

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/17**
Date: **20 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 Document

**Request to appear before the Appeals Chamber pursuant to
regulation 81(4)(b) of the Regulations of the Court**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. In accordance with Regulation 81(4) of the Regulations of the Court,¹ the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) requests to appear before the Appeals Chamber in order to represent the general interest of the victims, in relation to the issues subject to appeal following the decision of the Pre-Trial Chamber II (the “Pre-Trial Chamber”) issued on 17 September 2019 to partially grant the Prosecutor’s request for leave to appeal issues arising from its decision denying authorisation of an investigation into the Situation in the Islamic Republic of Afghanistan.

2. The notion of ‘interests of justice’, and particularly the need for a positive judicial determination to the effect that the proposed investigation would be in the interests of justice, and the Pre-Trial Chamber’s appreciation of factors in assessing said interests, will form the focus of the appeals proceedings. Each of these issues fundamentally affects the general interest of the victims before the Court, as the ‘interests of justice’ are indissolubly linked to, and often overlap with, the victims’ rights to the truth and justice. The interests of victims shall be seen through the lenses of article 21(3) of the Rome Statute,² providing that the Court’s legal framework must be interpreted and applied consistent with internationally-recognized human rights; a requirement of particular importance since the International Criminal Court is a ‘victim-centered’ Court.

3. In the context of requests for authorisation to open an investigation, victims have often similar but distinct interests from the Prosecution, hence the importance of their participation in the proceedings as autonomous actors. Their independent role stems from the internationally recognised rights to truth, justice and reparations, which translate into a set of procedural prerogatives in criminal proceedings.

¹ Where the term ‘Regulation’ is used in the present Request, it refers to the Regulations of the Court unless otherwise indicated.

² Where the term ‘Article’ is used in the present Request, it refers to the Rome Statute unless otherwise indicated.

4. Allowing the OPCV to appear before the Appeals Chamber on the specific issues on appeal will be instrumental in protecting and duly taking into account the interest of victims in general, and their fundamental rights to truth and justice in particular; and for these to be reflected in similar future proceedings related to the opening of an investigation, as well as to any other proceedings that may require, under the Court's legal framework, an assessment of the notion of 'interests of justice'. Said appearance is consequent to the previous appearance of the Office before the Pre-Trial Chamber and will secure the general interest of the victims.

II. PROCEDURAL BACKGROUND

5. On 9 November 2017, following the Prosecutor's notice of her intention to request judicial authorisation pursuant to Regulation 45,³ Pre-Trial Chamber III issued the "Order to the Victims Participation and Reparation Section Concerning Victims' Representations" instructing the VPRS:

"to (i) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations; (ii) receive and collect victims' representations, be it collective or individual; (iii) conduct a preliminary assessment, as set out in this order, whether the conditions set out in rule 85 have been met; and (iv) transmit incoming representations on a rolling basis, possibly every two weeks, together with a brief preliminary assessment".⁴

6. On 20 November 2017, the Prosecutor submitted the "Request for authorisation of an investigation pursuant to article 15", seeking authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan.⁵

7. Throughout the period from 20 November 2017 to 31 January 2018, Pre-Trial Chamber III received victims' representations on a rolling basis, together with

³ See the "Notice pursuant to regulation 45 of the Regulations of the Court", [No. ICC-02/17-1-AnxI](#), 9 November 2017 (dated 3 November 2017).

⁴ See the "Order to the Victims Participation and Reparation Section Concerning Victims' Representations" (Pre-Trial Chamber II), [No. ICC-02/17-6](#), 9 November 2017, para. 16.

