

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/17  
Date: **11 July 2019**

**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**  
**with Confidential Annexes A to E and Public Annexes F to H**  
*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

**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*

Mr Steven Powles *et al*

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

**States Representatives**

***Amicus Curiae* Representatives**

Ms Spojmie Nasiri

Mr Dimitris Christopoulos

**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. This filing is made by 17 human rights and civil society organizations based in Afghanistan (“Organizations”)<sup>1</sup> who request that Pre-Trial Chamber II (“Chamber”) certify for appeal its decision denying an investigation into crimes committed in Afghanistan (“Decision”) and that the issues certified for appeal encompass matters of importance to Afghan victims and Afghan society. The observations contained in these submissions are based on the Organizations’ collective experience working with and hearing from tens of thousands of Afghan victims who are amongst the most vulnerable and marginalized members of Afghan society. These include women and men who saw their family members killed and their homes destroyed, who were forced to flee their land or continue to live in fear of harm, and who were themselves tortured and abused, but who continue to fight for truth and justice.

2. The Organizations present these submissions at great risk of harm to themselves given the state of security in Afghanistan and the opposition to a justice-centered approach by the Afghan government, powerful foreign actors, and armed groups in Afghanistan. But they do so because they continue to believe that the most potent recourse to justice for the decades of crimes committed in Afghanistan is through this Court.

3. The Organizations do not deny that a criminal investigation in Afghanistan will be difficult and that cooperation by the States and armed groups subject to that investigation may be weak or non-existent. That the world’s strongest military power will continue to exert serious pressure to undermine the ICC and any future investigation. But the Organizations believe that the Court was created because the world needed a justice institution with a global mandate to fight impunity. And that

---

<sup>1</sup> A list of these organizations, their background, and relevant work, is detailed in Annex G. Annexes A to E are classified as “*Confidential*” because they contain information that could put at risk of physical harm the individuals named in the documents if they were made public.

the Court's founders knew that in certain circumstances, like here, pursuing that mandate would put the Court at odds with the most powerful countries in the world, willing to use aggressive, coercive, and potentially violent means to stifle the Court's objectives. But the Court's mandate is by definition a contentious one. There is no way to address war crimes without coming into conflict with powerful actors. The Court was created to do just this.

4. The Organizations sincerely believe that if the Court declines investigations or cases because of these difficulties: because of threats, because States may not cooperate, or even because the prospects of success are slim, then the disservice done to the Court's mandate and to the victims is even greater than if it were to try and fail. Further, the Organizations aver that the Decision to not investigate further invalidates the victims' contentions and puts them in a more vulnerable position with regards to actors within Afghanistan who will continue to commit the very atrocities the Court refuses to investigate.

5. For these reasons, the Organizations strongly believe that the Chamber should permit appellate review of the Decision given that it is broadly supported by Afghans and necessary to accord fair treatment to Afghan victims and Afghan society, and that the issues certified for appeal should include those supported by the Organizations as detailed below and summarized in Annex F.

## II. SUBMISSIONS

### A. Afghans broadly support an ICC investigation and an appeal

6. Afghan victims and Afghan society overwhelmingly favour appellate resolution and the opening of an ICC investigation. In 2005, a national survey published by the Afghanistan Independent Human Rights Commission ("AIHRC") confirmed that 95% of Afghans supported truth finding processes, and 88%

supported reparations for war victims. That survey was based on a representative sample of over 4,000 Afghans and refugees from almost every province in Afghanistan.<sup>2</sup>

7. This demand for an ICC investigation was reaffirmed before this Chamber. Despite little support and outreach by the Court, an exceptionally short time-frame, and immense access challenges;<sup>3</sup> 794 representations were received of which 534 were made collectively.<sup>4</sup> Almost all of those who commented supported an ICC investigation.<sup>5</sup>

8. The Organizations' experience with Afghan victims is consistent with this near universal demand. Since the Decision, victims have repeatedly expressed their desire for a fair and independent investigation into war crimes in Afghanistan and their confusion regarding the Decision not to authorize one.<sup>6</sup> At a meeting of Afghan victims in June 2019, all those present voiced their support for an investigation with one woman stating, "the International Criminal Court's decision not to investigate crimes in Afghanistan makes us feel like we are not human and not a part of humanity, why don't the same international standards apply to Afghans?"<sup>7</sup>

9. The Organizations themselves uniformly support an appeal. Over the past decade, the Organizations have assisted thousands of war crimes victims both before and after the Decision was rendered.<sup>8</sup> Virtually all victims strongly support an ICC

---

<sup>2</sup> [A Call for Justice. A National Consultation on past Human Rights Violations in Afghanistan](#), 5 January 2005 ("AIHRC Survey"), pp. 5, 29, 33 (last accessed 10 July 2019).

