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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
with Public Annex

***Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Afghanistan-Transitional Justice Coordination Group (TJCG),

Armanshahr/OPEN ASIA, International Federation for Human Rights (FIDH)

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

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I. INTRODUCTION

1. The Afghanistan-Transitional Justice Coordination Group (TJCG), Armanshahr/OPEN ASIA, and the International Federation for Human Rights (FIDH), (collectively the "Organisations") respectfully submit these submissions pursuant to the 'Decision on the "Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' (ICC-02/17-46),[1]" rendered by Pre-Trial Chamber II ("Chamber").
2. Afghanistan has experienced decades of war, marked by successive and relentless periods of conflict since 1978. Untold numbers of Afghans, primarily civilians, have suffered as a result of this conflict and continue to do so. Afghanistan has become a country in which core human rights values have been replaced by a culture of violence, gross human rights violations and impunity.[2]
3. The combined debilitating factors of a weak domestic judicial system, collapsed state institutions and limited access to justice mean that for the vast majority of Afghan victims, the International Criminal Court ("ICC" or "Court") remains their last bastion of justice. The Afghan people expect the ICC to guarantee 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured …'[3]
4. Victims consulted by the Organisations have stated that without investigations, trials and prosecutions by the ICC, "justice will be an empty slogan" and that the raison d'être of the Court will "disappear" should it fail to act in Afghanistan.[4] Afghans remain expectant that an investigation by the ICC will at the very least have a deterrent effect and help to curtail the incessant cycles of impunity in the country.[5]
5. The Organisations hope that these submissions will assist the Chamber in its determination of the 'Prosecution Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan[6]" ("Prosecution Request for Leave to Appeal"), the 'Victims' request for leave to appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an

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[1]ICC-02/17-47.
[2]See report by Armanshahr/Open Asia, 'How and why truth and justice have been kept off the agenda: A review of transitional justice in Afghanistan, available at: https://openasia.org/en/g/wp-content/uploads/2016/04/FULL-REPORT-NOV-2016.pdf
[3]Preamble, Rome Statute of the International Criminal Court ("Statute or "Rome Statute").
[4]See the Public Annex where the views and concerns of two victims and seven members of Afghan civil society regarding the importance of investigations by the ICC in Afghanisation were collected by the Organisations.
[5]*Ibid*.
[6]ICC-02/17-34.

Investigation into the Situation in the Islamic Republic of Afghanistan,[7]" ("Victims' Request for Leave to Appeal"), and the 'Prosecution Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15 (filed simultaneously before the Pre-Trial Chamber II and the Appeals Chamber)[8]' ("Prosecution Observations").

6. In summary, the Organisations aver that the Prosecution Request for Leave to Appeal and the Victims' Request for Leave to Appeal should be granted by the Chamber.
7. The Organisations submit that there is no legal basis which would enable the Chamber to review a decision of the Prosecutor to proceed with an investigation using the 'interests of justice' criteria.
8. *Arguendo*, even if the the Chamber was seized of the power to undertake a secondary review, it would have to assess whether the gravity of the crimes and the interests of victims acted as a counterweight to the 'interests of justice' criteria.
9. Again, *arguendo*, if the Chamber found that 'the interests of justice' trumped the twin considerations of gravity and the interests of victims, it would have been necessary to consult victims and the Prosecution on this largely discretionary concept of the 'interests of justice.'
10. With regards to the standing of victims as parties at this limited stage of the proceedings, the Organisations posit that victims should be allowed standing to appeal decisions that affect their personal interests in *exceptional* circumstances. The denial by the Chamber to authorise an investigation in Afghanistan is one such exceptional circumstance.

II. SUBMISSIONS

The 'interests of justice' – does the Pre-Trial Chamber have a secondary discretion to conduct a review?

11. The Pre-Trial Chamber determined that even though both jurisdiction and admissibility requirements were satisfied, it was mandated to determine, in accordance with article 53(1)(c) of the Statute, whether, 'taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'[9]
12. Article 53(1) requires the *Prosecutor* to consider whether:

[7]ICC-02/17-37.
[8]ICC-02/17-42.
[9]Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan ("Decision on Authorisation"), 12 April 2019, para. 87.

a. The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

b. The case is or would be admissible under article 17; and

c. 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.

13. Arguably, there are four defining features unique to sub-paragraph (c) that do not apply to sub-paragraphs (a) and (b).

14. Firstly, sub-paragraph (a) on jurisdiction and sub-paragraph on (b) admissibility are positive considerations to be taken into account by the Prosecutor. The third criterion, sub-paragraph (c) in contrast, is a negative countervailing one.[10]

15. There is no requirement that the Prosecutor makes a positive determination of the 'interests of justice' in order to commence an investigation. An investigation is presumed to be in the interests of justice unless the Prosecutor finds "substantial reasons" to the contrary. This last criterion in sub-paragraph (c) may result in a reason *not* to proceed, despite the gravity of the crime and the interests of the victims.[11] Jurisdiction and admissibility may be termed as '[r]elatively clear and judicially cognizable notions,'[12] whereas in contrast, the 'interests of justice' criteria '[m]oves along a principle of largely discretionary criminal action.'[13]

