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No.: **ICC-02/17**

Date: **25 September 2019**

**THE APPEAL CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding Judge  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Request to appear before the Appeals Chamber under Regulation 77(4)(c) of the Regulations of the Court or, in the alternative, appoint Defence Counsel under Regulation 76 of the Regulations of the Court**

**Source:** Office of Public Counsel for the Defence

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

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Mr. James Stewart  
Ms. Helen Brady

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Ms. Katherine Gallagher *et al.*  
Mr. Tim Moloney QC *et al.*  
Ms. Nancy Hollander *et al.*  
Mr. Steven Powles QC *et al.*

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**The Office of Public Counsel for Victims**

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**States Representatives**

**Unrepresented Applicants  
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**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

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**Victims Participation and  
Reparations Section**

Mr. Philipp Ambach

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## I. INTRODUCTION

1. On 17 September 2019, Pre-Trial Chamber II granted the Prosecutor leave to appeal on two issues concerning powers of a Chamber in considering the interests of justice when deciding whether or not to authorise the commencement of an investigation.<sup>1</sup>
2. The rights of potential suspects must be a factor to be considered when making such a decision. This includes when their rights could be seriously violated, as acknowledged in the Prosecutor's policy paper on the interests of justice.<sup>2</sup> In this case, the Pre-Trial Chamber concluded that the Prosecution "was not in a position to meaningfully act for the purposes of preserving evidence"<sup>3</sup> and, in light of minimal cooperation enjoyed thus far, that even "neutral, low-impact activities [have] proved unfeasible".<sup>4</sup> This inevitably impacts the rights of potential suspects in the case, with a potential bearing on the interests of justice of initiating an investigation.
3. The right to be heard requires a Chamber to hear a party or participant when a decision it may take affects their rights. The anticipated judgment by the Appeals Chamber in this case would not only affect the rights of potential suspects in the situation in Afghanistan, but also those of any potential suspects in any situation in which the Prosecution may consider requesting an investigation *proprio motu*. Under these circumstances, Principal Counsel of the Office of Public Counsel for the Defence (the "Office" or "OPCD") submits that he has a duty, under Regulation 77(4) of the Regulations of the Court, to represent and protect the rights of

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<sup>1</sup> 'Decision on the Prosecutor and Victims' Requests 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"', 17 September 2019, [ICC-02/17-62](#) ("Decision Granting Leave to Appeal"), p. 16.

<sup>2</sup> See Office of the Prosecutor, [Policy Paper on the Interests of Justice](#), September 2007 ("OTP Policy Paper on the Interests of Justice"), p. 4 & fn. 8.

<sup>3</sup> 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 12 April 2019, [ICC-02/17-33](#) ("Impugned Decision"), para. 93.

<sup>4</sup> Impugned Decision, para. 94.

potential suspects and therefore seeks leave to intervene on these questions currently before the Appeals Chamber.

## **II. PROCEDURAL BACKGROUND**

4. The Prosecution began its preliminary examination of Afghanistan in 2006.<sup>5</sup> It filed a request to open an investigation on 20 November 2017.<sup>6</sup>
5. Pre-Trial Chamber II issued its decision rejecting an investigation on 12 April 2019 on the basis that it would not be in the interests of justice.<sup>7</sup> On 31 May 2019, Judge Mindua issued his concurring and separate opinion.<sup>8</sup>
6. Various litigants have filed requests for leave to appeal, notices of appeal, as well as requests to appear on specific issues, including the Prosecution,<sup>9</sup> Office of Public Counsel for Victims (“OPCV”),<sup>10</sup> and other Legal Representatives of Victims.<sup>11</sup>

<sup>5</sup> Office of the Prosecutor, [Report on Preliminary Examination Activities](#), 13 December 2011, para. 20.

<sup>6</sup> ‘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](#).

<sup>7</sup> Impugned Decision, p. 32.

<sup>8</sup> ‘Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua’, 31 May 2019, [ICC-02/17-33-Anx](#).

<sup>9</sup> ‘Request for Leave to the 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”’, 7 June 2019, [ICC-02/17-34](#) (“Request for Leave to Appeal”).

