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No.: ICC-02/17
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APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public with Public Annex A

**APPLICATION ON BEHALF OF FORMER INTERNATIONAL CHIEF
PROSECUTORS TO FILE OBSERVATIONS AS AMICUS CURIAE IN APPEAL
AGAINST DECISION ON THE AUTHORISATION OF AN INVESTIGATION**

Source: **Amicus curiae applicants (David M. Crane, Benjamin B. Ferencz,
Richard J. Goldstone, Carla Del Ponte, Stephen J. Rapp)**

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
 Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims
 Katherine Gallagher
 Margaret L. Satterthwaite and Nikki Reisch
 Tim Moloney QC and Megan Hirst
 Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed
 Fergal Gaynor and Nada Kiswanson van Hooydonk

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims
 Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae Representatives
 Nina H. B. Jørgensen

REGISTRY

Registrar
 Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit
 Nigel Verill, Chief

Detention Section

Victims Participation and Reparations Section
 Philipp Ambach, Chief

Other

I. INTRODUCTION

1. This application is made pursuant to the ‘Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters’ issued by the Appeals Chamber on 27 September 2019 (‘Scheduling Order’).¹ In its Scheduling Order, the Appeals Chamber invited experts in ‘criminal procedure and/or international law, including international human rights law’ to file a request for leave to submit observations on three specified legal issues.² These issues arise in the appeals brought by the Office of the Prosecutor (‘OTP’)³ and Victims⁴ 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’ issued by Pre-Trial Chamber II on 12 April 2019 (‘Impugned Decision’).⁵
2. In this application, Stephen J. Rapp, Benjamin B. Ferencz, Richard J. Goldstone, David M. Crane and Carla Del Ponte (‘applicants’) seek leave to submit observations as amici curiae on ‘the merits of the appeals filed by the Prosecutor and the victims’.⁶ The applicants are former international chief prosecutors who do not currently serve in any position at a court or investigative body in any State or multilateral organisation. The applicants’ biographies are attached to this application in **Annex A**.

II. EXPERTISE AND INTEREST OF APPLICANTS

3. The applicants have all served as chief prosecutors before ad hoc international criminal tribunals and have notable expertise in international criminal prosecutions.

¹ Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019.

² ICC-02/17-72-Corr, paras 5 and 21.

³ Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019.

⁴ Corrigendum of Updated Victims’ Appeal Brief, ICC-02/17-73-Corr, 2 October 2019; Corrigendum of Victims’ Joint Appeal Brief 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” of 30 September 2019, ICC-02/17-75, ICC-02/17-75-Corr, 1 October 2019.

⁵ 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, 12 April 2019.

⁶ ICC-02/17-72-Corr, para. 3.

Their combined experience covers the Subsequent Proceedings at Nuremberg,⁷ the International Criminal Tribunal for the former Yugoslavia (ICTY),⁸ the International Criminal Tribunal for Rwanda (ICTR)⁹ and the Special Court for Sierra Leone (SCSL).¹⁰ In their positions as chief prosecutors, the applicants helped to shape and develop international principles governing prosecutorial independence and the exercise of prosecutorial discretion. On the basis of their extensive experience in managing and overseeing complex criminal investigations in a range of country situations, and addressing alleged criminal conduct occurring at different historical junctures, they are able to offer unique insights and perspectives relevant to the merits of the current appeal.

4. The Impugned Decision raises concerns for the applicants as it appears to undermine prosecutorial independence and curtail prosecutorial discretion in a manner that backtracks on the developments in international criminal justice since Nuremberg. The applicants recognise that the Rome Statute creates a novel institutional and procedural framework and that the operational structure of the International Criminal Court differs from that of the ad hoc tribunals.¹¹ Nevertheless, the basic principles of investigative and prosecutorial independence developed in the practice of the ad hoc tribunals are of broad application. The applicants are primarily interested in preserving prosecutorial independence in international criminal proceedings and establishing and maintaining appropriate boundaries for prosecutorial discretion. The Impugned Decision tends to create a misleading impression that international prosecutors may be incapable of investigating thoroughly and expeditiously in precisely the type of transitional and evolving context

⁷ Benjamin Ferencz was Chief Prosecutor for the United States in The Einsatzgruppen Case (1947-1948).