16. Jurisprudence before this Court has established that when conducting an assessment under article 15(4) of the Statute, only the dual components of jurisdiction and admissibility need to be positively established.[14]

17. In the Kenya situation, the Pre-Trial Chamber stated as follows:

> Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation "would not serve the interests of justice", which would prevent him from proceeding with a request for authorization of an investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to

[10]OTP Policy Paper on the Interests of Justice, September 2007, available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just, at p.2.
[11]*Ibid,* at p.3
[12]W.Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (1st edn., Oxford University Press, 2010), at 660, as cited in M. Varaki, Revisiting the 'Interests of Justice' Policy Paper, *Journal of International Criminal Justice*, Volume 15, Issue 3, July 2017, at 459, https://doi.org/10.1093/jicj/mqx036
[13]G. Turone, 'Powers and Duties of the Prosecutor', in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court*, Vol. 1 (Oxford University Press, 2002) 1137, at 1153, as cited in M. Varaki, *Ibid*, at 459.
[14]Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ("Kenya Article 15 Decision"), 31 March 2010, ICC-01/09-19-Corr, para. 63.

> proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.[15]

18. There is no positive determination envisaged within the texts of the Rome Statute either by the Prosecution or the Pre-Trial Chamber. The statute only envisages a negative determination of the 'interests of justice.'
19. Secondly, there is a difference between the standard to be applied for sub-paragraphs (a) and (b), as compared to sub-paragraph (c). For sub-paragraphs (a) and (b) the threshold the Prosecution has to take into consideration is a "reasonable basis to believe" that jurisdiction and admissibility have been met which is the lowest standard in the Statute, compared with the higher standards found respectively in articles 58 (reasonable grounds to believe"), 61 ("substantial grounds to believe") and 66 ("beyond reasonable doubt") of the Statute; on the other hand, for sub-paragraph (c) the only requisite threshold is "substantial reasons to believe…" This is one of the higher standards found in the Rome Statute. Therefore, in order not to proceed with an investigation there must be 'substantial reasons to believe that an investigation would not serve the interests of justice.'
20. Thirdly, the Prosecutor has the duty, in accordance with the last sub-paragraph in article 53(1) of the Statute, to notify the relevant Pre-Trial Chamber when a decision not to commence with an investigation is based solely on the "interests of justice." Such an obligation does not arise when a decision not to start an investigation is based on considerations related to jurisdiction or admissibility as referred to in article 53(1)(a) and (b) of the Statute.
21. Fourthly, the Statute provides for a particular system of judicial review when the Prosecutor's decision not to investigate is based solely on the considerations provided for in article 53(1)(c) of the Statute. In this regard, article 53(3)(b) states that:

> … [t]he Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

22. The four defining features of sub-paragraph (c) necessarily mean that the intervention of a Pre-Trial Chamber is limited to confirming the discretion of the Prosecution not to start an investigation if it would not serve the interests of justice.
23. In *Burundi*, Pre-Trial Chamber III stated as follows:

[15] ICC-01/09-19-Corr, para. 63.

> Since the *Prosecutor* has not determined that initiating an investigation in the Burundi situation "would not serve the interests of justice" and, importantly, taking into account the views of the victims which overwhelmingly speak in favour of commencing an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice.[16]

24. It is not within the mandate of the Pre-Trial Chamber to assess and to enter a positive finding concerning the interests of justice criterion either with regard to its functions under article 15 of the Statute[17] or with regard to its functions under article 58 of the Statute.[18] The role of the Pre-Trial Chamber with regard to the use of that criterion by the Prosecutor is to review her decision not to investigate or not to prosecute when solely based on that criterion and to have a final say on this issue, contrary to when the Prosecutor decides not to investigate or not to prosecute for reasons linked to the jurisdiction of the Court or for admissibility considerations, where the final word is left to the Prosecutor.[19]

25. Pre-Trial Chamber I, in its Decision on the Comoros' request to review the Prosecutor's decision not to open an investigation,[20] stated that the Prosecutor has discretion to open an investigation, but this discretion 'expresses itself only in sub-paragraph (c), *i.e* in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice.' On the other hand, sub-paragraphs (a) and (b) relating to jurisdiction and admissibility 'require the application of exacting legal requirements.'[21] One may reasonably argue that this primary discretion only lies with the Prosecution and the Pre-Trial Chamber's ("PTC") role in this regard is to confirm or reverse the Prosecution's conclusion: in this regard the PTC's intervention is meant to limit the use of the interests of justice criteria by the Prosecutor, not to increase it.

26. There are two distinct features with regard to the judicial review exercised by the Pre-Trial Chamber with regard to the Prosecutor's decision not to commence an investigation when it is based solely on the "interests of justice" criterion: first, that review may be exercised by the Pre-Trial Chamber on its own initiative, contrary to the judicial review exercised in accordance with article 53(3)(a) of the Statute which requires an application; second, the decision taken by

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[16]Para 90, ICC-01/17-9-Red. See also para. 58, of "Decision on the Prosecutor's request for authorization of an investigation', Situation in Georgia, ICC-01/15-12, where the Chamber did not undertake a review of 'the interests of justice' but simply confirmed the findings of the Prosecutor. Emphasis added.
[17]Kenya Article 15 Decision, para. 63.
[18]Decision on Application under Rule 103 (situation in Darfur, Sudan), 4 February 2009, ICC-02/05-185, paras.19-29.
[19]Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation," ICC-01/13-51, 6 November 2015.
[20]Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia*, ICC-01/13-34, Pre-Trial Chamber I, 16 July 2015, para.14.
[21]*Ibid*.

the Pre-Trial Chamber is binding on the Prosecutor which means that in order to decide that the initiation of an investigation is not in the interests of justice, both the Prosecutor *and* the Pre-Trial Chamber have to reach the same conclusion.

