organizations (hereinafter: ‘LRV 1’) for leave to appeal the Impugned Decision and granted, in part, the Prosecutor’s request for leave to appeal the same decision under article 82(1)(d) of the Statute.<sup>11</sup>

#### B. Proceedings before the Appeals Chamber

11. On 10 June 2019, LRV 1, the legal representatives of six victims in the situation in Afghanistan (hereinafter: ‘LRV 2’) and the legal representatives of an individual victim (hereinafter: ‘LRV 3’) filed notices of appeal against the Impugned Decision under article 82(1)(a) of the Statute (collectively, the ‘Notices of Appeal’).<sup>12</sup>

12. On 12 June 2019, the Prosecutor filed observations in which she submits, *inter alia*, that the victims who submitted the Notices of Appeal are not ‘parties’ in terms of article 82(1) of the Statute and are therefore not entitled to file an appeal and that the Impugned Decision is, in any event, not a decision in respect of jurisdiction or admissibility that can be appealed under article 82(1)(a) of the Statute.<sup>13</sup>

13. On 27 September 2019, the Appeals Chamber issued an order scheduling a hearing for three days from 4 to 6 December 2019, and invited the victims, the Prosecutor, and the Office of Public Counsel for victims (the ‘OPCV’) to participate. Further, interested States, professors of criminal law and/or international law, as well as organisations with specific legal expertise in human rights were invited to express their interest in participating in this proceeding as *amici curiae*.<sup>14</sup>

14. On 30 September 2019, three appeal briefs were filed: (i) the Prosecutor’s appeal brief (the ‘Prosecutor’s Appeal Brief’);<sup>15</sup> (ii) LRV 1’s updated appeal brief (the ‘LRV 1 Appeal Brief’);<sup>16</sup> and (iii) LRV 2 and LRV 3’s joint appeal brief (the ‘LRV 2 and 3 Appeal Brief’).<sup>17</sup>

15. On 22 October 2019, the following documents were filed with the Court: (i) the Prosecutor’s response to the appeal briefs of the victims (the ‘Prosecutor’s Response’);<sup>18</sup> (ii) OPCV’s submissions on the appeals (the ‘OPCV Submissions’);<sup>19</sup> and (iii) LRV 2 and LRV 3’s joint response to the Prosecutor’s Appeal Brief.<sup>20</sup>

16. On 14 or 15 November 2019, the victims of cross-border aerial bombardment (the ‘Cross-border Victims’),<sup>21</sup> the Office of Public Counsel for the defence (the ‘OPCD’),<sup>22</sup> and eight *amici curiae*<sup>23</sup> filed their respective views and observations on the appeals.

17. On 2 December 2019, the Government of Afghanistan filed written submissions.<sup>24</sup>

18. From 4 to 6 December 2019, the Appeals Chamber held a hearing pursuant to its decision on the conduct of hearing.<sup>25</sup> On the first day of the hearing, the Appeals Chamber heard submissions on the issue of the standing of victims to bring an appeal under article 82(1)(a) of the Statute, and whether the Impugned Decision may be considered to be a ‘decision with respect to jurisdiction or admissibility’ within the meaning of article 82(1)(a) of the Statute.<sup>26</sup> On the second day, the Appeals Chamber, by majority, Judge Ibáñez Carranza dissenting, dismissed the appeals brought by LRV1, LRV2 and LRV3 as inadmissible.<sup>27</sup> Submissions on the merits of the Prosecutor’s appeal were heard throughout the second and third day of the hearing.<sup>28</sup>

## IV. MERITS

### A. First ground of appeal: Whether the Pre-Trial Chamber erred in law by seeking to make a positive determination of the interests of justice

19. Under her first ground of appeal, the Prosecutor argues that the Pre-Trial Chamber erred by seeking to make a positive determination that the initiation of an investigation into the situation in Afghanistan was in the interests of justice.

#### 1. Relevant part of the Impugned Decision

20. In the Impugned Decision, the Pre-Trial Chamber found that it 'must consider, on the exclusive basis of the information made available by the Prosecutor, whether the requirements set out in article 53(1)(a) to (c) are met'.<sup>29</sup> It found that it was required not only to determine that 'there is a reasonable basis to believe that crimes under the Court's jurisdiction have been committed', but also to positively determine 'that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts [*sic*], the potential victims' interests and the likelihood that investigation [*sic*] be [*sic*] feasible and meaningful under the relevant circumstances'.<sup>30</sup> It is primarily this finding that the Prosecutor impugns in her first ground of appeal.

#### 2. Submissions of the parties

21. The Prosecutor submits that the Pre-Trial Chamber erred in law when it sought to make a positive determination that the initiation of an investigation into the situation in Afghanistan was in the interests of justice. The Prosecutor submits that articles 15(4) and 53(1)(c) require or permit 'the Pre-Trial Chamber to determine whether it agrees with the Prosecutor that there are *no* substantial reasons to believe that an investigation would *not* serve the interests of justice'.<sup>31</sup> The Prosecutor's view is based on an understanding that the contours of the Pre-Trial Chamber's determination under article 15(4) of the Statute should logically reflect the contours of the Prosecutor's determination under article 15(3) of the Statute 'given the clear link between those two assessments, both of which are based on the same reasonable basis to proceed standard'.<sup>32</sup> However, she submits that the Pre-Trial Chamber should 'confine its assessment of the interests of justice to the contours of the assessment *actually conducted by the Prosecutor*'.<sup>33</sup> If the Prosecutor's request for authorisation did not address any specific circumstances that could give rise to a negative finding as to the interests of justice, but the pre-trial chamber identifies any '*self-evident or ostensible concern*' that the opening of an investigation would not be in the interests of justice, it should 'revert to the Prosecutor [...] with a view to requesting additional information concerning the Prosecutor's assessment'.<sup>34</sup> In the absence of 'any cause to doubt the Prosecutor's determination that there were no substantial reasons to believe that an investigation would *not* be in the interests of justice', the Prosecutor submits that the Pre-Trial Chamber should have assented to her assessment under article 53(1)(c) of the Statute and authorised the investigation.<sup>35</sup>

22. The Victims, the OPCV, the Cross-border Victims, and Queen's University Belfast Human Rights Centre argue that the Pre-Trial Chamber may only review the Prosecutor's assessment of the 'interests of justice' when it is the basis for a decision *not* to initiate an investigation.<sup>36</sup> LRV 1 submits that the Pre-Trial Chamber is not mandated to review the Prosecutor's decision to proceed with an investigation by applying an 'interests of justice' test or to conduct such an assessment *proprio motu*.<sup>37</sup> LRV 2 and LRV 3 and the OPCV submit that the pre-trial chamber's review under article 15(4) of the Statute must be limited to the issues of jurisdiction and admissibility.<sup>38</sup> Similarly, the Cross-border Victims emphasise that the Pre-Trial Chamber is required to apply a purely evidentiary test as to whether there is a reasonable basis for an investigation and to assess 'whether there is any indication that the Court does not have jurisdiction over the case'.<sup>39</sup>

#### 3. Determination by the Appeals Chamber

23. The Appeals Chamber notes that the Prosecutor's arguments under her first ground of appeal are predicated on the assumption that a pre-trial chamber's decision pursuant to article 15(4) of the Statute should take into account the 'interests of justice' factor of article 53(1)(c) of the Statute, but that the manner in which the Pre-Trial Chamber



considered this factor in the present case was wrong. In contrast, the victims and certain *amici curiae* argue that the Pre-Trial Chamber should not have addressed the ‘interests of justice’ at all.<sup>40</sup> Therefore, the first issue for the Appeals Chamber to determine is whether the ‘interests of justice’ factor under article 53(1)(c) of the Statute should be assessed in determining whether ‘there is a reasonable basis to proceed’ with an investigation under article 15(4) of the Statute.

