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No. ICC-02/17 OA OA2 OA3 OA4

Date: 24 October 2019

THE 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 document

**Decision on the participation of *amici curiae*, the Office of Public Counsel for the
Defence and the cross-border victims**

Decision 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 Victims

Mr Fergal Gaynor
Ms Nada Kiswanson van Hooydonk

Ms Katherine Gallagher
Ms Margaret Satterthwaite
Ms Nikki Reisch
Mr Tim Moloney
Ms Megan Hirst
Ms Nancy Hollander
Mr Mikołaj Pietrzak

Mr Steven Powles
Mr Conor McCarthy

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

Amici Curiae

Ms Spojmie Nasiri
Mr Luke Moffett
Mr David J. Scheffer
Ms Jennifer Trahan
Ms Hannah R. Garry
Mr Göran Sluiter
Mr Kai Ambos
Mr Dimitris Christopoulos
Ms Lucy Claridge
Mr Gabor Rona
Mr Steven Kay
Mr Paweł Wiliński
Ms Nina H. B. Jørgensen
Mr Wayne Jordash
Mr Jay Alan Sekulow

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeals of individual victims and two organisations submitting representations on behalf of victims filed pursuant to article 82(1)(a) of the Statute, and of the Prosecutor filed pursuant to article 82(1)(d) of the Statute, in the Situation in the Islamic Republic of Afghanistan, against the decision of Pre-Trial Chamber II entitled ‘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 12 April 2019 (ICC-02/17-33),

Having before it the ‘Request to appear before the Appeals Chamber under regulation 77(4)(c) of the Regulations of the Court or, in the alternative, appoint Defence Counsel under Regulation 76 of the Regulations of the Court’ of 25 September 2019 (ICC-02/17-70),

Having before it the ‘Application on behalf of victims of cross border aerial bombardment in the Afghan conflict to make written and oral submissions’ of 11 October 2019 (ICC-02/17-77),

Having before it numerous requests to submit observations under rule 103 of the Rules of Procedure and Evidence (ICC-02/17-55; ICC-02/17-78; ICC-02/17-79; ICC-02/17-80; ICC-02/17-81; ICC-02/17-82; ICC-02/17-83; ICC-02/17-84; ICC-02/17-85; ICC-02/17-86; ICC-02/17-87; ICC-02/17-88; ICC-02/17-89; ICC-02/17-90; ICC-02/17-95),

Renders, pursuant to rules 93 and 103 of the Rules of Procedure and Evidence, the following

DECISION

1. The above-mentioned requests to submit observations under rule 103 of the Rules of Procedure and Evidence are granted.
2. The *amici curiae* are invited either to file written submissions, not exceeding 10 pages, by 16h00 on 15 November 2019, on the issues identified in their applications, or to indicate by 16h00 on 29 October 2019

that they will attend the oral hearing to be held between 4 and 6 December 2019 instead.

3. The Prosecutor and the legal representatives of appealing victims may file consolidated responses, not exceeding 30 pages, to the written observations of the *amici curiae* by 16h00 on 29 November 2019.
4. The above-mentioned request of the cross-border victims to submit observations is granted under rule 93 of the Rules of Procedure and Evidence.
5. The cross-border victims are invited to file observations, not exceeding 15 pages, on the issues identified in their application to participate by 16h00 on 15 November 2019.
6. The Prosecutor and the legal representatives of appealing victims may file consolidated responses, not exceeding 15 pages, to the written observations of the cross-border victims by 16h00 on 29 November 2019.
7. The Office of Public Counsel for the defence's request to submit observations is granted under rule 103 of the Rules of Procedure and Evidence.
8. The Office of Public Counsel for the defence is invited to file written submissions not exceeding 35 pages on the Prosecutor and victims' appeal briefs by 16h00 on 15 November 2019.
9. The Office of Public Counsel for the defence's request for access to the confidential case file is rejected.
10. The Prosecutor and the legal representatives of appealing victims may file responses, not exceeding 35 pages each, to the written observations of the OPCD by 16h00 on 29 November 2019.