27. The Organisations submit that the unusual manner[22] in which the Chamber sought to review the Prosecutor's assessment of 'the interests of justice' after the Prosecutor had determined that there was a reasonable basis to proceed with an investigation warrants appellate review.
28. The Organisations submit that the Statute's text and the Court's jurisprudence demonstrate that the Pre-Trial Chamber has no authority to take up the issue on its own volition, when the Prosecutor has raised no arguments to the contrary.
29. The Organisations concur with the Prosecutor that a proper interpretation of the application of articles 15(4) and 53(1)(c) by the Appeals Chamber is warranted given the constitutional importance of the principle of 'the interests of justice'[23] and its unprecedented application in the current situation.
30. Given the ripple effect that the Decision on Authorisation may have on future investigations carried out under article 15 of the Statute and its clear departure from the established jurisprudence before this Court, the Organisations submit that any lack of clarity should be rectified by the Appeals Chamber, as requested by the Prosecutor and the Legal Representatives for Victims in their respective filings.

What are the 'interests of justice?'

31. The preparatory works of the Rome Statute relating to Article 53 provide little clarity on the meaning of the 'interests of justice.'[24] Some states envisioned the term as a consideration that would ensure the Court was 'free from political manipulation, *pursuing only the interests of justice*, with due regard to the rights of the accused and the interests of victims.[25]' For others, '[T]he interests of justice would be served if victims could also be made parties to the trial and be given the opportunity to obtain restitution from the assets of the perpetrator.'[26]

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[22]The Decision on Authorisation represents a clear departure from established practice before the Court. See also Côte d'Ivoire, ICC-02/11-14-Corr, paras 207-208.
[23]Prosecution Request for Leave to Appeal, para.12.
[24]*United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (UN Diplomatic Conference), UN Doc. A/CONF.183/13 (Vol. II) (1998); *Report of the Working Group on Procedural Matters*, UN Doc. A/CONF.183/C.1/WGPM/L.2 (Vol. III) (1998).
[25]This was the position of the Kenyan Attorney General, *Summary Records of Rome Diplomatic Conference, ibid*, para. 63. Emphasis added.
[26]*Supra* note 24, para.48, comments made by the representatives from Nepal.

32. Some states viewed the term in a more general way as a guiding principle which would ensure the "fairness and efficiency" of the Court.[27] Whilst others expressed reservations that the provisions in article 54[28] would allow "the Prosecutor to stop an investigation in the supposed interests of justice.[29]'
33. The phrase appears in several places in the Statute and Rules of Procedure and Evidence ("RPE"), but it is never defined.[30]
34. The Pre-Trial Chamber, in its determination of the "interests of justice", took into account a number of factors. Namely, the lengthy period which the preliminary examination has taken, state cooperation, the availability of evidence and surrender of potential suspects, and budgetary considerations.[31] Judge Mindua, in his separate and concurring opinion, also took into account what he considered may represent the "interests of justice", and which factors might permissibly be taken into account.[32]
35. In the Decision on Authorisation,[33] the Chamber stated that:

> …article 15 is not limited to determining whether there is a reasonable basis to believe that crimes under the Court's jurisdiction have been committed, but must include a *positive determination* to the effect that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation would be feasible and meaningful under the relevant circumstances.[34]

36. The Organisations have argued above that no such positive determination exists either in the texts of the Court or in its jurisprudence.
37. The Chamber states that a positive determination under article 15 requires that investigations are in the interests of justice, *including* in relation to gravity and victims 'interests. In contrast, the Organisations submit that a plain reading of article 53(1)(c) requires that the Chamber must *first* consider gravity and the interests of victims as two primary considerations *prior* to making an assessment of the 'interests of justice,' and not vice versa. Gravity and the interests of

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[27]This was, for example, the position of the Danish, and Spanish representatives: see *Summary Records of Rome Diplomatic Conference*, *supra* note 24, at paras. 8, 30, 135.
[28] Article 54 became article 53 of the current Rome Statute due to a "renumbering" of the articles of the Statute at the end of the Rome Conference.
[29]Position of the representative of the Syrian Arab Republic, *supra* note 24, para. 45. See also FIDH Comments on the Office of the Prosecutor's draft policy paper on "The interest of Justice", 14 September 2006 and FIDH paper, *Reflexions sur la notion « intérêts de la justice », au terme de l'article 53 du Statut de Rome*, 20 June 2005, where the FIDH stated "the interests of justice should not be used as an exception based on political grounds, to the opening of investigations and/or prosecutions…"
[30]See for example articles 55(2)(c), 65(4) and 67(1)(d), as well as rules 69, 73, 82, 100, 136 and 185. OTP Policy Paper on the Interests of Justice, September 2007, p.2.
[31]Decision on Authorisation, paras. 88-96.
[32]Separate and concurring opinion of Judge Mindua, paras. 33-49.
[33]ICC-02/17-33.
[34]Para 35, Decision on Authorisation. Emphasis added.

victims are considerations which offset the weight given to the 'interests of justice' under article 53(1)(c).