⁵ See the "Public redacted version of 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, ICC-02/17-7-Conf-Exp", [No. ICC-02/17-7-Red](#), 20 November 2017.

reports containing a preliminary assessment of said representations.⁶ On 20 February 2018, the Registry submitted a final consolidated report summarising the process of collection of victims' representations.⁷

8. On 12 April 2019, the Pre-Trial Chamber⁸ issued 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" (the "Impugned Decision"), rejecting the Prosecution's request to authorise the opening of an investigation on the ground that "*an investigation into the situation in Afghanistan at this stage would not*

⁶ See the "First Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-10](#) and the "Public redacted version of 'First Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017', 7 December 2017, ICC-02/17-10-Conf", [No. ICC-02/17-11-Red](#), 7 December 2017. See also the "Second Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-15](#) and the "Public redacted version of 'Second Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017', 21 December 2017, ICC-02/17-16-Conf" [No. ICC-02/17-16-Red](#), 21 December 2017; the "Third Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-17](#); the "Third Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-18](#), 11 January 2018; the "Fourth Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-19](#) and the "Public redacted version of 'Fourth Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017', 25 January 2017, ICC-02/17-20-Conf", [No. ICC-02/17-20-Red](#), 25 January 2018; the "Fifth Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-21](#) and the "Public redacted version of 'Fifth Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017' 2 February 2017, ICC-02/17-22-Conf", [No. ICC-02/17-22-Red](#), 2 February 2018; the "Sixth Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-24](#) and the "Sixth Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-25](#), 5 February 2018; and the "Seventh Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-27](#) and the "Seventh Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", [No. ICC-02/17-28](#), 9 February 2018.

⁷ See "Annex I to the 'Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017'", [No. ICC-02/17-29-Anxl-Red](#), 20 February 2018, para. 47.

⁸ On 16 March 2018, the Presidency recomposed the Chambers of the Court and assigned the situation in Afghanistan of Pre-Trial Chamber II. See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), [No. ICC-02/17-30](#), 16 March 2018.

serve the interests of justice".⁹ On 31 May 2019, Judge Mindua issued his concurring and separate opinion.¹⁰

9. On 7 June 2019, the Prosecution filed the "Request for leave to appeal the Article 15 Decision",¹¹ seeking leave to appeal in respect of three issues arising from the Impugned Decision:

(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 (the "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 (the "Second Issue"); and

(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 (the "Third Issue").

10. On 10 June 2019, the OPCV filed the "Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court",¹² seeking authorisation to appear before the Pre-Trial Chamber on the three issues identified in the Request and directly affecting the victims' rights.

⁹ See 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" (Pre-Trial Chamber III), [No. ICC-02/17-33](#), 12 April 2019 (the "Impugned Decision").

¹⁰ See the "Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua", [No. ICC-02/17-33-Anx](#), 31 May 2019.

¹¹ See the "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", [No. ICC-02/17-34](#), 7 June 2019 (the "Request").

¹² See the "Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", [No. ICC-02/17-39](#), 10 June 2019.

11. Subsequently, Legal Representatives of various groups of individual victims and organisations filed submissions in the proceedings, including by way of requests for leave to appeal under Article 82(1)(d),¹³ responses to the Prosecution's request for leave to appeal filed before the Pre-Trial Chamber,¹⁴ requests for leave to file *amicus curiae* submissions,¹⁵ and direct appeals to the Appeals Chamber under Article 82(1)(a).¹⁶

12. On 12 July 2019, having been authorised by the Pre-Trial Chamber to appear,¹⁷ the OPCV filed its "Submissions in the general interest of the Victims on the

¹³ See the "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'", [No. ICC-02/17-37](#), 10 June 2019.

¹⁴ See the "Response to Office of the Prosecutor's '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'", [No. ICC-02/17-44](#), 13 June 2019; and the "Victims' response to the Requests for Leave to Appeal filed by the Prosecution and by other victims", [No. ICC-02/17-45](#), 13 June 2019.

¹⁵ See the "Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan", [No. ICC-02/17-35](#), 10 June 2019; the "Corrected version of 'Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence'", [No. ICC-02/17-46](#), 14 June 2019; and the "Request Seeking Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan", [No. ICC-02/17-55](#), 25 June 2019. Also see the "Decision on the 'Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39)" (Pre-Trial Chamber II), [No. ICC-02/17-43](#), 12 June 2019; 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)", [No. ICC-02/17-47](#), 17 June 2019; the "Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan", [No. ICC-02/17-57](#), 11 July 2019 and the "Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence", [No. ICC-02/17-58](#), 12 July 2019.