REASONS

I. PROCEDURAL HISTORY

1. On 12 April 2019, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) rejected the Prosecutor’s request under article 15(3) of the Statute for authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (hereinafter: ‘Afghanistan’), deciding that ‘an investigation into the Situation in Afghanistan at this stage would not serve the interests of justice’ (the ‘Impugned Decision’).¹

2. On 10 June 2019, the legal representatives of 82 victims and two organizations in the situation in Afghanistan (‘LRV 1’), the legal representative of six victims in the situation in Afghanistan (‘LRV 2’) and the legal representatives of an individual victim (‘LRV 3’) filed notices of appeal against the Impugned Decision under article 82(1)(a) of the Statute.²

3. On 24 June 2019, LRV 1 filed an appeal brief.³

4. On 25 June 2019, the Afghanistan Human Rights and Democracy Organization, the Afghanistan Human Rights Organization, the Afghanistan Forensic Science Organization, the Feminine Solidarity for Justice Organization and the Afghan Victims’ Families Association requested leave of the Appeals Chamber to participate in the appeals as *amici curiae*.⁴

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, (the ‘Impugned Decision’) p. 32.

² [‘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; [‘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 \[sic\]”](#), ICC-02/17-38; [‘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” \(ICC-02/17-33\)’](#), ICC-02/17-40; a corrected version was registered on 12 June 2019 (ICC-02/17-40-Corr).

³ [‘Victims’ Appeal Brief’](#), 24 June 2019, ICC-02/17-53.

⁴ [‘Request Seeking Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan’](#), ICC-02/17-55, para. 2.

5. On 17 September 2019, the Pre-Trial Chamber granted, in part, the Prosecutor's request for leave to appeal the Impugned Decision under article 82(1)(d) of the Statute.⁵

6. On 25 September 2019, the Office of Public Counsel for the defence ('OPCD') requested leave to appear before the Appeals Chamber by filing written submissions not exceeding 35 pages in relation to the issues under consideration in the present appeals ('OPCD Request').⁶

7. On 26 September 2019, the Prosecutor filed a response to the OPCD Request opposing same in its entirety.⁷

8. On 27 September 2019, the Appeals Chamber issued an order in which a hearing was scheduled from 4 to 6 December 2019 to hear oral arguments on the issues arising in all the appeals.⁸ To this end, the Appeals Chamber invited interested States to submit observations and to attend the hearing.⁹ Professors of criminal procedure and/or international law, including international human rights law as well as organisations with specific legal expertise in human rights were also invited to express their interest in participating as *amici curiae* in the proceedings.¹⁰ In similar vein, the Office of Public Counsel for victims was invited pursuant to regulation 81(4)(b) of the Regulations of the Court ('Regulations') to file written submissions on the Prosecutor's and the victims' appeal briefs by 22 October 2019.¹¹

9. On 30 September 2019, LRV 1 filed an updated appeal brief.¹²

⁵ ['Decision on the Prosecutor's 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"'](#), ICC-02/17-62, p. 16. See also ['Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua'](#), ICC-02/17-62-Anx.

⁶ ['Request to appear before the Appeals Chamber under regulation 77\(4\)\(c\) of the Regulations of the Court or, in the alternative, appoint Defence Counsel under Regulation 76 of the Regulations of the Court'](#), ICC-02/17-70.

⁷ ['Prosecution's response to the request by the Office of Public Counsel for the Defence for leave to appear before the Appeals Chamber'](#), ICC-02/17-71 ('Prosecutor's Response').

⁸ ['Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters'](#), ICC-02/17-72-Corr ('Scheduling Order').

⁹ [Scheduling Order](#), pp. 3, 8.

¹⁰ [Scheduling Order](#), pp. 4, 8.

¹¹ [Scheduling Order](#), pp. 4, 9.

¹² ['Updated Victims' Appeal Brief'](#), original version filed on 30 September 2019 and corrigendum registered on 2 October 2019, ICC-02/17-73-Corr.

10. On 30 September 2019, the Prosecutor filed her appeal brief.¹³
11. On 30 September 2019, LRV 2 and LRV 3 filed a joint appeal brief.¹⁴
12. On 11 October 2019, a group of victims located in Pakistan who have been affected by drone strikes launched from Afghanistan whose position was not included in the Prosecutor's request for authorisation of an investigation (the 'Cross-border Victims') applied for leave to make submissions.¹⁵
13. On 14 October 2019, Queen's University Belfast's Human Rights Centre requested leave to file observations under rule 103 of the Rules of Procedure and Evidence ('Rules').¹⁶
14. On 15 October 2019, Professor David J. Scheffer (*Mayer Brown/Robert A. Helman Professor of Law at Northwestern University Pritzker School of Law in Chicago*) requested leave to file observations under rule 103 of the Rules.¹⁷
15. On 15 October 2019, Professor Jennifer Trahan (*Clinical Professor at NYU's Center for Global Affairs*) requested leave to file observations under rule 103 of the Rules on the merits of the appeal.¹⁸
16. On 15 October 2019, Professor Hannah R. Garry (*University of Southern California Gould School of Law*), on behalf of former UN Special Rapporteurs, Professor Pablo De Greiff (*Senior Fellow and Director of the Transitional Justice Program at the Center for Human Rights and Global Justice at New York University School of Law, former UN Special Rapporteur on the Promotion of Truth, Justice,*

¹³ ['Prosecution Appeal Brief'](#), 30 September 2019, ICC-02/17-74.

