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Pénale
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**International
Criminal
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PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Corrected version of “Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”

Source: Armanshahr/OPEN ASIA, International Federation for Human Rights (FIDH), Afghanistan-Transitional Justice Coordination Group (TJCG)

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

to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Fergal Gaynor

Nada Kiswanson van Hooydonk

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The International Federation for Human Rights (“FIDH”), Armanshahr/OPEN ASIA, and the Transitional Justice Coordination Group-Afghanistan (“TJCG”) (collectively “the Applicants”) request Pre-Trial Chamber II (the “Chamber”) for leave to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”) in the Situation in the Islamic Republic of Afghanistan (“Afghanistan”).
2. Afghanistan has experienced several decades of war, marked by successive and uninterrupted phases of conflict since 1978, marking its transformation from a stable and peaceful country into a volatile society struggling to rebuild collapsed state institutions. Afghanistan has become a country in which core human rights values have been replaced by a culture of violence, gross human rights violations and impunity.¹
3. FIDH, an international human rights NGO created in 1922, is made up of a federation of 184 organisations from 112 countries, including Afghanistan. FIDH has been working closely with its member and partner organisations based in Afghanistan, including Armanshahr/OPEN ASIA and the TJCG. Armanshahr/OPEN ASIA is an independent organisation founded in 1996 active in Afghanistan since 2005, committed to a holistic approach and women’s agency as key components in supporting transitional justice processes, as characterized by the extreme fragility of the post-Taliban context. TJCG is a coalition of 20 organizations and human rights activists, formed in 2009 with the aim of strengthening advocacy and strategic coordination between organizations involved in transitional justice in Afghanistan. Since its inception, the group has been active and outspoken on transitional justice issues, and has dedicated itself to raising the voices of Afghanistan’s victims of war and oppression.

¹ See report by Armanshahr/Open Asia, ‘How and why truth and justice have been kept off the agenda: A review of transitional justice in Afghanistan, available at: <https://openasia.org/en/g/wp-content/uploads/2016/04/FULL-REPORT-NOV-2016.pdf>

4. This request is made in relation to the ‘Prosecution 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” (“Prosecution Request for Leave to Appeal”),’² 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” (“Victims’ Request for Leave to Appeal”)³ and the Prosecution “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber)” (“Prosecution Observations”).⁴
5. It is submitted by the Applicants that the issues presented by the Prosecutor in the Prosecution Request for Leave to Appeal are meritorious and deserve the benefit of appellate review. The Applicants intend to provide the Chamber with submissions aimed at assisting their determination of whether the Prosecution Request for Leave to Appeal should be granted in accordance with article 82(1)(d) of the Statute.
6. In particular, the Applicants seek to provide the Chamber with *amicus curiae* submissions on two of the three issues the Prosecutor is seeking to appeal, namely:
 - a) The exercise of the Pre-Trial Chamber’s discretion to review a decision of the Prosecutor to proceed with an investigation by applying the ‘interests of justice’ test;
 - b) The Chamber’s interpretation of articles 15(4) and 53(1)(c) of the Statute, with regard to the assessment of the ‘interests of justice’.
7. In relation to the Prosecution Observations, the Applicants aim to assist the Chamber with its evaluation of these observations. In particular, the Applicants seek to provide their interpretation of whether victims have standing as a “party”, enabling them to trigger appellate proceedings under article 82(1)(d) of the Statute.

² ICC-02/17-34.

³ 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”, 10 June 2019, ICC-02/17-37.

⁴ ICC-02/17-42 12-06-2019.

8. In the event that the Pre-Trial Chamber would grant this request for leave to submit observations pursuant to Rule 103 of the RPE, the Applicants are ready to submit their *Amicus Curiae* brief no later than 12 July 2019.⁵

