

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/17**
Date: **10 June 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 Public Annex A

**Request for 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

Counsel for the Defence

Legal Representatives of the Victims

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

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 the Prosecution's application seeking leave to appeal the Chamber's article 15 decision rejecting the opening of an investigation into crimes committed in Afghanistan ("Decision").¹

2. Should it be granted leave, the Organizations intend to make the following submissions to assist Pre-Trial Chamber II's ("Chamber") decision whether to grant an appeal and the issues to be certified: (1) the victims of international crimes in Afghanistan and Afghan society generally favour an appeal; (2) an appeal is necessary to accord fair treatment to Afghan victims; and (3) the issues certified for appeal should allow for observations on matters relevant to Afghan victims and Afghan society.

3. The Organizations are uniquely placed to opine on these issues given their extensive experience working with victims of international crimes in Afghanistan and knowledge of Afghan society, including on transitional justice matters. Further, permitting the Organizations to make submissions as *amicus curiae* is consistent with the Court's mandate towards victims, particularly in the context of determinations made under article 53(1)(c) of the Statute.

4. Altogether, the proposed submissions ensure that the Chamber understands the utility and potential contours of an appeal from the point of view of those most

¹ *Situation in the Islamic Republic of Afghanistan*, 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", [ICC-02/17-34](#), 7 June 2019 ("Request"). This application is made in accordance with rule 103(1) of the Rules of Procedure and Evidence.

directly impacted by its Decision—Afghan victims and Afghan society. These are views the Chamber has yet to hear from judicially.

II. SUBMISSIONS

A. The proposed submissions will assist the Chamber’s article 82(1)(d) determination and the issues to be certified for appeal

5. The proposed submissions will assist the Chamber in deciding whether to grant the Prosecution’s appeal in accordance with article 82(1)(d) and, if an appeal is permitted, the issues that should be certified for appeal.² If granted *amicus curiae* status, the Organizations intend to make submissions on the following three factual and legal issues relevant to these matters. *First*, the victims of international crimes in Afghanistan and Afghan society generally favour appellate resolution and that the Chamber has the discretion to factor this consideration into assessing whether to grant an appeal. This is particularly so given that the interests of Afghan victims and Afghan society are directly impacted by the Decision.³

6. *Second*, appellate review is necessary to accord fair treatment to Afghan victims. The Decision closes any prospects that the victims of international crimes in Afghanistan will obtain justice for their suffering and the tremendous harms they have incurred, and conveys to Afghans and the world that Afghans may continue to be abused with impunity. 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. It prevents any opportunity that they will obtain truth and

² *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.

³ *Situation in the Islamic Republic of Afghanistan*, 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”), para. 96. *See also* [Request](#), para. 6.

retribution for the crimes committed against them. Indeed, the Chamber itself 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.⁴

7. The Decision also weakened the potential position and role of Afghan war victims and victim's support organizations in the Afghan peace process. An ICC investigation would have strengthened and reinforced victims' roles in the construction of a durable peace. It could have encouraged the parties to the Afghan conflict to embed a justice framework in a final peace agreement. With the Decision, the prospects that there will be any framework for justice at all now appear slim.

8. Given these serious and consequential implications, Afghan victims and Afghan society require appellate review to enjoy fair treatment and to prevent the proceedings from being tainted. The proposed submissions will explain how the rights of victims can only have meaning if the Decision goes through a full and complete legal process—and why that process necessitates an appeal. It will also explain why this is particularly important given that the Decision was made under article 53(1)(c), whose central determining factor for consideration explicitly relates to their interests—the victims. The proposed submissions will also explain why the absence of appellate review would garner further distrust with the ICC and why that consideration should also factor into the Chamber's assessment as to whether to grant an appeal. In these regards, the Organizations' proposed submissions will demonstrate why an appeal is necessary to provide the Appeals Chamber an opportunity to rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings".⁵

⁴ See [Decision](#), paras. 74-79.

⁵ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), 13 July 2006, para. 14.

9. *Finally*, the Organizations will explain why if an appeal is granted, the issues to be certified for appeal should be broad enough to permit observations on the following matters:

- Whether the Chamber’s understanding of “justice” and what victims aspired⁶ was narrowly construed and how that narrow construction of “justice” has impacted victims in Afghanistan, including their perceptions of the ICC.
- What the “interests of justice” means for victims of crimes in Afghanistan, including whether it necessarily requires that suspects be arrested and prosecuted.
- Whether an investigation, by itself, can be the basis for justice given that investigations are designed *inter alia* to “establish the truth”.⁷
- 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 the offender and mitigate their ability to continue or perpetrate crimes; (ii) has the punitive effect of deterring future offenders; (iii) discourages individuals from associating themselves with organizations or individuals under investigation; and (iv) have the important punitive effect of “naming and shaming” individuals.
- Steps that the ICC can take to ensure that its concerns around overpromising and under-delivering to Afghan victims and Afghan society is not realized.

