

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document

**Request to appear before the Chamber pursuant to regulation 81(4)(b) of the
Regulations of the Court**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. In accordance with regulation 81(4) of the Regulations of the Court, and following the Prosecution's request for leave to appeal, the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office") requests to appear before the Pre-Trial Chamber (the "Chamber") in order to represent the general interest of the victims which is affected by the decision of the Chamber not to authorise the opening of an investigation, as well as by the issues identified by the Prosecution in its request for leave to appeal.

2. Victims have often similar but distinct interests from the Prosecution, hence the importance of the participation of victims in the proceedings as autonomous actors. Their independent role stems from the internationally recognised rights to truth, justice and reparations¹ which translate into a set of procedural prerogatives in criminal proceedings.² In turn, the interests of justice are linked to, and often overlap with, the victims' rights to the truth and justice. Such rights and prerogative shall be seen through the lenses of article 21(3) of the Statute, which requires that "[t]he application and interpretation of law pursuant to this article must be consistent with

¹ See IACtHR, *La Cantuta v. Perú*, [Judgment \(Merits, Reparations and Costs\)](#), 29 November 2006, para. 222; *Vargas-Areco v. Paraguay*, [Judgment \(Merits, Reparations and Costs\)](#), 26 September 2006, paras. 153; *Almonacid-Arellano et al v. Chile*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 26 September 2006, para. 148; *Moiwana Community v. Suriname*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 15 June 2005124, para. 204; and *Velásquez-Rodríguez v. Honduras*, [Judgment \(Reparations and Costs\)](#), 29 July 1988, paras. 162-166 and 174. See also ECtHR, *Hugh Jordan v. UK*, [Judgment](#), 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, [Judgment](#), 28 July 1999, para. 79; *Kurt v. Turkey*, [Judgment](#), 25 May 1998, para. 140; *Selçuk and Asker v. Turkey*, [Judgment](#), 24 April 1998, para. 96; *Aydın v. Turkey*, [Judgment](#), 25 September 1997, para. 103; and *Aksoy v. Turkey*, [Judgment](#), 18 December 1996, para. 98.

² See NAQVI (Y.), "The Right to the Truth in International Law: Fact or Fiction?", in *ICRC International Review*, vol. 88, 2006, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (Ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracusa Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; ANTKOWIAK (T. M.), "Truth as Right and Remedy in International Human Rights Experience", in *Michigan Journal of International Law*, vol. 23, 2002, pp. 977-1013; SHELTON (D.), *Remedies in International Human Rights Law*, 3rd ed., Oxford University Press, 2015, in particular pp. 112-120; AMBOS (K.), "El Marco Jurídico de la Justicia de Transición", Tenus, Bogotá, 2008, pp. 42-44; and DOAK (J.), *Victims' Rights, Human Rights and Criminal Justice. Reconciling the Role of Third Parties*, Hart Publishing, Oxford – Portland, 2008, in particular pp. 115-205.

international recognized human rights".³ This requirement is of particular importance since the International Criminal Court is a "*victim-centered Court*".⁴

3. Allowing the OPCV to appear before the Chamber on the specific issues developed *infra*, will make it possible to protect and duly take into account the interest of victims in general and their fundamental rights to the truth and justice in particular; and for these to be reflected in similar future proceedings related to the opening of an investigation and to the relevant assessment of the notion of 'interests of justice'.

II. PROCEDURAL BACKGROUND

4. On 9 November 2017, following the Prosecutor notice to request judicial authorisation pursuant to regulation 45 of the Regulations of the Court⁵ and the assignment to Pre-Trial Chamber III (the "Chamber") of the situation in the Islamic Republic of Afghanistan,⁶ the Chamber issued the "Order to the Victims Participation and Reparation Section Concerning Victims' Representations" instructing the VPRS:

"to (i) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations; (ii) receive and collect victims' representations, be it collective or individual; (iii) conduct a preliminary assessment, as set out in this order, whether the conditions set out in rule 85 have been