II. PROCEDURAL HISTORY

9. On 30 October 2017, the Prosecutor informed the Presidency of the International Criminal Court (“ICC”) of her decision to request judicial authorisation to commence an investigation in the situation in Afghanistan, pursuant to regulation 45 of the Regulations of the Court (“Regulations”).⁶
10. On 9 November 2017, Pre-Trial Chamber III issued its “Order to the Victims Participation and Reparations Section Concerning Victims’ Representations”, where it ordered the Victims Participation and Reparations Section (“VPRS”) to facilitate the collection of victim representations pursuant to article 15(3) of the Rome Statute of the International Criminal Court (“Statute”).⁷
11. On 20 November 2017, the Prosecutor formally requested authorisation from Pre-Trial Chamber III to proceed with an investigation of the situation in Afghanistan in the period since 1 July 2002, pursuant to article 15(3) of the Rome Statute.⁸
12. On 20 February 2018, the Registry transmitted 699 victim representations to the Chamber.⁹ 6,220 representations were submitted by individual victims, amongst these representations, 17 forms were submitted on behalf of 1,690 families.¹⁰ A further 12 representations were submitted by individuals and organisations on behalf of

⁵Pre-Trial Chamber II granted several *Amicus Curiae* Organisations and the OPCV until 12 July 2019 to file their written submissions in response to their respective requests. In the case that this Request is granted, the Applicants are more than able to submit their written submissions within the same time-frame. See “Decision on the ‘Request for Leave to File *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan’ (ICC-01/17-35) 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), 12 June 2019, ICC-02/17-43.

⁶Annex 1, ICC-02/17-1, 9 November 2017.

⁷Order to the Victims Participation and Reparations Section Concerning Victims’ Representations, 9 November 2017, ICC-02/17-6 09-11-2017.

⁸Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red, 20 November 2017.

⁹Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017, ICC-02/17-29, 20 February 2018.

¹⁰Annex 1, Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017, ICC-02/17-29-AnxI-Red, para. 28.

approximately 1,163,950 victims and 26 villages. Furthermore, one representation was submitted by an organisation on behalf of 7-9 million people.¹¹ In 680 of the 699 victim representations, it was indicated that victims wanted the Prosecutor to investigate the violence associated with the conflict in Afghanistan.¹²

13. On 12 April 2019, Pre-Trial Chamber II issued its “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (“Decision on Authorisation”)¹³ where it decided that an investigation into the situation in Afghanistan “would not serve the interests of justice.”¹⁴
14. On 31 May 2019, Presiding Judge Antoine Kesia-Mbe Mindua issued his separate and concurring opinion to the Decision on Authorisation.¹⁵
15. On 7 June 2019, the Office of the Prosecutor sought leave to appeal three issues arising from the Decision on Authorisation, namely: the Pre-Trial Chamber’s interpretation of articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice (“Issue 1”); the exercise of the Pre-Trial Chamber’s discretion under those provisions (“Issue 2”); and the Pre-Trial Chamber’s understanding of the scope of any investigation it may authorise, in light of article 15 and other material provisions of the Statute (“Issue 3”).¹⁶
16. On 10 June 2019, Victims’ Legal Representatives submitted their “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’”, where they stated that the Decision on Authorisation is ‘highly

¹¹Para. 29, ICC-02/17-29-AnxI-Red.

¹²Para.39, ICC-02/17-29-AnxI-Red.

¹³Decision 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, Pre-Trial Chamber II, ICC-02/17.

¹⁴Decision on Authorisation, p. 32.

¹⁵Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx, para.3.

¹⁶Request 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” (“Prosecution Request for Leave to Appeal”), 7 June 2019, ICC-02/17-34.

detrimental to the Victims' rights.¹⁷ The Victims' set forth six proposed issues for appeal, namely: whether the Pre-Trial Chamber has jurisdiction to review the Prosecutor's assessment of the 'interests of justice', after the Prosecutor has determined that there is a reasonable basis to proceed with an investigation ("Issue 1"); whether the Pre-Trial Chamber may consider the extent of cooperation that the Prosecution has received from a State Party during a preliminary examination, before the duty to cooperate under Part 9 of the Statute has been fully triggered, in deciding whether to authorize an investigation ("Issue 2"); whether the Pre-Trial Chamber may deny a request for authorisation to investigate on the basis that it believes that the investigation is unfeasible ("Issue 3"); whether the Pre-Trial Chamber may restrict the scope of the investigation to incidents specifically mentioned in the Prosecution's request, as well as those 'comprised within the authorization's geographical, temporal, and contextual scope, or closely linked to it', as opposed to authorizing an investigation into all crimes within the Court's jurisdiction arising in the situation, including those committed after authorisation of investigation ("Issue 4"); whether the Pre-Trial Chamber may deny a request for authorisation on the basis that it believes that the Prosecutor should allocate its resources to other preliminary investigations or cases which have 'more realistic prospects to lead to trials' ("Issue 5"); and whether, for the Court to exercise jurisdiction over the war crimes of torture, cruel treatment and inhumane treatment, it is necessary that the infliction of severe physical or mental pain took place in part on the territory of a State Party, and whether the victim must have been captured within the borders of the State in which the armed conflict is taking place ("Issue 6").