⁸ Richard Goldstone from South Africa was the first ICTY Chief Prosecutor from 1994 to 1996. Carla Del Ponte from Switzerland served as ICTY Chief Prosecutor from 1999 to 2007.

⁹ Richard Goldstone served as ICTR Chief Prosecutor in combination with his position at the ICTY, as did Carla Del Ponte until the two roles were separated in 2003. Stephen Rapp from the United States was Chief of Prosecutions at the ICTR from 2005 to 2007.

¹⁰ David Crane from the United States was the first SCSL Chief Prosecutor from 2002 to 2005. Stephen Rapp served as SCSL Chief Prosecutor from 2007 to 2009.

¹¹ See Articles 13(c) and 15 of the Rome Statute. See also Article 53(1).

in which they are mandated to act. The applicants have an interest in repairing any harm potentially done by the Impugned Decision for the benefit of all parties and especially the victims at this early investigative stage.

III. SUMMARY OF ARGUMENT AND CONCLUSIONS

5. The applicants support the central argument of the OTP and Victims that the Pre-Trial Chamber erred in conducting an ‘interests of justice’ assessment under Articles 15(4) and 53(1)(c) of the Rome Statute and furthermore that it erred in terms of the manner in which it carried out this assessment. The applicants wish to address the fundamental issues of prosecutorial independence and the exercise of prosecutorial discretion raised by the Impugned Decision.

6. The proposed submissions may be summarised as follows:

- a. In carrying out an ‘interests of justice’ assessment, the Pre-Trial Chamber usurped the functions of the OTP and interfered unreasonably with prosecutorial discretion. Applying the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, Articles 15(4) and 53(1)(c) of the Rome Statute provide for a prosecutorial discretion to determine that an investigation would *not* serve the interests of justice. Article 53(1)(c) mentions the gravity of the crime and the interests of victims as two factors the Prosecutor should take into account in the exercise of her discretion. The decision not to proceed with an investigation is subject to a discretionary review power of the Pre-Trial Chamber. The statutory provisions do not introduce a positive obligation for the OTP to assess whether an investigation *is* in the interests of justice. The appropriate degree of control over prosecutorial discretion is already built into the statutory provisions and should not be extended through the use (and abuse) of the Pre-Trial Chamber’s own discretionary powers.
- b. In assessing whether the opening of an investigation would be in the ‘interests of justice’, the Pre-Trial Chamber stepped into the shoes of the OTP thereby undermining prosecutorial independence. The Pre-Trial Chamber failed to take

proper consideration of the stage of the proceedings and unreasonably assessed factors that were within the exclusive competence of the OTP. Moreover, the Pre-Trial Chamber failed to offer the parties an opportunity to be heard contrary to established international principles and thus purported to review an exercise of discretion without any knowledge of the OTP's reasoning. The Pre-Trial Chamber's emphasis on two factors – the time that had elapsed since the commission of some of the alleged criminal conduct and the difficulty of ensuring state cooperation – affected prosecutorial independence in both its practical and ethical domains in a manner that has potentially damaging implications for the wider project of international criminal justice.

7. The applicants conclude that the appeal should be allowed on the merits and that an investigation into the situation in Afghanistan should be authorised.

IV. REQUEST

8. The applicants respectfully seek permission to file brief written observations as amici curiae pursuant to Rule 103 of the Rules of Procedure and Evidence and to participate in the oral hearing scheduled for the 4th, 5th and 6th December 2019.



Nina H. B. Jørgensen

Counsel for amicus curiae applicants

Dated this fifteenth day of October 2019
At Southampton, UK.