24. The Appeals Chamber notes that, in the five decisions that pre-trial chambers have issued to date authorising investigations under article 15(4) of the Statute, they have considered all the factors set out in article 53(1) of the Statute, including, to a certain extent, the Prosecutor’s interests of justice assessment under article 53(1)(c) of the Statute. The Pre-Trial Chamber (in a different composition) in the *Situation in the Republic of Kenya* was the first to issue a decision authorising an investigation and to explain its view on the link between articles 15(4) and 53(1) of the Statute.<sup>41</sup> It reasoned that pre-trial chambers are required to apply ‘the exact standard on the basis of which the Prosecutor arrived at his conclusion’ that there was a basis to proceed with an investigation.<sup>42</sup> It based this conclusion on: (i) the identical requirement in articles 15(3) and (4) and 53(1) of the Statute for a determination that there is a ‘reasonable basis to proceed’; (ii) the drafting history, which emphasises the link between articles 15 and 53; and (iii) article 15’s purpose in providing ‘the Chamber with a supervisory role over the *proprio motu* initiative of the Prosecutor to proceed with an investigation’.<sup>43</sup> Other pre-trial chambers followed the same approach in subsequent decisions.<sup>44</sup> In the case at hand and in similar vein, the Pre-Trial Chamber found that it ‘must consider, on the exclusive basis of the information made available by the Prosecutor, whether the requirements set out in article 53(1)(a) to (c) are met’.<sup>45</sup>

25. This is the first time that this jurisprudence on the authorisation of an investigation under article 15(4) of the Statute is tested on appeal. For the reasons set out below, the Appeals Chamber finds that the Pre-Trial Chamber erred in its interpretation of article 15(4) of the Statute when it found itself bound to assess the factors under article 53(1) of the Statute.

26. The starting point for the Appeals Chamber’s analysis is a consideration of the function of articles 15 and 53 of the Statute and the relationship between these provisions. During the drafting of the Rome Statute, these provisions were the subject of lengthy debate and the final text reflects a delicate balance regarding the Prosecutor’s discretionary power to initiate investigations and the extent to which judicial review of these powers would be permitted.<sup>46</sup>

27. Article 15 appears within Part 2 of the Rome Statute titled ‘Jurisdiction, Admissibility and Applicable Law’. It builds upon article 13, which prescribes the three circumstances in which the Court may exercise its jurisdiction with respect to an article 5 crime, namely when: (i) a situation is referred to the Prosecutor by a State Party in accordance with article 14; (ii) a situation is referred to the Prosecutor by the Security Council; or (iii) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

28. If a situation is referred by a State Party or the Security Council, article 53(1) of the Statute places, in principle, an obligation on the Prosecutor to open an investigation, by providing that ‘[t]he Prosecutor *shall* [. . .] initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute’ (emphasis added). The Prosecutor is obliged to evaluate the seriousness of the information received and may seek additional information for this purpose.<sup>47</sup> In deciding whether to initiate an investigation, article 53(1) obliges the Prosecutor to consider three factors: (i) whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) whether the case is or would be admissible; and (iii) whether, ‘[t]aking 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’.

29. Article 53(1) of the Statute thus reflects an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor *not* to proceed in the limited circumstances set out in article 53(1)(a) to (c) of the Statute. If the Prosecutor decides *not* to initiate an investigation under article 53(1) of the Statute, her decision is subject to certain notification requirements.<sup>48</sup> Article 53(3) of the Statute envisages judicial control over the Prosecutor’s decision not to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations.<sup>49</sup>

30. In contrast, article 15 of the Statute, titled 'Prosecutor', sets out the procedure for the triggering of an investigation by the Prosecutor *proprio motu*, that is, on her own motion when a situation has not been referred to her. Article 15 recognises the discretionary nature of this power, providing in paragraph 1 that 'the Prosecutor *may* initiate investigations *proprio motu*' (emphasis added). In this context, it is for the Prosecutor to determine whether there is a reasonable basis to initiate an investigation *proprio motu*. If the Prosecutor concludes that there is no reasonable basis to proceed (a scenario not arising in this appeal), article 15(6) of the Statute requires her to inform those who provided the information of her conclusion.<sup>50</sup> They may provide additional information to the Prosecutor who may reconsider the matter;<sup>51</sup> however, the legal framework does not envisage judicial review of the Prosecutor's conclusion.<sup>52</sup>

31. In the view of the Appeals Chamber, this is consistent with the discretionary nature of the power accorded to the Prosecutor under article 15 of the Statute. Indeed, it would be contrary to the very concept to suggest that a duty to investigate could be imposed by the pre-trial chamber in the absence of a request for authorisation of an investigation by the Prosecutor. The Appeals Chamber notes, in this regard, that a proposal to allow for notification to the pre-trial chamber and judicial review of decisions of the Prosecutor not to request authorisation of an investigation under article 15(6) of the Statute was rejected by the drafters.<sup>53</sup> Indeed, the right vested in all States Parties and in the Security Council to refer situations would provide the appropriate remedy in such circumstance.

32. Therefore, under the procedure set out in article 15 of the Statute, the pre-trial chamber has a role in respect of the Prosecutor's exercise of discretionary power only if she determines that there *is* a basis to initiate an investigation.<sup>54</sup> If the Prosecutor wishes to investigate a situation in the absence of a referral, the pre-trial chamber's authorisation is required, in accordance with article 15(4) of the Statute. If authorisation is granted, the Prosecutor may initiate an investigation directly. She is not required to determine for a second time under article 53(1) of the Statute that there is a reasonable basis to proceed with an investigation.<sup>55</sup>

33. On the basis of the foregoing, the Appeals Chamber considers that the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council.

34. The Appeals Chamber notes that article 15 of the Statute does not refer to the interests of justice or to article 53 of the Statute. Article 15(4) of the Statute requires a pre-trial chamber to determine only whether 'there is a reasonable basis to proceed with an investigation', and whether 'the case appears to fall within the jurisdiction of the Court'. This provision does not identify additional considerations that the pre-trial chamber must take into account for the purpose of this determination. A plain reading of the provisions, therefore, indicates that, for the purposes of exercising judicial control at this early stage of the proceeding, the pre-trial chamber need only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction. This interpretation fully reflects the concern of the drafters in terms of the exercise of the *proprio motu* power noted above.<sup>56</sup>

35. While rule 48 of the Rules requires the *Prosecutor* to consider all the factors under article 53(1) of the Statute, including the interests of justice, in deciding whether to request authorisation of an investigation under article 15(3), there is no equivalent rule that would import these considerations for the purposes of a pre-trial chamber's determination under article 15(4) of the Statute. The rule was adopted after the Statute and, had the drafters intended to import these considerations into the pre-trial chamber authorisation process they would have included such a requirement in the rule. In the Appeals Chamber's view, this shows that the factors under article 53(1)(a) to (c) are *not* relevant for the purposes of the pre-trial chamber's decision.

36. The Appeals Chamber notes that the reference to a 'reasonable basis to proceed' in article 15(4) is echoed in article 15(3) of the Statute (regarding the Prosecutor's request for authorisation to initiate an investigation) and article 53(1) of the Statute (regarding the Prosecutor's decision to initiate an investigation). As indicated above, the Pre-Trial Chamber in the *Kenya* Authorisation Decision found, based in part on the repetition of this phrase in the two articles, that all factors of article 53(1)(a) to (c) must be considered by a pre-trial chamber when issuing a

decision under article 15(4) of the Statute. However, this interpretation obscures the essential difference between the standard applicable to the assessment on the one hand and the subject-matter of the assessment on the other. In the view of the Appeals Chamber, the harmonisation of the standard between articles 15(3) and (4) and 53(1) of the Statute does not result in the harmonisation of the subject-matter of the Prosecutor's decision under articles 15(3) and 53(1) of the Statute and the Pre-Trial Chamber's assessment under article 15(4) of the Statute.

37. In light of the above, the Appeals Chamber considers that the 'interests of justice' factor set out in article 53(1)(c) of the Statute, while part of the Prosecutor's consideration under article 15(3) of the Statute as per rule 48 of the Rules, is not part of the pre-trial chamber's decision under article 15(4) of the Statute.

