

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/17 OA**

Date: **24 June 2019**

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Victims' Appeal Brief

Source:

Legal Representatives of Victims

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

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I. INTRODUCTION

1. Legal representatives for 82 victims ('Victims') from the situation in the Islamic Republic of Afghanistan ('Afghanistan'), and two organizations that submitted representations on behalf of a significant number of victims, hereby respectfully file this appeal brief pursuant to Article 82(1)(a) of the Rome Statute ('Statute'), Rule 154 of the Rules of Procedure and Evidence ('Rules'), and Regulations 36 and 64(2) of the Regulations of the Court ('Regulations'). The Victims are victims of crimes allegedly involving: (i) anti-government groups including the Taliban; (ii) Afghan armed forces; and (iii) United States armed forces.
2. The Victims appeal Parts IV, V.2.I and VII of the Pre-Trial Chamber's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation on an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019 ('Decision').¹

II. PROCEDURAL BACKGROUND

3. On 12 April 2019, Pre-Trial Chamber II ('Chamber') delivered the Decision, in which it noted that 680 out of the 699 victims' representations welcomed the prospect of an investigation.² The Chamber found that 'all the relevant requirements are met as regards both jurisdiction and admissibility'³ but declined to authorize the investigation on the basis of an interests of justice assessment. The Victims were amongst those that provided representations.
4. On 31 May 2019, the 'Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua ('Separate Opinion') was issued.⁴

¹ Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation on an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019', 12 April 2019, ICC-02/17-33 ('Decision'). Part IV encompasses paragraphs 29-42 of the Decision. Part V.2.I encompasses paragraphs 49-59 of the Decision. Part VII encompasses paragraphs 87-96 of the Decision.

² Decision, para. 87.

³ Decision, para. 96.

⁴ Pre-Trial Chamber II, 'Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua', 31 May 2019, ICC-02/17-33-Anx-Corr ('Separate Opinion').

5. On 7 June 2019, the Prosecution requested leave to appeal the Decision.⁵ The Victims support that request. The Prosecution’s request for leave to appeal has not been granted at the time of the filing of this appeal brief.
6. On 10 June 2019, in order to fully preserve their rights, the Victims filed a request for leave to appeal the Decision before Pre-Trial Chamber II⁶ and a notice of appeal of the Decision before the Appeals Chamber (‘Notice of Appeal’).⁷ In parallel, legal representatives of other victims filed two separate notices of appeal before the Appeals Chamber.⁸
7. On 12 June 2019, the Prosecution submitted identical observations⁹ on the Victims’ Notice of Appeal and Request for Leave to Appeal, as well as other submissions filed on behalf of victims, simultaneously to the Appeals Chamber and Pre-Trial Chamber II. Representatives for some victims responded on 19 June 2019.¹⁰

III. PRELIMINARY ISSUES

8. The Victims submit that they have standing as a party under Article 82(1)(a) to appeal the Decision. Article 82(1)(a) of the Statute enables ‘either party’ to seek leave to appeal ‘a decision with respect to jurisdiction or admissibility.’ The term should, in the present exceptional circumstances, where an entire investigation has been denied notwithstanding affirmative findings on jurisdiction and admissibility, be interpreted to include victims.

⁵ Prosecution, ‘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 (‘Prosecution request’).

⁶ Legal Representatives of Victims, ‘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’ with confidential Annex I, 10 June 2019, ICC-02/17-37.

⁷ Legal representatives of victims, ‘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’ with confidential Annex I, 10 June 2019, ICC-02/17-36.

⁸ Legal Representatives of Victims, ‘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”, 10 June 2019, ICC02/17-38; Legal Representatives of Victims, ‘Victims’ Notice of Appeal of the “Decision Pursuant o 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-02/07-36; Legal Representatives of Victims, ‘Corrected version of the Notice of appeal against the “Decision Pursuant to Article 15 of the Rome Statue on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”(ICC-02/17-33)’, 12 June 2019, ICC-02/17-40-Corr.

⁹ Prosecution, ‘Observations concerning diverging judicial proceedings arising from the Pre-trial Chamber’s decision under article 15 (filed simultaneously before the Pre-Trial Chamber II and the Appeals Chamber’, 12 June 2019, ICC-02/17.

¹⁰ Legal Representatives of Victims, ‘Victims’ response to the Prosecutor’s “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15”’, 19 June 2019, ICC-02-17.

9. The expression ‘either party’ is ambiguous at the pre-authorisation stage. It is erroneous to interpret the provision as referring to Prosecution and Defence, as there is no Defence at this stage. The only parties that submitted views to the Pre-Trial Chamber during the Article 15 process were the Prosecution and the victims.¹¹ The Rules and Regulations concerning Article 82 appeals add to that ambiguity, and foresee the participation of more than two parties: Rules 155(2) and 156(2) refer to ‘all parties who participated in the proceedings’ rather than ‘both parties’. Rule 157 requires that ‘the other parties’ must be informed when an appealing party discontinues an appeal. Regulations 64(6) and 65(3) of the Regulations refer to ‘participants’.
10. The Statute does not define ‘party’. Nor do the Elements of Crimes, the Rules, or the Regulations.¹² Article 81 of the Statute allows appeals by ‘the Prosecutor’ and or ‘the convicted person’. Article 82(1) is not similarly confined, and ‘party’ in Article 82(1) has been held to encompass a broader range of participants in the proceedings, as the circumstances require. Pre-Trial Chamber II granted Jordan leave to appeal a decision under Article 82(1)(d).¹³ The Prosecution did not object.¹⁴ The Appeals Chamber ruled on the merits of an appeal by Côte D’Ivoire under Article 82(1)(a).¹⁵
11. Just as States have interests which should be respected in exceptional circumstances by providing an avenue to appeal under Article 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision in exceptional circumstances that goes to the core of their interests. That is the case here.
12. The Statute recognizes that victims have a particular interest in a decision on admissibility and jurisdiction, and grants victims participatory rights that are considerably broader than those of *amicus curiae*. Article 19(3) of the Statute permits victims to make observations to the Court in proceedings concerning jurisdiction and admissibility. In a recent pre-authorisation decision in *Myanmar*, Pre-Trial Chamber I accepted observations made by victims of the situation pursuant to Article 19(3) of the Statute.¹⁶