<sup>3</sup> See below, paras. 19-27. See also Ehsan Qaane, Afghanistan Analysts Network, [Afghan Victims of War Crimes Want Investigation: Hundreds of thousands apply to ICC](#), 8 February 2018 (last accessed 10 June 2019).

<sup>4</sup> See [VPRS Report](#), para. 23.

<sup>5</sup> See [VPRS Report](#), paras. 39-40, 47.

<sup>6</sup> See e.g. Huma Saeed, Security Praxis, [A slap in the face of justice: the ICC and Afghanistan](#), 8 May 2019 (last accessed 10 July 2019); Kate Clark, Afghanistan Analysts Network, [ICC rejects war crimes investigation in Afghanistan: Continuing impunity for perpetrators, no voice yet for victims](#), 13 April 2019 (last accessed 10 July 2019).

<sup>7</sup> See Annex B, para. 17.

<sup>8</sup> See e.g. Annex C, paras. 4, 9; Annex E, paras. 6-7; Annex G.

investigation and that the Decision be appealed or reconsidered.<sup>9</sup> This is particularly so given that there are no other prospects of justice in Afghanistan. A series of amnesty laws and programs passed by the Afghan government have effectively precluded any other recourse to justice,<sup>10</sup> requiring Afghan victims and civil society organizations to call on the international community to take an active part in resolving Afghanistan’s human rights abuses.<sup>11</sup> The Court was created for this reason—to hear the call of war victims when nation states will not respond.

10. The Chamber has the power to, and should, account for these interests in determining whether to certify an appeal. The Appeals Chamber has determined that the right to appeal a decision under article 82(1)(d) arises only if the Chamber believes its decision should receive the Appeals Chamber’s immediate attention.<sup>12</sup> Nothing in the Statute or the Rules circumscribes the factors the Chamber may consider when exercising this discretion.

11. Here, the interests of Afghan victims and Afghan society are clearly relevant. Afghan victims and Afghan society are the ones most directly impacted by the Decision. They are also the ones who suffer the most depending on the outcome of the Chamber’s decision to permit an appeal. The Court—the judiciary, the Prosecution, and the Registry—will focus on other matters while it is Afghan victims and Afghan society that will permanently be impacted by the outcome of this process. Recognizing their voice is a recognition of those consequences.

12. Crediting the interests of Afghan victims and Afghan society also best ensures that they feel included in a process and that “justice” has been done, particularly

---

<sup>9</sup> See e.g. Annex B, paras. 16-18, 20-22; Annex C, paras. 7-10, 29-30; Annex E, paras. 13, 17, 43; Annex G.

<sup>10</sup> See Kate Clark, Afghanistan Analysts Network, [ICC reports: “Victims Overwhelmingly Support” Investigation into War Crimes in Afghanistan](#), 26 February 2018 (last accessed 10 July 2019); Kate Clark, Afghanistan Analysts Network, [ICC rejects war crimes investigation in Afghanistan: Continuing impunity for perpetrators, no voice yet for victims](#), 13 April 2019 (last accessed 10 July 2019).

<sup>11</sup> See e.g. Annex B, paras. 16-18; Annex C, paras. 6-7; Annex E, paras. 14-17.

<sup>12</sup> See *DRC Situation*, [13 July 2006 Appeal Judgment](#), para. 20; *Gbagbo*, [1 November 2016 Appeal Judgment](#), paras. 12-13.

when so many feel abandoned by the Decision. Most domestic jurisdictions leave victims feeling helpless and alienated from the very cases drastically transforming their lives given the absence of their direct input in the criminal justice process.<sup>13</sup> Social psychologists studying the impact of victim participation in hearings have concluded that the way a case is conducted and the extent to which victims have a “voice” are major influences on society’s satisfaction that justice was done.<sup>14</sup>

13. Afghan victims and Afghan society already bear general disappointment and resentment against the international community and institutions for failing to provide any semblance of justice after decades of conflict, crimes, and impunity. The Decision re-enforced those sentiments.<sup>15</sup> Recognizing and accounting for the interests of Afghan victims and Afghan society, by certifying an appeal and explicitly referencing that interest, is one step toward remedying those effects.

## **B. An appeal accords fair treatment to Afghan victims and Afghan society**

14. The rights and interests of Afghan victims and Afghan society can only have meaning if the Decision goes through a full and complete legal process—and that process necessitates an appeal.

### *a. The Decision has serious consequences for Afghans*

15. That the Decision creates serious consequences for Afghan victims and Afghan society is indisputable. The Decision closes the door on Afghans obtaining justice

---

<sup>13</sup> See e.g. Jo-Anne Wemmers, *Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice*, 9 INT’L REV. VICTIMOLOGY 43, 45-46 (2002) (emphasizing the importance placed on victim participation in restorative programs and arguing that such programs better meet victims’ needs, such as information, compensation, participation, practical, and emotional needs, rather than the conventional criminal justice responses).

