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No.: **ICC-02/17 OA OA2 OA3**

Date: **25 June 2019**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
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 with Public Annex A

Request Seeking Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan

Source: *Amicus Curiae* Organizations

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart, Deputy Prosecutor

Ms Helen Brady

Counsel for the Defence

Legal Representatives of the Victims

Mr Fergal Gaynor *et al*

Ms Katherine Gallagher

Ms Margaret Satterthwaite *et al*

Mr Tim Moloney *et al*

Ms Nancy Hollander *et al*

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

***Amicus Curiae* Representatives**

REGISTRY

Registrar

Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill, Chief

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. The Afghanistan Human Rights and Democracy Organization, Afghanistan Human Rights Organization, Afghanistan Forensic Science Organization, Feminine Solidarity for Justice Organization, and Afghan Victims' Families Association (collectively "Organizations") request leave to make submissions as *amicus curiae* regarding Pre-Trial Chamber II's decision rejecting the opening of an investigation into crimes committed in Afghanistan ("Decision").¹ While the Appeals Chamber ("Chamber") has suspended all time-limits until Pre-Trial Chamber II issues its decision on the requests for leave to appeal,² the Organizations bring this application now to provide the Chamber adequate time to consider this request and, if granted, permit the proposed submissions within the briefing schedule just rendered.

2. If granted leave, the Organizations propose to make submissions on the following matters relevant to the Chamber's evaluation of the Decision: (i) the flawed process by which Afghan victims and Afghan society were heard on issues relevant to Pre-Trial Chamber II's article 53(1)(c) determination; (ii) the Decision's flawed assessment of what Afghan victims and Afghan society consider the "interests of justice" entails within the context of the conflict in Afghanistan; and (iii) steps the Court can undertake to prevent the repetition of these issues in the event the Chamber remands the Decision to Pre-Trial Chamber II or permits the investigation to proceed.

3. The Organizations have already been granted leave to make submissions as *amicus curiae* before Pre-Trial Chamber II on the separate, but related, questions of whether an appeal should be granted and, if so, what issues should be certified for

¹ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, [ICC-02/17-33](#), 12 April 2019 ("Decision"). This application is made in accordance with rule 103(1) of the Rules of Procedure and Evidence.

² See Order suspending the time limit for the filing of an appeal brief and on related matters, [ICC-02/17-54](#), 24 June 2019.

appeal.³ This application is to ensure that the Organizations can also directly comment on the substance of those issues and that the Chamber can properly account for the perspectives of Afghan society and Afghan victims on matters of essential importance to the Afghan people. And while several victim-applicants have already appeared before this Chamber, those submissions do not obviate the importance of permitting the Organizations' perspectives.

4. The Organizations are uniquely placed to make the proposed submissions given their extensive experience working with victims of international crimes in Afghanistan and their intimate knowledge of Afghan society, including on transitional justice matters. The Organizations are the only Afghan-based institutions to appear before this Chamber to-date and the only institutions with direct access to Afghan society. The Organizations have solicited the viewpoints of thousands of Afghans directly harmed during the conflict in Afghanistan, have devised and implemented various transitional justice and outreach program, and were instrumental in collecting and submitting hundreds of victim statements before Pre-Trial Chamber II in advance of the Decision.

5. The Organizations are not only intimately familiar with the viewpoints of Afghan society and Afghan victims, but also the Court's process of soliciting those viewpoints before the Decision. The Organizations are also the only participants advised by and benefitting from the representation of Afghan counsel based in Kabul or in the Afghan Diaspora. Permitting these submissions is thus particularly important so that the proceedings benefit from the perspective of the community most directly impacted by the Decision—the Afghan people.

³ See Decision on the 'Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39), [ICC-02/17-43](#), 12 June 2019.

II. SUBMISSIONS

A. The proposed submissions will assist the Chamber's evaluation of the Decision and determination as to whether Pre-Trial Chamber II erred

6. The proposed submissions will assist the Chamber in adjudicating issues currently on appeal.⁴ If granted *amicus curiae* status, the Organizations intend to make submissions on the following factual and legal issues relevant to the Chamber's evaluation of the Decision and whether Pre-Trial Chamber II erred.

7. *First*, the proposed submissions will explain why Pre-Trial Chamber II did not properly account for the views of Afghan victims and Afghan society when assessing their interests. While Pre-Trial Chamber II's decision to solicit the viewpoints of Afghan victims and Afghan society concerning their interests in an investigation was well-intentioned, welcomed, and correct, it was poorly executed by the Registry to such a degree as to fundamentally impact the process' fairness. The proposed submissions will detail how flawed outreach by the Registry, namely the Victims Participation and Reparations Section and the Office of Public Counsel for Victims, meant that Afghan victims and Afghan society did not have the opportunity to genuinely contribute to the issues underlying the Decision and resulted in Pre-Trial Chamber II's erroneous understanding of their interests.