¹¹ This emerges from the procedural history set out in the Decision at paras. 1-14.

¹² See Rule 155 of the Rules and Regulation 65 of the Regulations.

¹³ See Pre-Trial Chamber II, ‘Decision on Jordan’s Request for Leave to Appeal’, 21 February 2018, ICC-02/05-01/09.

¹⁴ *Ibid*, para. 4

¹⁵ The Appeals Chamber, ‘Judgment on the appeal of Côte D’Ivoire against the decision of the Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte D’Ivoire’s Challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12 OA, paras. 36 and 141 (referring to the appeal as an “appeal pursuant to article 82 (1) (a) of the Statute”).

¹⁶ The Pre-Trial Chamber, ‘Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, 06 September 2018, ICC-RoC46(3)-01/18-37 (‘Myanmar Decision’), para. 21.

13. The centrality of victims' interests at the pre-authorisation stage is reflected in Article 15(3), which permits victims to make representations, following a request by the Prosecutor to open an investigation. Rule 50 further reflects the victims' standing at the pre-authorisation stage. No such standing is provided to any other person, nor to States. The Prosecutor is required to consider 'the interests of victims' when assessing the interests of justice under Article 53(1)(c) prior to a decision not to investigate. It is also reflected in Rule 93, which enables a Chamber to seek the views of victims or their legal representatives, to Rules 107 and 109, which concern prosecutorial decisions not to investigate or prosecute. In short, the Statute recognizes that the victims have a strong interest in the process of authorizing investigation under Article 15(3), rulings on jurisdiction and admissibility under Article 19(3), and the 'interests of justice' assessment under Article 53(1)(c).
14. The Appeals Chamber has 'clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.'¹⁷ The Appeals Chamber in that decision, as well as Pre-Trial Chamber I in *Myanmar*,¹⁸ relied on Article 68(3) of the Statute to permit views by victims. The *Myanmar* Pre-Trial Chamber also noted that 'rule 93 of the Rules gives it discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate.'¹⁹
15. On any reasonable view, the Victims should have standing to appeal. The victims' views were communicated to the Chamber during the Article 15 process²⁰ and the Chamber acknowledged that the Victims suffered serious crimes.²¹ The Decision represents a concrete, actual threat to the Victims' rights to truth, justice, and reparation: without active investigation by the Prosecution, there can be no trials at the Court and those responsible for the crimes will be not be held accountable. The Court will make no declaration of truth at the conclusion of any trial. Reparation cannot be awarded in the absence of conviction. It is *only* through investigation by the Prosecution that there will be a realistic prospect of trial, and reparation. A favourable

¹⁷ The Appeals Chamber, 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04 OA4 OA5 OA6, para 56.

¹⁸ Myanmar Decision, paras. 20-21.

¹⁹ Myanmar Decision, para. 21.

²⁰ Decision, para. 9.

²¹ Decision, paras. 80 to 86.

decision for the Victims on appeal would enable the Prosecution to use all powers conferred upon it by the Statute in order to ensure an effective investigation and prosecution. This is the *only* avenue for redress available, given the inability or unwillingness of governments, including the governments of Afghanistan and the United States, to meaningfully investigate and prosecute the crimes under consideration.

16. As a result of the Decision, the message to millions of victims of crimes against humanity and war crimes is that the Court has found that the crimes against them are of appalling gravity, that the situation is admissible, and that the Court has jurisdiction, but that the investigation cannot be opened as the Court considers that it is ‘not feasible and inevitably doomed to failure’.²² The framers of the Statute could not have intended victims to be without recourse in such a situation. To the contrary, victims at the Court are actors of international justice rather than its passive subjects.²³ Victims have a right to a just process, and to be treated fairly, at all stages of the proceedings.²⁴
17. The framers of the Statute intended for victims to have an effective remedy for violation of their rights. The Court is required to promptly inform victims of a Prosecution decision not to investigate.²⁵ Victims may make representations to the Chamber concerning an Article 15 request for authorisation of an investigation.²⁶ The Court must permit victims to present their views and concerns at stages of the proceedings determined to be appropriate by the Court, and the Court is required to consider their position.²⁷ Rule 86 provides that *inter alia* the Prosecution and the Chamber ‘in performing their functions under the Statute or the Rules, shall take into account *the needs of all victims*’ (emphasis added).
18. The Appeals Chamber may resolve the ambiguity concerning the standing of a ‘party’ in Article 82(1), and corresponding rules and regulations, by considering ‘principles and rules of international law’ and ‘internationally recognized human rights’ pursuant to Article 21 of the Statute. United Nations (‘UN’) principles that encapsulate customary international law require

²² Decision, para. 90.