38. In this regard, article 53(1)(c) is not drafted like article 53(2)(c) and restricts the way in which the Prosecutor is to conduct her analysis of the "interests of justice". Whereas under article 53(2)(c), she can take all circumstances together for her assessment, under article 53(1)(c), she must *first* analyse the gravity of the crimes and the interests of victims, which are criteria that weigh in favour of an investigation.

39. Therefore, the Chamber erred when it chose to make an assessment of the 'interests of justice' *without first* addressing the gravity of the crimes and the interests of victims under article 53(1)(c). Indeed, the Chamber solely addresses gravity in the context of article 17(1)(d) where it states that '[C]onclusively the Chamber finds that the gravity threshold under article 17(1)(d) is met in respect of all the 'categories' of crimes for which the Prosecution requests authorisation to investigation.'

40. Having made this conclusion, albeit under the auspices of article 17(1)(d) and not under article 53(1)(c), it would have then been incumbent on the Chamber to consider the interests of victims under article 53(1)(c), instead of prematurely conducting an analysis of the 'interests of justice.'

41. In their representations under article 15(3) of the Statute, victims articulated that their main motivations for requesting the Prosecutor to open investigations in Afghanistan were: investigation by an impartial and respected international court; bringing the perceived perpetrators of crimes to justice; ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims' voices to be heard; and protecting the freedom of speech and freedom of the press in Afghanistan.[35]

42. The phrase "interests of justice" was first inserted in the 1997 session of the Preparatory Committee in what became article 53 in the Statute. Victim groups such as the Women's Caucus for Gender Justice and Like-Minded Countries were concerned that prosecutorial decisions not to investigate or prosecute crimes under the "interests of justice" could potentially neglect the rights of victims to justice and therefore insisted on the inclusion of the interests of victims to act as "[a] brake on prosecutorial decisions not to investigate, not a brake on

[35]Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6, 9 November 2018, ICC-02/17-29.

investigations".[36] In this way, 'the 'interests of victims' reference seems to act as a counterweight to the 'interests of justice' consideration.'[37]

43. However, the Decision on Authorisation appears to give credence to the fear of civil society groups working on behalf of victims, where the Chamber used the 'interests of justice' consideration to effectively bulldoze 'the interests of victims.'
44. In Afghanistan, the interests of victims wholeheartedly favoured the commencement of an investigation.
45. Having failed to conduct this two-part analysis under article 53(1), the Chamber then proceeded to make its assessment of 'the interests of justice' without specifically establishing how state cooperation; budgetary considerations, the length of the preliminary examination phase and surrender of potential suspects met the "substantial grounds to believe" threshold.
46. Without such an analysis, the Organisations posit that state cooperation or resources may be considerations, but perhaps not substantial reasons not to proceed with an investigation.
47. With regards to budgetary considerations, nothing in the Statute or the texts of the Court addresses budgetary constraints as a reason not to open an investigation. The budget of the Court is within the exclusive province of the Assembly of States Parties in accordance with article 112(2)(d) of the Statute, and certainly not within the mandate of the Pre-Trial Judges. Furthermore, conclusions regarding the Prosecutor's management of her office's resources could be deemed to be antithetical to the independence of the Prosecutor under article 42(2) of the Statute.
48. Arguments made by the Chamber regarding state cooperation are purely speculative at this stage of the proceedings. In general, although it is preferable that State Parties cooperate with the Court, they have no obligation to do so at the preliminary examination stage of proceedings under the Statute. Furthermore, Afghan authorities have publicly stated that they would cooperate with the Court in the event that an investigation was authorised by the Chamber.[38]
49. The Legal Representatives for Victims rightly point out, the Chamber 'did not refer to any specific incidents of non-cooperation' and importantly that '[T]he Court is not yet at a stage at

[36] Amnesty International, *Open Letter to the Chief Prosecutor of the International Criminal Court: The Concept of Interests of Justice*, 17 June 2005, at p.9, available at: https://www.amnesty.org/download/Documents/84000/ior400232005en.pdf

[37] M. Varaki, Revisiting the 'Interests of Justice' Policy Paper, *Journal of International Criminal Justice*, Volume 15, Issue 3, July 2017, p. 464, https://doi.org/10.1093/jicj/mqx036

[38] See the Speech of H.E. Minister of Justice of Islamic Republic of Afghanistan at the commemoration of the 20th Anniversary of The Adoption of the Rome Statute of the International Criminal Court, 17 July 2018, available at: https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-afghanistan-speech.pdf

which it can conclude that Afghanistan, or any other State Party, has not yet complied with its duty to cooperate under the Statute because an investigation has not yet begun.'[39]

50. In terms of the preservation of evidence and the arrest and surrender of suspects, the Chamber must be aware that the prosecution of international crimes by their nature are inherently fraught with difficulties. Prosecutions of those suspected to have committed atrocities during the Second World War took place, sometimes almost 50 years after the event.[40] More recently, in 2016 Hissène Habré was found guilty of crimes against humanity that took place from 1982-1990. The Organisations agree that the preservation of evidence and arrest and surrender of suspects may not be easy, but to foreclose the possibility of justice for victims entirely is far too drastic a measure.[41]

51. Furthermore, in many cases a lapse of time is necessary in order to create an environment where witnesses are comfortable with coming forward in order to give their evidence or in order to allow for the building of the requisite capacity to carry out complex criminal investigations.