¹⁶ See the "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'", [No. ICC-02/17-36](#), 10 June 2019; the "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'", [No. ICC-02/17-38](#), 10 June 2019; the "Corrected version of the 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)", [No. ICC-02/17-40](#), 12 June 2019; and the "Victims' Appeal Brief", [No. ICC-02/17-53](#), 24 June 2019.

¹⁷ See the "Decision on the 'Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39)", *supra* note 15.

Prosecution's Request for Leave to Appeal",¹⁸ observing that the three issues raised by the Prosecutor trigger questions of importance for the victims and that they should be certified for appeal as they fulfil the requirements of Article 82(1)(d).

13. On 17 September 2019, the Pre-Trial Chamber issued its "Decision on the Prosecutor and Victims' Requests for Leave to Appeal".¹⁹ The Pre-Trial Chamber, *inter alia*, partially granted the Prosecution's request for leave, granting leave to appeal the First Issue and the Second Issue and denying leave with regard to the Third Issue.

14. On 18 September 2019, the Prosecution filed a notice of joined proceedings and requested an extension of page limit for its Appeal Brief.²⁰

III. SUBMISSIONS

1. The impact of the issues under appeal on the interests of victims

15. The Principal Counsel submits that the two issues in respect of which the Pre-Trial Chamber granted leave to appeal trigger questions of general importance for all victims of crimes within the jurisdiction of the Court. Indeed, the questions of "[w]hether 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"²¹ and "[w]hether 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",²² are at the core of the victims' interests.

¹⁸ See the "Submissions in the general interest of the Victims on the Prosecution's Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (ICC-02/17-34)", [No. ICC-02/17-59](#), 12 July 2019.

¹⁹ See the "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'" (Pre-Trial Chamber II), [No. ICC-02/17-62](#), 17 September 2019.

²⁰ See the "Prosecution's notice of joined proceedings, and request for extension of pages", [No. ICC-02/17-63](#), 18 September 2019.

²¹ See the Request, *supra* note 11, paras. 15-18.

²² *Idem*, paras. 19-23.

16. As pointed out by the Prosecution,²³ and as reflected in the wording of Article 53(1)(c),²⁴ the ‘interests of justice’ are indissolubly linked to, and usually overlap with, the interests of victims and their internationally-recognised rights.²⁵

17. In the context of requests for authorisation to open an investigation, victims have often similar but distinct interests from the Prosecution, hence the importance of their participation in the proceedings as autonomous actors. Their independent role stems from the internationally recognised rights to truth, justice and reparations,²⁶ which translate into a set of procedural prerogatives in criminal

²³ See the “Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Conf-Exp”, *supra* note 5, paras. 364-372.

²⁴ Article 53(1)(c) provides that: “[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] 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” (emphasis added).

²⁵ See the “Separate opinion of Judge Sang-Hyun Song” appended to the “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007” (Appeals Chamber), [No. ICC-01/04-01/06-925](#), 13 June 2007, para. 16: “victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms”. See also the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/07-474](#), 13 May 2008, stating that “the latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body” (para. 31) and acknowledged that “when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings” (para. 34). See also “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

²⁶ See IACtHR, *La Cantuta v. Perú*, [Judgment \(Merits, Reparations and Costs\)](#), 29 November 2006, para. 222; *Vargas-Areco v. Paraguay*, [Judgment \(Merits, Reparations and Costs\)](#), 26 September 2006, paras. 153; *Almonacid-Arellano et al v. Chile*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 26 September 2006, para. 148; *Moiwana Community v. Suriname*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 15 June 2005124, para. 204; and *Velásquez-Rodríguez v. Honduras*, [Judgment \(Reparations and Costs\)](#), 29 July 1988, paras. 162-166 and 174. See also ECtHR, *Hugh Jordan v. UK*, [Judgment](#), 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, [Judgment](#), 28 July 1999, para. 79; *Kurt v. Turkey*, [Judgment](#), 25 May 1998, para. 140; *Selçuk and Asker v. Turkey*, [Judgment](#), 24 April 1998, para. 96; *Aydin v. Turkey*, [Judgment](#), 25 September 1997, para. 103; and *Aksoy v. Turkey*, [Judgment](#), 18 December 1996, para. 98.