38. The Appeals Chamber considers that this interpretation of article 15(4) of the Statute is further supported by reference to the information that the Prosecutor is required to include in her request for authorisation of an investigation before the pre-trial chamber. Regulation 49(1) of the Regulations of the Court (the 'Regulations') provides that the Prosecutor must refer to the crimes committed and provide a statement of the facts alleged to provide a reasonable basis to believe that the crimes are being or have been committed, as well as a reasoned declaration that the listed crimes fall within the Court's jurisdiction. According to regulation 49(2) of the Regulations, the statement of facts must include the location of the crimes as precisely as possible, the time or time period of their commission and the persons involved or a description of the persons involved. Regulation 49(3) of the Regulations indicates that the Prosecutor must, if possible, append to the request a chronology of relevant events, maps showing relevant information and a glossary of relevant names of persons, places and institutions.

39. The Appeals Chamber notes that the information that the Prosecutor must provide at this stage is of a limited and very general nature. This is consistent with the preliminary stage of proceedings when the Prosecutor has not had the opportunity to gather evidence and ascertain the facts in the course of an investigation. The Prosecutor is not required to present evidence to support her request and is not required to present information regarding her assessment of complementarity with respect to the cases or potential cases. Similarly, the Prosecutor is not required to provide her reasoning (if any) or justify her conclusion regarding the interests of justice under article 53(1)(c) of the Statute. Indeed, according to regulation 49 of the Regulations, the Prosecutor is required only to provide a factual description of the crimes allegedly committed and a declaration that they fall within the jurisdiction of the Court. This further supports the finding that the pre-trial chamber, under article 15(4) of the Statute, is limited to determining whether there is a reasonable factual basis to proceed with an investigation and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction.

40. Additionally, the Appeals Chamber notes that, if a pre-trial chamber were expected to apply all the factors under article 53(1)(a) to (c) of the Statute, this would include an assessment of the admissibility of potential case(s) under article 53(1)(b) of the Statute. In the Appeals Chamber's view, the value of a judicial assessment of admissibility at this stage would be limited. The Appeals Chamber notes that, in the context of article 15 proceedings, there is no obligation for the Prosecutor to notify States of her intention to seek authorisation for an investigation and the participation of States is not provided for in the applicable procedural framework. This means that the pre-trial chamber would have to rely on the Prosecutor, who considers that the case(s) would be admissible, to provide information that would allow it to form a view on issues of admissibility. Therefore, in the view of the Appeals Chamber, it is sufficient for the purposes of the article 15 procedure that the Prosecutor considers the admissibility of potential cases in determining whether she should request authorisation for an investigation under article 15(3) of the Statute; there is no basis for the pre-trial chamber to consider that question as well.

41. The Appeals Chamber considers that the drafting history supports its view that the pre-trial chamber's determination under article 15(4) should not incorporate issues of admissibility. In this regard, it notes that, during the Rome Conference, a provision was deleted from draft article 15 that would have expressly required the pre-trial chamber to take issues of admissibility into account in determining whether to authorise an investigation.<sup>57</sup> Similarly, a proposal during the drafting of the Rules to incorporate admissibility and jurisdictional challenges into the authorisation procedure was rejected by the drafters, *inter alia*, due to concerns that it would exceed the oversight role of the pre-trial chamber under article 15 and that it would not be feasible to resolve these issues at such an early stage of proceedings.<sup>58</sup>

42. The Appeals Chamber considers that specific procedural mechanisms based on the full participation of relevant parties, participants and States are provided for elsewhere in the legal framework ensuring that the Court pursues investigations and prosecutions only in relation to admissible cases.<sup>59</sup> In particular, under article 18, as soon as the Prosecutor initiates an investigation pursuant to article 15 of the Statute, she must notify all States Parties and States which, based on available information, would normally exercise jurisdiction over the crimes concerned. Pursuant to that article, within one month of receipt of notification a State may inform the Court of its own investigations and, at the request of the State, the Prosecutor must defer to the State's investigation 'unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation'. As highlighted by the Prosecutor, in this context, an interested State may present detailed information with respect to any question of admissibility allowing for an informed and meaningful assessment by a pre-trial chamber at this stage.<sup>60</sup> The existence of this procedure, which allows the pre-trial chamber to consider admissibility at a stage designed specifically for that purpose immediately following upon the authorisation of an investigation, further supports the Appeals Chamber's interpretation of article 15(4) of the Statute.

43. The Appeals Chamber notes that, during the hearing, Afghanistan submitted that there was no need to authorise an investigation at this stage 'in light of the investigations being undertaken by Afghanistan under its new laws and new criminal justice bodies and mechanisms put in place precisely to investigate the same crimes that could come before the ICC'.<sup>61</sup> The Appeals Chamber considers that, as outlined above, the appropriate procedural mechanisms for consideration of such arguments by the pre-trial chamber (and potentially the Appeals Chamber) are provided by article 18 of the Statute, which allows Afghanistan to request deferral of the Prosecutor's investigation and, if necessary, allows for a preliminary ruling to be made regarding admissibility on the basis of arguments from the Prosecutor and Afghanistan.

44. Arguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation.<sup>62</sup> The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court, while articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute.<sup>63</sup> Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorisation of an investigation.

45. The Appeals Chamber concludes that a plain reading of the relevant legal provisions in their context suggests that the pre-trial chamber under article 15(4) of the Statute is only required to assess the information contained in the Prosecutor's request to determine whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction. In this regard, the Appeals Chamber notes that the process under paragraphs 3–5 of article 15 is not a review of the Prosecutor's determination. Rather the Prosecutor seeks the pre-trial chamber's authorisation to proceed and that authorisation should be based on the application by the pre-trial chamber of the separate factors specified in paragraph 4, to the Prosecutor's application. Thus the pre-trial chamber is required to reach its own determination under article 15(4) of the Statute as to whether there is a reasonable basis to proceed with an investigation. It is not called to review the Prosecutor's analysis of the factors under article 53(1)(a) to (c) of the Statute.

46. Based on the foregoing, the Appeals Chamber finds that the Pre-Trial Chamber erred in deciding that 'an investigation into the situation in Afghanistan at this stage would not serve the interests of justice'. It finds that the Pre-Trial Chamber's decision under article 15(4) of the Statute should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction.

**B. Second ground of appeal: Whether the Pre-Trial Chamber abused its discretion in assessing the interests of justice**

47. Under her second ground of appeal, the Prosecutor argues that, when determining that the initiation of an investigation into the situation in Afghanistan was not in the interests of justice, the Pre-Trial Chamber abused its discretion by failing to seek additional information from the Prosecutor, misapprehending the factors it took into account for its decision, taking into account factors it should not have taken into account and failing to take sufficient account of other relevant factors.<sup>64</sup>

48. Having determined in relation to the Prosecutor's first ground of appeal that the Pre-Trial Chamber erred in considering the 'interests of justice' when deciding on the Prosecutor's Request, the Appeals Chamber sees no need to address the Prosecutor's second ground of appeal. However, the interpretation given to the term 'interests of justice' as it appears in article 53(1)(c) of the Statute by the Pre-Trial Chamber has been the subject of extensive submissions before the Appeals Chamber and has provoked much commentary from the academic community and civil society. The concept of the 'interests of justice' is of significance under the Statute, particularly for the Prosecutor who remains obliged to consider it in her assessment under articles 15(3) and 53(1) of the Statute. For this reason, the Appeals Chamber is of the view that it is appropriate to provide some observations on the Pre-Trial Chamber's approach to this concept.

49. First, the Appeals Chamber underlines that article 53(1) of the Statute is formulated in the negative – the Prosecutor must consider whether there are 'reasons to believe that an investigation would not serve the interests of justice' and need not affirmatively determine that an investigation would be in the interests of justice, as suggested by the Pre-Trial Chamber.<sup>65</sup> Second, the Appeals Chamber notes that the Pre-Trial Chamber's reasoning in support of its conclusion regarding the 'interests of justice' was cursory, speculative and did not refer to information capable of supporting it.<sup>66</sup> Third, there is no indication that the Pre-Trial Chamber considered the gravity of the crimes and the interests of victims as articulated by the victims themselves in conducting this assessment. In these circumstances, the Appeals Chamber is of the view that the Pre-Trial Chamber did not properly assess the interests of justice.