<sup>10</sup> ‘Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’, 10 June 2019, [ICC-02/17-39](#); ‘Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’, 20 September 2019, [ICC-02/17-67](#).

<sup>11</sup> ‘Victims’ Notice of Appeal of 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”’, 10 June 2019, [ICC-02/17-36](#) (OA); ‘Victims’ Notice of Appeal of 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”’, 10 June 2019, [ICC-02/17-38](#) (OA2); ‘Notice of appeal against 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-02/17-33)’, 10 June 2019, [ICC-02/17-40](#) (OA3); a corrected version was registered on 12 June 2019 (ICC-02/17-40-Corr (OA3)); ‘Victims’ 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”’, 10 June 2019, [ICC-02/17-37](#); ‘Victims’ Appeal Brief’, 24 June 2019, [ICC-02/17-53](#) (OA). See also Victims’ request for extensions of time and of page limit’, 24 June 2019, [ICC-02/17-52](#) (OA2 OA3); ‘Victims’ response to “Prosecution’s notice of joined proceedings, and request for extension of pages”’, [ICC-02/17-66](#) (OA OA2 OA3 OA4); ‘Victims’ response to Prosecution’s notice of joined proceedings, and request for extension of pages’, [ICC-02/17-65](#) (OA4).

7. On 17 September 2019, Pre-Trial Chamber II granted the Prosecutor leave to appeal on the following two issues:
- a. “Whether Articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice”; and
  - b. “Whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors”.<sup>12</sup>

### **III. SUBMISSIONS**

#### **A. The rights of potential suspects are affected and should therefore be considered when determining whether an investigation is in the interests of justice**

8. The Court’s jurisprudence has confirmed that the rights of accused, as guaranteed in Article 67 of the Statute, apply to all stages of proceedings, including during the preliminary phase of proceedings.<sup>13</sup> Jurisprudence from The European Court of Human Rights also emphasises that the rights of accused apply during the preliminary information phase of proceedings.<sup>14</sup> In the context of these proceedings, these rights belong to potential suspects in the situation in Afghanistan. They have not yet been publicly named, nor are they parties to the proceedings, but their rights are

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<sup>12</sup> Decision Granting Leave to Appeal, para. 34 and p. 16.

<sup>13</sup> Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Decision the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, dated 31 March 2006, registered 20 April 2006, [ICC-01/04-135-tEN](#), para. 35, referring to, inter alia, *Baena-Ricardo et al. v Panamá*, (ACtHR, 2 February 2001), para. 124. See also Article 54(1)(c) of the Statute, requiring the Prosecutor to fully respect the rights of persons arising under the Statute during investigations, and Article 55 of the Statute, outlining the rights of persons during an investigation.

<sup>14</sup> *Vera Fernández-Huidobro v. Spain*, application no. 74181/01 (ECtHR, 6 January 2010), para. 109, referring to *Imbrioscia v. Switzerland* (ECtHR, 24 November 1993), para. 36, *Pandy v. Belgium*, application no. 13583/02 (ECtHR, 21 September 2006), para. 50.

nevertheless affected in the course of proceedings, and cannot be put aside when determining whether an investigation is in the interests of justice.

9. The Prosecution has previously acknowledged in a policy paper that there may be instances when it would not be in the interests of justice to investigate because of a violation of a suspect's rights.<sup>15</sup> In particular, it considered that "where a suspect's rights had been seriously violated in a manner that could bring the administration of justice into disrepute", it would conceivably not be in the interests of justice because it may be detrimental to Rome Statute's stated goal "to guarantee lasting respect for and the enforcement of international justice", as embodied in the Preamble.<sup>16</sup>
10. In deciding that it is not in the interests of justice to investigate in this case, the Pre-Trial Chamber cited factors that necessarily impact the rights of all suspects. First, it held that most of the alleged crimes occurred in the earlier part of the period between 2005 and 2015 and that, by the Prosecution's own admission, it "was not in a position to meaningfully act for the purposes of preserving evidence".<sup>17</sup> Second, given the minimal cooperation from national authorities for "even neutral, low-impact activities", the Pre-Trial Chamber surmised that "these difficulties will prove even trickier in the context of an investigation proper".<sup>18</sup>
11. These conclusions would apply to both incriminating and exonerating evidence, and the duty of the Prosecutor to investigate both equally under the Statute.<sup>19</sup> The reality, then, is that a Defence team, appointed

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<sup>15</sup> OTP Policy Paper on the Interests of Justice, p. 4 & fn. 8.