proceedings.²⁷ Such rights and prerogative shall be seen through the lenses of Article 21(3),²⁸ which requires that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”,²⁹ a requirement of particular importance since the International Criminal Court is a “victim-centered Court”.³⁰

18. The Appeals Chamber already found 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”.³¹ The Court’s obligation to respect the internationally recognised human rights of victims applies also with regard to the conduct and result of preliminary examination, “especially the rights of victims to know the truth, to

²⁷ See NAQVI (Y.), “The Right to the Truth in International Law: Fact or Fiction?”, in *ICRC International Review*, vol. 88, 2006, pp. 267-268; MENDEZ (J.), “The Right to Truth”, in JOYNER (Ch.) (Ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracusa Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; ANTKOWIAK (T. M.), “Truth as Right and Remedy in International Human Rights Experience”, in *Michigan Journal of International Law*, vol. 23, 2002, pp. 977-1013; SHELTON (D.), *Remedies in International Human Rights Law*, 3rd ed., Oxford University Press, 2015, in particular pp. 112-120; AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogotá, 2008, pp. 42-44; and DOAK (J.), *Victims’ Rights, Human Rights and Criminal Justice. Reconciling the Role of Third Parties*, Hart Publishing, Oxford – Portland, 2008, in particular pp. 115-205.

²⁸ Where the term ‘Article’ is used in the present Request, it refers to the Rome Statute unless otherwise indicated.

²⁹ See the “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” (Appeals Chamber), [No. ICC-01/04-01/06-772 OA 4](#), 14 December 2006, para. 37. See also BITTI (G.), “Article 21 and the Hierarchy of Sources of Law before the ICC”, in STAHN (C.), *The Law and Practice of the International Criminal Court*, OUP, 2015, p. 437; NERLICH (V.), “Article 21 (3) of the ICC Statute: Identifying and Applying ‘Internationally Recognized Human Rights’”, in LOBBA (P.) and MARINIELLO (T.) (Eds.), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals*, Brill Nijhoff, Leiden, Boston, 2017, 73-89; and PELLET (A.), “Applicable law”, in CASSESE (A.), GAETA (P.) and JONES (J.R.W.D.) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, pp. 1051-1084

³⁰ See the “Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua”, *supra* note 10, para. 50.

³¹ See the “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” *supra* note 29, para. 37.

have access to justice and to request reparations, as already established in the jurisprudence of this Court".³²

19. In accordance with international human rights law, the right to justice translates into a duty to investigate and punish gross violation of human rights. This duty has been internationally recognised in human rights case-law as both a procedural aspect inherent to the fundamental right to life, as well as to the prohibition of torture and inhumane and degrading treatment, and as a substantial aspect of the right to an effective remedy.³³

20. The right to truth has been equally recognised as a fundamental right of the victims, as well as their next of kin, first and foremost by the present Court,³⁴ but also

³² See the "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'" (Pre-Trial Chamber I), [No. ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, para. 88. See also the "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya" (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010, para. 5; and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 3 May 2008, paras. 31-44.