50. While the second ground of appeal will not be further considered, in the following section of this judgment, the Appeals Chamber will address aspects of the Prosecutor's arguments under the second ground of appeal, to the extent that they are relevant to the appropriate relief in this appeal and, in particular, the scope of the authorised investigation.

**V. APPROPRIATE RELIEF**

51. Pursuant to rule 158(1) of the Rules, in an appeal under article 82(1)(d) of the Statute the Appeals Chamber 'may confirm, reverse or amend the decision appealed'. The Appeals Chamber has found that the Pre-Trial Chamber erred by considering the 'interests of justice' in the Impugned Decision. As the Pre-Trial Chamber decided, on the basis of this consideration, not to authorise the initiation of an investigation,<sup>67</sup> the error materially affected the Impugned Decision.

52. It remains to be determined whether the Impugned Decision should be reversed and the matter remanded to the Pre-Trial Chamber for a new decision on the Prosecutor's Request,<sup>68</sup> or whether the Appeals Chamber should amend the Impugned Decision by granting the Prosecutor's Request. In case of the latter, the Appeals Chamber would also need to consider the scope of the authorisation. The Appeals Chamber will address these questions in turn.

**A. Whether the Impugned Decision should be reversed and the matter remanded to the Pre-Trial Chamber**

53. As to whether the Appeals Chamber should reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber, the Appeals Chamber notes that, in the Impugned Decision, the Pre-Trial Chamber found that 'there is a reasonable basis to believe that the incidents underlying the Request occurred'.<sup>69</sup> Elsewhere, the Pre-Trial Chamber found that 'all the relevant requirements are met as regards [...] jurisdiction'.<sup>70</sup>

54. Thus, based on the Request, the Pre-Trial Chamber entered all the requisite findings under article 15(4) of the Statute – that there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and that potential case(s) arising from such investigation appear to fall within the Court's jurisdiction. These aspects of the Pre-Trial Chamber's decision have not been appealed. Given these findings, if the matter were remanded to the Pre-Trial Chamber, it would have no other recourse but to authorise the investigation. In these circumstances and in the interests of judicial economy, the Appeals Chamber considers it appropriate to amend the Impugned Decision and authorise the investigation based on the aforementioned findings of the Pre-Trial Chamber.

### **B. The scope of the authorisation**

55. The Appeals Chamber recalls that the Prosecutor requested the Pre-Trial Chamber:

[T]o authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan 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.<sup>71</sup>

56. Although the Pre-Trial Chamber decided not to authorise the investigation, it also made statements relating to the scope of any potential investigation, which, in the view of the Appeals Chamber, are based on legal error and an incorrect understanding of its role under article 15(4) of the Statute. They therefore require clarification. These concern the following issues: (i) whether the authorisation is limited to the incidents mentioned in the Request and those closely linked thereto; and (ii) whether certain acts committed outside Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan. As noted above, arguments relating to these matters have been raised in the context of the Prosecutor's second ground of appeal<sup>72</sup> and were addressed by LRV 1, LRV 2 and 3,<sup>73</sup> the Cross-border victims,<sup>74</sup> the OPCV,<sup>75</sup> and various *amici curiae*.<sup>76</sup>

#### **1. Whether the scope of authorisation is limited to the incidents mentioned in the Request and those closely linked thereto**

57. The Appeals Chamber notes that, to support her request for authorisation of an investigation into the situation in Afghanistan, the Prosecutor presented information relating to numerous incidents, which, in her view, established a reasonable basis that crimes under the jurisdiction of the Court have been committed.<sup>77</sup> The Prosecutor clarified, however, that she did not seek authorisation to investigate only in respect of these alleged crimes, but that she 'should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation'.<sup>78</sup>

58. The Pre-Trial Chamber, in contrast, emphasised that, if it were to authorise an investigation, the Prosecutor could only investigate incidents mentioned in the Request and authorised by the Chamber, 'as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it'.<sup>79</sup> The Pre-Trial Chamber stated that the closeness of the link between the incidents in respect of which the investigation is authorised and other incidents must be 'assessed taking into account the temporal, territorial and material parameters of the authorisation as granted' and that '[p]roximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme, are [...] among the factors allowing a Chamber to establish such connection'.<sup>80</sup> The Pre-Trial Chamber went on to find that it was:

[D]uty-bound to determine in concrete terms whether the investigation of the specific incidents for which the authorisation is sought, and those which are closely linked to the former, must be allowed. Accordingly, the scope of the scrutiny could not encompass incidents and groups of offenders other than those for which the authorisation was specifically requested. Quite logically, the same applies for other alleged crimes that may have occurred after the date of the Request.<sup>81</sup>

59. The Appeals Chamber recalls that article 15(2) and (3) require the Prosecutor to analyse the seriousness of information received on crimes within the jurisdiction of the Court and to submit a request for authorisation of an

investigation to the pre-trial chamber if she concludes that there is a reasonable basis to proceed. At this early stage, the Prosecutor's investigative powers are limited and, barring exceptional circumstances, she will not be in a position to identify exhaustively or with great specificity each incident, crime or perpetrator that could be subject to investigation. Also, evidently she will not be able to reference crimes which may occur after the request for authorisation. Nevertheless, the examples of alleged crimes presented by the Prosecutor in her request under article 15(3) of the Statute should be sufficient to define in broad terms the contours of the situation that she wishes to investigate.

60. If an investigation is authorised by the pre-trial chamber, the full range of investigative powers under the Statute are available to the Prosecutor, but she is also subject to certain duties that affect the scope of her investigation. She is mandated, under article 54(1)(a) of the Statute to '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'. Under article 54(1)(b) of the Statute, she is required to '[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court'. The Prosecutor's duty, according to article 54(1) of the Statute, is 'to establish the truth'. Therefore, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor must carry out an investigation into the situation as a whole.

61. In these circumstances, the Appeals Chamber considers that restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function. Such a restriction is also unnecessary to fulfil the purpose of article 15(4) of the Statute in ensuring that the Prosecutor does not embark on a frivolous or politically motivated investigation in that she remains restricted in her investigation to the contours of the situation authorised by the pre-trial chamber. Therefore, the Appeals Chamber considers that authorisation for an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's Request and incidents that are 'closely linked' to those incidents in the manner described by the Pre-Trial Chamber.

62. In relation to the Afghanistan situation, the Appeals Chamber notes that the Prosecutor presented information regarding the alleged large scale commission of multiple crimes against humanity and war crimes by various armed groups and actors involved in the conflict, which began prior to the entry into force of the Rome Statute on 17 July 2002 and continues to the present day. This information was accepted by the Pre-Trial Chamber as providing a reasonable basis to believe that the alleged events occurred and that they may constitute crimes within the jurisdiction of the Court.<sup>82</sup> Given the scope of the information presented by the Prosecutor and accepted by the Pre-Trial Chamber, the Appeals Chamber considers that the requirements of article 15(4) of the Statute would be met by granting the authorisation in the terms requested by the Prosecutor, which sufficiently defines the parameters of the situation.

63. The Appeals Chamber considers that the alternative proposed by the Pre-Trial Chamber – that investigation of incidents not closely related to those authorised would be possible if they were the subject of a new request for authorisation under article 15 – is unworkable in practice in the context of an investigation into large-scale crimes of the type proposed by the Prosecutor.<sup>83</sup> First, the Appeals Chamber is of the view that it would be impossible for the Prosecutor to determine in the course of investigating, which incidents could safely be regarded as 'closely linked' to those authorised and which would require the submission of a new request for authorisation. As a result, the Prosecutor would be required to submit repeated and sometimes unnecessary requests for authorisation of investigation as new facts are uncovered. Second, the Appeals Chamber considers that such continuous monitoring of the scope of the Prosecutor's investigation by the pre-trial chamber is contrary to the statutory scheme regulating the respective functions and powers of these two organs with respect to investigations. In this regard, the Appeals Chamber notes that article 42(1) recognises the independence of the Prosecutor and her responsibility for the conduct of investigations, while articles 56 and 57 of the Statute identify specific functions that may be exercised by the pre-trial chamber during the investigation. Third, the implications of the limited scope of authorisation for the questioning of witnesses and collection of evidence are unclear. In particular, the question arises as to whether the Prosecutor would be expected to refrain from collecting information and evidence on other incidents that are not closely linked to those authorised pending the grant of a new authorisation. If so, the delay in pursuing investigative leads and the inefficiencies in collecting evidence would undoubtedly compromise the Prosecutor's investigation. The Appeals

Chamber considers that such cumbersome and unwieldy procedures are not required by the Statute and are likely to have a significant detrimental effect on the conduct of investigations.