³ See the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" (Appeals Chamber), [No. ICC-01/04-01/06-772 OA 4](#), 14 December 2006, para. 37. See also BITTI (G.), "Article 21 and the Hierarchy of Sources of Law before the ICC", in STAHN (C.), *The Law and Practice of the International Criminal Court*, OUP, 2015, p. 437; NERLICH (V.), "Article 21 (3) of the ICC Statute: Identifying and Applying 'Internationally Recognized Human Rights'", in LOBBA (P.) and MARINIELLO (T.) (Eds.), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals*, Brill Nijhoff, Leiden, Boston, 2017, 73-89; and PELLET (A.), "Applicable law", in CASSESE (A.), GAETA (P.) and JONES (J.R.W.D.) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, pp.1051-1084

⁴ See the Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, [No. ICC-02/17-33-Anx](#), 31 May 2019 (the "Concurring Opinion"), para. 50.

⁵ See the "Notice pursuant to regulation 45 of the Regulations of the Court", [No. ICC-02/17-1-AnxI](#), 9 November 2017 (dated 3 November 2017).

⁶ See the "Decision assigning the situation in the Islamic Republic of Afghanistan" (Presidency), [No. ICC-02/17-1](#), 9 November 2017 (dated 3 November 2017).

*met; and (iv) transmit incoming representations on a rolling basis, possibly every two weeks, together with a brief preliminary assessment”.*⁷

5. On 20 November 2017, the Prosecutor submitted the “Request for authorisation of an investigation pursuant to article 15”, together with 14 annexes, seeking authorisation to commence *“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”*.⁸

6. Throughout the period 20 November 2017 to 31 January 2018, the Chamber received victims’ representations on a rolling basis, together with reports containing a preliminary assessment of the representations.⁹

⁷ See the “Order to the Victims Participation and Reparation Section Concerning Victims’ Representations” (Pre-Trial Chamber II), [No. ICC-02/17-6](#), 9 November 2017, para. 16.

⁸ See the “Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Conf-Exp”, [No. ICC-02/17-7-Red](#), 20 November 2017, para. 376.

⁹ See the “First Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-10](#) and the “Public redacted version of ‘First Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017’, 7 December 2017, ICC-02/17-10-Conf”, [No. ICC-02/17-11-Red](#), 7 December 2017. See also the “Second Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-15](#) and the “Public redacted version of ‘Second Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017’, 21 December 2017, ICC-02/17-16-Conf” [No. ICC-02/17-16-Red](#), 21 December 2017; the “Third Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-17](#); the “Third Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-18](#), 11 January 2018; the “Fourth Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-19](#) and the “Public redacted version of ‘Fourth Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017’, 25 January 2017, ICC-02/17-20-Conf”, [No. ICC-02/17-20-Red](#), 25 January 2018; the “Fifth Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-21](#) and the “Public redacted version of ‘Fifth Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017’ 2 February 2017, ICC-02/17-22-Conf”, [No. ICC-02/17-22-Red](#), 2 February 2018; the “Sixth Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-24](#) and the “Sixth Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, [No. ICC-02/17-25](#),

7. On 20 February 2018, the Registry submitted a final consolidated report summarising the process of collecting the victims' representations and informing the Chamber that the victims "*overwhelmingly support an investigation into all crimes against humanity and war crimes committed in Afghanistan since 1 May 2003*"¹⁰ and "*would also like the investigation to cover crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the Afghanistan situation, that were committed on the territory of other State Parties since 1 July 2002*".¹¹

8. On 16 March 2018, the Presidency assigned the situation in Afghanistan to a newly constituted Pre-Trial Chamber II.¹²

9. On 12 April 2019, the Chamber issued 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" (the "Impugned Decision"), rejecting the Prosecution Request on the ground that "*an investigation into the situation in Afghanistan at this stage would not serve the interests of justice*" and ordering the VPRS to notify its decision to the victims whose representations were conveyed to the Chamber.¹³

10. On 31 May 2019, Judge Mindua issued his concurring and separate opinion.¹⁴

5 February 2018; and the "Seventh Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-27](#) and the "Seventh Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-28](#), 9 February 2018.