³³ Human Rights Committee, "General Comment No. 31: the Nature of General Legal Obligations Imposed on States Parties to the Covenants adopted on 29 March 2004", [UN Doc. CCPR/C/21/Rev.1/Add.13](#), 26 May 2004, para. 18. See also Human Rights Committee, Communication No. 1225/2003, *Eshonov v. Uzbekistan*, [Views, 22 July 2010](#), para. 9.9; Communication No. 2398/2014, *Millis v. Algeria*, [Views, 6 April 2018](#), para. 9; Communication No. 2143/2012, *Dovadzija and Dovdzija v. Bosnia and Herzegovina*, [Views 22 July 2015](#), para. 13; Communication No. 322/1988, *Rodriguez v. Uruguay*, [Views, 19 July 1994](#), para. 14; and Communication No. 563/1993, *Bautista v. Colombia*, Views 27 October 1995, paras. 8.2 and 10. See also ECtHR, *Kaya v. Turkey*, [Judgment](#), 19 February 1998, para. 107; *Nachova and others v. Bulgaria*, [Judgment](#), 6 July 2006, para. 116; *Velikova v. Bulgaria*, [Judgment](#), 4 October 2000, para. 80; *Timurtaş v. Turkey*, [Judgment](#), 13 June 2010, para. 110; *Çakici v. Turkey*, [Judgment](#), 8 July 1999, para. 86; *McCann and others v. the United Kingdom*, [Judgment](#) (Grand Chamber), 27 September 1995, para. 161; *Ramsahai and others v. The Netherlands*, [Judgment](#) (Grand Chamber), 15 May 2007, para. 324; *Armani da Silva v. the United Kingdom*, [Judgment](#) (Grand Chamber) 20 March 2016, para. 233; *M. Tunç and F. Tunç v. Turkey*, [Judgment](#) (Grand Chamber) 14 April 2015, para. 172; *Giuliani and Gaggio v. Italy*, [Judgment](#) (Grand Chamber) 24 March 2011, para. 301; *Al-Skeini and others v. the United Kingdom*, [Judgment](#) (Grand Chamber) 7 July 2011, para. 166; *Özkan and others v. Turkey*, [Judgment](#), 6 April 2004, para. 312; *Isayeva v. Russia*, [Judgment](#), 6 July 2005, para. 212; *El-Masri v. the Former Yugoslav Republic of Macedonia*, [Judgment](#) (Grand Chamber), 13 December 2012, para. 192; and IACtHR, *Velásquez-Rodríguez v. Honduras*, [Judgment](#), 29 July 1988, paras. 174, 176 and 181. See also NOWAK (M.), *U.N. Covenant on Civil and Political Rights*, 2nd ed., N.P. Engel, Kehl – Strasbourg – Arlington, 2005, pp. 29 and 62-72, where the right to an effective remedy is construed as a general principle of international law.

³⁴ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" *supra* note 25, paras. 31-36, including footnote 39, referring to the "well-established right to the truth of the victims of serious violations of human rights".

by international human rights courts and bodies,³⁵ and by other international authorities and legal instruments, such as: the UN General Assembly;³⁶ the UN Economic and Social Council;³⁷ the UN Office of the High Commissioner for Human Rights;³⁸ the UN Human Rights Council;³⁹ the UN Commission on Human Rights;⁴⁰ the Working Group on Enforced or Involuntary Disappearances;⁴¹ the International Red Cross and Red Crescent Movement;⁴² the International Committee of the Red Cross;⁴³ the Parliamentary Assembly of the Council of Europe;⁴⁴ the General Assembly of the Organization of American States;⁴⁵ the African Commission on Human and Peoples' Rights of the African Union;⁴⁶ the International Convention for

³⁵ Human Rights Council, "General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life", UN Doc. [CCPR/C/GC/36](#), 30 October 2018, para. 28 and the Concluding Observations cited therein. See also IACtHR, *Castillo-Páez v. Perú*, [Judgment \(Merits\)](#), 3 November 1997, paras. 86 and 90; *Bámaca-Velásquez*, [Judgment \(Merits\)](#), 25 November 2000, para. 201; *Barrios Altos v. Perú*, [Judgment \(Merits\)](#), 14 March 2001, paras. 47-49. See also Inter-American Commission of Human Rights, *Ellacuría et al. v. El Salvador*, [Report No. 136/99](#), 22 December 1999, paras. 223-228; and ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Judgment, *supra* note 33, para. 191.

³⁶ See *inter alia* UN General Assembly Resolutions [33/173](#) (1978), [47/132](#) (1992) and [57/161](#) (2003).

³⁷ See the "Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28", UN Doc. [E/CN.4/1997/104](#), 16 January 1997, pp. 2-5. See also the "Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. [E/CN.4/Sub.2/1997/20](#), 26 June 1997, pp. 3-31.

³⁸ See the "Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights", UN Doc. [E/CN.4/2006/91](#), 8 February 2006.

³⁹ See Human Rights Council Resolutions 2005/66 (2005), *Right to the Truth*, UN Doc. [E/CN.4/RES/2005/66](#); 9/11 (2008), *Rights to the Truth*, UN Doc. [A/HRC/RES/9/11](#), and 12/12 (2009), *Right to the Truth*, UN Doc. [A/HRC/RES/12/12](#). See also Human Rights Council Decision 2/105 (2006), *Right to the Truth*, [A/HRC/DEC/2/105](#).