²³ See ‘Report of the Court on the Strategy in Relation to Victims’, 1 November 2009, ICC/ASP/8/45, para. 46.

²⁴ See Pre-Trial Chamber, ‘Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6’, 31 March 2006, ICC-01/04-135-tEN, paras. 36 and 39-40.

²⁵ Rule 92(2) of the Rules.

²⁶ Article 15(3) of the Statute, and Rules 50(3) and 50(4) of the Rules.

²⁷ Article 68(3) of the Statute.

governments to undertake thorough, prompt, and impartial investigations, and they provide that victims must have equal access to an effective judicial remedy for violation of their rights.²⁸ The UN Human Rights Committee has said that “[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”²⁹ The aims of an effective investigation are to ensure as far as possible that the truth is established and that those responsible are tried and convicted.³⁰

19. The Court frequently looks to jurisprudence of the European Court of Human Rights (‘ECtHR’) in resolving ambiguities in the Statute. ECtHR jurisprudence confirms that a failure to adequately and effectively investigate or prosecute criminal conduct may constitute a violation of internationally recognized human rights, including the right to life,³¹ the prohibition on torture,³² and the right to an effective remedy.³³
20. Jurisprudence of the Court recognises that victims have three principal rights: (i) to have a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.³⁴
21. In the present case, not one of these rights has been realized, nor will they be realised if the Decision is permitted to stand. Consistent with the principle of *ubi jus ibi remedium*, there must be a remedy for this comprehensive breach of the victims’ rights. The rights of victims to an effective remedy and access to justice ‘lie at the heart of victims’ rights’ at the Court.³⁵
22. Against this backdrop of applicable international human rights and customary law, it would be

²⁸ See The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted on 16 December 2005, Articles 3- 4 and 11-12; United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions , adopted 24 May 1989, Article 9.

²⁹ United Nations Human Rights Committee, ‘General Comment 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)’, 10 March 1992.

³⁰ See The Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted in 1991.

³¹ See ECtHR, *Akkum and Others v. Turkey*, 24 June 2005.

³² ECtHR, *Biser Kostov v. Bulgaria*, 10 January 2010.

³³ See ECtHR, *Aksoy v. Turkey*, 18 December 1996.

³⁴ Pre Trial Chamber I, ‘Decision on the 34 Applications for Participation at the Pre Trial Stage’, 25 September 2009, ICC-02/05-02/09-121, para. 3. See also Pre Trial Chamber I, ‘Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’, 15 Mayo 2008, ICC-01/04-01/07-474, paras 31-44.

³⁵ Pre-Trial Chamber I, ‘Decision on Information and Outreach for the Victims of the Situation’, 13 July 2018, ICC-01/18, para. 9.

‘a result which is manifestly absurd or unreasonable’³⁶ to interpret the Statute as depriving victims of an effective means of challenging a decision by the Chamber not to permit an investigation, where the requirements of jurisdiction and admissibility have been met.

23. For these reasons, it is consistent with Article 21(1) and 21(3) of the Statute and the Court’s jurisprudence on victims’ rights to interpret Article 82(1) of the Statute to permit the Victims to challenge the Decision, in their own right.

IV. SUBMISSIONS

i. The Decision is a ‘decision with respect to jurisdiction’

24. The Decision pertains directly to jurisdiction: the Chamber refused to allow the Prosecutor to exercise investigative jurisdiction, and refused to allow the Court, as a whole, to ‘exercise its jurisdiction’ in accordance with Article 13(c) of the Statute,³⁷ on the basis of an erroneous legal test. The Decision prevented this exercise of jurisdiction in Afghanistan, and must reasonably be understood as a decision ‘with respect to jurisdiction’ pursuant to Article 82(1)(a) of the Statute. Neither the legal texts of the court, nor the court’s jurisprudence, nor the *travaux préparatoires* exclude decisions under Article 15(4) from being appealed on the basis of Article 82(1)(a) of the Statute.

25. Article 82(1)(a) is not expressly restricted to decisions made on the basis of Articles 18 and 19 of the Statute. The *Triffterer* commentary on the Statute confirms that Article 15(4) decisions may fall within the scope of Article 82(1)(a).³⁸ The drafters of the Statute left it to the Court to decide on the scope of Article 82(1)(a) of the Statute.³⁹

26. The Appeals Chamber has ruled on the scope of Article 82(1)(a) in relation to admissibility in

³⁶ Vienna Convention on the Law of Treaties, Article 32(b).

³⁷ Under Article 13(c), ‘[t]he Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:[...] (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.’

³⁸ O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing, 3rd Edition, 2016) (‘Triffterer Commentary’), page 1957.

³⁹ *Ibid.*

the situations of *Comoros*,⁴⁰ *Kenya*,⁴¹ *Libya*,⁴² and *Democratic Republic of the Congo*⁴³ ('Admissibility Decisions'). The Admissibility Decisions are different from the impugned Decision, as none of them concerned an appeal of a decision that prevented the Prosecution or the Court from exercising jurisdiction over an entire situation.

27. The Admissibility Decisions note that '[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute'⁴⁴ and that '[i]t is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.'⁴⁵ The impugned Decision relates *directly* to the Court's ability to 'exercise its jurisdiction' in the situation in Afghanistan in accordance with Article 13(c). The *nature* of the Decision pertains directly to the Court's ability to exercise jurisdiction where the requirements of admissibility and temporal, territorial, subject matter and personal jurisdiction are met.
28. It is not required that the operative part of a decision explicitly refers to the terms 'jurisdiction' or 'admissibility' for it to be a decision on jurisdiction or admissibility. Rather, 'the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case.'⁴⁶ The operative part in the Decision pertains directly to the question on jurisdiction as it prevents the Prosecutor and the Court as a whole from exercising jurisdiction over the situation in Afghanistan.