¹⁴ ['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"](#), original version filed on 30 September 2019 and corrigendum registered on 1 October 2019, ICC-02/17-75-Corr.

¹⁵ ['Application on behalf of victims of cross border aerial bombardment in the Afghan conflict to make written and oral submissions'](#), ICC-02/17-77 ('Application of Cross-border Victims'), paras 4-6.

¹⁶ ['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"'](#), ICC-02/17-78.

¹⁷ ['Request for Leave to File Amicus Curiae Submission on Behalf of David J. Scheffer'](#), ICC-02/17-79.

¹⁸ ['Request by Professor Jennifer Trahan for leave to submit observations on the legal questions presented regarding Pre-Trial Chamber II's "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 12 April 2019'](#), ICC-02/17-80.

Reparation and Guarantees of Non-Recurrence and current UN Rapporteur for the Human Rights Council Experts' Group on Prevention), Professor Juan E. Méndez (*Professor of Human Rights Law in Residence and Faculty Director of the Anti-Torture Initiative, Center for Human Rights and Humanitarian Law, at the American University Washington College of Law, and former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*) and Professor Manfred Nowak (*Professor of International Law and Human Rights at the University of Vienna and former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*) requested leave to file observations under rule 103 of the Rules.¹⁹

17. On 15 October 2019, Ms Kate Mackintosh (*Executive Director of the Promise Institute for Human Rights, University of California Los Angeles School of Law*) and Professor Göran Sluiter (*Professor of International Criminal Law at the University of Amsterdam and Professor of criminal law and procedure at the Open University*) requested leave to file observations under rule 103 of the Rules.²⁰

18. On 15 October 2019, Professor Kai Ambos (*Chair of Criminal Law, Criminal Procedure, Comparative Law, International Criminal Law and International Law at the Georg-August University of Göttingen, Germany; Judge at the Kosovo Specialist Chambers; and Dr. Alexander Heinze (Assistant Professor at the University of Göttingen School of Law, Department of Foreign and International Criminal Law)*) requested leave to file observations under rule 103 of the Rules.²¹

19. On 15 October 2019, the following human rights organisations requested leave to file observations under rule 103 of the Rules: Armanshahr/OPEN ASIA, International Federation for Human Rights, Afghanistan-Transitional Justice Coordination Group, European Center for Constitutional and Human Rights, Human

¹⁹ [Request of Former UN Special Rapporteurs for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), ICC-02/17-81.

²⁰ [Request by Kate Mackintosh and Göran Sluiter for Leave to Submit Observations](#), ICC-02/17-82.

²¹ [Request for Leave to Submit Amicus Curiae Observations in the Proceedings Relating to the Appeals Filed 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 on the 12 April 2019 \(ICC-02/17-33\) and Pursuant to 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters' issued on 27 September 2019 \(ICC-02/17-72-Corr\)](#), dated 14 October and filed on 15 October 2019, ICC-02/17-83.

Rights Watch, No Peace Without Justice, The Center for Justice & Accountability, REDRESS, and Women’s Initiatives for Gender Justice requested leave to file observations under rule 103 of the Rules.²²

20. On 15 October 2019, Amnesty International requested leave to file observations under rule 103 of the Rules.²³

21. On 15 October 2019, Professor Gabor Rona (*Professor of Practice at Cardozo Law School in New York and lecturer at Columbia Law School in New York*) requested leave to file observations under rule 103 of the Rules.²⁴

22. On 15 October 2019, the Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, The Lawfare Project, and UK Lawyers for Israel requested leave to file observations under rule 103 of the Rules.²⁵

23. On 15 October 2019, Professor Paweł Wiliński (*Professor of Criminal Procedure at Adam Mickiewicz University, Poznań, Poland*) requested leave to file observations under rule 103 of the Rules.²⁶

24. On 15 October 2019, former chief prosecutors of *ad hoc* international criminal tribunals, Professor David M. Crane, Mr Benjamin B. Ferencz, Mr Richard J. Goldstone, Ms Carla Del Ponte, and Mr Stephen J. Rapp, requested leave to file observations under rule 103 of the Rules.²⁷

²² [Request for Leave to Submit Amicus Curiae Observations Pursuant to “Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters”](#), ICC-02/17-84.

