

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/17  
Date: **27 June 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**

**Information concerning the Request Seeking Leave to File *Amicus Curiae*  
Submissions on Behalf of Human Rights Organizations in Afghanistan  
(ICC-02/17-55 OA OA2 OA3)**

**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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**Unrepresented Victims**

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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

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**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. PROCEDURAL BACKGROUND

1. On 20 November 2017, the Prosecutor submitted the “Request for authorisation of an investigation pursuant to article 15”, together with 14 annexes, seeking authorisation to commence an investigation in the Situation in the Islamic Republic of Afghanistan.<sup>1</sup>

2. On 12 April 2019, the Chamber 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”, rejecting the Prosecution Request (the “Impugned Decision”).<sup>2</sup>

3. On 7 June 2019, the Prosecution filed the “Request for leave to appeal the Article 15 Decision” (the “Request for Leave to Appeal”) before Pre-Trial Chamber II pursuant to article 82(1)(d) of the Statute.<sup>3</sup>

4. On 10 June 2019, various human rights organisations (the “*Amicus Curiae* Organisations”) filed the “Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan” (the “First Request”).<sup>4</sup>

5. On the same day, the Office of Public Counsel for Victims (the “OPCV” or the “Office”) filed the “Request to appear before the Chamber pursuant to

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<sup>1</sup> 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, para. 376.

<sup>2</sup> 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”).

<sup>3</sup> 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 for Leave to Appeal”).

<sup>4</sup> 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.

regulation 81(4)(b) of the Regulations of the Court” (the “OPCV Request”)<sup>5</sup> requesting leave “to appear before the Pre-Trial Chamber in order to represent the general interest of the victims which is affected by the decision of the Chamber not to authorise the opening of an investigation, as well as by the issues identified by the Prosecution in its request for leave to appeal”.<sup>6</sup>

6. On 12 June 2019, Pre-Trial Chamber II issued 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)”,<sup>7</sup> granting both the First Request and the OPCV Request.

7. On 24 June 2019, the Appeals Chamber issued the “Order suspending the time limit for the filing of an appeal brief and on related matters”,<sup>8</sup> noting the appeals against the Impugned Decision filed pursuant to article 82(1)(a) of the Statute by groups of victims and individual victims and extending the time limit for the filing of appeals briefs in those proceedings until ten days after the notification of Pre-Trial Chamber II’s decision on the pending requests pursuant to article 82(1)(d).

8. On 25 June 2019, the *Amicus Curiae* Organisations filed the “Request Seeking Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan” (the “Second Request”),<sup>9</sup> requesting leave to make submissions as *amicus curiae* before the Appeals Chamber.

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<sup>5</sup> 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 (the “OPCV Request”).

<sup>6</sup> See the OPCV Request, *supra* note 5, para. 1.

<sup>7</sup> 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)”, [No. ICC-02/17-43](#), 12 June 2019.

<sup>8</sup> See the “Order suspending the time limit for the filing of an appeal brief and on related matters”, [No. ICC-02/17-54](#), 24 June 2019.

<sup>9</sup> See 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 (the “Second Request”).

9. Considering that the Second Request directly and publicly touches upon the mandate of the OPCV, the Principal Counsel deems it necessary to provide the Appeals Chamber with the present information to clarify the scope of the OPCV's mandate and its involvement in the situation in the Islamic Republic of Afghanistan to date.

## II. INFORMATION ON THE REQUEST FOR LEAVE TO FILE *AMICUS CURIAE* SUBMISSIONS

10. The Principal Counsel notes that, in the Second Request, the *Amicus Curiae* Organisations seek leave to make submissions before the Appeals Chamber on matters including the “*flawed process by which Afghan victims and Afghan society were heard on issues relevant to Pre-Trial Chamber II’s article 53(1)(c) determination*”.<sup>10</sup> In particular, the *Amicus Curiae* Organisations aver that:

*“The proposed submissions will detail how flawed outreach by the Registry, namely the Victims Participation and Reparations Section and the Office of Public Counsel for Victims, meant that Afghan victims and Afghan society did not have the opportunity to genuinely contribute to the issues underlying the Decision and resulted in Pre-Trial Chamber II’s erroneous understanding of their interests”.*<sup>11</sup>

11. As clarified in regulation 81 of the Regulations of the Court, the OPCV is primarily mandated to provide victims with legal assistance and representation.<sup>12</sup> The OPCV is not competent to carry out outreach activities with respect to victims

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<sup>10</sup> See the Second Request, *supra* note 9, para. 2.