10. The Organizations will argue that for an appeal to have meaningful effect for Afghan victims and Afghan society, the issues certified for appeal must be sufficiently broad to permit observations on the above matters.

⁶ [Decision](#), paras. 89, 96.

⁷ Article 54(1)(a), Rome Statute.

11. Overall, the proposed submissions are clearly important to the Chamber's consideration of the Prosecution's request. It ensures that the Chamber understands the utility and scope of an appeal from those most directly impacted by its 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 decision fully considerate of diverse viewpoints, not simply that of the Prosecution, with the appreciation of how its decision will impact the rights and concerns of a broader community outside the Court.

B. The Organizations are uniquely placed to opine on these matters

12. The proposed submissions concern matters falling within the Organizations' expertise and for which they are uniquely placed to opine upon. Annex A provides a general description of each representative organization and their activities in Afghanistan.

13. As reflected in Annex A, the Organizations are among Afghanistan's most active and prominent human rights institutions. The Organizations have specialised 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. The Organizations have a direct 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. Further, the Organizations have extensive programmes 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 Prosecution's application to open an investigation.

14. 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.

15. 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 proposed submissions complement and assist these proceedings and are not redundant of arguments already advanced by the Prosecution.

16. Faced with similar circumstances, others Chambers of this Court have also permitted *amicus curiae* submissions.⁸

C. Permitting the proposed submissions is consistent with the Court's mandate towards victims

17. Permitting the Organizations to make the proposed submissions is consistent with the Court's mandate towards victims and with the interests underlying article

⁸ See e.g. *Prosecutor v. Jean-Pierre Bemba*, Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, [ICC-01/05-01/08-451](#), 17 July 2009; *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, Decision on the "Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", [ICC-01/11-01/11-153](#), 18 May 2012; *Prosecutor v. Omar Hassan Ahmad al Bashir*, Decision on the "Request for Leave to Submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)", [ICC-02/05-01/09-283](#), 28 February 2017. See also *Prosecutor v. Nuon Chea and Khieu Samphan*, Decision on the Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, [002/19-09-2007/ECCC/TC](#), 13 September 2016.

53(1)(c). The proposed submissions ensure that Afghan victims and Afghan society have a direct, public, and diverse voice in these proceedings. Providing that opportunity falls firmly within the Chamber's mandate under article 68(3) to permit the views and concerns of victims to be presented where their personal interests are affected.

18. Victim participation is particularly important here given that the Decision was based on article 53(1)(c). Article 53(1)(c) explicitly places a focus on the "interests of victims" as to whether the opening of an investigation would serve the interests of justice. The OTP's policy on preliminary examination attests to this fact, noting that the focal point of an article 53(1)(c) inquiry relates to the "interests of victims".⁹ Apart from the Court's system of reparations, no other provision in the Statute centralises and highlights the importance of victim interests in this regard, demonstrating that it is and should be the fulcrum consideration when assessing whether to open an investigation. Granting this request is consistent with that underlying consideration.

19. That the Chamber has already heard from Afghan victims prior to issuing the Decision does not obviate the importance and utility of the proposed submissions.

20. *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 a wide-range of putative victims. They have expert insight as to the importance and value of an ICC investigation in Afghanistan and the value of such investigation to transitional justice in the country given the entrenched culture of impunity and the failed transitional justice process in Afghanistan. Overall, the proposed submission

⁹ [OTP Policy Paper on Preliminary Examinations](#), para. 68.

complement those already before the Chamber and ensure that the Chamber has the widest collection of perspectives on a matter important and intimate to the experience of Afghan victims and Afghan society.

21. *Second*, the circumstances underlying the proposed submissions are different than those canvassed for the Decision. At issue now is whether the Decision should be subject to appeal and the contours of that appeal. Those matters were not before the victims when they were first solicited for their perspectives. In that sense, re-collecting the perception of victims and groups in contact with them, including the Organizations, would not be redundant to the Chamber's prior inquiries.

22. *Third*, the Chamber should aspire to hear from the broadest possible spectrum of opinions from groups on-the-ground, most directly impacted by its Decision. Granting the Organizations the opportunity to directly make submissions to the Chamber best ensures that important objective.

23. *Finally*, there is no prejudice to the Prosecution or the proceedings by permitting the Organizations' participation at this point. The Organizations are prepared to submit their proposed submissions in accordance with any timeline set by the Chamber. They have also sought to make this request at the earliest possible opportunity after having time to review and evaluate the Prosecution's motion. In these regards, there will be no impact to the expeditiousness of the proceedings by granting this request and any minor delay is offset by the important benefits of permitting the Organizations' observations.

III. RELIEF SOUGHT

24. The Decision closed the door on Afghan victims and the whole of Afghan society to justice and truth. Claiming to do so in their interests. Those victims and the Afghan human rights community should now be permitted to openly, publicly,

and directly disagree with that outcome and provide input on whether an appeal should proceed. This request should be granted.



Spojmie Nasiri
Lead Counsel for the *Amicus Curiae* Organizations

Dated this 10th day of June 2019
At San Francisco, USA