²³ [Application for leave to submit *amicus curiae* observations](#), ICC-02/17-85.

²⁴ [Request of Professor Gabor Rona for leave to file observations, pursuant to Paragraph 21 of the Scheduling Order of 27 September 2019, 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”](#), dated 14 October and filed on 15 October 2019, ICC-02/17-86.

²⁵ [Request for Leave to Submit Observations on behalf of Human Rights Organisations](#), ICC-02/17-87; [Annex to Request for Leave to Submit Observations on behalf of Human Rights Organisations](#), ICC-02/17-87-Anx.

²⁶ [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”](#), ICC-02/17-88.

²⁷ [Application on behalf of former international chief prosecutors to file observations as *amicus curiae* in appeal against decision on the authorisation of an investigation](#), ICC-02/17-89.

25. On 15 October 2019, Global Rights Compliance requested leave to file observations under rule 103 of the Rules.²⁸

26. On 21 October 2019, the Cross-border Victims requested 21 days from the date of the decision authorising their intervention to file their written submissions.²⁹

27. On 22 October 2019, the Prosecutor filed a response to the appeals briefs of the victims.³⁰

28. On 22 October 2019, LRV 2 and LRV 3 filed a joint response to the Prosecutor's Appeal Brief.³¹

29. On 22 October 2019, the European Centre for Law and Justice ('ECLJ') requested leave to file observations under rule 103 of the Rules.³²

II. MERITS

A. *Amici Curiae* Requests

30. Rule 103 of the Rules provides, in relevant part, as follows:

1. At 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, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

31. The Appeals Chamber's decision pursuant to rule 103(1) of the Rules is discretionary and premised on whether it considers it 'desirable for the proper determination of the case' to grant leave to submit observations on the legal questions presented in the appeal.

²⁸ [Request for Leave to Submit Observations in the Appeal Against "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-02/17-90.

²⁹ 'Application on behalf of victims of cross border on timtabling [*sic*]', dated 18 October and filed on 21 October 2019, ICC-02/17-91.

³⁰ 'Consolidated Prosecution Response to the Appeals Briefs of the Victims', ICC-02/17-92.

³¹ 'Victims' Joint Response and Request for Reply', ICC-02/17-94.

³² 'Request for Leave to Submit Observations on behalf of the European Centre for Law and Justice', dated 15 October 2019 and filed on 22 October 2019, ICC-02/17-95.

32. The Appeals Chamber notes that the application of the ECLJ was received one week after the expiry of the deadline for the submission of *amici curiae* applications and that no explanation was offered for this delay. Nevertheless, the Appeals Chamber notes that the ECLJ is one of the few prospective intervenors in the present appeals that has indicated an intention to present a different perspective on the factors relied upon in the Impugned Decision. Considering, in addition, that the delay in submitting the request will not cause an overall delay in the briefing schedule, the Appeals Chamber will exceptionally treat this application in conjunction with the others that were received within the deadline.

33. The Appeals Chamber has considered the calibre and professional standing of the above-mentioned individuals and organisations who applied to participate as *amici curiae* in the present proceedings, as well as the diversity of the issues on which they intend to submit observations. It considers that the submissions of all applicants could potentially contribute to the proper determination of the matters under appeal. Therefore, it grants all of the requests to participate as *amici curiae* under rule 103 of the Rules.

34. However, the Appeals Chamber is mindful of the need to ensure that proceedings are conducted expeditiously and that the Prosecutor and LRV1, LRV2 and LRV 3 (collectively the ‘LRVs’) are not overwhelmed by the volume of submissions with which they must engage. Therefore, the *amici curiae* are invited to *either* file written submissions on the issues identified in their applications, *or* to appear at the oral hearing to be held between 4 and 6 December 2019. The *amici curiae* are also requested to familiarise themselves with the appeal briefs and responses in the present appeals (identified in paragraphs 9, 10, 11, 27, and 28 above) and to refrain from repeating submissions that are already before the Appeals Chamber.

35. If the *amici curiae* opt to file written submissions, these submissions shall not exceed 10 pages and shall be filed no later than 16h00 on 15 November 2019. The Appeals Chamber emphasises that the written observations must adhere, in particular, to the requirements stipulated in regulations 23, 33 and 36 of the Regulations.