<sup>14</sup> See Eric Stover *et al.*, *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT’L REV. RED CROSS 503, 531 (2011). See also Y. Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 41, 69–70 (Carla Ferstman *et al.* eds., 2009) (showing resentment by communities in the former Yugoslavia and Rwanda for the failure by the *ad hoc* tribunals to integrate victims into the judicial process).

<sup>15</sup> See e.g. Annex B, para. 19; Annex C, paras. 25-28; Annex E, paras. 40-42; Annex G.

through the ICC, a tribunal created for this precise purpose.<sup>16</sup> It sends the message to Afghans and the world that Afghans may continue to be abused with impunity. It 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 it effectively prevents any opportunity that they will obtain truth and retribution for the crimes committed against them through the ICC. With the ICC being the only international tribunal directed at addressing war crimes when nation states have failed, the reality is that Afghan victims and Afghan society have no other outlet for truth and justice.

16. The Decision also weakened the potential position and role of Afghan war victims and victim support organizations in the Afghan peace process. When the OTP's preliminary examination was announced, the Afghan government took steps to address war crimes in the country. For instance, after meetings between the OTP and the Afghan government in 2016 and 2017, the Afghan government shared two packages of cases that were prosecuted in Afghanistan in 2016 and 2017,<sup>17</sup> passed an anti-torture law,<sup>18</sup> and updated the Afghan penal code to include war crimes.<sup>19</sup> Efforts by the Afghan government, however, began to stall and falter given the OTP's elongated preliminary examination.<sup>20</sup> Following the Decision, all efforts at transitional justice appear to have come to an end.

---

<sup>16</sup> *Contra Concurring and Separate Opinion of Judge Mindua*, para. 50.

<sup>17</sup> Ehsan Qaane, Afghanistan Analysts Network, [Investigating Post-2003 War crimes: Afghan Government wants "one more year" from the ICC](#), 27 June 2017 (last accessed 10 July 2019).

<sup>18</sup> Islamic Republic of Afghanistan, [Ministry of Justice, Official Gazette 1321-Law on Prohibition of Torture](#) (31 October 2018) (in Persian) (last accessed 10 July 2019).

<sup>19</sup> Islamic Republic of Afghanistan, Ministry of Justice, [Official Gazette 1260-Penal Code](#) (15 May 2017) (in Persian) (last accessed 10 July 2019). *See also* Kate Clark and Ehsan Qaane, Afghanistan Analysts Network, [One Step Closer to War Crimes Trials \(2\): ICC Prosecutor requests authorisation to investigate](#), 5 November 2017 (last accessed 10 July 2019).

<sup>20</sup> *See* Annex B, paras. 5-7. *See also* Kate Clark, Afghanistan Analysts Network, [ICC reports: "Victims Overwhelmingly Support" Investigation into War Crimes in Afghanistan](#), 26 February 2018 (last accessed 10 July 2019).

17. When the Decision was issued, the Taliban announced a spring offensive despite peace talks with the United States.<sup>21</sup> Since the Decision, resources have also been diverted away from the office tasked with investigating war crimes. That office is now de-prioritized, less active, and staffed with personnel lacking relevant experience.<sup>22</sup> Further, though the office is tasked with investigating and prosecuting war crimes, no domestic court currently has jurisdiction to hear such cases, and will not unless the Law on the Organization and Jurisdiction of Afghan Courts is amended, effectively leaving the ICC as the only court that can currently hear war crimes cases on behalf of Afghan victims.<sup>23</sup>

18. These circumstances are not coincidental. Through their decades-long experience working on transitional justice in Afghanistan, the Organizations believe that the ICC's actions impact how the Afghan government and armed groups respond. Without the pressure accompanying an ICC investigation, there is a high likelihood that there will be no truth and justice for Afghans domestically or as part of any peace settlement. An ICC investigation would have strengthened and reinforced victims' roles in constructing a durable peace and encouraging the parties to the Afghan conflict to embed a justice framework in a final peace agreement. Absent the Decision's successful appeal or reconsideration, the prospect that there will be any framework for justice in a peace settlement appears slim. Instead the normative situation is back. Violators in Afghanistan exist against a back-drop of several immunity deals and behave as if war is a business without rules.

---

<sup>21</sup> Mujib Mashal, [Taliban Announce Spring Offensive, Even as Peace Talks Gain Momentum](#), NY Times, 12 April 2019 (last accessed 10 July 2019).

<sup>22</sup> See Annex B, paras. 5-7. Before the Decision, the office contacted a group of international organizations through UNAMA for assistance in building the capacity of the office.

<sup>23</sup> Islamic Republic of Afghanistan, Ministry of Justice, Official Gazette 1109, [Law on the Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan](#) (30 June 2013) (in Persian) (last accessed 10 July 2019); Ehsan Qaane and Sari Kouvo, Afghanistan Analysts Network, [Peace in The Air, But Where Is Justice? Efforts to get transitional justice on the table](#), 28 February 2019 (last accessed 10 July 2019).

