

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/17  
Date: **26 September 2019**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Prosecution's response to the request by the Office of Public Counsel for the  
Defence for leave to appear before the Appeals Chamber**

**Source:** Office of the Prosecutor

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

***Court to:***

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## Introduction

1. The Office of Public Counsel for Defence (“OPCD”) has requested leave to appear in these appeal proceedings under regulation 77(4)(c) of the Regulations of the Court,<sup>1</sup> on the basis that the “rights of potential suspects must be a factor to be considered” under articles 15(4) and 53(1)(c),<sup>2</sup> and that, more generally, arguments representing the interests of “potential” or “future” suspects must be presented in this appeal.<sup>3</sup> The Prosecution opposes the Request, which seems to misconstrue the Court’s legal framework and procedure. Specifically, this does not contemplate Defence participation in proceedings related to the application of article 15 of the Statute.

## Submissions

2. In the Prosecution’s submission, the rights of the Defence were neither engaged for the purpose of the Pre-Trial Chamber’s decision nor the appeal proceedings which have now resulted from it. Nor does regulation 77(4) support the Request. Accordingly, the Request lacks legal basis, and must therefore be denied. This applies not only to the primary relief sought (intervention in these proceedings by the OPCD itself) but also to the alternative relief sought (appointment of counsel from the List of Counsel),<sup>4</sup> which is equally flawed by the same misunderstanding of the Court’s legal framework. All submissions in the Request going to the merits of the Pre-Trial Chamber’s decision must therefore be disregarded for the purpose of these proceedings.<sup>5</sup>

3. While the OPCD has been invited to appear in appeal proceedings in the past, this has been in exceptional circumstances when the rights of the Defence are engaged—specifically, *after* a case has been initiated under article 58—but, for

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<sup>1</sup> ICC-02/17-70 OA4 (“Request”), paras. 3, 16.

<sup>2</sup> Request, paras. 2-3. *See also* paras. 8, 19.

<sup>3</sup> Request, para. 14.

<sup>4</sup> *See* Request, paras. 18, 21.

<sup>5</sup> *See e.g.* Request, para. 12 (referring to the view of the ICRC on the effect of the passage of time on investigations).

example, it was necessary to address particular issues on an *ex parte* basis.<sup>6</sup> In the present matter, however, an investigation has *not* yet been initiated—far less any case involving a named suspect. There is no precedent for the OPCD to intervene on matters which do not engage the rights of the Defence.

4. The OPCD acknowledges that proceedings under articles 15, 53, 54, and 58 of the Statute are *ex parte*,<sup>7</sup> but fails to appreciate that this itself disposes of the Request. Such proceedings are *ex parte* because the Statute does not recognise that potential suspects have a sufficient interest in proceedings under article 15, justifying their participation. At this stage, only one potential case need even be identified,<sup>8</sup> and the Prosecution may not necessarily have specified any named individual as bearing individual criminal responsibility.<sup>9</sup> It follows that, if such persons do not themselves have a sufficient interest to be heard in proceedings under article 15, neither can the OPCD have any better interest to be heard on their behalf.

5. The OPCD is not assisted by the single early decision to which it refers, stating in general terms that the rights of procedural fairness may apply even in preliminary stages of the Court's proceedings,<sup>10</sup> since it has subsequently been explained that this principle does not necessarily entail the engagement of Defence rights. Thus, the Court has consistently held that potential or even actual suspects have no participatory rights in the Court's judicial proceedings until such time as a warrant or summons has been issued under article 58. For example, the Appeals Chamber has held that "the Statute does not provide a role for the subject of an arrest warrant

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<sup>6</sup> See e.g. ICC-ACRed-01/16.

<sup>7</sup> Request, para. 8 (allowing that "potential suspects" are not "parties to the proceedings").

<sup>8</sup> See e.g. ICC-01/09-19-Corr, para. 48. Compare further e.g. Statute, art. 18(2), with art. 19(2). Even *after* an investigation has been opened, the object of a potential case does not have standing to challenge the admissibility of a potential case. Rather, such matters rest in the hands of relevant States. Other than States, only "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58" has individual standing to challenge the admissibility of a case.