<sup>11</sup> *Idem*, para. 7.

<sup>12</sup> Regulation 81(4) of the [Regulations of the Court](#) lists the following tasks of the OPCV: “(a) Providing general support and assistance to the legal representative of victims and to victims, including legal research and advice and, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case; (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues; (c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims’ applications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed; (d) Acting when appointed under regulation 73 or regulation 80; and (e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice”.

and affected communities, as said activities pertain to the mandate of other sections of the Court.<sup>13</sup>

12. The Principal Counsel notes that, in some instances, the OPCV has been appointed by Pre-Trial Chambers to convey the views of victims and represent their interests in judicial proceedings arising from preliminary examinations,<sup>14</sup> as well as in those concerning challenges to the jurisdiction of the Court or the admissibility of specific cases.<sup>15</sup>

13. However, this was not the case in the context of the Prosecutor's request for authorisation to commence an investigation in the situation in the Islamic Republic of Afghanistan. As such, the OPCV was not involved in the proceedings concerning said situation which led to the adoption of the Impugned Decision by Pre-Trial Chamber II on 12 April 2019.

14. Following the Impugned Decision, and the Prosecutor's Request for Leave to Appeal, the OPCV requested to appear before the Pre-Trial Chamber in accordance with regulation 81(4) of the Regulations of the Court in order to represent the general interest of victims.<sup>16</sup> The Pre-Trial Chamber granted the OPCV Request on 12 June 2019, and it is only from that date that the Office was mandated to represent the general interests of victims in the situation in the Islamic Republic of Afghanistan.

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<sup>13</sup> See regulation 5*bis* of the [Regulations of the Registry](#).

<sup>14</sup> See *inter alia* the "Decision on the Victims' Participation in the Situation" (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, para. 17 and the "Decision on the Requests for Withdrawal of the Legal Representative of Victims pursuant to Regulation 82 of the Regulations of the Court" (Pre-Trial Chamber I), [No. ICC-01/13-54](#), 26 September 2016.

<sup>15</sup> See *inter alia* the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-134](#), 4 May 2012, para. 13; the "Decision on the conduct of the proceedings following Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (Pre-Trial Chamber I), [No. ICC-02/11-01/12](#), para. 10; and the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), [No. ICC-02/04-101](#), 10 August 2007.

<sup>16</sup> See the OPCV Request, *supra* note 5.

15. The Principal Counsel therefore rejects the *Amicus Curiae* Organisations' assertion that the OPCV is responsible for allegedly "*flawed outreach*" towards Afghan victims.<sup>17</sup> To the contrary, the actions undertaken by the Office indicate its constant dedication to the victims' cause and its continuous efforts to enhance an effective and meaningful participation of victims in the different proceedings before the Court. The Principal Counsel regrets that, despite repeated attempts, she has been unable to make contact with the *Amicus Curiae* Organisations to clarify these matters prior to the filing of the Second Request.

16. Accordingly, without addressing the issue of the *Amicus Curiae* Organisations' standing to make the proposed submissions, the Principal Counsel of the OPCV posits that the Second Request should be dismissed *in limine* to the extent it is based on a fundamental misunderstanding of the OPCV's mandate and its involvement in the situation in the Islamic Republic of Afghanistan to date.



**Paolina Massidda**  
**Principal Counsel**

Dated this 27<sup>th</sup> day of June 2019

At The Hague, The Netherlands

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<sup>17</sup> The Principal Counsel notes that, according to the Impugned Decision, "A high number of victims of the situation have come forward to present their views on whether the Chamber should authorise the commencement of the Prosecutor's investigation into the situation. Overall, the Court has received a total of 794 representations in Dari and Pashto, as well as Arabic, English and German of which 699 were transmitted to the Pre-Trial Chamber on behalf of the following victims: 668 representations on behalf of 6,220 individuals; 17 representations on behalf of 1,690 families; 13 representations on behalf of several millions of victims, including 26 villages; and 1 representation on behalf of an institution". See the Impugned Decision, *supra* note 2, para. 27 (references omitted).