⁴⁰ Appeals Chamber, 'Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"', 6 November 2015, ICC-01/13 OA ('Comoros Admissibility Decision').

⁴¹ Appeals Chamber, 'Decision on the admissibility of the "Appeal of the Government of Kenya against the Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"', 10 August 2011, ICC-01/09 OA ('Kenya Admissibility Decision').

⁴² Appeals Chamber, 'Decision on the admissibility of the "Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012"', 9 March 2011, ICC-01/11-01/11 OA ('Hosseinioun Admissibility Decision'); Appeals Chamber, Decision on "Government of Libya's Appeal Against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi" of 10 April 2012", 25 April 2012, ICC-01/11-01/11 OA 2 ('Libya Admissibility Decision').

⁴³ Appeals Chamber, 'Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "D cision sur la confirmation des charges" of 29 January 2007"', 13 June 2007, CC-01/04-01/06 OA8; and Appeals Chamber, 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.

⁴⁴ Comoros Admissibility Decision, para. 44-45; Kenya Admissibility Decision, para. 17; Hosseinioun Admissibility Decision, para. 10; and Libya Admissibility Decision para. 13.

⁴⁵ Kenya Admissibility Decision, para. 15.

⁴⁶ Kenya Admissibility Decision, para. 15.

29. Further, the Chamber erroneously restricted the temporal and territorial scope of the Prosecution's inquiry.⁴⁷ This as an error *directly* relating to the exercise of the temporal and territorial jurisdiction of the Court. In its nature and in its effect, the Chamber erroneously ruled that any future investigation by the Prosecution (and consequently, the jurisdiction of future Chambers in carrying out their truth-seeking functions in accordance with the Statute), would be limited in time to those crimes occurring before the request for authorisation was filed. An investigation would be limited in territorial scope to those locations identified in the Prosecution's request or closely linked to them.⁴⁸
30. A decision 'with respect to jurisdiction' includes one preventing the *exercise* of jurisdiction. Part 2 of the Statute ('Jurisdiction, Admissibility and Applicable Law') includes Articles 12 and 13.⁴⁹ These 'set the jurisdictional parameters of the Court and its Prosecutor'⁵⁰ and address the 'exercise of jurisdiction' by the Court. The Decision, by denying the exercise of jurisdiction, therefore pertains directly to jurisdiction and may be appealed under Article 82(1).

ii. Errors of law, fact and procedure materially affected the Chamber's determination

31. The Victims submit that the Chamber made errors of law, fact and procedure in the Decision, discussed in the six grounds of appeal below, which materially affected its determination.
32. The Chamber made an error of law when it carried out an interests of justice review. The interest of justice review was *ultra vires* as it was not within the powers granted to the Pre-Trial Chamber in Articles 15(4) and 53(3) of the Statute.
33. Alternatively, if the Appeals Chamber considers that the Chamber's interests of justice assessment was a *proprio motu* assessment and was not a review of the Prosecutor's assessment, this was also *ultra vires* as nothing in Articles 15 and 53 envisage that the Chamber will carry out an interests of justice assessment *proprio motu* and present it as a basis for declining to authorise an investigation.

⁴⁷ Decision, para. 40: 'the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it.'

⁴⁸ Decision, para. 41.

⁴⁹ The title of Article 12 is 'Preconditions to the exercise of jurisdiction' and of Article 13 is 'Exercise of jurisdiction'.

⁵⁰ Triffterer Commentary, page. 1367.

34. In either case, the Chamber committed a procedural error by not inviting the Prosecutor, and the victims, to make full and reasoned submissions on the interests of justice prior to making its interests of justice assessment.
35. If the Chamber had applied the correct test, it would have authorized the investigation once it was satisfied that there was ‘a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court’, as required by Article 15(4).
36. The present appeal allows the Appeals Chamber to clarify the considerable uncertainty which has resulted from the Decision, particularly in respect of the applicable statutory regime for authorisation of investigation, the Pre-Trial Chamber’s powers to review the Prosecution’s interest of justice assessment, and the delimitation of powers between the Prosecution and the Pre-Trial Chamber. It enables the Appeals Chamber to “settle the matter [...] through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁵¹

a. First ground of appeal: the Chamber erred in reviewing the Prosecutor’s assessment of ‘the interests of justice’, after the Prosecutor has determined that there is a reasonable basis to proceed with an investigation, and further erred by not giving the Prosecutor and victims an opportunity to be heard on ‘the interests of justice’.

37. The first ground of appeal relates to Part IV, paras. 29-38, and part VII, paras. 87-96, of the Decision. In these parts the Chamber erroneously carried out an ‘interest of justice’ assessment. The Chamber’s error goes to the heart of one of its major functions: approving the opening of an investigation.
38. The judicial review function of a Pre-Trial Chamber concerning the ‘interests of justice’ is expressly limited by Article 53(3). That subsection enables a Pre-Trial Chamber only to review a decision of the Prosecution *not* to proceed with an investigation where the *Prosecution* determines that there are ‘substantial reasons to believe that an investigation would not serve the interests of justice.’ That is not the case here: the Prosecution decided to proceed with the investigation. Article 53(3) does not permit review of a decision to proceed. There is nothing

⁵¹ Appeals Chamber, ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s Decision Denying Leave to Appeal’, 13 July 2006, ICC-01/04-168, para. 14 and paras 15-18. *See also* Pre-Trial Chamber I, ‘Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros’, 18 January 2019, para. 43.

in Article 53, nor elsewhere in the Statute, to suggest that the Chamber may review a decision of the Prosecution to proceed with an investigation by applying an ‘interests of justice’ test.