*b. The Decision was rendered without adequate participation by Afghan victims and Afghan society*

19. Despite the Decision's serious and consequential impacts, Afghan victims and Afghan society were deprived of an adequate opportunity to participate in these proceedings and to genuinely opine on the issues central to the Decision. Execution of the Chamber's order to solicit the viewpoints of Afghan victims and Afghan society was fraught with problems such as to fundamentally impact the process' fairness.<sup>24</sup>

20. First, the process by which victims were solicited feedback was manifestly flawed. Victim input was solicited *via* an online intake process<sup>25</sup> even though only 15% of Afghans have internet access and only approximately 30% of Afghans are literate.<sup>26</sup> Those figures are significantly less when considering gender and socio-economic factors. For instance, the literacy rate for Afghan women is slightly more than half that of men and women in rural areas are far less likely to be literate.<sup>27</sup> It is thus unsurprising that the Registry's process—which encouraged responses to be provided in English<sup>28</sup>—only generated 165 submissions from individuals and only 10 on behalf of or by women.<sup>29</sup>

21. Second, the Registry failed to undertake all reasonable and necessary measures to solicit victim feedback.<sup>30</sup> The Registry had no presence in Afghanistan, and no outreach or public information activities in the country to try and reach victims directly.<sup>31</sup> It failed to undertake a mass media campaign using Pashto or Dari

<sup>24</sup> See generally Annex C, paras. 11-24; Annex D, paras. 6-21; Annex E, paras. 25-39.

<sup>25</sup> See [VPRS Report](#), paras. 5-9.

<sup>26</sup> See UNDP, [UN Human Development Report 2018 Statistical Update](#) (last accessed 10 July 2019); [VPRS Report](#), para. 12.

<sup>27</sup> See UNESCO, [Enhancement of Literacy in Afghanistan Programme](#) (last accessed 10 July 2019).

<sup>28</sup> See [Afghanistan situation: How victims and their representatives can submit their views to ICC judges](#) (last accessed 10 July 2019).

<sup>29</sup> See [VPRS Report](#), para. 35. See also Annex C, paras. 14-18.

<sup>30</sup> See rule 92(8) of the [Rules](#) and regulation 103(1) of the [Regulations of the Registry](#).

<sup>31</sup> See [VPRS Report](#), para. 5. See also Annex C, paras. 11-24; Annex E, paras. 25-39.

speaking radio or television (such as BBC Pashto, BBC Persian, or any of the hundreds of Afghan national television and radio stations that broadcast throughout the country)—the primary means through which Afghans obtain information. It did not conduct a national information campaign to help the population better understand the Court’s role, the purpose of victims’ representations and how to submit them.<sup>32</sup> It also failed to contract third parties, including other international organizations, institutions, journalists, or academic agencies, to facilitate on-the-ground-access with victims and ensure a broad collection of viewpoints. There were also no efforts to organize population-based surveys, as has been done by other organizations similarly situated with little resources, little time, and indirect access to the afflicted community.<sup>33</sup> While the Registry undertook efforts to connect with victims through civil society organizations,<sup>34</sup> those efforts put local Afghan human rights organizations on the front-lines, in harm’s way, and without adequate time, training, or the Court’s support or security.<sup>35</sup>

22. Finally, these issues were exacerbated by the exceptionally short period of time allocated to collecting the perspective of victims. Two months to organize outreach and collect information from victims is wholly insufficient for a country where information about the ICC has been scarce, where the Court lacks a physical presence, where ongoing conflict hampers access to many of the areas where international crimes occurred, where many people are illiterate and do not have internet access or stable electricity, and where—for good reasons—the population has learned to be careful about sharing information that may subject them to harm. Despite being repeatedly confronted about the limited time by human rights

---

<sup>32</sup> See Annex C, paras. 11-24; Annex E, paras. 25-39.

<sup>33</sup> See e.g. Phuong Pham & Patrick Vinck, [A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda](#), December 2010 (last accessed 10 July 2019) (population based survey of 2,498 individuals between April and May 2010 in Northern Uganda).

<sup>34</sup> See [VPRS Report](#), para. 7.

<sup>35</sup> See Mark Kersten, Justice in Conflict, [Interview with Ehsan Qaane: Afghans Don’t Know the ICC, but its Hope to Deliver Justice Depends on Making Sure They Do](#), 26 September 2018 (last accessed 10 July 2019). See also Annex C, paras. 11-24; Annex D, paras. 6-21; Annex E, paras. 25-39.

organizations on the ground, additional time was not provided to ensure adequate victim feedback.<sup>36</sup>

23. These circumstances may have been overcome by advance planning. However, outreach efforts by the Registry only truly began once requested by the Chamber,<sup>37</sup> despite the Registry's standing mandate to provide victims and their representatives "adequate support, assistance and information" and "general support and assistance", and to generally "serve as the channel of communication of the Court".<sup>38</sup>

24. To their credit, the Registry has been open and transparent about these issues.<sup>39</sup> But that transparency does not rectify the damage done to the process, and the lack of adequate representation by Afghan victims before this Court, particularly across gender, ethnic, religious, racial, and socio-economic lines.