¹⁰ See "Annex I to the 'Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017'", [No. ICC-02/17-29-Anxl-Red](#), 20 February 2018, para. 47.

¹¹ *Idem*.

¹² See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), [No. ICC-02/17-30](#), 16 March 2018.

¹³ See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (Pre-Trial Chamber III), [No. ICC-02/17-33](#), 12 April 2019 (the "Impugned Decision").

¹⁴ See the Concurring Opinion, *supra* note 4.

11. On 7 June 2019, the Prosecution filed the “Request for leave to appeal the Article 15 Decision” (the “Request”).¹⁵

III. SUBMISSIONS

1. The OPCV appearance before a Chamber in respect of specific issues

12. In accordance with regulation 81(4) of the Regulations of the Court, “[t]he tasks of the Office of Public Counsel for victims shall include: [...] (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues”.¹⁶ The provision has been amended to reflect the relevant practice of the Court and in its revised version specifies that the OPCV appearance can be triggered either upon request of the Office itself or by instructions of the Chamber.

13. In this vein, Trial Chamber I found that:

“The opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by:

- the Chamber (this will usually relate to issues of general importance and applicability);*
- a victim or his or her representative, who has asked for its support and assistance;*
- the Office, if it is representing one or more victims; or*
- the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability)”.*¹⁷

¹⁵ See the “Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” No. ICC-02/17-34, 7 June 2019, (the “Request”).

¹⁶ See regulation 81(4) of the Regulations of the Court, [Doc. ICC-BD/01-05-16](#).

¹⁷ See the “Decision on the role of the Office of Public Counsel for Victims and its request for access to documents” (Trial Chamber I), [No. ICC-01/04-01/06-1211](#), 6 March 2008, para. 35 (emphasis added).

14. Accordingly, in the past, the Office requested and was granted leave to appear on specific issues pertaining to the general interest of victims.¹⁸ The Office has also appeared on specific issues having an impact on victims' general interest directly at the request of a Chamber.¹⁹ Moreover, regulation 81 clearly provides for an obligation – binding upon the Office – to provide, where appropriate, assistance to victims by, *inter alia*, appearing before the Chamber in respect of specific issues.

15. In this regard, the Principal Counsel recalls the reasons for the creation of the OPCV, namely: to create a permanent body within the Court “able to provide expert advice and assistance” on victims' issues.²⁰ The practice developed by the Court and the responsibilities vested in the OPCV by both the Chambers and the victims since its inception has greatly contributed to the development of such expertise.

16. In the present case, the Principal Counsel submits that the Chamber will benefit from the OPCV expertise in receiving informed legal submissions on the

¹⁸ See, *inter alia*, the “Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), [No. ICC-01/04-01/06-1046](#), 27 November 2007, para. 2. See also the “Order on Written Submissions on the Interpretation of Regulation 42 of the Regulations of the Court (Regulation 28 of the Regulations of the Court)” (Trial Chamber II), [No. ICC-01/04-01/07-1205](#), 12 June 2009, which *inter alia* decided on the OPCV's Request to appear filed on 20 May 2009 (“*Demande du BCPV afin d'être autorisé en vertu de la norme 81-4-b du Règlement de la Cour à comparaître devant la Chambre dans le cadre de questions spécifiques liées aux mesures de protection au bénéfice du témoin W-007*”, [No. ICC-01/04-01/07-1160](#), 20 May 2009). See also the “Decision on the ‘Proposal on victim participation in the confirmation hearing’” (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/10-229](#), 10 June 2011, which *inter alia* decided on the OPCV's Request to appear filed on 9 June 2011 (“Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' participation in the confirmation hearing”, [No. ICC-01/04-01/10-226](#), 9 June 2011), rejecting said Request arguing “that any further observations from the OPCV are unnecessary, without prejudice to the question of whether there was a valid basis for its intervention before the Chamber on this issue” (*Idem.*, p. 5); the “Decision on the OPCV's ‘Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process’” (Pre-Trial Chamber III), [No. ICC-02/11-01/11-57](#), 13 March 2012; and the “Decision on the OPCV's request to participate in the reparations proceedings” (Trial Chamber I), [No. ICC-01/04-01/06-2858](#), 5 April 2012.