⁴⁰ See Commission on Human Rights, Resolution 2005/66, UN Doc. [E/CN.4/RES/2005/66](#)

⁴¹ See *inter alia*, the "Report of the Working Group on Enforced or Involuntary Disappearances", UN Doc. [A/HRC/22/45](#), 28 January 2013, in particular paras. 14 and 33 stressing the need to conceive the right to the truth as an absolute right.

⁴² See the [Resolution II](#) of the XXIV International Conference of the Red Cross and Red Crescent, Manila, 1981

⁴³ See "Rule 117", in ICRC, [Customary International Humanitarian Law, Vol. I: Rules \(2005\)](#), p. 421, where the right to the truth is considered a norm of customary international law.

⁴⁴ See Council of Europe, Parliamentary Assembly, [Recommendation 1056 \(1987\)](#), para. 17(2); and [Resolution 1463 \(2005\)](#), para. 10 (2).

⁴⁵ See Organization of American States, General Assembly, Resolution [AG/RES.666 \(XIII-0/83\)](#) (1983), para. 5; and Resolution [AG/RES.742 \(XIV-0/84\)](#) (1984), para. 5

⁴⁶ See African Union, African Commission on Human and People's Rights, *Principles and Guidelines on the Right for a Fair trial and Legal Assistance in Africa*, [DOC/OS \(XXX\) 247](#), C., p. 5.

the Protection of All Persons from Enforced Disappearances;⁴⁷ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;⁴⁸ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.⁴⁹

21. Moreover, within the legal framework of the Court, the victims' rights both to participate in the proceedings and to claim reparations are entirely dependent on the Prosecutor starting an investigation, or being authorised to do so by the Chamber.⁵⁰ As recognised by Judge Mindua in his partly dissenting opinion:

“the victims' right to substantive justice implies redressing the harm they have suffered and addressing the cause of their victimisation. Thus, if the Pre-Trial Chamber rejects the Prosecutor's request, for these victims such a decision is, in reality, a final one, since it puts an end to the prospect of the investigation and the very possibility to have a trial and a possible conviction against the accused”.⁵¹

22. The Principal Counsel submits therefore that the interpretation of Article 53(1)(c) – with the applicable standard and the definition and related assessment of the notion of the 'interests of justice' – substantially impacts on the fundamental rights of, and the overall fairness of the Court proceedings towards, victims. The Principal Counsel submits that in light of the lack of any “*settled authority*” with regard the factors which may be taken into account in performing

⁴⁷ See UN General Assembly Resolution 61/177 (2007), UN Doc. [A/RES/61/177](#), 12 January 2007.

⁴⁸ See the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, UN General Assembly Resolution 40/34 (1985), 29 November 1985, UN Doc. [A/RES/40/34](#) (the “1985 Principles”).

⁴⁹ See UN General Assembly Resolution 60/147 (2005), UN Doc. [A/RES/60/147](#) (the “2005 Principles”). The 1985 Principles and the 2005 Principles have been resorted to by the Chambers as an authoritative source for the definition of victims and of victims' rights. See *e.g.*, the “Decision on victims' participation” (Trial Chamber I), [No. ICC-01/04-01/06-1119](#), 18 January 2008, para. 35. See also the “Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya” (Pre-Trial Chamber II), [No. ICC-01/09-24](#), 3 November 2010 para. 5; and the “Decision on the Applications for Participation in Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), [No. ICC-01/04-010-tEN-Corr](#), 17 January 2006, para. 115.

⁵⁰ See the “Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” *supra* note 32, para. 88.

⁵¹ See the “Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua”, [No. ICC-02/17-62-Anx](#), 17 September 2019, para. 37.

such assessment,⁵² and considering the central role of victims in criminal proceedings, the Office may contribute with its views to shed light on such elements from a victims' perspective.