25. To put matters in context, 69% of respondents to AIHRC's representative survey identified themselves or their immediate families as direct victims of serious human rights violations over a 23-year period.<sup>40</sup> Yet in a country of over 35 million people, only 794 victim representations were received by the Registry;<sup>41</sup> and only because of the tremendous efforts of civil society organizations on-the-ground.

26. Afghan women and girls were particularly prejudiced by the Registry's approach.<sup>42</sup> Afghan women and girls are faced with systematic violence and human rights violations, including sexual violence, abuse, and trauma. Afghanistan's cultural history also results in many female victims feeling an acute sense of stigma

---

<sup>36</sup> See Annex C, paras. 15-19; Annex D, paras. 14-15; Annex E, paras. 31-32.

<sup>37</sup> See [VPRS Report](#), para. 1.

<sup>38</sup> See rules 13 and 16(1)(b) of the [Rules](#); regulation 81(4)(a) of the [Regulations of the Court](#). *Contra* [OPCV Information](#), para. 13. Note that the OPCV's manual states that "the Office is involved in outreach activities for members of the judiciary, the legal profession and the civil society in countries where investigations and/or cases are ongoing": OPCV, [Representing Victims before the International Criminal Court](#) (2019), p. 35. Regulation 81(4) also contrasts powers requiring the Court's leave to be exercised with those that do not.

<sup>39</sup> See [VPRS Report](#), paras. 12-14.

<sup>40</sup> [AIHRC Survey](#), p. 8.

<sup>41</sup> [VPRS Report](#), para. 15.

<sup>42</sup> Annex D, paras. 22-33.

and shame in sharing their stories. They often also face the additional hurdle of having to seek permission to leave home or needing to be accompanied by a male relative. The Court was informed of these limitations and the need for more time to properly connect with Afghan women and girls.<sup>43</sup> Medica Afghanistan, for instance, wrote VPRS urgently requesting an extension to the deadline for victim submissions to the ICC, explaining that few submissions had been made by women. They also explained that the lack of representation by women would compromise the Court's decision to open an investigation.<sup>44</sup> However, no further extension was granted and only 6% of all total submissions were from women and girls.<sup>45</sup>

27. But even if the process was fair, the Chamber did not credibly account for the viewpoints of Afghan victims and Afghan society. Those victims who did submit their views expressed the near-uniform opinion that they “want the Prosecutor to investigate the violence associated with the conflict in Afghanistan”.<sup>46</sup> Only 15 representations stated that they did not want an ICC investigation to be authorized due to security concerns or “doubts as to the likelihood that the Prosecutor’s investigation would result in the perpetrators being brought to justice”.<sup>47</sup> None of those who supported an investigation were asked whether they would continue to support an investigation if they believed the prospects of arrests were low. None were also asked what “justice” meant for them in the context of Afghanistan. In this sense, it cannot be credibly said that Afghan victims and Afghan society had a voice on the issues central to the Decision.

---

<sup>43</sup> Annex D, paras. 14-18.

<sup>44</sup> Annex D, paras. 14-18; [VPRS Report](#), para. 35

<sup>45</sup> Annex D, paras. 14-16.

<sup>46</sup> [VPRS Report](#), para. 39.

<sup>47</sup> [VPRS Report](#), para. 40.

*c. The Decision creates finality*

28. The Decision, absent appeal or reconsideration, creates finality by precluding all prospects of an investigation or trial. While Judge Mindua’s separate opinion presupposes that the Prosecution can request an investigation again,<sup>48</sup> the Decision’s reasoning effectively precludes that possibility or a successful outcome even if one is requested. The Decision rejected an investigation by relying *inter alia* upon the length of time undertaken by the OTP in conducting its preliminary examination.<sup>49</sup> That characteristic is immutable—time cannot be regained. The Decision also cited the apparent lack of cooperation by the entities likely subject to an investigation, in Afghanistan and in “key States”.<sup>50</sup> Yet the Decision aggravates that factor, by incentivizing non-cooperation as one method to avoiding responsibility.<sup>51</sup>

29. This finality is important when assessing whether to permit an appeal. Chambers of the Court normally take a restrictive approach when determining whether to grant an appeal under article 82(1)(d) since the issues traditionally at stake are interlocutory.<sup>52</sup> As such, the Chamber balances the convenience of deciding certain issues at the proceedings’ early stage and the need to avoid possible delays and disruptions caused by recourse to appeals during the case’s pendency.<sup>53</sup> Whatever is not appealed in the interim can be appealed upon the case’s disposition—following the confirmation decision or a trial judgment.<sup>54</sup> Thus, there is no prejudice to the party whose interest is denied as there is always the possibility of appeal.