<sup>9</sup> See Regulations of the Court, reg. 49(2)(c). See also e.g. ICC-02/17-33, para. 57. In its article 15(3) request in this situation, however, the Prosecution has identified persons or groups of persons in accordance with regulation 49(2)(c): see ICC-02/17-7-Red, paras. 338, 345, 353.

<sup>10</sup> Request, para. 8 (citing ICC-01/04-135-tEN, para. 35).

at the application stage” and that such proceedings are generally *ex parte*.<sup>11</sup> The judges of the Court as a whole have endorsed similar conclusions in the *Chambers’ Practice Manual*.<sup>12</sup> Likewise, as the Pre-Trial Chamber held in *Kenya*:

[H]ad the drafters intended that the proceedings under article 58 of the Statute be conducted on an adversarial basis, they would have *expressis verbis* provided for it (*ubi lex voluit dixit, ubi noluit tacuit*), alongside the other instances wherein the voices of parties or participants shall or may be heard by a Chamber. On the contrary, the wording of article 58 of the Statute clearly indicates that the decision as to whether a warrant of arrest or a summons to appear should be issued is to be based upon an examination of ‘the application and the evidence or other information submitted by the Prosecutor’ only. No role, actual or potential, is provided or anticipated for the person named in the Prosecutor’s application under article 58 of the Statute.<sup>13</sup>

6. If this is so, even at the article 58 stage, such reasoning must apply *a fortiori* at preceding stages, especially before an investigation has even been authorised under article 15 of the Statute.

7. In any event, an investigation under the Statute affords no prejudice to any person. This is because, to any extent that investigative measures may affect the rights of a person under the Statute, separate and dedicated procedures exist to ensure that these are protected—including by the obligations under articles 54-56 and the general requirement to use the cooperation regime in Part 9 of the Statute, which provides if necessary for the application of procedures under national law.<sup>14</sup> As a result, nothing in the resolution of the current matter under article 15—which, at most, can lead to the opening of an investigation—has the potential to prejudice the internationally recognised rights of any potential suspect.

8. Regulation 77 further evinces the expectation that the OPCD’s role prior to the initiation of any case is extremely limited. Regulation 77(4)(a) *expressly* regulates the

<sup>11</sup> ICC-01/05-01/13-559 OA3, para. 48.

<sup>12</sup> ICC, *Chambers’ Practice Manual*, 3<sup>rd</sup> Ed., 12 May 2017, p. 6 (observing, in the context of article 58 proceedings, that “[e]ven if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application”).

<sup>13</sup> ICC-01/09-42, para. 18. *See also* ICC-01/09-35, para. 10.

<sup>14</sup> *See e.g.* Statute, art. 93(1).

extent to which the OPCD may be required “to [r]epresent[] and protect[] the rights of the defence during the initial stages of the investigation”.<sup>15</sup> Accordingly, this must be regarded as *lex specialis* to the general provision contained in regulation 77(4)(c). The Request’s reliance on regulation 77(4)(c) is thus misplaced for the current proceedings.

9. It is also clear that regulation 77(4)(a) cannot encompass general matters relating to the authorisation of an investigation under article 15 of the Statute. As examples of its proper scope at this very early stage, regulation 77(4)(a) refers to matters under article 56(2)(d) and rule 47(2)—in other words, situations where specific evidence is in issue and consequently the conduct of the proceedings may have concrete and direct consequences for the specific persons implicated by that evidence. By contrast, general matters concerning the authorisation of the investigation itself—such as the current appeal proceedings—have no such consequences for any specific person, and thus are entirely dissimilar to the matters described in regulation 77(4)(a). Applying the *ejusdem generis* rule, they must therefore be excluded from the scope of regulation 77(4)(a).

10. In this respect, the OPCD is in a materially different position to the Office of Public Counsel for Victims (“OPCV”), notwithstanding the ostensible similarity of the procedural mechanisms by which they may seek to appear in these proceedings.<sup>16</sup> While the rights of the Defence are not engaged at present,<sup>17</sup> article 15(3) of the Statute is unequivocal in demonstrating that the rights of victims, by contrast, *are* engaged in judicial proceedings under article 15. On that basis, and mindful of the inevitable limitations on the victims who could directly make

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<sup>15</sup> By implication of the reference to rule 47(2) in regulation 77(4)(a), the Prosecution understands this provision also to apply to matters prior to an investigation.