64. In view of foregoing, the Appeals Chamber finds that the Pre-Trial Chamber erred in finding that the scope of any authorisation granted would be limited to the incidents mentioned in the Request and those closely linked thereto.

**2. *Whether certain acts committed outside Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan***

65. In the Request, the Prosecutor provided information relating to alleged war crimes amounting to serious violations of article 3 common to the four Geneva Conventions ('Common Article 3') of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence,<sup>84</sup> committed as part of a policy,<sup>85</sup> by members of the CIA in a number of detention facilities in Afghanistan,<sup>86</sup> as well as in detention facilities located on the territory of other States Parties.<sup>87</sup> The Prosecutor presented information relating to individuals who were allegedly mistreated by the CIA as part of this program.<sup>88</sup> Some of these individuals were allegedly captured outside Afghanistan;<sup>89</sup> at least one individual was captured on the territory of Afghanistan, while the location of capture of the remaining individual was unclear.<sup>90</sup> In all instances, the mistreatment was alleged to have taken place on the territory of States Parties.<sup>91</sup>

66. The Prosecutor described the CIA detention program as 'global in nature' and indicated that it 'included persons with no direct connection to the conflict in Afghanistan, such as persons detained in connection with other armed conflicts or otherwise suspected of planning attacks against the United States'.<sup>92</sup> However, for the purpose of the Request, the Prosecutor referred only to crimes allegedly committed on the territory of States Parties against individuals that she considered to have a nexus to the armed conflict in Afghanistan.<sup>93</sup> The Prosecutor specified that she had included alleged crimes committed against individuals who were suspected by the CIA to be members of the Taliban and/or Al Qaeda, or of cooperating with those groups, or having 'links with or information about Al-Qaeda "core" or "central" group, allegedly responsible for the 11 September 2001 attacks'.<sup>94</sup> She submitted that the 'detainees were interrogated for their (actual or perceived) knowledge of Taliban and Al Qaeda operations and planned attacks, locations of Taliban and Al Qaeda leaders or training camps, and other intelligence information about each organisation'.<sup>95</sup> Conversely, she indicated that she had excluded the reported mistreatment of persons who were 'allegedly linked to other "franchise" Al Qaeda groups or other terrorist organisations'.

67. The Prosecutor explained her view of the nexus of the alleged crimes to the conflict in Afghanistan in the following terms:

The US-led [Operation Enduring Freedom] was triggered by the attacks on the US of 11 September 2001, and its goal was to fight Al Qaeda and the Taliban Government which harboured Al Qaeda and its leadership. After the fall of Taliban Government, Al Qaeda "core" fled to the Federally Administered Tribal Areas in Pakistan, where it continued its operations, including with respect to the ongoing armed conflict in Afghanistan. Thus, the capture of persons suspected of belonging to or being associated with the Al Qaeda leadership or with the Taliban in the neighbouring region of Pakistan or on the territory of other third States, undertaken in the context of or associated with the ongoing armed conflict in Afghanistan, and the later alleged mistreatment of such persons on the territory of a State Party, combine to provide the requisite nexus and jurisdictional base for the exercise of ICC jurisdiction. [...] It has also excluded persons detained and allegedly mistreated on the territory of a State Party, but with no clear nexus to the armed conflict in Afghanistan, such as the detention of persons allegedly linked to other "franchise" Al Qaeda groups or other terrorist organisations.<sup>96</sup>

68. The Appeals Chamber notes that the nexus requirement for war crimes is recognised in the Elements of Crimes. The penultimate element of each of the war crimes under the Court's jurisdiction requires that:

The conduct took place in the context of and was associated with an international armed conflict [or with an armed conflict not of an international character].



69. It has been observed that the function of the nexus requirement is to differentiate ‘war crimes, e.g. the killing or rape of a prisoner of war, from “ordinary” or “common” crimes under domestic law, such as the common crime of murder and rape’.<sup>97</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the ‘ICTY’) has found in the *Kunarac* case:

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. [...]

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.<sup>98</sup>

70. The Appeals Chamber endorsed this approach in the *Ntaganda* case, while also noting that ‘any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement’.<sup>99</sup>

71. In the Impugned Decision, the Pre-Trial Chamber found that the alleged incidents which the Prosecutor attributed to the CIA fell outside the Court’s jurisdiction ‘since these are said to have occurred against persons captured elsewhere than Afghanistan’.<sup>100</sup> The Pre-Trial Chamber considered that the acts in question lacked the nexus with an internal armed conflict required to trigger the application of international humanitarian law.<sup>101</sup> The Pre-Trial Chamber noted that the ‘two requirements “in the context of” and “associated with” are clearly not in the alternative but cumulative’.<sup>102</sup> The Pre-Trial Chamber supported its view by reference to the *chapeau* of Common Article 3, stating that ‘[b]oth the wording and the spirit of common article 3 to the Geneva Conventions are univocal in confining its territorial scope within the borders of the State where the hostilities are actually occurring’.<sup>103</sup>

72. For the reasons that follow, the Appeals Chamber considers that the Pre-Trial Chamber’s approach was incorrect. Common Article 3 reads, in full, as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;

- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

73. While it is true that the *chapeau* of Common Article 3 refers to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', this phrase does not have the function ascribed to it by the Pre-Trial Chamber, namely to limit the applicability of the provision to the State on the territory of which the armed conflict occurs. Rather, in the view of the Appeals Chamber, it simply describes the circumstances under which Common Article 3 applies: there must be an armed conflict not of an international character in one of the States Parties to the Geneva Convention. As highlighted by the *amicus curiae* submission of Professor Rona, this view finds support in the position of the International Committee of the Red Cross (the 'ICRC'), which suggests that this phrase does not have the effect of restricting the application of Common Article 3 to the territory of the State in which the armed conflict occurs, but rather was aimed at ensuring that the provision would bind only those States that had ratified the Geneva Conventions.<sup>104</sup> The ICRC indicates that this phrase 'has lost its importance in practice' as any armed conflict not of an international character 'cannot but take place on the territory of one of the Parties to the Convention' given the universal ratification of the Geneva Conventions.<sup>105</sup> Indeed, all States relevant to the allegations in question – Afghanistan, Poland, Romania and Lithuania, as well as the United States – are parties to the four Geneva Conventions.

74. The remaining text of Common Article 3 does not expressly limit the applicability of Common Article 3 to the territory of the State where the conflict occurs either. To the contrary, the minimum provisions set out in subparagraph (1) stipulate that those falling under its protection 'shall *in all circumstances* be treated humanely' and that certain acts against these persons 'shall remain prohibited at any time and *in any place whatsoever*' (emphases added). Therefore, contrary to the Pre-Trial Chamber's finding, the text of Common Article 3 read in its totality does not suggest that the requisite nexus with the armed conflict in Afghanistan cannot exist if the criminal conduct occurred outside Afghanistan and the victim was not captured in Afghanistan. Importantly, such a conclusion would also be contrary to the purpose of Common Article 3, which is to provide minimum guarantees in relation to armed conflicts.<sup>106</sup>

75. The Appeals Chamber notes in this context that the ICRC has recognised that 'an existing non-international armed conflict may spill over from the territory of the State in which it began into the territory of a neighbouring State not party to the conflict'.<sup>107</sup> The ICRC has also noted that:

The existence of such situations also seems to be acknowledged in the 1994 ICTR Statute, which describes the jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations *committed in the territory of neighbouring States*' (emphasis added).<sup>108</sup>

76. Thus, in the view of the Appeals Chamber, it is incorrect to assume that, merely because the alleged capture of the victim did not take place in Afghanistan and the alleged criminal act also occurred outside Afghanistan, the conduct cannot possibly have taken place in the context of, and have been associated with, the armed conflict in that

State. Rather, a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus. The place of capture of the alleged victim may be a relevant factor for this analysis, but it does not settle the matter.