39. Article 15(4) *compels* the Chamber to authorize an investigation if it ‘considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.’ The Chamber made positive determinations as to admissibility and jurisdiction in its Decision, and erroneously conducted an ‘interests of justice’ assessment.
40. The Chamber did not cite jurisprudence of the Court, nor the *travaux préparatoires* of the Statute, in support of its interpretation of Article 53(1). The Chamber’s interpretation of Article 53(1) is inconsistent with the position taken by other Pre-Trial Chambers. In *Kenya* and *Côte d’Ivoire*, the Pre-Trial Chamber affirmed that its review power is only triggered when Prosecution decides on the sole basis of interests of justice not to open an investigation.⁵²
41. Furthermore, there is nothing in the Decision to suggest that the Chamber gave Prosecution an opportunity to fully explain its own ‘interests of justice’ assessment, including its consideration of the victims’ interests. Nor were the victims provided with any opportunity to make submissions on this assessment. This was a procedural error. Any judicial review of an ‘interests of justice’ assessment by the Prosecutor must be an *informed* review. This principle is found in Regulation 48, which enables the Chamber carrying out the review to request the Prosecutor ‘to provide specific or additional information or documents in his or her possession, or summaries thereof in order for the Chamber to properly carry out’ its Article 53(3)(b) ‘interests of justice’ review. This is to say, the Regulations contemplate that the Pre-Trial Chamber will be fully informed of the reasons why the Prosecutor believes that an investigation or prosecution is not in the interests of justice before it reviews that assessment. Article 53(1)(c) of the Statute also requires the Prosecutor to take into account victims’ interests in deciding not to open an investigation. The failure to give the Prosecutor and the victims an opportunity to be heard on a critically important issue,⁵³ which directly resulted in the denial of authorization of investigate an entire situation, was a procedural error.

⁵² Kenya Decision, para. 63; Cote d’Ivoire Decision, para. 207.

⁵³ See Appeals Chamber, ‘Judgment on the appeal of the Prosecutor against the decision of the Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”’, 17 June 2015, ICC-02/04-01/15 OA 3, para. 46. The Appeals Chamber found that making a decision ‘without first receiving submissions from the parties’ meant that the decision ‘was unfair and unreasonable and had a material effect on the Impugned Decision.’ The decision in that case concerned pre-trial analysis charts.

b. Second ground of appeal: the Chamber erred in considering the extent of cooperation that the Prosecution had received from State Parties during the preliminary examination, before the duty to cooperate under Part 9 of the Statute has been fully triggered, in deciding whether to authorize the investigation.

42. In Part VII, paras. 91-94, of the Decision the Chamber erred in its assessment of cooperation by Afghanistan and other States Parties.⁵⁴ The Chamber referred to ‘the relevant political landscape in Afghanistan and in key States (both parties and not parties to the Statute)’ and said that it is ‘extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects. Nothing in the present conjecture gives any reason to believe that such cooperation can be taken for granted’.⁵⁵
43. The Chamber did not refer to specific incidents of non-cooperation, nor any part of the Prosecution’s request, in making its assessment. Nor did it invite submissions from States on this point, which directly affect their interests. The Chamber did not separately assess the prospects for cooperation from States Parties and other States, or elaborate on the ‘relevant political landscape in Afghanistan and in key States’.⁵⁶ The lack of detailed reasoning or citation to incidents means that it is not possible to understand in full the Chamber’s reasoning.
44. The Chamber erred as a matter of law and procedure as it, in effect, concluded that States Parties are not complying with their duties to cooperate with the Court. The Court is not yet at a stage at which it can conclude that Afghanistan, or any other State Party, has not complied with its duty to cooperate under the Statute. This is because the investigation has not yet begun. The Article 86 obligation on Afghanistan, Poland, Lithuania, Romania and all other States Parties to cooperate with the Court applies only to the investigation and prosecution stages.
45. Where a State Party’s non-compliance with its duties under the Statute are such as to prevent the Court from exercising its functions or powers, the correct procedure is to trigger the procedures which can culminate in referral to the Assembly of States Parties (‘ASP’) or (in the case of referral by the United Nations Security Council, to the Council) under Article 87(7). Article 87(7) of the Statute provides the Court with a tool so that it may seek assistance to

⁵⁴ Decision, para. 94.

⁵⁵ Decision, para. 94.