17. On 12 June 2019, the Prosecution submitted its "Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber)".¹⁸

¹⁷Victims' 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", 10 June 2019, ICC-02/17-37, para.4.

¹⁸ ICC-02/17-42 12-06-2019.

III. APPLICABLE LAW

18. Rule 103(1) of the RPE provides that “[A]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue the Chamber deems appropriate.”
19. The RPE foresee that unsolicited applications can be submitted by States, organisations, or individuals interested in addressing issues of consequence to the proceedings.
20. Pre-Trial Chambers, in deciding on a submission, have applied “the proper determination test” to various cases, including by the Appeals Chamber granting a leave for *Amicus Curiae* submissions in the case against Thomas Lubanga.¹⁹ Pre-Trial Chamber II has espoused an “exceptional basis test” where the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations provide specific expertise on specific topics.²⁰
21. More recently, the Appeals Chamber has allowed *amicus curiae* submissions as long as they were “desirable for the proper determination of the case” and in cases where the novelty of the issues raised could benefit from *amicus curiae* submissions.²¹
22. The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone (“SCSL”), and the Extraordinary Chambers in the Courts of Cambodia have provisions equivalent to rule

¹⁹Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, Case No. ICC-01/04- 01/06 OA 11, 22 April 2008, para. 7-8.

²⁰Pre-Trial Chamber II, “Decision on the Application by the Redress Trust to Submit Amicus Curiae Observations”, 18 February 2014, ICC-01/04-02/06-259, Pre-Trial Chamber II, “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as *Amicus Curiae*’”, 12 April 2011, ICC-01/09-01/11-49, para. 14; Pre-Trial Chamber II, “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as Amicus Curiae’”, 12 April 2011, ICC-01/09- 02/11-54, para. 15; Pre-Trial Chamber II, “Decision on the ‘Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 11 May 2011, ICC-01/09-01/11-84, para. 8; Pre-Trial Chamber II, “Decision on the ‘Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 11 May 2011, ICC-01/09-02/11-87, para. 8.

²¹*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the “Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence” 13 September 2013, para.10.

103(1) and have permitted third party interventions using a rationale similar to the ICC.²²

23. In their determinations, these tribunals considered whether *amicus curiae* submissions would assist the court in achieving “the end of justice”.²³

24. The International Court of Justice (“ICJ”) permits the appearance of *amicus curiae* in both contentious and advisory proceedings.²⁴ The European Court of Human Rights (“ECtHR”) accepts *amicus curiae* submissions ‘in the interest of the proper administration of justice’ to any person concerned other than the applicant.²⁵

25. At the SCSL, the Appeals Chamber has observed that the intervening party may have an interest in the issue where the decision ‘will be likely to create a precedent affecting [it] in the future’, or where a ‘State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way’.²⁶

IV. SUBMISSIONS

*The Applicants proposed submissions will assist in the Chamber’s determination to certify the Prosecutor’s first issue*²⁷

26. The Applicants submit that given the unusual manner²⁸ in which the Chamber sought to review the Prosecutor’s assessment of ‘the interests of justice’ after the Prosecutor

²²ICTY Rules of Procedure and Evidence, Rule 74; ICTR Rules of Procedure and Evidence, Rule 74; SCSL Rules of Procedure and Evidence, Rule 74; ECCC Internal Rules, Rule 33.

²³See for example *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, “Order Granting Leave for Amicus Curiae to Appear”, 12 February 1998.