77. In sum, the Appeals Chamber considers that the Pre-Trial Chamber's finding regarding the nexus requirement was incorrect. There is no reason to limit the Prosecutor's investigation in the manner envisaged by the Pre-Trial Chamber.

78. This is not to say that the Appeals Chamber has determined that any or all of the incidents listed in Annex 2C to the Request would necessarily have the requisite nexus to qualify as war crimes. When the relevant circumstances have been established in the course of an investigation into the situation as whole, the Prosecutor will be in a position to evaluate the applicable law, the significance of the fact that capture is alleged to have taken place outside Afghanistan and whether one or more individual cases fall within the Court's jurisdiction. In the event that the Prosecutor proceeds with a prosecution on a questionable jurisdictional basis, article 19(2) of the Statute provides that a challenge may be raised by an accused or person for whom a warrant of arrest or summons to appear has been issued, or a State with jurisdiction or from which acceptance of jurisdiction is required. The Court also has an obligation to satisfy itself that it has jurisdiction in any case brought before it pursuant to article 19(1) of the Statute. In this context, the Appeals Chamber finds that it is premature and unnecessary to resolve specific and detailed jurisdictional issues on an incident- by-incident basis for the purposes of authorising the investigation into the situation in Afghanistan.

### C. Conclusion on appropriate relief

79. In sum, the Appeals Chamber considers it appropriate to amend the Impugned Decision to the effect that the Prosecutor is authorised 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'.

Judge Ibáñez Carranza appends a separate opinion to this judgment in relation to the interpretation of article 15 and its relationship with article 53 of the Statute as discussed in paragraphs 29–33 of this judgment.

Done in both English and French, the English version being authoritative.



**Judge Piotr Hofmański**  
Presiding

## ENDNOTES

- 1 [Request for authorisation of an investigation pursuant to article 15, ICC-02/17-7-Conf-Exp](#) (public redacted version registered on the same day, ICC-02/17-7-Red), para. 1.
- 2 [Request](#), paras 72, 123.
- 3 [Request](#), para. 161.
- 4 [Request](#), para. 187.
- 5 [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.
- 6 [Impugned Decision](#), pp. 31, 32.
- 7 [Prosecution Appeal Brief](#), 30 September 2019, ICC-02/17-74 (the 'Prosecutor's Appeal Brief'), paras 12–59.
- 8 [Prosecutor's Appeal Brief](#), paras 60–167.
- 9 [Transcript of hearing](#), 4 December 2019, ICC-02/17-T-001-ENG; [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG; [Transcript of hearing](#), 6 December 2019, ICC-02/17-T-003-ENG. The hearing on 4 December 2019 addressed issues related to three appeals brought by victims against the same decision.
- 10 [Impugned Decision](#), p. 32. *See also*, [Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua](#), 31 May 2019, ICC-02/17-33-Anx-Corr, annexed to the Impugned Decision.
- 11 [Decision on the Prosecutor and Victims' Requests 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-02/17-62 (the 'Decision Granting Leave to Appeal'), p. 16. *See also* [Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua](#), ICC-02/17-62-Anx. For the requests for leave to appeal of the Prosecutor and LRV 1, *see* [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"](#), 7 June 2019, ICC-02/17-34 and [Victims' 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"](#), 10 June 2019, ICC-02/17-37.
- 12 [Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"](#), ICC-02/17-36; [Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" \[sic\]](#), ICC-02/17-38; [Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" \(ICC-02/17-33\)](#), ICC-02/17-40, a corrected version was registered on 12 June 2019 ([ICC-02/17-40-Corr](#)).
- 13 [Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15](#) (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber), ICC-02/17-42 (the 'Prosecutor's Observations'), paras 12–26. LRV 2 and LRV 3 subsequently filed a joint response to rebut the Prosecutor's Observations ([Victims' response to the Prosecutor's "Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15"](#), dated 19 June 2019 and registered on 20 June 2019, ICC-02/17-50).
- 14 [Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters](#), 27 September 2019, ICC-02/17-72-Corr, paras 3–6. After having received 15 expressions of interests to participate as *amici curiae*, the Appeals Chamber, on 24 October 2019, rendered a decision inviting *amici curiae* to either file written submissions or indicate that they will attend the oral hearing, and also granting the victims of cross-border aerial bombardment and the Office of Public Counsel for the defence their respective requests to submit observations ([Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims](#), 24 October 2019, ICC-02/17-97, paras 2, 4, 5, 7, 8). Following this decision, seven *amici curiae* indicated their intention to make oral submissions at the hearing, and eight *amici curiae* submitted their written submissions.
- 15 [Prosecutor's Appeal Brief](#).
- 16 [Updated Victims' Appeal Brief](#), original version filed on 30 September 2019 and corrigendum registered on 2 October 2019, ICC-02/17-73-Corr. LRV 1 had already filed an appeal brief on 24 June 2019 ([Victims' Appeal Brief](#), ICC-02/17-53), but filed an update of this following the Appeals Chamber's decision to allow an updated appeal brief to be filed by LRV 1 ([Order suspending the time limit for the filing of an appeal brief and on related matters](#), 24 June 2019, ICC-02/17-54, pp. 3, 4).
- 17 [Victims' Joint Appeal Brief against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"](#), original version filed on 30 September 2019 and corrigendum registered on 1 October 2019, ICC-02/17-75-Corr. The Appeals Chamber had extended the time limit for the filing of LRV 2 and 3 Appeal Brief to ten days after the notification of the Pre-Trial Chamber's decision on the requests for leave to appeal the Impugned Decision ([Order suspending the time limit for the filing of an appeal brief and on related matters](#), 24 June 2019, ICC-02/17-54, p. 3).
- 18 [Consolidated Prosecution Response to the Appeals Briefs of the Victims](#), ICC-02/17-92.
- 19 [OPCV Consolidated Submissions pursuant to the "Order Scheduling a Hearing before the Appeals ICC-02/17-93"](#).
- 20 [Victims' Joint Response and Request for Reply](#), ICC-02/17-94.
- 21 [Submissions On Behalf Of Victims Of Cross Border Aerial Bombardment](#), 15 November 2019, ICC-02/17-116 ('Cross-border Victims' Submissions').
- 22 [Observations of the OPCD on the Appeals Against ICC-02/17-33](#), 15 November 2019, ICC-02/17-110.
- 23 These *amici curiae* are those that chose to file written submissions instead of participating in the hearing. [Written Submissions in the Proceedings Relating to the Appeals Filed Against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" Issued on 12 April 2019 \(ICC-02/17-33\) and Pursuant to "Decision on the participation of amici curiae, the Office of Public](#)