8. *Second*, the proposed submissions will explain what the "interests of justice" mean for Afghan victims and Afghan society, including whether it necessarily requires that suspects be arrested and prosecuted. The proposed submissions will explain why an investigation, by itself, can be the basis for "justice" as per article 53(1)(c) given that investigations are designed *inter alia* to "establish the truth". It will explain how, from the standpoint of Afghan victims and Afghan society,

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence", [ICC-01/04-01/06-1289](#), 22 April 2008, para. 8.

investigations and arrest warrants have numerous practical and important benefits, including that they: (i) keep the spotlight on the offender and mitigate their ability to continue or perpetrate crimes; (ii) deter future offenders; (iii) discourage individuals from associating themselves with organizations or individuals under investigation; and (iv) have the important punitive effect of “naming and shaming” individuals. The proposed submissions will explain why Pre-Trial Chamber II erred by not accounting for these considerations in its Decision.

9. *Third*, the proposed submissions will explain why Pre-Trial Chamber II’s understanding of “justice” and what Afghan victims “aspired” was narrowly construed. The proposed submissions will explain how the Decision closed any prospects that the victims of international crimes in Afghanistan will obtain justice for their suffering and the tremendous harm they have incurred, and conveys to Afghans and the world that Afghans may continue to be abused with impunity. How the Decision prevents the countless victims of torture, murder, sexual violence, and forced displacement, from ever accessing the truth, gaining recognition for their harms, or seeing those responsible for their crimes be brought to justice. And how it prevents any opportunity that Afghans will obtain truth and retribution for the crimes committed against them, particularly, as Pre-Trial Chamber II concedes, there is no ongoing investigation or prosecution against those who bear the greatest responsibility for these crimes and thus no current prospects for truth or justice.⁵

10. Further to this issue, the proposed submissions will explain how the Decision weakened the potential position and role of Afghan war victims and victim support organizations in the Afghan peace process and how an ICC investigation would have strengthened and reinforced the role of victims in the construction of a durable peace. How the pressure and presence of an international law body on war crimes would have resulted in justice concepts being considered in the peace process. And

⁵ See [Decision](#), paras. 74-79.

how the Decision's failure to account for these considerations resulted in its erroneous outcome.

11. *Finally*, the proposed submissions will describe what the Court can do to ensure that it does not later undercut its own position if the Decision is remanded or overturned. The proposed submissions will detail steps the Court could take to ensure that its concerns around overpromising and under-delivering to Afghan victims and Afghan society is not realized and that the mistakes preceding the Decision are not repeated

12. Overall, the proposed submissions are important to the Chamber's assessment of the Decision. It ensures that the Chamber understands the issues from those most directly impacted by the Decision—Afghan victims and Afghan society. It also demonstrates the Chamber's willingness to engage victims and local human rights organizations and to hear from them on matters central to their judicial concerns. Finally, it allows the Chamber to issue a judgment fully considerate of diverse viewpoints, not simply that of the Prosecution and a relative handful of victim-applicants, with the appreciation of how its judgment will impact the rights and concerns of a broader community outside the Court.

B. The proposed submissions fall within the Organizations' expertise

13. For the reasons already outlined before Pre-Trial Chamber II,⁶ the proposed submissions concern matters falling squarely within the Organizations' expertise and for which they are uniquely placed to comment upon.

14. As reflected in Annex A, the Organizations are among Afghanistan's most active and prominent human rights institutions. The Organizations have a direct

⁶ See Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan, [ICC-02/17-35](#), 10 June 2019.

insight on the attitudes and perceptions of justice across a broad and diverse cross-section of the Afghan population, including victims of gender-based crimes, crimes against minors, and crimes committed along persecutory or discriminatory lines. The Organizations have extensive programs for victim participation in proceedings before the ICC, peace negotiations, capacity building, and the documentation of crimes under the Court's jurisdiction. They have also actively engaged victims of human rights abuses across Afghanistan, including victims of the crimes identified in the Decision. For example:

- The Afghanistan Democracy and Human Rights Organization has implemented over 100 projects across Afghanistan with over 100,000 direct and indirect beneficiaries focusing on improving the human rights situation of Afghans. This includes an initiative launched in 2011 where for over eight years the organization constructed hundreds of "Memory Boxes" to collect, protect, and share the memories and oral histories of Afghan war victims. These "Memory Boxes" include more than 4,000 personal objects, hundreds of personal stories, and thousands of Afghan war victims' names and personal details.
- The Afghanistan Forensic Science Organization, a team of 23 professionals trained and mentored by the Physicians for Human Rights, has worked on the identification, documentation, registration, and protection of mass graves. Over the past decade, they have uncovered and protected over 20 mass graves throughout Afghanistan, and documented evidence of torture and other forms of violence.
- The Feminine Solidary for Justice Organization has provided psychotherapy services to over 250 victims of human rights violations, the majority being women and children. They also established the first ever "victim *shuras*" in

Afghanistan—traditional consultative sessions focused on bringing together victims of human rights abuses in Afghanistan. Through these *shuras* they have assisted hundreds of Afghan human rights victims.