The 'interests of justice'- the need for a broader definition?

52. In April 2019, UNAMA issued its annual report on the Protection of Civilians in Armed Conflict and found that more civilians were killed in the Afghan conflict in 2018 than any time since records have been kept. Among the dead were 927 children, the highest recorded number of boys and girls killed in the conflict during a single year.[42]

53. The UN Secretary General's Report on the Protection of civilians in armed conflict notes that 22,800 civilians were killed in 2018 in attacks that took place in six conflict situations, including, Mali, Iraq, Somalia, South Sudan and Yemen: almost 11,000 of those civilians were killed in Afghanistan. That is almost half of all deaths recorded by the UN in the year 2018.[43]

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[39]ICC-02/17-37. paras. 55-57.

[40]For example, John Demjanjuk was convicted in Germany in 2011 as an accessory to the murder of 28,060 Jews while acting as a guard at the Sobibor extermination camp in occupied Poland.

[41]For example, the Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, together with Foreword by Chairman Feinstein and Additional Minority Views, 113th Congress 2d Session, S.Report, 113-288, 9 December 2014, provides detailed evidence and analysis of the CIA Detention and Interrogation Program.

[42]See Afghanistan: Protection of civilians in armed conflict, Annual Report 2018, issued on February 2019, p.11, available at: https://unama.unmissions.org/sites/default/files/unama_annual_protection_of_civilians_report_2018_-_23_feb_2019_-_english.pdf

[43]See UNSC Report, Protection of civilians in armed conflict, Report of the Secretary General, 7 May 2019, S/2019/373, para. 28. See also paras. 31, 35 and para.40; which highlight the number of civilians killed by explosive devices; the number of internally displaced people; and the number of humanitarian workers that were killed in Afghanistan in 2018. Available at: https://unama.unmissions.org/sites/default/files/2019_report_of_the_secretary-general_on_protection_of_civilians_in_armed_conflict.pdf

54. In August 2018, the United Nations High Commission for Refugees ("UNHCR") published its findings on the ability of the Afghan state to protect civilians and found that governance and adherence to the rule of law 'are perceived as particularly weak.' It further considered that '[t]he capability of the Government to protect human rights is undermined in many districts by insecurity and the high number of attacks by AGEs [Anti-Government Elements]. Rural and unstable areas reportedly suffer from a generally weak formal justice system that is unable to effectively and reliably adjudicate civil and criminal disputes. Government-appointed judges and prosecutors are reportedly frequently unable to remain in such communities, due to insecurity.'[44]
55. The systematic persecution of women during the conflict has left women completely marginalized from political and economic engagement.
56. The Ministry of Women's Affairs of Afghanistan ("MoWA") has reported an increase in cases of gender-based violence against women, especially in areas under Taliban control. The Afghanistan Independent Human Rights Commission reported thousands of cases of violence against women and girls across the country, including beatings, killings and acid attacks, stating that women are the main victims of the armed conflict in Afghanistan.[45] Cases of violence against women remain grossly under-reported due to a culture of impunity, traditional practices, stigmatization and fear of the consequences by victims.[46]
57. In 2018, UNAMA reported 'consistent patterns countrywide of women routinely subjected to pressure by authorities, family members and perpetrators to withdraw their criminal cases and consent to resolving these issues through mediation. Such patterns highlight the underlying imbalance of power relations in Afghan society, which place women in a subordinate position and which is perpetuated in the mediation of cases of violence against women, irrespective of whether State or non-State actors manage the mediation process.'[47] In most cases there is no possibility to take up independent legal proceedings at all for women.
58. The alleged use of sexual violence against men and boys in detention by US forces and Afghan forces as highlighted in the Prosecution Request for authorisation of an investigation is one of

[44]UN High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, available at: https://www.refworld.org/docid/5b8900109.html, at page 29.
[45]See AIHRC, Preliminary findings of the National Inquiry on Women, Peace and Security, 2019, https://bit.ly/2IfnMFF
[46]See https://www.amnesty.org/en/countries/asia-and-the-pacific/afghanistan/report-afghanistan/ , and MOWA http://mowa.gov.af/fa/page/1338/pressrelease
[47]Injustice and Impunity-Mediation of Criminal Offences of Violence against Women, UNAMA, May 2018, at p.7 https://unama.unmissions.org/sites/default/files/unama_ohchr_evaw_report_2018_injustice_and_impunity_29_may_2018.pdf

the first times violence against men and boys has been featured prominently in a situation before the ICC.[48]