¹⁹ See, *inter alia*, the Transcripts of the hearing held on 30 October 2007, [No. ICC-01/04-01/06-T-58-ENG-ET WT](#), p. 13, lines 4 to 18; and the Transcripts of the hearing held on 4 December 2007, [No. ICC-01/04-01/06-T-62-ENG-ET WT](#), pp. 53 to 54.

²⁰ In this sense see FULFORD (A.), “The role of the Office of Public Counsel for Victims in trial proceedings”, in OPCV, [Helping victims make their voice heard: The Office of Public Counsel for Victims 5 years of activities](#), 2010, pp. 4-5.

general interest of victims in relation to the matters triggered by the Decision denying the authorisation to open an investigation, and to the issues raised by the Prosecution in its Request for leave to appeal the Impugned Decision.

17. In this regard, the Principal Counsel recalls that the Chamber, having established that both the jurisdiction and the admissibility requirements are satisfied,²¹ rejected the Prosecution's request solely on the ground that an investigation into the situation in Afghanistan at this stage "*would not serve the interests of justice*", pursuant to article 53(1)(c) of the Statute.

18. Article 53(1)(c) provides that:

"[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".

19. As it was also pointed out by the Prosecution in the relevant part of its Request,²² the interests of justice are indissolubly linked to, and often overlap with, the interests of victims and their internationally recognised rights to truth, to justice and to reparations.²³ Therefore, internationally recognised human rights must be taken into account when interpreting the notion of interests of justice.

²¹ See the Impugned Decision, *supra* note 13, para. 87.

²² See the "Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7-Conf-Exp", *supra* note 8, paras. 364-372.

²³ See the "Separate opinion of Judge Sang-Hyun Song" appended to the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), [No. ICC-01/04-01/06-925](#), 13 June 2007, para. 16: "*victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms*". See also the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/07-474](#), 13 May 2008, stating that "*the latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body*" (para. 31) and acknowledged that "*when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings*" (para. 34). See also "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January

20. The right to justice translate into the duty to investigate and punish gross violation of human rights. This duty has been internationally recognised in human rights case-law as both a procedural aspect inherent to the fundamental right to life - as well as to the prohibition of torture and inhumane and degrading treatments -, and as a substantial aspect of the right to an effective remedy.²⁴

21. The right to truth enjoyed the same international recognition as a fundamental right of the victims, as well as of their next of kin, firstly and foremost by the present Court,²⁵ but also by international human rights courts and bodies,²⁶ and by other

2008" (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97; the "Decision on victims' representation and participation" (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the "Decision on victims' representation and participation" (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; the "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

