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No: **ICC-02/17**

Date: **11 October 2019**

THE APPEALS CHAMBER

Before:

Judge Piotr Hofmański, Presiding

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

**APPLICATION ON BEHALF OF VICTIMS OF CROSS BORDER AERIAL
BOMBARDMENT IN THE AFGHAN CONFLICT TO MAKE
WRITTEN AND ORAL SUBMISSIONS**

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

The Office of the Prosecutor

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Legal Representatives of the Victims

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Ms. Nancy Hollander, Mr. Mikolaj Pietrzak
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Mr. Steven Powles QC and Mr. Conor
 McCarthy

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims
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 Defence**

States' Representatives

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit
 Mr. Nigel Verrill, Chief

Detention Section

**Victims Participation and Reparations
 Section**
 Mr. Philipp Ambach, Chief

Introduction

1. This application is made on behalf of a group of victims (“**the Cross-border Victims**”), located in Pakistan, in support of their application for permission to intervene in the Appeal against Pre-Trial Chamber II’s “*Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*” of 12 April 2019 (“**the Decision**”).
2. In particular, the Cross-border Victims wish to respond to, and address, submissions by the Prosecutor and other groups of victims on a number of issues (identified below), which impact on the position of the Cross-border Victims as regards the scope and conduct of any future investigation into the Afghan situation undertaken by the Prosecutor and any future proceedings before the ICC in respect of the conflict in Afghanistan.
3. A list of the victims on behalf of whom these submissions are made is set out in the Annex to these submissions.¹ The Cross-border victims seek permission to file brief written submissions **and** to participate in the oral hearing scheduled for the 4, 5 and 6th December 2019. In any written submissions and/or oral hearing, the applicants undertake not to duplicate the submissions of other parties.

Background

4. In early 2014 the Cross-border Victims submitted a substantial dossier to the Prosecutor which contained evidence of crimes within the jurisdiction of the ICC that had been committed in Pakistan but launched from Afghanistan. This dossier ran to many hundreds of pages of evidence, gathered by a Pakistan NGO, the Foundation for Fundamental Rights, and a UK NGO, Reprieve, on behalf of the Cross-border Victims.
5. It included eye-witness evidence as well as analysis of, and information concerning, drone strikes launched from Afghan territory into Pakistan in connection with the conflict in Afghanistan in which hundreds of civilians have been killed, including attacks on schools, markets and civilian gatherings in Pakistan. In many of these strikes no military target is apparent.

¹ It is important to note that at this stage these victims are representative of many hundreds of other civilians based in Pakistan who have been killed or injured (or who are close family members of persons killed or injured) in cross-border air strikes launched into Pakistan from Afghan territory in connection with the Afghan conflict.

6. The Prosecutor was also presented with detailed legal submissions explaining why, in the Cross-border Victims view, the crimes they allege were all within the proper scope of the ICC's jurisdiction. On 20 November 2017 the Prosecutor requested authorisation from the Pre-Trial Chamber to initiate an investigation into alleged crimes in Afghanistan. This request made no mention of the Cross-border Victims, ignoring their position.
7. On 31 January 2018 the Cross-border Victims filed 'Submissions on Behalf of Victims of Cross Border Aerial Bombardment in The Afghan Conflict' to the Pre-Trial Chamber making representations on behalf of the Cross-border Victims regarding flaws in the Prosecutor's Request for Authorisation in respect of the Afghan Situation.
8. On 12 April 2019 the Pre-Trial Chamber issued 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', refusing the Prosecutor's request to initiate an investigation.
9. On 7 June 2019 the Prosecutor sought leave to appeal on the following three grounds:
 - 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' ('First Issue');
 - 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' ('Second Issue');
 - c. 'Whether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents' ('Third Issue').
10. On 10 June 2019 three groups of Victims Requested Leave to Appeal.
11. The Cross-border Victims filed a 'Response to the Office of the Prosecutor's Request for Leave to Appeal' on 13 June 2019.
12. On 19 July 2019, at the direction of the Pre-trial Chamber, the Prosecutor filed a response to the submissions of the Cross-border Victims (*Consolidated Response to Submissions by Amici Curiae, under rule 103(2), and Reply to the Response of Certain Participating Victims*).

13. On 17 September 2019 Pre-Trial Chamber II granted permission on the first two grounds but not the third.² The Cross-border Victims seek leave to make submissions on (1) standing, (2) interpretation of articles 15(4) and 53(1)(c) and (3) legal approach to determining scope.

Basis for Request

14. This request is made, *inter alia*, pursuant to Articles 68 (3) of the Statute and Regulation 24 (2) of the Regulations of the Court and/or Rule 93 of the Rules of Procedure and Evidence and/or Rule 103 of the RPE. Insofar as a substantive issue arises as regards the standing of the Cross-border Victims to participate in the appeal hearing *qua* victims, the Cross-border Victims seek to make submissions on this substantively if granted leave.

Issues for Intervention

15. As is apparent from this brief procedural history of the Afghan Proceedings, the Cross-border Victims have actively participated throughout the proceedings and, indeed, have proactively sought to engage with the Prosecutor in respect of her investigation. In order to protect their interests in the investigation and/or any future proceedings before the ICC, the Cross-border Victims seek permission to participate in the appeal hearing (orally and in writing) on three related issues:
- a. *First*, the applicants propose to make brief submissions on the question of the standing of victims in the position of the Cross-border Victims to participate in an appeal such as the present one in respect of an authorisation decision by a Pre-trial Chamber.
 - b. *Second*, the scope of the Pre-trial Chamber's power under Article 15 (4) and 53(1) (c) of the Statute. In particular, whether articles 15(4) and 53(1)(c) require or permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice and, relatedly, 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.

² Pre-Trial Chamber II, 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' dated 17 September 2019.

- c. *Third*, in response to material submitted by the Legal Representatives of Victims³, the Applicants wish to make submissions on the legal effect and scope of a decision to authorise an investigation and, in particular, whether an authorisation limits a future prosecutorial investigation to investigate those crimes specifically mentioned in the Prosecutor's request.

Request

16. Each of the issues in respect of which the Cross-border Victims request permission to participate in the appeal hearing affect the interests of these victims both as regards the Appeal Chambers assessment of whether the Pre-trial Chamber erred in refusing authorisation and, more generally, as regards the ability of the Cross-border Victims to participate in any investigation and/or proceedings arising in the Afghan Situation in the future.
17. The applicants therefore request (a) permission to provide short written submissions, not longer than **20 pages** addressing the matters identified above, and (b) permission to participate in the hearing of the Prosecutor's appeal listed from 4-6 December 2019.

Steven Powles QC

Conor McCarthy



Dated this 11th day of October 2019

At London, United Kingdom

³ See Updated Victims Appeal Brief, 30 September 2019, §§ 144 et seq.