<sup>16</sup> OTP Policy Paper on the Interests of Justice, p. 4 & fn. 8. See the Preamble of the Statute.

<sup>17</sup> Impugned Decision, para. 93.

<sup>18</sup> Impugned Decision, para. 94.

<sup>19</sup> Article 54(1)(a) of the Statute. The Office of the Prosecutor has confirmed that its obligation to investigate incriminating and exonerating circumstances equally applies at the preliminary examination stage in relation to information that could form the basis of a determination to proceed with an investigation. See Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, para. 30.

potentially a number of years further down the line, would have seemingly insurmountable difficulties in this respect. This would impede a number of rights held by an accused, not the least of which include adequate time and facilities to prepare his or her defence and the ability to secure the attendance and examination of witnesses and present evidence, all guaranteed under Article 67 of the Statute.

12. Indeed, in recent guidelines on investigating violations of international humanitarian law, the ICRC similarly stated that investigations opened long after the events at issue are likely to “face particular obstacles as regards the collection of information and evidence which, in turn, can affect the due process rights of suspects, as well as victims and witnesses”.<sup>20</sup>
13. To what extent the rights of potential suspects have been adversely affected could therefore be a relevant factor when a Pre-Trial Chamber determines whether it is in the interests of justice to commence an investigation. To this end, it is important that, during this appeal, the interests of potential suspects are safeguarded by ensuring that arguments can be made on their behalf.

**B. Arguments on behalf of potential suspects should be heard in these appeal proceedings**

14. Future suspects who may eventually be party to proceedings will unlikely be able to be heard on the issues currently before the Appeals Chamber. By the time they become party to proceedings, if any will be, the Appeals Chamber will have issued its judgment, and it would be too late for suspects to argue on the interests of justice of initiating an investigation in their case, despite their rights being affected in making such a decision.

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<sup>20</sup> International Committee of the Red Cross, [Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice](#), 16 September 2019, para. 145.

This would amount to a denial of the right to be heard.<sup>21</sup> It is therefore vital that the arguments representing their interests are presented now in this appeal.

15. Under Regulation 77(4) of the Regulations of the Court, the OPCD has the duty to protect the rights of the Defence, which it is fulfilling by raising these issues and requesting to be heard in this appeal. Principal Counsel of the Office is “entrusted with the power of representing and protecting the rights of the defence during the initial stages of the investigation”.<sup>22</sup> Although this is the stage before investigations, the Office should be entrusted with this power even now to preserve the rights of future suspects. To find otherwise would nullify the rights conferred under Article 67, as there would be no one who would be in a position to assert them, despite those rights being engaged.
16. The OPCD submits that granting leave to appear in these proceedings may be authorised under Regulation 77(4)(c) of the Regulations of the Court, which allows it to appear “on the instruction or with leave of the Chamber, in respect of specific issues”. Accordingly, we respectfully request that the Chamber grants the Office authorisation to make consolidated written submissions not exceeding 35 pages in response to any appeal briefs filed, similar to any written submissions the Chamber may authorise the OPCV

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<sup>21</sup> See ICTY Appeals Chamber, *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-AR15bis, [Decision on Continuation of Proceedings](#), 6 June 2014, para. 51 (“The Appeals Chamber recalls that the parties to a case have a right to be heard before a decision is made which can affect their rights”); ICTR Appeals Chamber, *Prosecutor v Karemera et al.*, ICTR-98-44-A15bis, [Decision in the Matter of Proceedings under Rule 15bis\(D\)](#), 21 June 2004, para. 9 (“it is a matter of principle that the parties to a case have a right to be heard before a decision is made which can affect their rights”).