²⁴ Human Rights Committee, "General Comment No. 31: the Nature of General Legal Obligations Imposed on States Parties to the Covenants adopted on 29 March 2004", UN Doc. [CCPR/C/21/Rev.1/Add.13](#), 26 May 2004, para. 18. See also Human Rights Committee, Communication No. 1225/2003, *Eshonov v. Uzbekistan*, [Views](#), 22 July 2010, para. 9.9; Communication No. 2398/2014, *Millis v. Algeria*, [Views](#), 6 April 2018, para. 9; Communication No. 2143/2012, *Dovadzija and Dovdzija v. Bosnia and Herzegovina*, [Views 22 July 2015](#), para. 13; Communication No. 322/1988, *Rodriguez v. Uruguay*, [Views](#), 19 July 1994, para. 14; and Communication No. 563/1993, *Bautista v. Colombia*, [Views](#) 27 October 1995, paras. 8.2 and 10. See also ECtHR, *Kaya v. Turkey*, [Judgment](#), 19 February 1998, para. 107; *Nachova and others v. Bulgaria*, [Judgment](#), 6 July 2006, para.116; *Velikova v. Bulgaria*, [Judgment](#), 4 October 2000, para. 80; *Timurtaş v. Turkey*, [Judgment](#), 13 June 2010, para. 110; *Çakici v. Turkey*, [Judgment](#), 8 July 1999, para. 86; *McCann and others v. the United Kingdom*, [Judgment](#) (Grand Chamber), 27 September 1995, para. 161; *Ramsahai and others v. The Netherlands*, [Judgment](#) (Grand Chamber), 15 May 2007, para. 324; *Armani da Silva v. the United Kingdom*, [Judgment](#) (Grand Chamber) 20 March 2016, para. 233; *M. Tunç and F. Tunç v. Turkey*, [Judgment](#) (Grand Chamber) 14 April 2015, para. 172; *Giuliani and Gaggio v. Italy*, [Judgment](#) (Grand Chamber) 24 March 2011, para. 301; *Al-Skeini and others v. the United Kingdom*, [Judgment](#) (Grand Chamber) 7 July 2011, para. 166; *Özkan and others v. Turkey*, [Judgment](#), 6 April 2004, para. 312; *Isayeva v. Russia*, [Judgment](#), 6 July 2005, para. 212; *El-Masri v. the Former Yugoslav Republic of Macedonia*, [Judgment](#) (Grand Chamber) 13 December 2012, para 192; and IACtHR, *Velásquez-Rodríguez v. Honduras*, [Judgment](#), 29 July 1988, paras. 174, 176 and 181. See also NOWAK (M.), *U.N. Covenant on Civil and Political Rights*, 2nd ed., N.P. Engel, Kehl – Strasbourg – Arlington, 2005, pp. 29 and 62-72, where the right to an effective remedy is construed as a general principle of international law.

²⁵ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" *supra* note 23, paras. 31-36, including footnote 39, referring to the "well-established right to the truth of the victims of serious violations of human rights".

²⁶ Human Rights Council, "General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life", UN Doc. [CCPR/C/GC/36](#), 30 October 2018, para. 28 and the Concluding Observations cited therein. See also IACtHR, *Castillo-Páez v. Perú*, [Judgment \(Merits\)](#), 3 November 1997, paras. 86 and 90; *Bámaca-Velásquez*, [Judgment \(Merits\)](#), 25 November 2000, para. 201; *Barrios Altos v. Perú*, [Judgment \(Merits\)](#), 14 March 2001, paras. 47-49. See also Inter-

international authorities and legal instruments, such as: UN General Assembly;²⁷ the UN Economic and Social Council;²⁸ the UN Office of the High Commissioner for Human Rights;²⁹ the UN Human Rights Council;³⁰ the UN Commission on Human Rights;³¹ the Working Group on Enforced or Involuntary Disappearances;³² the International Red Cross and Red Crescent Movement;³³ the International Committee of the Red Cross;³⁴ the Parliamentary Assembly of the Council of Europe;³⁵ the General Assembly of the Organization of American States;³⁶ the African Commission on Human and Peoples' Rights of the African Union;³⁷ the International Convention for the Protection of All Persons from Enforced Disappearances;³⁸ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;³⁹ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

American Commission of Human Rights, *Ellacuría et al. v. El Salvador*, [Report No. 136/99](#), 22 December 1999, paras. 223-228; and ECtHR: *El-Masri v. the Former Yugoslav Republic of Macedonia* Judgment, *supra* note 24 para. 191.

²⁷ See *inter alia* UN General Assembly Resolutions [33/173](#) (1978), [47/132](#) (1992) and [57/161](#) (2003).

²⁸ See the "Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28", UN Doc. [E/CN.4/1997/104](#), 16 January 1997, pp. 2-5. See also the "Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. [E/CN.4/Sub.2/1997/20](#), 26 June 1997, pp. 3-31.

²⁹ See the "Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights", UN Doc. [E/CN.4/2006/91](#), 8 February 2006.