- Counsel for the Defence and the cross-border victims' Issued on 14 October 2019 (ICC-02/17-97), 14 November 2019, ICC-02/17-108; Observations by Professor Jennifer Trahan as *amicus curiae* on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019, 15 November 2019, ICC-02/17- 109; Observations of Professor Gabor Rona on the Pre-Trial Chamber's Conclusion that Events Beyond the Territory of Afghanistan Lack Sufficient Nexus to the Armed Conflict There for Purposes of Application of Rome Statute War Crimes, 14 November 2019, ICC-02/17-111 (hereinafter: 'Professor Gabor Rona's Submissions'); *Amicus curiae* observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, 15 November 2019, ICC-02/17-112; *Amicus Curiae* Observations on behalf of Former International Chief Prosecutors David M. Crane, Benjamin B. Ferencz, Richard J. Goldstone, Carla del Ponte and Stephen J. Rapp, 15 November 2019, ICC-02/17-113 (hereinafter: 'Former International Chief Prosecutors' Submissions'); *Amicus Curiae Observations*, 15 November 2019, ICC-02/17-114 (hereinafter: 'Human Rights Organisations' Submissions'); Observations by Queen's University Belfast Human Rights Centre as *amicus curiae* on the appeal of Pre-Trial Chamber II's "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" of 12 April 2019, 15 November 2019, ICC-02/17-115 (hereinafter: 'Queen's University Belfast Human Rights Centre Submissions'); *Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter*, 15 November 2019, ICC-02/17-117.
- 24 Written Submissions of the Government of the Islamic Republic of Afghanistan, ICC-02/17-130 (The time period for Afghanistan to apply to participate was extended by the Appeals Chamber, *Decision on request for extension of time*, 26 November 2019, ICC-02/17-121).
- 25 *Decision on the conduct of the hearing before the Appeals Chamber*, 22 November 2019, ICC-02/17-118. The schedule of the hearing was subsequently revised per the following two decisions: *Decision on request for extension of time*, 26 November 2019, ICC-02/17-121; *Decision on 'Urgent Request Regarding Conduct of Proceedings' and revised schedule for the hearing on 4 December 2019*, 2 December 2019, ICC-02/17-129.
- 26 *Transcript of hearing*, 4 December 2019, ICC-02/17-T-001-ENG.
- 27 This interlocutory decision was rendered orally, *Transcript of hearing*, 5 December 2019, ICC-02/17- T-002-ENG, p. 2, line 19 to p. 5, line 4. On the same day, Judge Ibáñez Carranza filed her dissenting opinion (preliminary reasons) to the Majority's oral ruling, *Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal*, 5 December 2019, ICC-02/17-133. On 4 March 2020, the majority of the Appeals Chamber filed the *Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan*, ICC-02/17-137 (hereinafter: 'Reasons of 4 March 2020'). Judge Ibáñez Carranza filed the *Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan*, 5 March 2020, ICC- 02/17-137-Anx.
- 28 *Transcript of hearing*, 5 December 2019, ICC-02/17-T-002-ENG; *Transcript of hearing*, 6 December 2019, ICC-02/17-T-003-ENG.
- 29 *Impugned Decision*, para. 30.
- 30 *Impugned Decision*, para. 35.
- 31 *Prosecutor's Appeal Brief*, para. 18.
- 32 *Transcript of hearing*, 5 December 2019, ICC-02/17-T-002-ENG, p. 9, lines 6-11.
- 33 *Prosecutor's Appeal Brief*, para. 37 (emphasis in original).
- 34 *Prosecutor's Appeal Brief*, para. 37 (emphasis in original).
- 35 *Prosecutor's Appeal Brief*, para. 59.
- 36 *LRV 1 Appeal Brief*, para. 107; *Transcript of hearing*, 5 December 2019, ICC-02/17-T-002-ENG, p. 33, lines 7-13; *LRV 2 and LRV 3 Appeal Brief*, paras 55, 59; *OPCV Submissions*, para. 39; *Transcript of hearing*, 5 December 2019, ICC-02/17-T-002-ENG, p. 79, line 15 to p. 81, line 25; *Cross-border Victims' Submissions*, paras 19–21; *Transcript of hearing*, 5 December 2019, ICC-02/17-T-002-ENG, p. 71, line 22 to p. 73, line 1; *Queen's University Belfast Human Rights Centre Submissions*, paras 3–4.
- 37 *LRV 1 Appeal Brief*, para. 107.
- 38 *LRV 2 and LRV 3 Appeal Brief*, paras 65–58; *OPCV Submissions*, para. 43.
- 39 *Cross-border Victims' Submissions*, paras 19–20.
- 40 *LRV 1 Appeal Brief*, para. 107; *LRV 2 and LRV 3 Appeal Brief*, paras 55, 59; *OPCV Submissions*, para. 39; *Cross-border Victims' Submissions*, para. 21; *Queen's University Belfast Human Rights Centre Submissions*, paras 3–4.
- 41 Pre-Trial Chamber II (composed of Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and Judge Cuno Tarfusser), 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*, dated 31 March 2010 and registered on 1 April 2010, ICC-01/09-19-Corr (hereinafter: '*Kenya Authorisation Decision*').
- 42 *Kenya Authorisation Decision*, para. 24.
- 43 *Kenya Authorisation Decision*, paras 21–24.
- 44 Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 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", 15 November 2011, ICC-02/11-14-Corr, paras 16-18, 207–208; *Situation in Georgia*, Pre-Trial Chamber I, *Decision on the Prosecutor's request for authorization of an investigation*, 27 January 2016, ICC-01/15-12, paras 4–5, 58; *Situation in the Republic of Burundi*, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, 25 October 2017; a public redacted version was registered on 9 November 2017 (ICC-01/17-9-Red), paras 28, 190; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, *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*, 14 November 2019, ICC-01/19-27, paras 119, 127.
- 45 *Impugned Decision*, para. 30.

- 46 M. Bergsmo, J. Pejić, and D. Zhu, 'Article 15' in O. Triffterer and K. Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck et al., 3<sup>rd</sup> ed., 2015) (hereinafter: 'Triffterer'), pp. 726–729; M. Bergsmo, P. Kruger, and O. Bekou, in 'Article 53' in Triffterer, pp. 1366–1368.
- 47 Rule 104 of the Rules.
- 48 Article 53(1), second paragraph; Rule 105(1) of the Rules: The Prosecutor is required to inform the referring State(s) or the Security Council, as applicable, of her decision, and, if the decision not to proceed is based on the factor in article 53(1)(c) of the Statute alone, she must also inform the pre-trial chamber.
- 49 Article 53(3)(a) of the Statute provides that the pre-trial chamber may, at the request of the referring entity, review a decision not to proceed based on article 53(1) of the Statute and may request the Prosecutor to reconsider her decision. If the decision is based on the factor in article 53(1)(c) of the Statute alone, article 53(3)(b) provides that the pre-trial chamber may *proprio motu* review the Prosecutor's decision, which will only be effective if confirmed by the pre-trial chamber.
- 50 See also rule 49(1) of the Rules which provides that '[w]here a decision under article 15, paragraph 6 is taken, the Prosecutor shall promptly ensure that notice is provided, including reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information [...] or the integrity of investigations or proceedings'. Rule 105 of the Rules, applicable to decisions not to proceed under article 53, confirms that the notification requirements in respect of decisions not to request authorisation for an investigation are exclusively regulated by rule 49 of the Rules and that the Prosecutor is not required to inform the pre-trial chamber that she will not request authorisation for an investigation under article 15 of the Statute. See rule 105 (1) and (3) to (5), which elaborate on the Prosecutor's notification requirements if she decides not to initiate an investigation under article 53(1) of the Statute, and Rule 105(2), which affirms that rule 49 applies in relation to decisions not to request authorisation for an investigation.
- 51 Rule 49(2) of the Rules.
- 52 The Appeals Chamber notes that Pre-Trial Chamber II in the *Kenya* Authorisation Decision appears to have taken the alternative view that it could conduct a review under article 53(3)(b) of the Statute if the Prosecutor decided not to request authorisation under article 15 on the basis that an investigation would not serve the interests of justice (*Kenya Authorisation Decision*, n. 35; para. 63). As further explained below, the Appeals Chamber considers that this view is incompatible with the nature of the Prosecutor's discretionary power under article 15 of the Statute, with the wider legal framework and with the drafting history of the rules. In particular, the Appeals Chamber notes that rule 110(2) of the Rules, titled 'Decision by the Pre-Trial Chamber under article 53, paragraph 3 (b)', provides that '[w]hen the Pre-Trial Chamber does not confirm the decision by the Prosecutor referred to in sub-rule 1, he or she shall proceed with the investigation or prosecution'. In the view of the Appeals Chamber, this confirms that the judicial review envisaged under article 53(3)(b) is limited to decisions taken under article 53 of the Statute and does not extend to decisions not to request authorisation of an investigation under article 15 of the Statute.
- 53 See rules 54.2 and 56.2 of Preparatory Commission for the International Criminal Court, [Proposal by France on Rules of Procedure and Evidence Part 3, section 3, subsection 1](#), 12 February 1999, PCNICC/1999/DP.6, p. 2, which proposed inclusion of a rule requiring the Prosecutor to notify the pre-trial chamber of decisions not to proceed based on the 'interests of justice' factor in relation to 'a situation referred to him under articles 13 to 15' and allowing for judicial oversight of decisions not to submit requests for authorisation to the Pre-Trial Chamber. Friman notes that a number of delegations objected to this proposal, *inter alia*, on the basis 'that it would be inconsistent with the Statute to provide for such a direct control of the Prosecutor'. See H. Friman, 'Investigation and Prosecution' (hereinafter: 'Friman') in R. Lee (ed.) *The ICC: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 497–498.
- 54 The concern of the drafters was to ensure that a Prosecutor vested with *proprio motu* powers would not be able to pursue frivolous or politically motivated investigations in an unchecked manner. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), 25 March–12 April 1996, A/AC.249/1, pp. 43–44.
- 55 Article 18(1) of the Statute specifies that, in the case of referrals, the Prosecutor must also determine that there is a reasonable basis to commence and investigation, whereas, when she initiates an investigation under article 15 of the Statute, there is no need for an additional determination by the Prosecutor under article 53(1) of the Statute.
- 56 As Professor Scheffer outlined in his oral submissions during the hearing, the drafters' understanding of this phrase was derived from their own judicial systems and represented 'a very commonsensical platform of analysis': [Transcript of hearing](#), 6 December 2019, ICC-02/17-T-003-ENG, p. 58, line 15 to p. 59, line 2.
- 57 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court International Criminal Court Documents, ICC Preparatory Works and Statute Amendments, Preparatory Committee, [Article 46, Information Submitted to the Prosecutor: Proposal / Submitted by Argentina and Germany](#), 16 March–3 April 1998, A/AC.249/1998/WG.4/DP.35. M. Bergsmo, J. Pejić, and D. Zhu, 'Article 15' in Triffterer, p. 728.
- 58 Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, [Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law](#), 23 November 1999, PCNICC/1999/WGRPE/DP.43, p. 1; J. T. Holmes, 'Jurisdiction and Admissibility' in R. Lee (ed.) *The ICC: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 328–329; Friman, p. 495.
- 59 Article 19 of the Statute provides that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 of the Statute and the Prosecutor may seek a ruling on the admissibility of a case (Article 19(1) and (3) of the Statute). Challenges may also be brought by an accused person or person for whom a warrant of arrest or summons to appear has been issued, a State which has jurisdiction over a case and is investigating or prosecuting or has investigated or prosecuted the case, or a State from which acceptance of jurisdiction is required (Article 19(2) of the