36. If the *amici curiae* opt to appear at the oral hearing, they shall indicate their intention so to do and shall identify one person who will represent the organisation or group of individual applicants at the hearing by 16h00 on 29 October 2019. Professors of criminal procedure and/or international law, including international human rights law, may not be represented at the hearing by persons who are not professors. It should be noted that the time allocated for the oral submissions of the *amici curiae* will also be limited. This will be regulated in a decision on the conduct of proceedings that will be issued by the Appeals Chamber in due course.

37. In accordance with rule 103(2) of the Rules, the Prosecutor and the LRVs may file consolidated responses, not exceeding 30 pages, to written observations filed by the *amici curiae* by 16h00 on 29 November 2019. The Prosecutor and the LRVs shall refrain from repeating submissions that are already before the Appeals Chamber in their responses.

B. Cross-border Victims' Request

38. A group of victims located in Pakistan who submit they have been affected by drone strikes launched from Afghanistan whose position was not included in the Prosecutor's request for authorisation of an investigation applied under article 68(3) of the Statute and regulation 24(2) of the Regulations and/or rule 93 of the Rules and/or rule 103 of the Rules to submit observations.

39. The Appeals Chamber notes that rule 50(3) of the Rules provides that victims may make representations to the Pre-Trial Chamber during the procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation. In the view of the Appeals Chamber, this rule highlights the importance of victim participation in the procedure for authorisation of investigations. There is no equivalent rule governing victim participation in appeals proceedings that arise from decisions issued in the course of such procedure. However, rule 93 provides in relevant part that 'a Chamber may seek the views of [...] victims [other than those participating pursuant to rules 89 to 91] as appropriate'.

40. The Appeals Chamber notes that the Cross-border Victims participated in the proceedings before the Pre-Trial Chamber leading to the issuance of the Impugned Decision and that their proposed submissions relate to arguments raised in the

appeals.³³ The Appeals Chamber finds it appropriate to invite the written and oral submissions of the Cross-border Victims pursuant to rule 93 of the Rules. The Cross-border Victims are invited to file observations not exceeding 15 pages on the issues identified in their application to participate by 15 November 2019. Their participation in the oral hearing will be regulated in a decision on the conduct of proceedings that will be issued by the Appeals Chamber in due course. The Cross-border Victims are requested to familiarise themselves with the appeals briefs and responses in the present appeals and to refrain from repeating submissions that are already before the Appeals Chamber in their written and oral submissions.

41. The Prosecutor and the LRVs may file responses, not exceeding 15 pages, to the written observations of the Cross-border Victims by 29 November 2019. The Prosecutor and the LRVs shall refrain from repeating submissions that are already before the Appeals Chamber in their responses.

C. OPCD Request

42. The OPCD requested leave to appear in these proceedings under regulation 77(4)(c) of the Regulations on the basis that the ‘rights of potential suspects must be a factor to be considered’ when determining whether an investigation is in the interests of justice.³⁴ In support of this argument, the OPCD submits that, in considering the interests of justice, the Pre-Trial Chamber cited factors that necessarily impact the rights of suspects should an investigation be authorised, namely the lapse of time since the commission of the crimes, the Prosecutor’s inability to preserve evidence, and difficulties with securing cooperation with national authorities for the investigation.³⁵ In its view, these considerations will also affect the right of potential suspects to defend themselves under article 67(1) of the Statute.³⁶ On this basis, the OPCD argues that the extent to which the rights of potential suspects could be adversely affected could be a relevant factor when a Pre-Trial Chamber determines whether it is in the interests of justice to commence an investigation.³⁷

³³ [Application of Cross-border Victims](#), paras 7,11,

³⁴ [OPCD Request](#), paras 2-3, 8-9.

³⁵ [OPCD Request](#), para. 10.

³⁶ [OPCD Request](#), paras 8, 10-11.

³⁷ [OPCD Request](#), para. 13.