15. The Organizations also have familiarity with the ICC's practices and procedures. Since the onset of the Prosecution's preliminary examination, the Organizations have participated in consultative sessions with the Office of the Prosecutor and, more broadly, in roundtable discussions with the Court. The Organizations also assisted hundreds of Afghan victims submit their views to the Chamber when they were first solicited in November 2017. As a result, the Organizations have specialized knowledge concerning the perceptions of Afghan victims and Afghan society towards the ICC, including the potential impact of ICC investigations on justice and peace efforts in Afghanistan.

16. Finally, the Organizations are assisted by counsel who have practiced before the Court and other international criminal tribunals as well as by Counsel who have direct insight as to the circumstances in Afghanistan. In these regards, the Organizations have ensured that their submissions complement and assist these proceedings and are not redundant of arguments by other parties and participants.

C. The proposed submissions supplement those made by the victim-applicants

17. That multiple victim-applicants have already appeared before the Chamber does not obviate the importance and utility of the proposed submissions.

18. *First*, the Organizations do not purport to speak on behalf of specific victims, victim-applicants, or potential applicants who have already sought to participate in these proceedings. Rather the proposed submissions are from local human rights organizations based in Afghanistan that have canvassed the perspectives of

thousands of Afghan victims of the crimes described in the Decision. The Organizations are also represented by Afghan lawyers based in Kabul or from the Afghan Diaspora with specific subject-matter expertise relevant to the issues underpinning the Decision. Collectively, the Organizations and their advocates have expert insight as to the importance and value of an ICC investigation to justice in the country given the entrenched culture of impunity and the failed transitional justice process in Afghanistan. These characteristics distinguish the Organizations from the current pool of victim-applicants. While the victim-applicants provide valuable and necessary input on the Decision and the role of victims generally, the proposed submissions ensure that the Chamber benefits from a more holistic understanding of the Afghan experience and of the situation in Afghanistan *vis-à-vis* justice and the ICC.

19. *Second*, the Organizations were heavily involved in assisting hundreds of victims submit their views to Pre-Trial Chamber II in advance of the Decision. The Organizations were among the principal groups liaising with the Registry during that process. They thus have direct observations as to the process' flaws and inadequacies, particularly given the short time-frame imposed by Pre-Trial Chamber II and conditions specific to conducting outreach in Afghanistan, such as the ongoing conflict, high illiteracy rates, absence of adequate communication channels, severe weather conditions during the period when submissions were permitted, and the specific situation of Afghan women.

20. *Third*, the Chamber should, in any event, hear from the broadest possible spectrum of opinions from groups on-the-ground, most directly impacted by the Decision. Permitting the Organizations to directly make submissions to the Chamber best ensures that outcome. Doing so is also consistent with the Court's mandate towards victims and with the interests underlying article 53(1)(c).

21. *Finally*, there is no prejudice to the Prosecution, victim-applicants, or the proceedings by permitting the Organizations' participation at this point. The Organizations are prepared to file their submissions in accordance with any timeline set by the Chamber. The Organizations recommend a filing deadline within a week of the victim-applicants' appeal briefs.⁷ This would allow the Organizations time to update their arguments to prevent any duplication with those advanced by the victim-applicants while also allowing the Prosecution sufficient time to respond to the Organizations' submissions within the deadline already set by the Chamber. In these regards, there will be no impact to the expeditiousness of the proceedings by granting this request and any delay is offset by the important benefits of permitting the Organizations' observations.

III. RELIEF SOUGHT

22. The Afghan people deserve the opportunity to speak directly to the Appeals Chamber on why the Decision was wrong and fails to reflect their interests and aspirations. On why the Decision has in fact harmed prospects for justice, accountability, and a durable peace in Afghanistan. This request should be granted.



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Lead Counsel for the *Amicus Curiae* Organizations

Dated this 25th day of June 2019
 At San Francisco, USA

⁷ See Order suspending the time limit for the filing of an appeal brief and on related matters, [ICC-02/17-54](#), 24 June 2019, paras. 8-9.