²⁴In contentious proceedings, Article 34(2) of the Statute of the ICJ provides that the Court “subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative’. The Rules of the Court define an international organisation as ‘an international organisation of states’, so public interest organisations do not have standing in contentious proceedings: Rule 69(4). In relation to advisory opinions, standing is less restrictive: any state or “international organization” considered likely to be able to furnish information on the question will be notified by the Registrar “that the Court will be prepared to receive . . . written statements, or to hear, at a public sitting to be held for the purpose, oral statement relating to the question”: Art 66(4) Statute of the ICJ.

²⁵Rule 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of *amicus* briefs.)

²⁶*Prosecutor v Kallon* ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *Amicus Curiae* brief and to Present Oral Arguments’ SCSL-2003-07, 1 November 2003 (SCSL) at para 4.

²⁷ The Legal Representatives for Victims first issue for consideration is identical to that of the Prosecution.

²⁸For instance, the Decision on Authorisation represents a clear departure from established practice before the Court, whereby the Prosecutor does not need to prove that an investigation would be in the interests of justice. See for example, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the

had determined that there was a reasonable basis to proceed with an investigation, it is important to allow Organisations such as the Applicants to assist the Chamber on its determination of this matter as it is likely to create a precedent which will affect future investigations under the Court's jurisdiction under article 15 of the Statute.

27. In the Decision on Authorisation, the Pre-Trial Chamber determined that despite the fact that both jurisdictional and admissibility requirements were satisfied, it was mandated to determine, in accordance with article 53(1)(c) of the Statute, 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."²⁹
28. Jurisprudence before this Court has established that when conducting an assessment under article 15(4) of the Statute, the dual components of jurisdiction and admissibility need to be positively established.³⁰ Nonetheless, as the wording of article 53(1)(c) suggests an investigation is presumed to be in the interests of justice unless the Prosecutor finds "substantial reasons" to the contrary. Therefore, the Statute's text and the Court's jurisprudence demonstrate that the Pre-Trial Chamber has no authority to take up the issue on its own volition, when the Prosecutor has raised no arguments to the contrary.
29. The Applicants concur with the Prosecutor that a proper interpretation of the application of articles 15(4) and 53(1)(c) is warranted given the constitutional importance of the principle of 'the interests of justice'³¹ and its unprecedented application in the current situation.
30. Given the ripple effect that the Decision on Authorisation may have on future investigations carried out under article 15 of the Statute and its clear departure from the established jurisprudence before this Court, the Applicants submit that any lack of

Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para.63; Côte d'Ivoire, ICC-02/11-14-Corr, paras 207-208; Georgia, ICC-01/15-12, para.58; Burundi, ICC-01/17-9-Red, para.190.

²⁹Para. 87, Decision on Authorisation.

³⁰Para. 63, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr.

³¹Prosecution Request for Leave to Appeal, para.12.

clarity should be rectified by the Appeals Chamber, as requested by the Prosecutor and the Legal Representatives for Victims in their respective filings.

31. The Applicants submit that given their collective experience in engaging with local civil society organisations, victims' groups, and organs of the ICC across numerous situation countries, they are well placed to engage with the Chamber on this issue.
32. Armanshahr/Open Asia and TJCG are members of the Coalition for the International Criminal Court ("CICC") and have engaged with the Court since the commencement preliminary examination in Afghanistan. Both Organisations have offered their knowledge of the local context to the Court in various capacities and assisted in the facilitation of victim representations to the VPRS. They have regularly provided updates, advocated for accountability and relayed demands for justice to the Government of Afghanistan, the EU and its Member States, donors, and the UN Assistance Mission in Afghanistan ("UNAMA").³²
33. FIDH's work on justice and accountability in countries under preliminary examination such as Ukraine, Palestine, Colombia, Venezuela, the Philippines, Myanmar/Bangladesh and Guinea, amongst others, will inform any submissions made on this matter.