59. Violence and conflict have been an almost constant presence for many years in Afghanistan and now internal displacement has also become a permanent feature of life. A report by the UN Special Rapporteur on internal displacement has stated that the 'trends are negative and worsening.' In 2016, more than 600,000 people in Afghanistan fled conflict to seek safety in other areas of the country.[49]

60. The UN Committee on Torture ("CAT") stated that it 'remains gravely concerned about the general climate and culture of impunity in Afghanistan, as evidenced by the large number of cases of alleged human rights violations, including torture, involving senior State officials.'[50]

61. The Organisations have also expressed concerns similar to the CAT regarding the National Reconciliation, General Amnesty, and National Stability Law ("Amnesty Law"), passed in 2007,[51] which prevents the prosecution of individuals responsible for gross human rights violations, including acts of torture, committed before December 2001.[52] The CAT was also 'deeply concerned about various reports alleging that perpetrators of war crimes and gross human rights violations, including acts of torture, are still holding, or have been nominated for, official executive positions, some of them in government,'[53] contributing to the general climate of impunity in Afghanistan.

62. The UN Special Rapporteur on torture has also appealed to the United States ("US") to end a pervasive policy of impunity for crimes of torture committed by US officials, stating that '[A] society bruised by torture and abuse can heal only when the truth about secret policies and practices is fully disclosed to the public and when full reparation and rehabilitation is granted to victims.'[54]

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[48]Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red, at paras. 179-83 and paras. 207-217.
[49]Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Afghanistan, 12 April 2017, A/HRC/35/27/Add.3, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/091/19/PDF/G1709119.pdf?OpenElement
[50]Committee Against Torture, Concluding observations on the second periodic report of Afghanistan, 12 June 2017, CAT/C/AFG/CO/2, para.7.
[51]See 'In Support of ICC Intervention: The TJCG Roadmap for Justice in Afghanistan', produced by Afghanistan Human Rights and Democracy Organization (AHRDO), October 2017.
[52]Section 3, Clause 2 of the Amnesty Law states the following: "armed people who are against the government of Afghanistan, after the passing of this law, if they cease from their objections, join the national reconciliation process, and respect constitutional law and other regulations of the Islamic Republic of Afghanistan. They will have all the perquisites of this law." See also Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red, para.5, where the Prosecutor notes that "near total impunity has been the rule, not the exception."
[53]*Ibid*.
[54]Statement by UN Special Rapporteur on torture, Nils Melzer, 13 December 2017, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E

63. Following the Prosecutor's announcement of her intention to request authorisation to commence investigations in Afghanistan, in 2017 Afghanistan enacted a new criminal code incorporating provisions on war crimes, crimes against humanity, genocide and the crime of aggression.[55] The opening of an investigation in Afghanistan could have arguably had a domino effect leading to the strengthening of state institutions, enactment of relevant laws, positive complementarity with the Court and led to enhanced peace and security. As noted, the Amnesty laws in place also mean that there is little prospect of domestic prosecutions for crimes that took place prior to 2001.[56]
64. The Chamber's stance also necessarily means that there is little prospect for positive complementarity in Afghanistan. The Court's investigations in the Central African Republic ("CAR"), Uganda and the Democratic of Congo ("DRC") have arguably acted as a catalyst for domestic and hybrid mechanisms to address mass atrocities. In 2008, the Ugandan Government set up the International Crimes Division ("ICD") of the High Court of Uganda in order to prosecute crimes such as genocide, terrorism, human trafficking, crimes against humanity and piracy, amongst others.[57] The ICD was set up to ratify and replicate the Rome Statute. The DRC ratified the Rome Statute in 2002 and military courts have increasingly applied the Rome Statute directly in their proceedings and used international jurisprudence to support judicial decision-making.[58] In CAR, organic law 15/003 establishing the Special Criminal Court was promulgated in 2015. The law domesticates the Rome Statute's rules on individual criminal responsibility and superior responsibility which had not been incorporated in the 2010 Penal Code and Code of Penal Procedure.[59]
65. Despite all the considerations highlighted above, the Chamber did not deliberate on relevant factors such as ending cycles of impunity, access to justice, positive complementarity or the possibility that an ICC investigation could act as a deterrent to parties[60] engaged in ongoing violence in Afghanistan in its assessment of the 'interests of justice.'

[55]This legislation is available at: http://moj.gov.af/content/files/OfficialGazette/01201/OG_01260.pdf
[56] After the fall of the Taliban in 2001, there has been no attempt to hold them accountable for war crimes and other violations.
[57]International Criminal Court Act No.11 of 2010.
[58]A. Trapani, 'Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC', DOMAC Project, DOMAC Paper 11, November 2011.
[59]Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale, [Law 15/003 of June 3, 2015, Establishing the Organization and Functioning of the Special Criminal Court], Journal Officiel de la République Démocratique du Congo [Official Journal of the Democratic Republic of the Congo].
[60]See Public Annex.

66. The Organisations posit that a determination of the interests of justice would inherently require the consideration of other factors than those considered by the Pre-Trial Chamber.[61] It would be important for the issue to be certified for appeal to be framed sufficiently broadly in order to encompass those possible factors. Factors that would act to increase the Court's legitimacy, rather than decrease it.