³⁰ See Human Rights Council Resolutions 2005/66 (2005), *Right to the Truth*, UN Doc. [E/CN.4/RES/2005/66](#); 9/11 (2008), *Rights to the Truth*, UN Doc. [A/HRC/RES/9/11](#), and 12/12 (2009), *Right to the Truth*, UN Doc. [A/HRC/RES/12/12](#). See also Human Rights Council Decision 2/105 (2006), *Right to the Truth*, [A/HRC/DEC/2/105](#).

³¹ See Commission on Human Rights, Resolution 2005/66, UN Doc. [E/CN.4/RES/2005/66](#)

³² See *inter alia*, the "Report of the Working Group on Enforced or Involuntary Disappearances", UN Doc. [A/HRC/22/45](#), 28 January 2013, in particular paras. 14 and 33 stressing the need to conceive the right to the truth as an absolute right.

³³ See the [Resolution II](#) of the XXIV International Conference of the Red Cross and Red Crescent, Manila, 1981

³⁴ See "Rule 117", in ICRC, [Customary International Humanitarian Law, Vol. I: Rules \(2005\)](#), p. 421, where the right to the truth is considered a norm of customary international law.

³⁵ See Council of Europe, Parliamentary Assembly, [Recommendation 1056 \(1987\)](#), para. 17(2); and [Resolution 1463 \(2005\)](#), para. 10 (2).

³⁶ See Organization of American States, General Assembly, Resolution [AG/RES.666 \(XIII-0/83\)](#) (1983), para. 5; and Resolution [AG/RES.742 \(XIV-0/84\)](#) (1984), para. 5

³⁷ See African Union, African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right for a Fair trial and Legal Assistance in Africa*, [DOC/OS \(XXX\) 247](#), C., p. 5.

³⁸ See UN General Assembly Resolution 61/177 (2007), UN Doc. [A/RES/61/177](#), 12 January 2007.

³⁹ See the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", UN General Assembly Resolution 40/34 (1985), 29 November 1985, UN Doc. [A/RES/40/34](#) (the "1985 Principles").

Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.⁴⁰

22. Moreover, victims who made representations before the Chamber in relation to the Situation has overwhelmingly express their support to the opening of an investigation.⁴¹ As the Chamber itself emphasised, “680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth”.⁴²

23. These individuals, victims of the crimes allegedly committed, along with their families, have a personal interest in obtaining justice and knowing the truth about the events they suffered from. Their interest is the interest of all victims of crimes within the jurisdiction of the Court. Consequently, the Principal Counsel submits that permitting the OPCV to appear before the Chamber on the specific issues developed *infra*, will allow protecting the victims’ fundamental rights to truth and justice and for these to be reflected in the eventual subsequent appeals proceedings, as well as in similar future proceedings related to the opening of an investigation and to the relevant assessment of the notion of “*interests of justice*”.

2. Issues on which the OPCV would like to appear

24. The Principal Counsel submits that the three issues identified by the Prosecution in its Request triggered questions of general importance for all victims of crimes within the jurisdiction of the Court.

⁴⁰ See UN General Assembly Resolution 60/147 (2005), UN Doc. [A/RES/60/147](#) (the “2005 Principles”). The 1985 Principles and the 2005 Principles have been resorted to by the Chambers as an authoritative source for the definition of victims and of victims’ rights. See *e.g.*, the “Decision on victims’ participation” (Trial Chamber I), [No. ICC-01/04-01/06-1119](#), 18 January 2008, para. 35. See also the “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya” (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010 para. 5; and the “Decision on the Applications for Participation in Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), [No. ICC-01/04-010-tEN-Corr](#), 17 January 2006, para. 115.

⁴¹ See *supra*, para. 7.

⁴² See the Impugned Decision, *supra* note 13, para. 87.

25. In particular, the matters identified by the Prosecution in the First and Second issues, namely “[w]hether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice”⁴³ and “[w]hether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors”,⁴⁴ are at the core of the victims’ interests.