In respect of the Second Issue for which the Prosecution³³ seeks leave to appeal, the Applicants are uniquely placed to provide input on the factors that should be taken into account when making an assessment of 'the interests of justice' which would assist in the framing of this issue for appeal

34. The Pre-Trial Chamber, in considering the "interests of justice", took into account a number of factors: the lengthy period which the preliminary examination has taken, state cooperation, the availability of evidence and surrender of potential suspects, and budgetary considerations.³⁴ Judge Mindua, in his separate and concurring opinion,

³²See for example Armanshahr/OPEN ASIA letter signed by 28 organisations addressed to Navi Pillay, UN Human Rights Commissioner, <http://www.bitly.fr/dde> See also para. 64, Situation of human rights in Afghanistan and technical assistance achievements in the field of human rights- Report of the United National High Commissioner for Human Rights, 21 February 2018, A/HRC/37/45.

³³Similarly, the Legal Representatives for Victims refers to this in Issues 2 and 4 of their Request.

³⁴Paras. 88-96, Decision on Authorisation.

also took into account what he considered may represent the “interests of justice”, and which factors might permissibly be taken into account.³⁵

35. With regards to budgetary considerations, nothing in the Statute or the texts of the Court addresses budgetary constraints as a reason not to open an investigation. Conclusions regarding the Prosecutor’s management of her office’s resources could be deemed to be antithetical to the independence of the Prosecutor under article 42 (2) of the Statute.
36. Arguments made by the Chamber regarding state cooperation are purely speculative at this stage of the proceedings, as State Parties have no obligation to cooperate with the Court at the preliminary-examination stage of proceedings. Furthermore, Afghan authorities have publicly stated that they would cooperate with the Court in the event that an investigation was authorised by the Chamber.³⁶
37. The Legal Representatives for Victims rightly point out, that the Chamber ‘did not refer to any specific incidents of non-cooperation’ and importantly that ‘[T]he Court is not yet at a stage at which it can conclude that Afghanistan, or any other State Party, has not yet complied with its duty to cooperate under the Statute because an investigation has not yet begun.’³⁷
38. In their representations under article 15(3) of the Statute, victims articulated that their main motivation for requesting the Prosecutor to open investigations in Afghanistan were: investigation by an impartial and respected international court; bringing the perceived perpetrators of crimes to justice; ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims’ voices to be heard; and protecting the freedom of speech and freedom of the press in Afghanistan.³⁸

³⁵Separate and concurring opinion of Judge Mindua, paras. 33-49.

³⁶See the Speech of H.E. Minister of Justice of Islamic Republic of Afghanistan at the commemoration of the 20th Anniversary of The Adoption of the Rome Statute of the International Criminal Court, 17 July 2018, available at: <https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-afghanistan-speech.pdf>

³⁷ICC-02/17-37. paras. 55-57.

³⁸Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6, 9 November 2018, ICC-02/17-29.

39. None of these considerations feature in the Pre-Trial Chamber's assessment of 'the interests of justice.'
40. In April 2019, UNAMA issued its annual report on the Protection of Civilians in Armed Conflict and found that more civilians were killed in the Afghan conflict in 2018 than any time since records have been kept. Among the dead were 927 children, the highest recorded number of boys and girls killed in the conflict during a single year.³⁹
41. The UN Secretary General's Report on the Protection of civilians in armed conflict notes that 22,800 civilians were killed in 2018 in attacks that took place in six conflict situations, including, Mali, Iraq, Somalia, South Sudan and Yemen: almost 11,000 of those civilians were killed in Afghanistan. That is almost half of all deaths recorded by the UN in the year 2018.⁴⁰
42. The Ministry of Women's Affairs of Afghanistan ("MoWA") has reported an increase in cases of gender-based violence against women, especially in areas under Taliban control. The Afghanistan Independent Human Rights Commission reports thousands of cases of violence against women and girls across the country, including beatings, killings and acid attacks and considers that women are the main victims of the armed conflict in Afghanistan.⁴¹ Cases of violence against women remain grossly under-reported due to the culture of impunity, traditional practices, stigmatization and fear of the consequences by victims.⁴²
43. Violence and conflict have been an almost constant presence for many years in Afghanistan and now internal displacement has also become a permanent feature of life. A report by the UN Special Rapporteur on internal displacement has stated that

³⁹See Afghanistan: Protection of civilians in armed conflict, Annual Report 2018, issued on February 2019, p.11, available at: https://unama.unmissions.org/sites/default/files/unama_annual_protection_of_civilians_report_2018_-_23_feb_2019_-_english.pdf