23. Victims who made representations before the Pre-Trial Chamber in relation to the situation in Afghanistan have overwhelmingly expressed their support to the opening of an investigation.⁵³ As the Pre-Trial Chamber itself emphasised in the Impugned Decision, *"680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth"*.⁵⁴ These individuals, victims of the crimes allegedly committed, along with their families, have a personal interest in obtaining justice and knowing the truth about the events they suffered from.⁵⁵

24. The Office has been contacted by victims and organisations representing victims, both from within and outside Afghanistan. Said victims indicated that decades of impunity in Afghanistan have showed that the interests of the powerful will always supersede their interests and their right to see those responsible held accountable for the crimes they suffered from. By opting out of an investigation of the alleged war crimes and crimes against humanity committed in Afghanistan, victims consider that the ICC – their only hope for justice – has also failed them. Victims also pointed out that the idea that the Court needs to establish criteria for prioritizing investigative, prosecutorial, and judicial resources, or even that 'likelihood of success' should be part of the equation, is particularly troubling. Indeed, it will mean their access to justice will be denied. This is particularly concerning in a situation in which hundreds of victims made clear, in their representations before the Pre-Trial Chamber, that in their view an investigation of

⁵² See the Request, *supra* note 11, para. 22.

⁵³ The Registry's Consolidated Report noted that the victims *"overwhelmingly support an investigation into all crimes against humanity and war crimes committed in Afghanistan since 1 May 2003"*. See "Annex I to the 'Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017'", *supra* note 7, para. 47.

⁵⁴ See the Impugned Decision, *supra* note 9, para. 87.

⁵⁵ See the "Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua", *supra* note 51, para. 47.

the situation in Afghanistan is necessary and could contribute to deter further violations.

2. The OPCV's duty to appear in respect of specific issues

25. In accordance with Regulation 81(4), “[t]he tasks of the Office of Public Counsel for victims shall include: [...] (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues”.⁵⁶ Said provision has been amended to reflect the relevant practice of the Court and specifies, in its revised version, that the OPCV's appearance can be triggered either upon request of the Office itself or by instructions of the Chamber. In this vein, Trial Chamber I confirmed that the opportunity for the OPCV to appear in respect of specific issues can be initiated *inter alia* by “the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability)”.⁵⁷

26. Accordingly, in the past, the Office requested and was granted leave to appear on specific issues pertaining to the general interest of victims,⁵⁸ including most recently by the Pre-Trial Chamber in relation to the Prosecutor's Request for Leave,

⁵⁶ See Regulation 81(4), [Doc. ICC-BD/01-05-16](#).

⁵⁷ See the “Decision on the role of the Office of Public Counsel for Victims and its request for access to documents” (Trial Chamber I), [No. ICC-01/04-01/06-1211](#), 6 March 2008, para. 35.

⁵⁸ See, *inter alia*, the “Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), [No. ICC-01/04-01/06-1046](#), 27 November 2007, para. 2. See also the “Order on Written Submissions on the Interpretation of Regulation 42 of the Regulations of the Court (Regulation 28 of the Regulations of the Court)” (Trial Chamber II), [No. ICC-01/04-01/07-1205](#), 12 June 2009, which *inter alia* decided on the OPCV's Request to appear filed on 20 May 2009 (“*Demande du BCPV afin d'être autorisé en vertu de la norme 81-4-b du Règlement de la Cour à comparaître devant la Chambre dans le cadre de questions spécifiques liées aux mesures de protection au bénéfice du témoin W-007*”, [No. ICC-01/04-01/07-1160](#), 20 May 2009). See also the “Decision on the ‘Proposal on victim participation in the confirmation hearing’” (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/10-229](#), 10 June 2011, which *inter alia* decided on the OPCV's Request to appear filed on 9 June 2011 (“Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' participation in the confirmation hearing”, [No. ICC-01/04-01/10-226](#), 9 June 2011), rejecting said Request arguing “that any further observations from the OPCV are unnecessary, without prejudice to the question of whether there was a valid basis for its intervention before the Chamber on this issue” (*Idem.*, p. 5); the “Decision on the OPCV's ‘Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process’” (Pre-Trial Chamber III), [No. ICC-02/11-01/11-57](#), 13 March 2012; and the “Decision on the OPCV's request to participate in the reparations proceedings” (Trial Chamber I), [No. ICC-01/04-01/06-2858](#), 5 April 2012.

which led to the present appeals proceedings.⁵⁹ In other instances, the Office appeared on specific issues having an impact on the victims' general interests directly at the request of a Chamber.⁶⁰ Said appearances reflect the binding duty of the OPCV to provide, where appropriate, assistance to victims *inter alia* by appearing before the Chamber in respect of specific issues, as required under Regulation 81(4).