67. The Prosecution Request for Leave to Appeal highlights that 'neither the Prosecution nor the Pre-Trial Chamber has ever previously determined that an investigation by the Court might be contrary to the interests of justice, and as such there is no settled authority as to the factors which may properly be taken into account in that assessment.'[62]

68. It is notable that the Pre-Trial Chamber did not seek the observations from the Prosecutor or from victims on the factors that would encompass an 'interests of justice' assessment when making its Decision on Authorisation. Given the much lauded rhetoric of victims' rights before the ICC, it would have been critical that the Pre-Trial Chamber consult not only the Prosecution, but victims as well in order to ensure that they could make their submissions on this assessment.

69. Furthermore, given the potentially wide-ranging impact of this decision, not only in Afghanistan, but in other cases under the Court's jurisdiction, the Organisations submit it is imperative that the application and definition of the 'interests of justice' is developed in a manner that allows all concerned parties and participants to provide their input.

70. Lastly, the Appeals Chamber stated in the context of article 21(3) of the Statute 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. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute.'[63]

71. The Organisations submit that an analysis of the interests of justice must be interpreted in line with article 21(3) of the Statute.

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[61]Carsten Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, *Journal of International Criminal Justice*, Volume 3, Issue 3, July 2005, Pages 695–720, https://doi.org/10.1093/jicj/mqi046

[62]Prosecution Request for Leave to Appeal, para.22.

[63]Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, 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, 14 December 2006, ICC-01/04-01/06-772, para. 37.

Victims have standing as a "party" in exceptional circumstances

72. The Victims have sought to assert that victims have standing as a "party", at this limited stage of the proceedings, which enables them to trigger appellate proceedings under article 82(1)(d).[64]
73. The Prosecution argues that the consideration of victims as a "party" in the proceedings would upset the 'integrity' and 'consistency' of the Court's established procedures, a narrow definition of "party" ensures legal certainty and judicial economy[65] and that 'the participation of victims on matters of procedure' will 'risk delay, inefficiency, and inconsistency.'[66]
74. In the view of the Prosecution the presentation of victims' views at this stage of the proceedings is best served through the provision of *amicus curiae* submissions and through the intervention of the Office of Public Counsel for Victims ("OPCV") via regulation 81(4)(b).
75. The Organisations submit that it would be illogical if, as the Prosecution suggests, the Legal Representatives for Victims, who have engaged with their clients and their respective networks in Afghanistan are unable to challenge the Decision on Authorisation in their own right, and instead have to rely on the OPCV, who can only represent them in a 'general way' and have never met with any of the victims who have participated in the article 15(3) process.
76. The Legal Representatives for 82 victims and 2 organisations argue that '[T]he expression 'either party' is ambiguous at the pre-authorisation stage, as they are no two obvious parties.'[67] Citing a decision of Pre-Trial Chamber II where the State of Jordan[68] was granted leave to appeal a decision in accordance with article 82(1)(d)[69], they go on to argue that '[J]ust as States have interests which should be respected in *exceptional* circumstances by providing an avenue to appeal under Article 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision that goes to the core of their interests.'[70]
77. In a seminal decision on victim participation, Pre-Trial Chamber I stated that:

> …the Statute grants victims an *independent voice* and role in proceedings before the Court. It should be possible to exercise this independence, in particular, *vis-à-vis* the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims

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[64]Victims'request for leave to appeal, paras. 20-42.
[65]Prosecution Observations, para.13.
[66]Prosecution Observations, para. 15.
[67] ICC-02/17-37, para.21.
[68] The Appeals Chamber has also ruled on the merits of an appeal by Côte d'Ivoire under Article 82(1)(a). See 'Judgment on the appeal of Côte d'Ivoire against the decision of the Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12 OA, paras. 36 and 41.
[69]Pre-Trial Chamber II, 'Decision on Jordan's Request for Leave to Appeal', 21 February 2018, ICC-02/05-01/09.
[70]Para. 25, ICC-02/17-37, Emphasis added.

> participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different."[71]

78. The Organisations submit that article 15(3) provides victims with a specific statutory right, a right that is independent from their participatory rights under article 68(3) of the Statute.
79. Article 15(3) provides victims with a stand-alone statutory right, granting them direct access to the Pre-Trial Chamber at this very specific stage of the proceedings. Indeed, one might argue that it is an exceptional right that victims have at this stage of the proceedings.
80. The submission of victim representations in relation to the authorisation of an investigation is dealt with Rule 50 of the RPE, whereas the submission of victim observations under article 19(3) is dealt with Rule 59 of the RPE.
81. As a result of their detailed regulation in these provisions, arguably, they are independent of the regime created by rules 89-93 of the RPE. Neither rule 50 or rule 59 make reference to article 68(3). Rather, they state that victims may make representations in writing directly to the Chamber within the prescribed time limits
82. The Organisations argue that from this specific and exceptional right that victims have under article 15(3), flow all the other rights that victims have under the Rome Statute framework; including the right of victims to participate in proceedings as well as their right to reparations.
83. The Decision on Authorisation negatively impacted on three victims' rights recognized by the Court's jurisprudence: the right (i) to a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.[72]
84. In Afghanistan, a lack of investigation is particularly detrimental as there is no prospect of justice at the domestic level. The Organisations have highlighted in the previous section the Amnesty Law which prevents the prosecution of those suspected to have committed gross human rights violations.
85. Contrary to the Concurring Opinion of Judge Mindua, the Organisations submit that the ICC Trust Fund for Victims ("TFV") cannot operate without the existence of an investigation. The assistance mandate of the TFV does not operate in a vacuum. The history of the operations of the TFV demonstrate that there has never been an instance where the TFV has assisted victims