⁴⁰See UNSC Report, Protection of civilians in armed conflict, Report of the Secretary General, 7 May 2019, S/2019/373, para. 28. See also paras. 31, 35 and para.40; which highlight the number of civilians killed by explosive devices; the number of internally displaced people; and the number of humanitarian workers that were killed in Afghanistan in 2018. Available at: https://unama.unmissions.org/sites/default/files/2019_report_of_the_secretary-general_on_protection_of_civilians_in_armed_conflict.pdf

⁴¹See AIHRC, Preliminary findings of the National Inquiry on Women, Peace and Security, 2019, <https://bit.ly/2IfnMFF>

⁴²See <https://www.amnesty.org/en/countries/asia-and-the-pacific/afghanistan/report-afghanistan/>, and MOWA <http://mowa.gov.af/fa/page/1338/pressrelease>

the ‘trends are negative and worsening.’ In 2016, more than 600,000 people in Afghanistan fled conflict to seek safety in other areas of the country.⁴³

44. The UN Committee on Torture (“CAT”) stated that it ‘remains gravely concerned about the general climate and culture of impunity in Afghanistan, as evidenced by the large number of cases of alleged human rights violations, including torture, involving senior State officials.’⁴⁴
45. The Applicants have also expressed concerns similar to the CAT regarding the National Reconciliation, General Amnesty, and National Stability Law, passed in 2007,⁴⁵ which prevents the prosecution of individuals responsible for gross human rights violations, including acts of torture, committed before December 2001. The CAT was also ‘deeply concerned about various reports alleging that perpetrators of war crimes and gross human rights violations, including acts of torture, are still holding, or have been nominated for, official executive positions, some of them in government,’⁴⁶ contributing to the general climate of impunity in Afghanistan.
46. Despite these reports and figures, the Chamber did not consider relevant factors such as ending cycles of impunity or the possibility that an ICC investigation could act as a deterrent to parties engaged in ongoing violence in Afghanistan in its ‘interests of justice’ test.
47. In 2017 Afghanistan enacted a new criminal code incorporating provisions on war crimes, crimes against humanity, genocide and the crime of aggression.⁴⁷ The opening of an investigation in Afghanistan could have arguably had had a domino effect leading to the strengthening of state institutions, enactment of relevant laws, complementarity with the Court and led to enhanced peace and security. As noted, the

⁴³Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Afghanistan, 12 April 2017, A/HRC/35/27/Add.3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/091/19/PDF/G1709119.pdf?OpenElement>

⁴⁴Committee Against Torture, Concluding observations on the second periodic report of Afghanistan, 12 June 2017, CAT/C/AFG/CO/2, para.7.

⁴⁵See ‘In Support of ICC Intervention: The TJCG Roadmap for Justice in Afghanistan’, produced by Afghanistan Human Rights and Democracy Organization (AHRDO), October 2017.

⁴⁶*Ibid.*

⁴⁷This legislation is available at: http://moj.gov.af/content/files/OfficialGazette/01201/OG_01260.pdf

Amnesty laws in place also mean that there is little prospect of domestic prosecutions for crimes that took place prior to 2001.

48. The Applicants posit that a determination of the interests of justice would inherently require the consideration of other factors than those considered by the Pre-Trial Chamber.⁴⁸ It would be important for the issue to be certified for appeal to be framed sufficiently broadly in order to encompass those possible factors.
49. The Prosecution Request for Leave to Appeal highlights that ‘neither the Prosecution nor the Pre-Trial Chamber has ever previously determined that an investigation by the Court might be contrary to the interests of justice, and as such there is no settled authority as to the factors which may properly be taken into account in that assessment.’⁴⁹
50. It is notable that the Pre-Trial Chamber did not seek the observations from the Prosecutor or from victims on the factors that would encompass an ‘interests of justice’ assessment when making its Decision on Authorisation. Given the much lauded rhetoric of victims’ rights before the ICC, it would have been incumbent on the Pre-Trial Chamber to consult not only the Prosecution, but victims as well in order to ensure that they could make their submissions on this assessment.
51. Considering the lack of settled authority as to the factors that may be taken into account in making an assessment of what is in the ‘interests of justice,’ the Applicants seek to provide the Pre-Trial Chamber with guidance on this principle from the perspective of victims, civil society actors in Afghanistan and beyond.
52. Furthermore, given the potentially wide-ranging impact of this decision, not only in Afghanistan, but in other cases under the Court’s jurisdiction, the Applicants submit it is imperative that the application and definition of the ‘interests of justice’ is developed in manner that allows all concerned parties and participants to provide their input.