<sup>22</sup> Pre-Trial Chamber I, Situation in Darfur, Sudan, Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings, 23 July 2007, [ICC-02/05-85](#), p. 3; Pre-Trial Chamber I, Situation in Darfur, Sudan, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 3 December 2007, [ICC-02/05-110](#), fn. 33. See Regulation 77(4)(a) of the Regulations of the Court.

to file in this appeal.<sup>23</sup> Further, we respectfully request the Chamber to allow the OPCD to participate in any subsequent submissions in the matter.

17. In addition, the OPCD submits that to effectively represent the interests of potential suspects, it must also be granted confidential access to the case file. The Prosecution relies on much evidence which has been redacted in the public redacted version of the Request for an Investigation.<sup>24</sup> To be able to meaningfully argue the extent to which the failure to preserve evidence or the difficulties in acquiring it has impacted the rights of potential suspects, the Office must be able to have access to the relevant redacted information, notwithstanding that the Prosecution may seek to maintain some redactions under Rule 81 of the Rules. The Office must also be in a position, through accessing any other confidential filings as well as monitoring future ones, to make further submissions should the rights of potential suspects need to be further safeguarded, in accordance with its duties under Regulation 77(4) of the Regulations of the Court.

18. In the alternative, the OPCD respectfully requests that the Appeals Chamber appoints Defence Counsel from the ICC's List of Counsel to represent the interests of potential suspects and grant that Counsel standing to appear in these appeal proceedings. The Chamber may order such appointment pursuant to Regulation 76(1) of the Regulations of the Court, which allows it to appoint Defence Counsel "where the interests of justice so require".<sup>25</sup> For the same reasons outlined above, and in particular

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<sup>23</sup> See 'Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court', 20 September 2019, [ICC-02/17-67](#).

<sup>24</sup> See Request for an Investigation, paras 227, 274, 287, 290–294, 330–331, 333, 374, fns 72, 113, 158–167, 172–173, 178–181, 183, 187–189, 222–223, 225–226, 233, 242, 266, 270–272, 274–279, 281–284, 304, 311, 313, 320, 323, 325, 327–328, 331–332, 334–335, 349–356, 378, 424, 427, 436–439, 483–487, 490, 551, 553, 555, 558, 582, 598, 600–605, 613–614.

<sup>25</sup> If warranted, such assignment could also be of a Counsel from OPCD, pursuant to Regulations 76(2) and 77(4)(e) of the Regulations of the Court.

the need for potential suspects' rights to be safeguarded, the Office submits that this requirement is satisfied.

19. The Prosecution has already been involved in the situation in Afghanistan for over 13 years. This has more recently been supplemented by submissions by multiple groups of legal representatives representing victims, as well as the OPCV, all of whom broadly argue that the interests of justice question should be decided in favour of the rights of victims.<sup>26</sup> A voice representing potential suspects has been absent, despite their rights being implicated. It is vital, in light of the issues of "constitutional importance" that are at stake,<sup>27</sup> that this imbalance is redressed through grant of this request.

#### **IV. RELIEF REQUESTED**

20. For the reasons above, the OPCD respectfully requests the Appeals Chamber to:

- a. Grant the OPCD standing to appear in these appeal proceedings, pursuant to Regulation 77(4)(c) of the Regulations of the Court, to file consolidated written submissions not exceeding 35 pages in response to any appeal brief filed, similar to any written submissions that the OPCV may be authorised to file in this appeal;
- b. Grant the OPCD standing to participate in any subsequent submissions in the matter; and,
- c. Order that the OPCD be granted confidential access to the case file to ensure monitoring of the rights of suspects.

21. In the alternative, the OPCD respectfully requests the Appeals Chamber to appoint Defence Counsel from the ICC's List of Counsel and grant that

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<sup>26</sup> See above, fns 8–10.

<sup>27</sup> Request for Leave to Appeal, para. 5.

Counsel standing to represent the interests of potential suspects in these appeal proceedings pursuant to Regulation 76 of the Regulations of the Court.



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Xavier-Jean Keita  
Principal Counsel of the OPCD

Dated this, 25<sup>th</sup> Day of September 2019  
At, The Hague