[71] Pre-Trial Chamber I, 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para.51. Footnote omitted, emphasis added.
[72] Pre-Trial Chamber I, 'Decision on the Set of Procedural Rights attached to Procedural Status of a Victim at the Pre-Trial Stage of the Case', ICC-02/05-02/09-121, para. 3. See also ICC-01/04-01/07-474, paras 31-44

where an investigation has not been authorised.[73] Furthermore, even where investigations have been authorised, and where warrants of arrests have been issued, the TFV has not been able to provide assistance. Kenya, Georgia, Burundi, Darfur and Libya are cases in point.

86. As stated by Pre-Trial Chamber I, 'the process of reparations is intrinsically linked to criminal proceedings, as established in article 75 of the Statute, and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court.'[74]

87. The Organisations submit that the Decision on Authorisation, whereby the rights of victims to the truth, justice and reparations were effectively extinguished, is one such *exceptional* circumstance where victims should have standing to seek appellate review.

88. Despite their frequent invocation to justify the work of the Court,[75] any other result would ensure that victims serve merely as a symbolic entity at the Court and limit their agency to make observations to the Court in proceedings that directly affect their interests.

89. Furthermore, any reasonable interpretation of article 21(3) of the Statute would mean that victims should be able to challenge the Decision on Authorisation in their own right.

90. The principle of *ubi ius ibi remedium* – "where there is a right, there is a remedy" – is a well-established principle of international law first elucidated in the 1928 holding of the Permanent Court of International Justice ("ICJ") in the *Factory at Chorzów* case.[76]

91. The Universal Declaration of Human Rights ("UDHR") was one of the first international instruments to recognize the right to a remedy. Article 8 provides that '[e]veryone has the right to an effective remedy…for acts violating the fundamental rights granted him…[77]' This principle was codified in the International Covenant on Civil and Political Rights, which was adopted by the UN General Assembly in 1966. Article 2(3) requires States Parties to take the following action:

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[73] The is despite language on the website of the TFV to the effect that: "[T]he Trust Fund anticipates the need to expand its assistance mandate programmes to other situation countries in the coming years..". Available at: https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes

[74] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"', 6 September 2018, ICC-RoC46(3) -01/18-37, para.88.

[75] For example, see a recent statement made by the OTP Prosecutor where she states that: "[E]nding impunity worldwide, through independent and impartial investigations and prosecutions, must surely become a globally shared objective, *for the sake of victims*, and humanity as a whole." Emphasis added. Available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1438

[76] "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

[77] UDHR, G.A. Res. 217 A, 10 December 1948.

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c) To ensure that the competent authorities shall enforce such remedies when granted.[78]

92. The importance of the right to a remedy has been further acknowledged by the UN General Assembly in 2005 in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[79] The Basic Principles state that victims must have 'equal access to an effective judicial remedy as provided for under international law.'[80] Full and effective reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[81] Remedies are also fundamental to provide '[v]erification of the facts and full and public disclosure of the truth.'[82]

93. Regional human rights institutions have also recognized the right to a remedy. The American Convention provides that '[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention . . . .'[83]

94. In *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights issued a ground-breaking decision on the right to a remedy. According to the Inter-American Court, 'every violation of an international obligation which results in harm creates a duty to make adequate reparation.'[84]

95. Similarly, the European Convention on Human Rights[85] and the African regional human rights framework[86] both recognize the right to a remedy for human rights violations.

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[78] ICCPR, G.A. Res. 2200A (XXI) of 16 December 1966.
[79] G.A. Res. 60/147, U.N. GAOR 60th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006) ("Basic Principles").
[80] *Ibid*, para.12.
[81] Basic Principles, para.18.
[82] *Ibid*, para.22.
[83] American Convention on Human Rights, article 25(1).
[84] *Velásquez Rodríguez v. Honduras,* Inter-Am. Ct. H.R. (ser. C) No. 7, at para.10 (July 21, 1989).
[85] European Convention on Human Rights, article 13 states that "("[e]veryone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."
[86] Protocol to the African Charter on Human and Peoples' Rights, article 27, June 9, 1998, CAB/LEG/665 ("[i]f the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation").

96. The jurisprudence of this Court has clearly acknowledged the right to an effective remedy for victims which "lie at the heart of victims' rights".[87] The Organisations therefore submit that consistent with internationally recognised human rights norms and pursuant to article 21(3) victims must be allowed a right to a remedy- in this case that is the right to challenge the Decision on Authorisation in their own right.

Respectfully submitted,

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Dimitris Christopoulos,

President, FIDH

Dated this 11th day of July, 2019

At Paris, France, The Hague, The Netherlands and at Kabul, Afghanistan

[87]Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-243, November 2010, para. 5.