⁴⁸Carsten Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, *Journal of International Criminal Justice*, Volume 3, Issue 3, July 2005, Pages 695–720, <https://doi.org/10.1093/jicj/mqi046>

⁴⁹Prosecution Request for Leave to Appeal, para.22.

53. The Applicants believe that they will be able to provide the Pre-Trial Chamber with reasoned submissions on what would constitute the ‘interests of justice’ not only from the perspective of Afghan victims of the conflict, but also from civil society actors who have engaged with the ICC across various situations and thereby assist to the development of the law in this area.
54. For example, FIDH’s work relating to justice and accountability pre-dates the inception of the Court, being amongst one of the foremost civil society organisations that advocated for the Court’s creation at the diplomatic conference in Rome in 1998. Since 2004, FIDH maintains a permanent Hague-based representation to the ICC that facilitates interaction between: organs of the Court; victims of Rome Statute crimes; and grassroots organisations working in partnership with FIDH on documentation and accountability for such crimes. FIDH also transmitted the first victim application forms in the situation in the Democratic Republic of Congo and represents victims of international crimes in Mali, Ivory Coast, the Central African Republic and Guinea before national proceedings. FIDH has also commented on numerous policies and strategies affecting victims at the ICC, including the OTP policy on the interests of justice.⁵⁰
55. In 2006 Armanshahr/OPEN ASIA conducted a multi-regional study on the needs and recommendations of war victims. In 2007, it organised the first international conference on transitional justice: “Seeking Truth and Justice in Afghanistan.” Both Armanshahr/OPEN ASIA and the TJCG convened a victims’ national conference in 2010.⁵¹
56. Together with Armanshahr/OPEN ASIA and the TJCG, FIDH continues to monitor the human rights situation in Afghanistan and has organised numerous meetings between Afghan and US civil society members and representatives of the ICC.

⁵⁰For example, FIDH provided draft comments to the OTP in relation to its Draft Policy on the ‘interests of justice’ in 2006. See https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/FIDH-Comments-on-the-OTP-draft_3987 and <https://www.fidh.org/IMG/pdf/cpi20062005f.pdf>

⁵¹See for example <https://openasia.org/en/2015/12/what-does-transitional-justice-mean-to-people-of-afghanistan/> and Armanshahr report: How and Why Truth and justice have been kept off the agenda, a review on transitional Justice in Afghanistan, <http://www.bitly.fr/ddf>

Whether victims have standing as a “party”, enabling them to trigger appellate proceedings under article 82(1)(a) and/or (d).

57. The Victims have sought to assert that victims have standing as a “party”, at this limited stage of the proceedings, which enables them to trigger appellate proceedings under article 82(1)(d).⁵²
58. The Prosecution argues that consideration of victims as a “party” in the proceedings would upset the ‘integrity’ and ‘consistency’ of the Court’s established procedures and a narrow definition of “party” ensures legal certainty and judicial economy⁵³ and that ‘the participation of victims on matters of procedure’ will ‘risk delay, inefficiency, and inconsistency.’⁵⁴
59. In the view of the Prosecution the presentation of victims’ views at this stage of the proceedings is best served through the provision of *amicus curiae* submissions and through the intervention of the Office of Public Counsel for Victims (“OPCV”) via regulation 81(4)(b).
60. The Legal Representatives for 82 victims and 2 organisations argue that ‘[T]he expression ‘either party’ is ambiguous at the pre-authorisation stage, as they are not two obvious parties.’⁵⁵ Citing a decision of Pre-Trial Chamber II where the State of Jordan was granted leave to appeal a decision in accordance with article 82(1)(d)⁵⁶, they go on to argue that ‘[J]ust as States have interests which should be respected in *exceptional* circumstances by providing an avenue to appeal under Article 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision that goes to the core of their interests.’⁵⁷
61. The Applicants are well placed to provide submissions on whether the Decision on Authorisation, whereby the rights of victims to the truth, justice and reparations were

⁵²Victims’ request for leave to appeal, paras. 20-42.