43. In the alternative, the OPCD requests that the Appeals Chamber appoint Defence Counsel from the Court’s List of Counsel with standing to represent the interests of potential suspects.³⁸ In the event that the OPCD Request is granted, it submits further that to ‘effectively represent the interests of potential suspects, access must also be granted to the confidential case file’.³⁹

44. The Prosecutor opposes the OPCD Request, arguing that it appears to ‘misconstrue the Court’s legal framework and procedure’, which ‘does not contemplate Defence participation in proceedings related to the application of article 15 of the Statute’.⁴⁰ The Prosecutor submits that, in the present proceedings, an investigation has not yet been initiated and no suspect has yet been identified. Thus the rights of the Defence are not engaged and as such the OPCD should not be allowed to intervene.⁴¹ The Prosecutor argues further that proceedings under article 15, 53, 54 and 58 of the Statute are *ex parte* ‘because the Statute does not recognise that potential suspects have a sufficient interest in proceedings under article 15, justifying their participation’.⁴² With regard to the legal basis for the OPCD’s Request, the Prosecutor contends that the OPCD’s reliance on regulation 77(4)(c) of the Regulations is misplaced as, in her view, ‘[r]egulation 77(4)(a) *expressly* regulates the extent to which the OPCD may be required “to [r]epresent[] and protect[] the rights of the defence during the initial stages of the investigation”’ and that ‘this must be regarded as *lex specialis* to the general provision contained in regulation 77(4)(c)’.⁴³

45. Regulation 77(4) of the Regulations provides, in relevant part, that

When a conflict of interest does not arise, the tasks of the Office of Public Counsel for the defence shall include:

(a) Representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2(d) and rule 47, sub-rule 2. For this purpose the Office of Public Counsel for the

³⁸ [OPCD Request](#), para. 18.

³⁹ [OPCD Request](#), para. 17.

⁴⁰ [Prosecutor’s Response](#), para. 1.

⁴¹ [Prosecutor’s Response](#), para. 3.

⁴² [Prosecutor’s Response](#), para. 4.

⁴³ [Prosecutor’s Response](#), para. 8.

defence may, on the instruction or with the leave of the Chamber, make submissions concerning the needs of the defence in ongoing proceedings;

(b) [...]

(c) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues;

[...]

46. Regulation 77(4) of the Regulations sets out the tasks of the OPCD at various stages of proceedings and its terms indicate (the tasks of the OPCD ‘shall include’) that the examples set out therein are not exhaustive. Regulation 77(4)(a) deals with the circumstances that may impact the rights of the defence during the initial stages of the investigation and, in this regard, refers, in particular, to provisions allowing for the appointment of a counsel in certain circumstances ‘to attend and represent the interests of the defence’ when a unique investigative opportunity arises and to be present in order to protect the rights of the defence when the Prosecutor receives testimony at the seat of the Court prior to the opening of an investigation.

47. The Appeals Chamber considers that there may be circumstances that engage the mandate of the OPCD under regulation 77(4) of the Regulations when authorisation for an investigation is sought. However, any such intervention must be premised on an identifiable and specific need to represent and protect the rights of the defence, analogous to those situations explicitly envisaged in regulation 77(4)(a) of the Regulations.

48. The issues arising in these appeals concern the very preliminary question as to whether an investigation should be authorised under article 15 of the Statute and what factors should be taken into account for this decision. The Appeals Chamber notes that such proceedings are conducted on an *ex parte* basis, without the participation of potential suspects. In the present case, the Appeals Chamber is not persuaded that the rights of the defence could be prejudiced by the issues under appeal such the OPCD’s intervention under regulation 77(4) of the Regulations or the appointment of a defence counsel under regulation 76 of the Regulations could be warranted.

49. Nevertheless, the Appeals Chamber notes that the circumstances of the present appeal are unusual in that the Prosecutor and the LRVs have filed four separate

appeals all arguing in favour of reversal of the Impugned Decision. The vast majority of those who applied to participate as *amici curiae* have also indicated their intention to argue for the reversal of the Impugned Decision in whole or in part. This means that the OPCD is one of the few prospective intervenors in the present appeals that has indicated an intention to present a different perspective on the factors relied upon in the Impugned Decision.⁴⁴

50. For this reason, the Appeals Chamber finds it desirable for the proper determination of the issues on appeal, to invite counsel from the OPCD to submit written and oral observations as *amicus curiae* under rule 103 of the Rules on the matters identified in its request. Counsel from the OPCD may file consolidated written submissions not exceeding 35 pages on the Prosecutor and victims' appeal briefs by 16h00 on 15 November 2019. Participation in the oral hearing will be regulated in a decision on the conduct of proceedings that will be issued by the Appeals Chamber in due course. The Appeals Chamber considers that access to the confidential case file is unnecessary for the purpose of the OPCD's submission. Therefore, this aspect of the OPCD's request is rejected.

51. The Prosecutor and the LRVs may file responses not exceeding 35 pages each, to the written observations of the OPCD by 16h00 on 29 November 2019.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
Presiding

Dated this 24th day of October 2019

At The Hague, The Netherlands

⁴⁴ [OPCD Request](#), paras 8-13.