⁵⁶ Decision, para. 94.

eliminate impediments to cooperation.⁵⁷ Referral under Article 87(7) triggers the ASP's own formal procedure for securing cooperation.⁵⁸

46. As a matter of fairness, the Chamber should, at the very least, have heard from the State Parties in question, to determine the nature of the cooperation problems and address whether solutions could be found, in line with the spirit of Article 97 and Rule 195.
47. The Decision was a disproportionate remedy to a perceived problem of non-cooperation. The Chamber, by refusing to authorise the investigation and prematurely concluding that unnamed States Parties were not complying with their obligations under the Statute, unfairly deprived the victims of a procedure which would have permitted the Court to use the tools available in the Statute to address State non-cooperation: an Article 87(7) referral. Deciding not to open an investigation due in part to a perception that States Parties are unlikely to comply with their obligations before the fact is also unreasonable and unfair to the States Parties. It is worth noting that the government of Afghanistan has voiced its commitment to the international legal order and justice and to 'strengthen the Court by supporting its decisions.'⁵⁹
48. Additionally, the Statute makes specific provision for the situation where a State (including a non-party State) has information relevant to an investigation which it might be reluctant to disclose on national security grounds. Articles 72(5) and 72(7) set forth an expectation that the Prosecution will act in conjunction with the relevant Chamber and the State to seek to resolve the matter by cooperative means, and provide specific steps that might be taken to protect the State's security interests while ensuring that the truth will emerge. Article 87(5) permits the Court to invite non-party States to provide assistance on the basis of an *ad hoc* arrangement. The Chamber has given no indication that it has considered the potential for access to relevant evidence that the Article 72 and 87(5) procedures envisage.
49. Due to these errors, the Chamber prevented the Prosecution, and the Court as a whole, from taking all the action that they can to secure the cooperation of State Parties and other States in respect of providing access to relevant witnesses and evidence. The Appeals Chamber can remedy these errors by ordering the investigation to commence, thereby enabling the triggering

⁵⁷ Pre-Trial Chamber I, 'Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council', 10 December 2014, ICC-01/11-01/11-577, para. 33.

⁵⁸ At its tenth session, the Assembly of States Parties adopted the 'Assembly Procedures relating to non-cooperation'.

⁵⁹ See Statement by Ambassador of the Islamic Republic of Afghanistan to The Netherlands at the 17th session of the Assembly of States Parties, 2018.

of the Article 86 cooperation obligation for all States Parties, and permitting the use of the procedures set out in Articles 72(5), 72(7) and 87(5) in respect of all States.

c. Third ground of appeal: the Chamber erred in denying a request for authorisation to investigate on the basis that it believed that the investigation is unfeasible.

50. In Part VII, paras. 90-93 of the Decision, the Chamber erred in determining that the investigation is ‘not feasible and doomed to failure’, and therefore should not take place, and relatedly considering that suspects might be unavailable and that ‘[t]he very availability of evidence for crimes dating back so long in time [2005-2015] is far from being likely’.⁶⁰ Feasibility is not a factor mentioned anywhere in the Statute. The Statute does not envisage that investigations will take place only where it is easy to investigate. It foresees the opposite.
51. The Court deals exclusively with crimes of the utmost seriousness—genocide, crimes against humanity, war crimes and aggression⁶¹—which inevitably take place in great turmoil. Post-conflict environments are typically uncondusive to investigation. The Court can exercise jurisdiction over such crimes *only* where the State that has jurisdiction over them is unwilling or unable genuinely to carry out an investigation or prosecution.⁶² The Statute recognises that in many—if not most—cases, the Court will be required to carry out investigations in challenging and risky environments, where the State itself might not be able or willing to assist. For example, Article 56 foresees that unique opportunities to take evidence will arise, which may not be available subsequently: Article 57(3)(d) envisages investigations on the territory of a failed state; and Article 87(7) foresees and provides a remedy for State non-cooperation.
52. The Chamber did not cite jurisprudence of the Court, nor the *travaux préparatoires* of the Statute, in support of its interpretation of Article 53(1). The Chamber exceeded its discretion by reading into the Statute a requirement that the investigation should be deemed by the Chamber to be feasible. The Chamber’s conclusion was also grossly unfair to the victims.
53. The Chamber, in assuming that evidence and suspects may be unavailable, ignored the fact that much relevant material has been collected and preserved, and many victims and other witnesses are available to testify. It also ignored the deterrent effect of investigation.

⁶⁰ Decision, paras. 91 and 93.

⁶¹ See Article 5 of the Statute.

⁶² See Article 17(1) of the Statute.

54. The trials and convictions of many persons, including former Bosnian Serb President Radovan Karadžić, former Liberian president Charles Taylor, and former Khmer Rouge leaders Nuon Chea and Khieu Samphan, were once considered to be hopelessly unlikely. All were duly convicted, and their convictions upheld on appeal.
55. To conclude that too much time has passed since the period 2005-2015⁶³ was unreasonable and an abuse of discretion. The successful prosecutions of Khmer Rouge leaders by the ECCC, with trials starting in 2009, for crimes committed in 1975-1979, demonstrate that probative evidence and suspects can remain available for decades.⁶⁴ World War II-era trials have famously taken place in every decade since the war. By reading into the Statute a criterion of ‘feasibility’ that does not appear in it, the Chamber exceeded its discretion and unfairly deprived the Victims of their *only* chance of investigation and prosecution.

d. Fourth ground of appeal: the Chamber, by majority, erred in attempting to restrict the scope of any investigation which might be authorised in the future to ‘events or categories of events’ specifically mentioned in the Prosecution’s request, as well as those ‘comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it’.