26. As highlighted *supra*,⁴⁵ since the notion of the interests of justice encompasses – and often coincide with – the victims’ rights to the truth and justice, victims have a fundamental interest in advocating for an interpretation of the relevant statutory provisions that properly takes into account these prerogatives. Victims have a clear interest in taking part in the relevant litigations on whether a positive determination of ‘why’ an investigation would be in the interests of justice is required and on whether it is for the Chamber or the Prosecution to proceed with such determination.

27. In this regard, the Court is under the obligation to respect the internationally recognised human rights of victims. This obligation applies also with regard to the conduct and result of preliminary examination, “especially the rights of victims to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of this Court”.⁴⁶

28. Moreover, as recalled by the Prosecution, the wording of article 53(1)(c) of the Statute requires that the interests of justice being assessed against, *inter alia*, “the

⁴³ See the Request, *supra* note 15, paras. 15-18.

⁴⁴ *Idem*, paras. 19-23.

⁴⁵ See *supra* paras. 19-20.

⁴⁶ See the “Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’” (Pre-Trial Chamber I), [No. ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, para. 88. See also the “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya” (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010, para. 5; and the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 3 May 2008, paras. 31-44.

gravity of the crime and the interests of victims".⁴⁷ Accordingly, the Principal Counsel submits that in light of the lack of any "*settled authority*" with regard the factors which may be taken into account in performing such assessment,⁴⁸ and considering the central role of victims in criminal proceedings, the Office may contribute with its views to shed light on such elements from a victims' perspective.

29. Similarly, in relation to the Third issue – namely: "[w]hether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents"⁴⁹ – victims have a substantial interest in advocating for the broadest approach possible, which would allow for an investigation that duly encompasses the full extent of their victimisation and the impact of the crimes on individuals and affected communities.

30. In this regard, it is recalled that the Appeals Chamber already found that "*the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court*".⁵⁰ Moreover, within the legal framework of the Court, the victims' rights both to participate in the proceedings and to claim reparations are entirely dependent on the Prosecutor starting an investigation, or being authorised to do so by the Chamber.⁵¹

31. The Principal Counsel submits that the interpretation of article 53(1)(c) of the Statute – with the applicable standard, including article 21(3), and the definition and related assessment of the notion of the 'interests of justice' – coupled with a judicial

⁴⁷ See the Request, *supra* note 15, para. 24.

⁴⁸ *Idem*, para. 22.

⁴⁹ *Ibid.*, paras. 24-28.

⁵⁰ See the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006" *supra* note 3, para. 37.

⁵¹ See the "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'" *supra* note 46, para. 88.

determination of the scope of an article 15 investigation, is meant to have a substantial impact on the fundamental rights of, and the overall fairness of the Court proceedings towards, victims.

32. Finally, the Principal Counsel informs the Chamber that the Office has been contacted by victims and organisations representing victims indicating that decades of impunity in Afghanistan have showed that the interests of the powerful will always supersede their interests and their right to see those responsible held accountable for the crimes they suffered from. By opting out of an investigation of the alleged war crimes and crimes against humanity committed in Afghanistan, victims consider that the ICC – their only hope for justice – has also failed them. Victims also pointed out that the idea that the Court needs to establish criteria for prioritizing investigative, prosecutorial, and judicial resources, or even that ‘likelihood of success’ should be part of the equation, is particularly troubling. Indeed, it will mean their access to justice will be denied. This is particularly striking in a situation in which hundreds of representations by victims made clear that an investigation is necessary and could contribute to deter further violations.

IV. CONCLUSION

33. For the foregoing reasons, the Principal Counsel of the OPCV respectfully requests the Pre-Trial Chamber to be allowed to appear before it on the three issues as identified by the Prosecution in its Request and directly affecting the victims' rights, by filing written submissions within a deadline established by the Chamber.

A handwritten signature in black ink, appearing to read "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 10th day of June 2019

At The Hague, The Netherlands