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No.: ICC-02/17

Date: 14 October 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 for leave to file observations in the Appeal on 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'

Source: Queen's University Belfast Human Rights Centre

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Legal Representatives of the Victims

Mr Fergal Gaynor

Ms Nada Kiswanson van Hooydonk

Ms Katherine Gallagher

Ms Margaret L. Satterthwaite

Ms Nancy Hollander Mr Mikołaj Pietrzak

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**Applicants to participate as Amicus
Curiae**

Spojmie Nasiri

Dimitris Christopoulos

REGISTRY

Registrar

Mr Peter Lewis

1. On the 12 April 2019 the Pre-Trial Chamber rejected the Prosecutor's request for authorising an investigation under Article 15(3) into the situation in Afghanistan.¹ On the 7 June 2019 the Office of the Prosecutor requested leave to appeal the decision of the Pre-Trial Chamber,² and on the 10 June 2019 the Legal Representatives of the Victims gave notice of their appeal.³
2. Queen's University Belfast's Human Rights Centre (HRC) requests leave to file observations in light of the Appeals Chamber's call for 'professors of criminal procedure and/or international law, including international human rights law' to file observations on the distinct legal issues highlighted by the Appeals Chamber.⁴
3. The HRC is a group of professors, practitioners and scholars working on criminal procedure, international law, and international human rights law. The HRC has provided research and evidence to a range of national, regional and international courts as well as governments around the world on related issues of the obligation to prosecution, the interests of justice, amnesties and victims' rights.
4. In responding to the distinct legal issues highlighted by the Appeals Chamber we will situate our observations in light of human rights jurisprudence and transitional justice practice. This perspective appreciates that while the International Criminal Court is not a human rights court, its application and interpretation of the statute and rules of the Court 'must be consistent with internationally recognized human rights'.⁵ We are also cognisant of the feasibility

¹ '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.

² 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, 7 June 2019.

³ 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', ICC-02/17-36, 10 June 2019.

⁴ Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019, para.21.

⁵ Article 21(3), Rome Statute.

of achieving justice in countries in ongoing conflicts, the margin of appreciation that is nuanced in such human rights jurisprudence and state practice in transitional societies, which can inform the substance of the 'interests of justice'.

5. Our submission will address two issues. First it will focus on the substantive and procedural content of the interests of justice as decided in the impugned Pre-Trial Chamber decision. We will address the issues of historic investigations (time lapse), preserving evidence, and incentivising cooperation from alleged perpetrators and states. This will be placed on the broader background of obligations to investigate and prosecute international crimes under international law, in particular international human rights law and relevant jurisprudence. Second our observations will address the role of victims in such determinations at the investigative stage. As the Pre-Trial Chamber has noted, 680 of the 699 victim representations it has received have been supportive of an investigation at the ICC.⁶ We will also outline how the interests of victims fit within the interests of justice. While the victims' leave for appeal outlines the broad contours of the relevant position of the court and human rights jurisprudence,⁷ our submission will provide more analysis of the content of such jurisprudence and its procedural implications for investigations and related decision-making processes.



Signed by Luke Moffett,
Director of the Queen's University Belfast Human Rights Centre

14th October 2019.
At Belfast.

⁶ ICC-02/17-33, para.87.

⁷ ICC-02/17-36, paras.23-46.