---

<sup>48</sup> [Concurring and Separate Opinion of Judge Mindua](#), para. 50.

<sup>49</sup> [Decision](#), paras. 91-93.

<sup>50</sup> [Decision](#), paras. 91, 94.

<sup>51</sup> Mark Kersten, Justice in Conflict, [Interview with Judge Keith Raynor: A Reality-Check: The Need for Reform and a Culture Change at the ICC](#), 17 June 2019 (last accessed 10 July 2019).

<sup>52</sup> See *Ongwen*, [29 April 2016 Pre-Trial Chamber Decision](#), para. 4 (including citations).

<sup>53</sup> See *Uganda Situation*, [19 August 2005 Pre-Trial Chamber Decision](#), para. 19.

<sup>54</sup> See *Uganda Situation*, [19 August 2005 Pre-Trial Chamber Decision](#), para. 19.

30. That is not the case here where there is no later stage if leave for appeal is denied. Whether by a *lacuna* in a Statute or by design, decisions to deny an investigation under article 53(1)(c) fall outside the structure of appeals provided for by the Statute, in that they are the only time where a case can be terminated with finality without an automatic right of appeal. This means that the Chamber should not view the Prosecution's or LRV1's request to appeal the Decision with the traditional restrictive lens afforded to article 82(1)(d) requests as the Decision clearly falls outside the article's normative paradigm. Instead, the Chamber should be more sensitive to appellate demands in these circumstances given the Decision's terminable consequences.

*d. Without an appeal, the rights of Afghan victims are prejudiced*

31. That the Decision has serious consequences, was rendered without adequate input by Afghan victims and Afghan society, and causes finality is important to ascertaining whether to grant an appeal. Central to the article 82(1)(d) inquiry is whether the impugned decision goes to a matter implicating the proceedings' fairness.<sup>55</sup> That analysis extends to this stage of the proceedings.<sup>56</sup> The Statute's fairness guarantees also go beyond the Prosecution's rights or that of the accused. It encompasses the interests of victims and witnesses and societal interest in fair proceedings.<sup>57</sup> This is particularly the case at the pre-investigation stage where the public's interest and that of victims is the most acute.<sup>58</sup> The most essential of all victims' interests is seeing that an investigation proceeds—it is “[t]his decision [...] on which the satisfaction of all other victims' interests depends.”<sup>59</sup> The European Court on Human Rights has, for instance, held that when determining whether the

---

<sup>55</sup> See *DRC Situation*, [13 July 2006 Appeal Judgment](#), para. 19.

<sup>56</sup> See *DRC Situation*, [31 March 2006 Pre-Trial Chamber Decision](#), para. 36; *Comoros Situation*, [18 January 2019 Pre-Trial Chamber Decision](#), para. 41.

<sup>57</sup> See *DRC Situation*, [31 March 2006 Pre-Trial Chamber Decision](#), para. 38.

<sup>58</sup> See *DRC Situation*, [31 March 2006 Pre-Trial Chamber Decision](#), para. 37.

<sup>59</sup> Human Rights Watch, [Commentary to the Second Preparatory Commission Meeting on the International Criminal Court](#), July 1999, p. 33.

proceedings have been fair, the weight of the public interest in the investigation and punishment of an offence is a factor to consider in assessing its fairness.<sup>60</sup>

32. For the rights of Afghan victims and Afghan society to be honored, they must be able to assert their rights, have denials of those rights be reviewed at the appellate level, and have the appellate court take the appeal and order relief. Because victims are the real party in interest, the Court must always provide opportunity for their inclusion in the process. Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, victims are left at the mercy of the very chamber that may have erred. This Court's appellate process was specifically designed to avoid that occurrence.

33. To not grant that right to Afghan victims and Afghan society—to appeal the Decision when it directly implicates their interests—would also have two potentially irreparable effects. First, it would put victims on significantly different standing than other parties or participants when the Court was designed to enhance their participation in the criminal justice process.<sup>61</sup> It would create an inexcusable dissonance between the rights of an accused—who has every right to an automatic appeal of a final judgment under the Statute—versus the interests of victims—who would have no similar right in respect to a final decision relating to their interests. This would marginalize the role of victims and send the wrong message concerning their place at the ICC.

34. Second, the absence of appellate review would garner further distrust with the Court. Prior to the Decision, Afghan victims and Afghan society stood ready to support the Court's work. They put themselves in harm's way to assist the Prosecution, assist the Registry, and assist the Chamber.<sup>62</sup> The absence of adequate

---

<sup>60</sup> See ECHR, [Jalloh Judgment](#), para. 97; ECHR, [Ibrahim Judgment](#), para. 252.