⁵³Para. 13, Prosecution Observations.

⁵⁴Para. 15, Prosecution Observations.

⁵⁵Para. 21, ICC-02/17-37.

⁵⁶Pre-Trial Chamber II, ‘Decision on Jordan’s Request for Leave to Appeal’, 21 February 2018, ICC-02/05-01/09.

⁵⁷Para. 25, ICC-02/17-37, Emphasis added.

effectively extinguished, is one such *exceptional* circumstance as argued by the Legal Representatives for Victims.

62. Furthermore, it would be absurd if, as the Prosecution suggests, the Legal Representatives for Victims, who have engaged with their clients and their respective networks in Afghanistan are unable to challenge the Decision on Authorisation in their own right, and instead have to rely on the OPCV, who can only represent them in a 'general way' and have never met with any of the victims who have participated in the article 15(3) process.

63. Despite their frequent invocation to justify the work of the Court⁵⁸, such a result would ensure that victims serve merely as a symbolic entity at the Court and limit their agency to make observations to the Court in proceedings that directly affect their interests.

64. Thus, the Applicants propose to submit their observations to the Chamber on whether victims are able to seek appellate review in exceptional circumstances and what the parameters of such exceptional circumstances will encompass. The Applicants are uniquely placed to describe, from the perspective of victims in Afghanistan, as well as through their interactions with victims in other situations under preliminary examination, what the significance is for them of the commencement of an investigation.

The Applicants' submissions are desirable for the proper determination of the case given the novelty of the issues raised

65. The Applicants contend that their submissions are desirable for the proper determination of the case given the novelty of the issues raised. The varied expertise of the Applicants necessarily means that they are uniquely placed to provide expertise of the matters that form the basis of this Request. The Applicants have engaged with the

⁵⁸For example, see a recent statement made by the OTP Prosecutor where she states that: "[E]nding impunity worldwide, through independent and impartial investigations and prosecutions, must surely become a globally shared objective, *for the sake of victims, and humanity as a whole.*" Emphasis added. Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1438>

Court and victims of mass atrocities in various capacities as briefly outlined throughout these submissions.

66. In sum, the Applicants will be able to provide the Pre-Trial Chamber a balanced assessment of the three issues that form the basis of this request for certification as *amicus curiae* and assist in the Chamber's determination of the Prosecution request for leave to appeal and on the issue of the victims' standing to present a request for leave to appeal given that these issues are "desirable for the proper determination of the case."⁵⁹

67. Furthermore, the Applicants submit that the novelty of the issues raised and their novel application are such that the Pre-Trial Chamber will benefit from *amicus curiae* submissions.⁶⁰ Indeed, "in light of the nature and complexity of the issues at stake... receiving additional submissions may assist the Chamber in determining the Prosecutor's Request."⁶¹

IV. RELIEF SOUGHT

68. The Applicants respectfully request the Chamber for leave to submit *amicus curiae* submissions on:

- a) The exercise of the Pre-Trial Chamber's discretion to review a decision of the Prosecutor to proceed with an investigation by applying the 'interests of justice' test;
- b) The Chamber's interpretation of articles 15(4) and 53(1)(c), with regard to the assessment of the 'interests of justice'.

⁵⁹*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the "Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence" 13 September 2013, para.10.

⁶⁰*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the "Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence" 13 September 2013, para.10.

⁶¹Decision 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), 12 June, 2019, ICC-02/17-43, para.7.

c) Whether victims have standing as a “party”, enabling them to trigger appellate proceedings under article 82(1) (d).

Respectfully submitted,



Dimitris Christopoulos,
President, FIDH, on behalf of the Applicants

Dated this 14th day of June 2019

At Paris, France, The Hague, the Netherlands and at Kabul, Afghanistan