27. In this regard, the Principal Counsel recalls that the reasons for the creation of the OPCV was to create an independent permanent body within the Court "*able to provide expert advice and assistance*" on victims' issues.⁶¹ The practice developed by the Court and the responsibilities vested in the OPCV by both the Chambers and the victims since the Office's inception have greatly contributed to the development of such expertise.

28. In the present case, the Principal Counsel submits that the Appeals Chamber will benefit from the OPCV's expertise in receiving informed legal submissions on the general interest of victims in relation to the matters triggered by the Prosecution's appeal arising from the Impugned Decision, and notably in respect of the First and Second Issues certified for appeal by the Pre-Trial Chamber. The impact of the Appeals Chamber's ruling on these two issues will go well beyond the proposed investigation into the situation in Afghanistan. The approach adopted by the Appeals Chamber will affect all future investigations initiated *proprio motu* by the Prosecutor pursuant to Article 15, affecting the general interests of victims as a whole and their role within the Court's legal framework. This constitutes an issue of "*general*

⁵⁹ See the "Decision on the 'Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39)", *supra* note 15.

⁶⁰ See, *inter alia*, the Transcripts of the hearing held on 30 October 2007, [No. ICC-01/04-01/06-T-58-ENG-ET WT](#), p. 13, lines 4 to 18; and the Transcripts of the hearing held on 4 December 2007, [No. ICC-01/04-01/06-T-62-ENG-ET WT](#), pp. 53 to 54.

⁶¹ In this sense see FULFORD (A.), "The role of the Office of Public Counsel for Victims in trial proceedings", in OPCV, [Helping victims make their voice heard: The Office of Public Counsel for Victims 5 years of activities](#), 2010, pp. 4-5.

importance and applicability”,⁶² which was indeed the very scenario envisaged by the drafters in bestowing upon the OPCV a duty to appear under regulation 81(4).

29. Consequently, the Principal Counsel submits that permitting the OPCV to appear before the Appeals Chamber on the First and Second Issues, will contribute to protecting the victims’ fundamental rights to truth and justice in the upcoming appeals proceedings, as well as in any future proceedings related to the opening of an investigation and to the relevant assessment of the notion of ‘interests of justice’.

30. Furthermore, the Principal Counsel posits that the intervention of the OPCV is also justified in light of its previous appearance before the Pre-Trial Chamber in relation to the Prosecutor’s Request for Leave, which led to the present appeals proceedings.⁶³ The Pre-Trial Chamber, in granting the Office’s request for leave to appear, confirmed that *“in light of the nature and complexity of the issues at stakes”* it considered that *“receiving additional submissions may assist the Chamber in determining the Prosecutor’s Request”*.⁶⁴ The Principal Counsel submits that the same considerations apply to the present appeal proceedings.

⁶² See the “Decision on the role of the Office of Public Counsel for Victims and its request for access to documents” (Trial Chamber I), [No. ICC-01/04-01/06-1211](#), 6 March 2008, para. 35

⁶³ See the “Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, *supra* note 12 and the “Submissions in the general interest of the Victims on the Prosecution’s Request for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (ICC-02/17-34)”, *supra* note 18.

⁶⁴ See the “Decision on the ‘Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan’ (ICC-02/17-35) and on the ‘Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ (ICC-02/17-39)”, *supra* note 15, para. 7.

IV. CONCLUSION

31. For the foregoing reasons, the Principal Counsel of the OPCV respectfully requests the Appeals Chamber to be allowed to appear on the First Issue and Second Issue subject to appeal, both of which directly affect the victims' rights and interests, by filing written submissions not exceeding 35 pages, within a deadline established by the Appeals Chamber.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 20th day of September 2019

At The Hague, The Netherlands