<sup>61</sup> See article 68(3) of the [Rome Statute](#) and rules 89 and 92(2) of [Rules](#).

<sup>62</sup> See Annex E, paras. 29, 40.

outreach and the lack of genuine support shook the confidence of many Afghan victims and civil society members. And the confidence Afghan victims and Afghan society had that the Court would not sacrifice them to protect itself from conducting cases related to Afghanistan has since been shattered by the Decision. If the Court is still unable to provide Afghan victims and Afghan society with assurances that their interests will be understood and delivered by permitting an appeal, the Court cannot hope to win the trust of those who are also in possession of crucial evidence if an investigation is ever to be opened. And without that trust, there will be no justice. The effect of the Court's engagement in Afghanistan in turn will go far beyond the borders of Afghanistan. Unless addressed through appeal, the Court risks its fundamental legitimacy.

**C. The issues certified for appeal should permit submissions relevant to Afghan victims and Afghan society**

35. The Prosecution and the victim-applicants collectively request that the Chamber certify eleven issues for appeal; falling into six thematic categories: (i) the Chamber's assessment of jurisdiction *ratione loci*; (ii) the Chamber's power to decide whether an investigation is in the "interests of justice"; (iii) the appropriate standard of review for article 53(1)(c) decisions; (iv) the process by which the Prosecution and victims were heard on issues relating to the "interests of justice"; (v) the factors that should be considered for making a determination under article 53(1)(c); and (vi) the Chamber's authority to determine the scope of an investigation. The Organizations provide their observations with regards to each of these issues; also summarized in Annex F. The Organizations do not propose further issues for certification.

36. Ensuring that these issues are certified for appeal is as equally important as allowing victims a direct voice in these proceedings. Without certifying these issues for appeal, Afghan victims and Afghan society have no opportunity to voice their

opinions on matters relevant to their concerns before the Appeals Chamber. It is the Chamber's prerogative "to determine not only whether a decision may be appealed, but also to what extent."<sup>63</sup> And while the Appeals Chamber may address matters that are "intrinsically linked" to the issue on appeal—appellate review is still limited by the contours of the certified issues.<sup>64</sup> For this reason it is insufficient that an appeal simply be certified. Equally important to Afghan victims and Afghan society is the *nature* of the issues on appeal and whether they will permit submissions on matters of central importance to Afghans.

*a. Proposed issue relating to the Chamber's assessment of jurisdiction  
ratione loci*

37. The Organizations take no position on LRV1's sixth proposed issue.<sup>65</sup>

*b. Proposed issues relating to the Chamber's authority to make decisions  
relating to the "interests of justice"*

38. The Organizations agree with the Prosecution and LRV1 that the Chamber should certify an issue as to its powers to make determinations with regards to the "interests of justice".<sup>66</sup> The issue is of direct concern to Afghan victims and Afghan society as it directly impacts the current and future relations of victims with the Court, including the Chamber's obligations *vis-à-vis* victims.

39. Of the two proposals, the Organizations favor the Prosecution's version with a minor reformulation:

---

<sup>63</sup> *Gbagbo*, [16 December 2013 Appeal Judgment](#), para. 63.

<sup>64</sup> *Katanga*, [27 May 2008 Appeal Judgment](#), para. 37.

<sup>65</sup> [LRV1 Request](#), paras. 73-74.

<sup>66</sup> [Prosecution Request](#), paras. 15-18; [LRV1 Request](#), paras. 47-52.

“Whether the Court’s legal texts require or permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice”

LRV1’s formulation of the issue is limited to whether the Chamber had “jurisdiction” and the Prosecution’s formulation is limited to whether the Chamber had authority under articles 15(4) and 53(1)(c). The Organizations consider that a broader formulation is more appropriate—one that evaluates the Chamber’s authority within the Court’s general legal framework—given that the issue goes to a fundamental constitutional question relating to the Chamber’s powers *vis-à-vis* the Prosecution, and towards victims and impacted communities.

*c. Proposed issue relating to standard of review applicable to article 53(1)(c) determinations*

40. The Organizations take no position on the Joint LRVs’ first proposed issue.<sup>67</sup>

*d. Proposed issues relating to the process by which the parties and participants were heard on issues relevant to article 53(1)(c)*

41. The Organizations support the Joint LRVs’ second proposed issue as formulated. The issue goes to a matter of importance to Afghan victims and Afghan society: the proceedings’ fairness as it pertains to their participation.<sup>68</sup> For the reasons described above and by the Joint LRVs,<sup>69</sup> the process by which the interests of Afghan victims and Afghan society were accounted for was mired with errors, ranging from problems with outreach, insignificant time for feedback, and a failure to fully solicit opinions from victims on issues directly underpinning the Decision. Because of these errors, the viewpoints of Afghan victims and Afghan society were not genuinely considered by the Decision on the issues that ultimately mattered the

<sup>67</sup> [Response by Joint LRVs](#), paras. 13-15.