56. In Part IV, paras. 39-42 of the Decision, the Chamber erred in restricting the scope of an authorized investigation. As the Separate Opinion clarifies, the Chamber was divided on this issue.⁶⁵ The Chamber cited no basis in law for the limitation that it imposed, and there is no legal basis for it. The Statute does not limit the temporal, territorial, or material parameters of an authorised investigation beyond the general limits of the Court’s jurisdiction.
57. The Chamber’s view that an authorization may only cover ‘events or categories of events’ specifically mentioned in the Prosecution’s request is inconsistent with the Court’s jurisprudence. As the Separate Opinion notes, the Chamber in *Burundi* authorized the commencement of an investigation into *any crime* committed on the territory of Burundi or by Burundi nationals elsewhere, and extended the temporal scope of the authorized investigation to cover crimes committed before and after the dates requested by the Prosecution.⁶⁶ In

⁶³ Decision, paras. 91 and 93.

⁶⁴ See for example, ECCC, Supreme Court Chamber, *Prosecutor v. Nuon Chea and Khieu Samphan*, Appeal Judgement, 23 October 2016.

⁶⁵ Separate Opinion, paras. 4-15.

⁶⁶ Burundi Decision, para. 192.

Georgia, the Pre-Trial Chamber authorized an investigation into ‘all crimes within the jurisdiction of the Court’ in the situation.⁶⁷

58. The notion that crimes should be limited to those known to the Prosecution before the investigation has commenced is inconsistent with the Court’s Article 69(3) function ‘to request the submission of all evidence that it considers necessary for the determination of the truth’, and the Prosecution’s strict duty in Article 54(1) to ‘establish the truth’ by extending ‘the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility’. As the Pre-Trial Chamber stated in *Georgia*, ‘[i]t is precisely the purpose of the investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted.’⁶⁸
59. Furthermore, as there are no accused or suspects at the authorisation stage, no fair trial rights arise. There are no fundamental guarantees to be protected by needless limitation of the investigation to that which is known at the authorisation stage.
60. As a matter of practice, the Chamber’s limitation makes little sense. A desk-based preliminary examination of ‘information received’⁶⁹ and open source material⁷⁰ is inevitably an imperfect probe of a situation.⁷¹ Given the size of Afghanistan, its geography, and its current instability, it is likely that there have been numerous crimes—including sexual and gender-based crimes and crimes against children—which are totally or in large part unknown to the Prosecution. It is similarly likely that crimes committed in relation to cases of rendition to other States Parties are not yet known to the Prosecution. It would be unfair to the victims of those crimes to exclude them from the justice process at the Court for reasons beyond their control.
61. The limits imposed by the Chamber on the scope of an authorisation would also, as the Separate Opinion points out, ‘render the investigative proceedings unduly cumbersome’ with the Prosecution repeatedly having to return to the Chamber with further requests for

⁶⁷ Georgia Decision, para. 64.

⁶⁸ Georgia Decision, para. 63.

⁶⁹ Article 15(2) of the Statute: The Prosecutor shall analyse the seriousness of the information received [...]

⁷⁰ Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’, 2013.

⁷¹ See Georgia Decision, para. 63: ‘Indeed, for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor’s investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation. To impose such limitation would be also illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information.’

authorization.⁷² This would unnecessarily prolong the investigation, delay the prospect of justice, and it would be to the detriment of judicial economy.

62. There is nothing in the extensive experience of the ICTY, ICTR and ECCC—all of which conducted trials based at least in part on events which came to light during, and as a result of, investigation—to warrant the limitation proposed by the majority of the Chamber. Immediate resolution by the Appeals Chamber is warranted in order to clarify the delimitation of powers between Prosecution and the Chamber and the permissible bounds of any investigation that might result, if the Decision is reversed.

e. Fifth ground of appeal: the Chamber erred in denying the request for authorisation in part on the basis that it believed that the Prosecution should allocate its resources to other preliminary investigations, investigations or cases which have ‘more realistic prospects to lead to trials’.

63. The Chamber’s assessment, in Part VII, para. 95 of the Decision, of the Prosecution’s allocation of its resources in deciding not to authorise the investigation was a legal error. It represents an unwarranted invasion of the Prosecution’s competence to determine how to best allocate the resources made available to it by the States Parties, and the Prosecutor’s discretion to prioritize situations and cases.

64. Article 42 of the Statute gives the Prosecutor exclusively ‘full authority over the management and administration of the [Office of the Prosecutor] including the staff, facilities and other resources.’ The Prosecution is inevitably in a better position than the Chamber to address the sufficiency or otherwise of its own resources. This is particularly so, as the Prosecution is not obliged to make public, nor to disclose to the Chamber, all activities which it is undertaking in order to comply with its Article 54(1) duties across all its investigations and prosecutions.

65. The Chamber’s analysis of the Prosecution’s ‘financial and human resources,’⁷³ in determining whether to authorize the investigation, is not envisaged in the Statute, Rules or Regulations. Further, the Chamber’s assessment of the Prosecutor’s resources was cursory and unspecific. It did not cite, nor analyse, any of the budgetary documents discussed by the ASP, such as those prepared by the Court or Committee on Budget and Finance.

⁷² Separate Opinion, para. 9.

⁷³ Decision, para. 95.