- Statute). Article 19(3) of the Statute provides that those who have referred the situation under article 13 of the Statute, as well as victims, may also submit observations to the Court in proceedings with respect to admissibility.
- 60 [Transcript of hearing](#), 6 December 2019, ICC-02/17-T-003-ENG, p. 35, lines 21–25.
- 61 [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 23, lines 10–14.
- 62 [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 100, line 13 to p. 104, line 24.
- 63 [Transcript of hearing](#), 6 December 2019, ICC-02/17-T-003-ENG, p. 37, line 23 to p. 38, line 2; p. 40, line 13 to p. 41, line 15.
- 64 [Prosecutor’s Appeal Brief](#), paras 60–167.
- 65 [Impugned Decision](#), paras 35, 89.
- 66 [Impugned Decision](#), paras 91–95.
- 67 [Impugned Decision](#), p. 32.
- 68 As to the Appeals Chamber’s power to remand a matter to the original Chamber see, Appeals Chamber, Situation in the Democratic Republic of the Congo, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”](#), 13 July 2006, ICC-01/04-169, para. 91.
- 69 [Impugned Decision](#), paras 48, 60.
- 70 [Impugned Decision](#), para. 96.
- 71 [Request](#), para. 376.
- 72 [Prosecutor’s Appeal Brief](#), paras 73–110.
- 73 [LRV 1 Appeal Brief](#), paras 144–167, 172–185; [LRV 2 and 3 Appeal Brief](#), paras 100–121, 122–145.
- 74 [Cross-border Victims’ Submissions](#), para 33; [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 75, lines 1–17;
- 75 [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 15, line 15 to p. 19, line 8.
- 76 [Former International Chief Prosecutors’ Submissions](#), para. 12; [Human Rights Organisations’ Submissions](#), paras 24–35; [Transcript of hearing](#), 6 December 2019, ICC-02/17-T-003-ENG, p. 15, line 18–24; [Professor Gabor Rona’s Submissions](#), paras 1–15.
- 77 [Request](#), section VII.
- 78 [Request](#), para. 38.
- 79 [Impugned Decision](#), para. 40.
- 80 [Impugned Decision](#), para. 41.
- 81 [Impugned Decision](#), para. 69.
- 82 [Impugned Decision](#), para. 60.
- 83 [Impugned Decision](#), para. 42.
- 84 [Request](#), paras 191–199 *et seq.*, 201, 204–208, 210–217.
- 85 [Request](#), paras 218–221, 229–245.
- 86 [Request](#), para. 201.
- 87 [Request](#), paras 202–203.
- 88 [Request](#), para. 249; Confidential *Ex Parte* Annex 2C to the Request, nos. 55–78.
- 89 [Request](#), para. 249; Confidential *Ex Parte* Annex 2C to the Request, nos. 55–75, 77–78.
- 90 Confidential *Ex Parte* Annex 2C to the Request, nos. 70, 76.
- 91 [Request](#), para. 249.
- 92 [Request](#), para. 248.
- 93 [Request](#), para. 248.
- 94 [Request](#), paras 246, 248.
- 95 [Request](#), para. 199.
- 96 [Request](#), para. 250.
- 97 M. Cottier and J. Grignon, ‘Article 8’ in Triffterer, pp. 314–316 (paras 37–42).
- 98 ICTY, Appeals Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, 12 June 2002, IT-96- 23 & IT-96-23/1-A, paras 58–60.
- 99 [Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 15 June 2017, ICC-01/04-02/06-1962, para. 68.
- 100 [Impugned Decision](#), para. 56.
- 101 [Impugned Decision](#), para. 55.
- 102 [Impugned Decision](#), para. 52.
- 103 [Impugned Decision](#), para. 53 (footnote omitted). The Appeals Chamber notes that the Pre-Trial Chamber erroneously addressed this issue under the heading of ‘Jurisdiction *ratione loci*’ or territorial jurisdiction ([Impugned Decision](#), p. 17, heading 2.1 ‘Jurisdiction *ratione loci*’). However, as the incidents at issue all allegedly took place on the territory of a State Party to the Rome Statute and would therefore fall squarely within the Court’s jurisdiction as per article 12(2)(a) of the Statute, provided that they amount to crimes under article 5 of the Statute, no question relating to the Court’s territorial jurisdiction arises in this respect. Pursuant to this provision, the Court may exercise its jurisdiction if ‘[t]he State on the territory of which the conduct in question occurred’ is Party to the Statute or has accepted the Court’s jurisdiction under article 12(3) of the Statute. The issue addressed by the Pre-Trial Chamber instead relates to the Court’s subject-matter jurisdiction (jurisdiction *ratione materiae*), namely whether it can be said that certain conduct took place in the context of and was associated with an armed conflict (that is to say, the armed conflict in Afghanistan) and, therefore, potentially qualifies as a war crime.
- 104 [Professor Gabor Rona’s Submissions](#), para. 8; ICRC, Commentary of 2016, Article 3: Conflicts not of an International Character (hereinafter: ‘Commentary of 2016, Article 3’), paras 466–470.
- 105 ICRC, [How is the Term “Armed Conflict” Defined in International Humanitarian Law?](#) (Opinion Paper March 2008), 31 March 2008, p. 3.
- 106 See Commentary of 2016, Article 3, para. 356. See also United States, Supreme Court, *Hamdan v. Rumsfeld*, *Secretary of Defense, et al.*, [Opinion](#), 29 June 2006, (No. 05-184) 415 F. 3d 33, p. 67.
- 107 Commentary of 2016, Article 3, para. 474.
- 108 Commentary of 2016, Article 3, para. 475.