<sup>68</sup> [Response by Joint LRVs](#), paras. 16-25.

<sup>69</sup> See above, paras. 19-27; [Response by Joint LRVs](#), paras. 16-25.

most. This is particularly true in relation to the Chamber's assertion that an investigation absent substantial prospects of arrest is not what victims aspire.<sup>70</sup>

42. Appellate resolution of this issue is particularly important as there is no clear guidance on: (i) the Chamber's obligation towards victims prior to taking a decision under article 53(1)(c); and (ii) the steps the Chamber and the Registry must take to ensure that their legal mandate towards victims and the groups that represent them are fulfilled, particularly given that article 68(1)(3) permits the view of victims where their personal interests are affected. Absent clearer appellate guidance, the viewpoints of victims may not be appropriately heard or weighed and all reasonable and necessary efforts required to solicit the viewpoints of victims may not be taken.

*e. Proposed issues relating to the factors that may be considered for article 53(1)(c) determinations*

43. The Organizations agree with the Prosecution and LRV1, that the Chamber should certify an issue concerning the factors considered by the Chamber in assessing the interests of justice.<sup>71</sup> This issue is the Decision's defining feature and revolves around the critical question: what does "justice" mean under article 53(1)(c). This is a matter important to Afghans, since they are the ones most directly interested in justice for crimes committed in Afghanistan and the ones best positioned to define what justice means in the context of Afghanistan. In these regards, the issue directly concerns core questions such as what the "interests of justice" means for victims of war crimes in Afghanistan, including whether it necessarily requires that suspects be arrested and prosecuted and whether the

---

<sup>70</sup> [Decision](#), para. 96.

<sup>71</sup> [Prosecution Request](#), paras. 19-23; [LRV1 Request](#), paras. 53-62, 68-72.

Chamber's understanding of "justice" and what victims aspired<sup>72</sup> was narrowly construed.

44. The Organizations favour the formulation proposed by the Prosecution and consider that its breadth encompasses the narrower proposals presented by LRV1. The Prosecution's broader formulation also permits submissions on matters particularly important to Afghan victims and Afghan society, including that an investigation, by itself, can be the basis for justice given that investigations are designed *inter alia* to "establish the truth"<sup>73</sup> and how from the standpoint of victims in Afghanistan, investigations and arrest warrants have numerous practical and important benefits, including that they: (i) keep the spotlight on offenders and mitigate their ability to continue or perpetrate new crimes; (ii) have the punitive effect of deterring future offenders; (iii) discourage individuals from associating themselves with organizations or individuals under investigation; (iv) have the important punitive effect of "naming and shaming" individuals; and (v) using information obtained to direct future policies in Afghanistan.

*f. Proposed issues relating to the Chamber's authority to determine the scope of an investigation at the article 53 stage*

45. While not part of the Chamber's *ratio decidendi*, the Organizations agree with the Prosecution and LRV1 that whether the Chamber has the authority to determine the scope of an investigation should be an issue certified for appeal.<sup>74</sup> Who can determine the scope of an investigation is a matter of central importance to victims. Rule 85(a) limits the rights of victims to those "who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." By definition, it requires the existence of a causal connection between the harm suffered by the

<sup>72</sup> [Decision](#), paras. 89, 96.

<sup>73</sup> Article 54(1)(a) of the [Rome Statute](#).

<sup>74</sup> See [Prosecution Request](#), paras. 24-28; [LRV1 Request](#), paras. 63-67.

putative victim and the crimes charged or being investigated. Thus, the scope of an investigation also determines the scope of victims who may be eligible for the procedural and reparative rights afforded under the Court's legal texts.

46. Traditionally, victims and civil society inform these considerations by cooperating with the OTP in identifying sources of information given their own subject-matter and in-country expertise, petitioning for a larger or more holistic investigation, or otherwise informing the investigative process through consultations with the OTP. To the extent the authority to define the scope of an investigation now extends to the Chamber, particularly so early in the proceedings, then how civil society and victims can inform an investigation will also necessarily change. Clarity on this matter is therefore essential so that Afghan victims and Afghan society know how to safeguard their rights.

### **III. RELIEF SOUGHT**

47. The Decision sacrificed justice and truth for millions of Afghan victims in the belief that it would pave a more sustainable path for the Court. Afghan victims and Afghan society deserve the opportunity to challenge that premise. An appeal should be permitted to proceed on the issues supported above.



---

**Spojmie Nasiri**  
**Lead Counsel for the *Amicus Curiae* Organizations**

Dated this 11<sup>th</sup> day of July 2019  
At San Francisco, USA