- f. Sixth ground of appeal: the Chamber erred in concluding that the Court may only exercise jurisdiction over torture if (a) the infliction of severe physical or mental pain took place at least in part on the territory of a State Party; and (b) the victim was captured within the borders of the State in which the armed conflict is taking place.**
66. The Chamber erred in Part V.2.1, paras. 51-55, in its reasoning and finding that ‘for the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of ‘inflicting severe physical or mental pain’ [...] takes place at least in part in the territory of a State Party.’⁷⁴
67. The Court’s territorial jurisdiction is triggered *inter alia* when ‘the conduct in question’ occurs on the territory of a State Party.⁷⁵ The ‘conduct in question’ is not confined to the infliction of severe physical or mental pain or suffering. The Appeals Chamber has confirmed that ‘it is the conduct of the suspect him or herself that is the basis for the case against him or her [...] the "conduct" that defines the "case" is both that of the suspect [...] and that described in the incidents under investigation which is imputed to the suspect.’⁷⁶
68. Therefore, the infliction of ‘severe physical or mental pain or suffering upon one or more person’⁷⁷ is a necessary element of the incident, but need not take place on the territory of a State Party, provided that the suspect’s own participation took place in the context of and was associated with an armed conflict on the territory of a State Party. As is evident from Article 25(3) of the Statute, criminal participation extends beyond the physical perpetration of the crime, and includes ordering, soliciting, inducing, aiding and abetting and other forms of participation, including direct and indirect co-perpetration.
69. The requirement that the suspect’s ‘conduct took place in the context of and was associated with’ an armed conflict is satisfied if the conduct is ‘closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict.’⁷⁸ The alleged

⁷⁴ Decision, para. 54.

⁷⁵ Article 12(2)(a).

⁷⁶ Appeals Chamber, ‘Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’’, ICC-01/11-01/11-547-Red, 21 May 2014, para. 62.

⁷⁷ This is a requirement of the war crimes of torture under Article 8(2)(a)(ii)-1 and Article 8(2)(c)(i)-4; inhuman treatment under Article 8(2) (a)(ii)-2; and cruel treatment under Article 8(2)(c)(i)-3

⁷⁸ See Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Judgment pursuant to Article 74 of the Statute’, 21 March 2016, ICC-01/05-01/08 (‘Bemba TC Judgment’), para. 142; Trial Chamber II, *Prosecutor v. Germain Katanga*, ‘Judgment pursuant to article 74 of the Statute’, 7 March 2014, ICC-01/04-01/07, para. 1176 and the authorities cited in footnote 2733.

crimes may be considered to have been committed ‘within the context’ of an armed conflict irrespective of whether they took place contemporaneously with or proximate to intense fighting. The requirement that the acts of the accused must be closely related to the armed conflict is not negated if the crimes were geographically remote from the actual fighting.⁷⁹

70. Therefore, what is required is that the suspect’s *conduct* must be closely linked to the hostilities and must have occurred on the territory of a State Party, even if the physical act of *infliction* of ‘severe physical or mental pain or suffering’ took place in a non-party State.
71. The Chamber further erred in finding that ‘the alleged war crimes whose victims were captured outside Afghanistan fall outside the Court’s jurisdiction due to the lack of a nexus with an internal armed conflict’.⁸⁰
72. The Chamber erroneously relied upon a part of common Article 3 to the Geneva Conventions which provides that ‘[i]n 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’.⁸¹ The Chamber ruled 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 occurring’.⁸² It cited no authority in support of this interpretation.
73. The Chamber’s reliance on common article 3 is inapposite. The wording of common Article 3 expressly provides that certain acts, including torture, ‘remain prohibited at any time and in any place whatsoever’. As for the spirit of common article 3, the International Court of Justice confirmed that it reflects ‘elementary considerations of humanity’.⁸³ The ICTY Appeals Chamber has held that common article 3 applies ‘outside the narrow geographical context of the actual theatre of combat operations.’⁸⁴ As the United States Supreme Court

⁷⁹ See Bemba TC Judgment, para. 144, citing ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al.*, ‘Judgement’, 12 June 2002, IT-96-23/1-A, para. 57; and ICTY, Appeals Chamber, *Prosecutor v. Stakic*, ‘Judgement’, 22 March 2006, para. 342.

⁸⁰ Decision, para. 55.

⁸¹ Decision, para. 53.

⁸² Decision, para. 53.

⁸³ International Court of Justice, *Nicaragua v. United States*, 1986, para. 218.

⁸⁴ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’, 2 October 1995 (‘Tadic Jurisdiction AC Judgement’), para. 69.

has noted, ‘the scope of [common article 3] must be as wide as possible’.⁸⁵ Common article 3, then, is a set of minimum standards of broad scope which applies to any person captured anywhere, provided there is a nexus with the armed conflict.

74. As for the war crimes of torture, inhuman treatment and cruel treatment relevant here, the nexus to the conflict in Afghanistan must be established, as discussed above. But there is no additional requirement in the Statute or the Elements of Crimes that the victim of the alleged crime was captured on the territory of the State in which the armed conflict is taking place. Such a limitation constitutes a legal error, and is inconsistent with the *jus cogens* nature of the prohibition against torture, ‘an absolute value from which nobody must deviate.’⁸⁶

V. RELIEF REQUESTED

75. For the reasons set out above, the Victims respectfully request the Appeals Chamber, pursuant to Article 83(2) of the Statute, to reverse the Decision and to authorize the commencement of an investigation into the situation in Afghanistan.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Dated this 24th day of June 2019
At The Hague

⁸⁵ United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), relying on *inter alia* GCIV Commentary 51 (‘[N]obody in enemy hands can be outside the law’); U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook, (2004), p. 144 (Common Article 3 ‘serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’), citing International Court of Justice, *Nicaragua v. United States*, 1986, para. 218; Tadic Jurisdiction AC Judgement, para. 102.

⁸⁶ ICTY, Trial Chamber, Prosecutor v. Furundzija, ‘Judgement’, 10 December 1998, paras. 143-146 and 154.