<sup>16</sup> In key respects, however, the structure of regulation 81(4) is quite different to regulation 77(4)—there is no analogous regulation, for example, concerning the circumstances in which the OPCV may be granted leave to appear in judicial proceedings at the early stages of an investigation.

<sup>17</sup> See *above* paras. 2-8.

representations under article 15(3), the Prosecution agrees that the OPCV's mandate is engaged under regulation 81(4).<sup>18</sup> No analogous justification applies to the OPCD.

11. Further arguments by the OPCD not only presuppose that the Pre-Trial Chamber was legally entitled to seek to forecast the feasibility of the investigation in this situation—which the Prosecution contests—but also piles speculation upon speculation by expressing its concern about the potential impact for any Defence investigations thereafter.<sup>19</sup> This is illogical. If the Prosecution can mount a sufficiently effective investigation that it can bring a prosecution triggering the rights of the defence, then there is no reason to suppose that counsel for any future suspect would not likewise be able to mount effective investigations in the interests of their client. And of course if, for the sake of argument, the Prosecution cannot mount an effective investigation so as to even bring a prosecution, then necessarily no potential suspect could be prejudiced.

12. The OPCD also seeks to rely on a passage from the Prosecution's own *Policy Paper on the Interests of Justice*, but takes this passage out of context.<sup>20</sup> It is true that the policy recognises that instances in which “a suspect's rights had been seriously violated in a manner that could bring the administration of justice into disrepute” might constitute a “possible example” of a factor to be taken into account in assessing the interests of justice.<sup>21</sup> However, the reference to “a suspect” demonstrates that this scenario applies only to consideration of the interests of justice under article 53(2), and not under article 53(1) of the Statute. While the precise application of article 53(2) may itself remain an open question,<sup>22</sup> it is clear that the current proceedings in any event do not raise matters under article 53(2) but only

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<sup>18</sup> See ICC-02/17-67. The Pre-Trial Chamber previously granted leave to the OPCV for the purpose of its proceedings under article 82(1)(d) of the Statute: ICC-02/17-39; ICC-02/17-43.

<sup>19</sup> Request, para. 11.

<sup>20</sup> Request, paras. 2, 9. See ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007 (“OTP Policy Paper”).

<sup>21</sup> OTP Policy Paper, p. 4 (fn. 8). Specifically, the Prosecution considered that such a hypothetical scenario might exemplify the type of circumstance in which further prosecutorial action “was clearly detrimental to [...] respect for international justice”.

<sup>22</sup> See e.g. ICC-02/05-185, para. 21.

under article 53(1). Consequently, reliance upon the Prosecution's policy is inapposite.

13. Finally, the OPCD seeks "confidential access to the case file", including the confidential version of the Prosecutor's request under article 15(3).<sup>23</sup> Since the OPCD should not be granted leave to appear in these proceedings, this request should be denied. But in any event, even if leave were granted, confidential access is unnecessary for the purpose of any participation by the OPCD, and should in any event be refused.

14. No entity other than the Prosecution and the relevant chambers of this Court, and appropriate staff of the Registry, has access to the confidential filings in this situation. The Prosecution's appeal brief will be filed publicly. The legal representatives of victims participating in these proceedings—as well as the OPCV and any *amici curiae*, if granted leave to appear—will all make their submissions on the basis of access only to the public redacted version of the Prosecution's article 15(3) request. Nor will they be impaired in doing so. The particularities of any material which is not in the public domain are in principle inapposite to the issues certified for appeal or the issues inextricably linked to those issues, and since it is not a party to these proceedings any submissions by the OPCD would be confined to the issues raised on appeal. The OPCD fails to make any showing to the contrary.

15. The OPCD's unexplained and apparently unnecessary further suggestion that it should also be granted access to "any other confidential filings" in this situation, in order to "monitor[] future" confidential submissions,<sup>24</sup> further underlines the speculative nature of its access request.

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<sup>23</sup> Request, para. 17. *See also* para. 20.

<sup>24</sup> Request, para. 17.



### Conclusion

16. For all the reasons above, the Appeals Chamber should dismiss the Request in its entirety.



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Fatou Bensouda, Prosecutor

Dated this 26<sup>th</sup> day of September 2019

At The Hague, The Netherlands