

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/17OA OA2 OA3

Date: 19 September 2019

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

Victims' response to 'Prosecution's notice of joined proceedings, and request for extension of pages'

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. This response to the “Prosecution’s notice of joined proceedings, and request for extension of pages” of 18 September 2019 (“Request”) is submitted by the legal representatives of 82 victims in the situation in Afghanistan (“Victims”).

2. For the reasons set out below, the Victims support (a) the request of the Office of the Prosecutor (“Prosecution”) for an extension of the page limit for its appeal brief, with a commensurate extension applying to all other appeal briefs; and (b) the Prosecution’s suggestion that it file its appeal brief first, with the understanding that other appeal briefs may be filed within 14 days of notification of the filing of the Prosecution’s appeal brief.

3. The Victims respectfully disagree with some arguments made by the Prosecution in the Request, as explained further below.

II. RELEVANT PROCEDURAL BACKGROUND

4. On 12 April 2019, Pre-Trial Chamber II rejected a request by the Prosecution for authorization to open an investigation into the situation in Afghanistan (“Impunged Decision”).¹

5. On 10 June 2019, the Victims filed a Notice of Appeal before the Appeals Chamber.²

6. On 24 June 2019, the Victims filed the “Victims’ Appeal Brief” pursuant to article 82(1)(a) of the Rome Statute, containing detailed arguments on six grounds of appeal, on standing, and on the applicability of article 81(1)(a) to an appeal of the Impugned Decision.³

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,” (“Order”).⁴ In the Order, the Appeals Chamber *inter alia* ruled that: “Once the Pre-Trial Chamber has issued its decision on the

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, ICC-02/17-33, 12 April 2019. On 31 May 2019, Judge Mindua filed a separate concurring opinion. Concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr (“Concurring and Separate Opinion”).

² Legal Representatives, ‘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’, 10 June 2019. ICC-02/17-36.

³ ICC-02/17-53.

⁴ ICC-02/17-54.

requests for leave to appeal ... the LRV 1 shall have ten days to file an updated version of the LRV 1 Appeal Brief, should they so wish.”⁵

8. On 13 September 2019, the legal representatives for the Victims, together with the Legal Representatives of six other victims and one other victim, submitted a ‘Victims’ Request for a Scheduling Order’ to the Appeals Chamber.⁶

9. On 17 September 2019, Pre-Trial Chamber II issued a decision in which it *inter alia* granted in part a request pursuant to article 82(1)(d) of the Rome Statute by the Prosecution for leave to appeal the Impugned Decision (“Certification Decision”), and denied the Victims’ request for leave to appeal pursuant to article 82(1)(d).⁷

10. On 18 September 2019, the Prosecution filed the Request on an “urgent” basis, seeking “an expedited decision is necessary in order to enable the Prosecution to implement in good time whatever outcome is decided by the Appeals Chamber.”⁸ In view of this, the Victims concisely set out below their position on the matters raised by the Prosecution.

III. SUBMISSIONS

i. Victims do not oppose the Request

11. The Victims take note that the Prosecution has joined appeal proceedings as appellants. The Victims support the appeal by the Prosecution before the Appeals Chamber pursuant to article 82(1)(d) of the Rome Statute.

12. The Victims do not oppose the Prosecution’s request to file an appeal brief of no more than 75 pages, in recognition of the exceptional circumstances of this appeal. The Victims note that the Prosecution does not oppose any consequential increase to the page limit for the submissions filed by the Legal Representatives, and request that a similar extension be granted for all appeal briefs to be filed on behalf of victims.

13. The Prosecution has indicated “its willingness to file its appeal brief first (on 30 September 2019), so that the Legal Representatives may file their submissions on the merits with sight of the Prosecution’s submissions.”⁹

⁵ Appeals Chamber, ‘Order suspending the time limits for the filing of an appeal brief and on related matters’, 24 June 2019, para. 4. ICC-02/17-54.

⁶ ICC-02/17-61.

⁷ Pre-Trial Chamber II, ‘Decision on the Prosecutor 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’’, 17 September 2019.

⁸ Request, para. 4.

⁹ Request, para. 8.

14. The Victims agree that it is in the interest of the orderly and expeditious conduct of this appeal that the Prosecution file its appeal brief first, in order that all parties are made aware of its position on issues where it has particular knowledge.

15. The Victims therefore agree to the Prosecution filing its appeal brief first, with the understanding that the Victims be permitted to file an updated appeal brief within 14 days of the filing of the Prosecution's appeal brief.

ii. Appeal should address the temporal and territorial scope of the Court's investigative jurisdiction in Afghanistan

16. The Victims maintain their position that article 82(1)(a) is a valid avenue for appeal. The Victims therefore do not agree with the Prosecution's submission that the question of whether article 82(1)(a) is a valid basis for appeal "is now moot insofar as article 82(1)(d) ensures that the Appeals Chamber is properly seised of these proceedings."¹⁰

17. Only two of the three issues for which the Prosecution sought leave to appeal have been certified by Pre-Trial Chamber II under article 82(1)(d). An appeal on the permitted scope of an investigation was not certified.

18. This issue is encompassed in one of the grounds addressed in the Victims' Appeal Brief, which was filed pursuant to article 82(1)(a). It is in the interest of justice for the Appeals Chamber to issue a decision on all issues identified in the Victims' Appeal Brief, including that of the temporal and territorial jurisdiction of the Prosecution's investigation. This is not an abstract legal question. It is an exceptionally important issue, which affects all future investigations by the Court. It is also a live issue, as it directly affects the temporal and territorial jurisdictional parameters of the Prosecution's investigation in Afghanistan, if an investigation is authorized.

19. All victims in Afghanistan, all relevant States Parties, and the Prosecution, are entitled to clarity from the Appeals Chamber as to whether any investigation in Afghanistan may encompass incidents which become known to the Prosecution after it submitted its request for authorisation, and those which occur after submission of a request for authorization, or after a decision authorizing investigation.

20. This is a matter of real and immediate significance for Afghanistan. On the date of the filing of this submission, 19 September 2019, Taliban militants reportedly detonated a truck packed with explosives outside a hospital in southern Afghanistan, killing fifteen persons,

¹⁰ Request, para. 7.

many of whom were doctors and patients.¹¹ Tragically, this is merely one of many recent events which potentially fall within the Court's investigative jurisdiction.

21. It is exceptionally important that the Prosecution is at liberty to investigate such incidents without repeatedly returning to the Pre-Trial Chamber with further requests for authorization. This scenario of repeated litigation before the Pre-Trial Chamber would, as Judge Mindua pointed out, 'render the investigative proceedings unduly cumbersome'.¹² It would divert the Court's limited resources to the preparation and consideration of unnecessary filings before the Pre-Trial Chamber and, potentially, the Appeals Chamber. It would also delay delivery of justice to the victims. Furthermore, as a matter of procedural fairness, States Parties must be made aware as to whether they have an obligation to co-operate under Part IX of the Statute with investigations into post-authorization incidents.

22. For these reasons, it is important for the Appeals Chamber to clarify that the temporal scope of an investigation may cover incidents other than those expressly identified by the Prosecution in its request for authorization, including incidents (that involve crimes within the jurisdiction of the Court) which take place after authorization to investigate is granted.

23. Furthermore, it is important for the Appeals Chamber to rule on the Court's territorial jurisdiction concerning torture and related crimes. In particular, the Appeals Chamber should determine whether the Court's investigative jurisdiction can encompass crimes committed against persons *hors de combat* either captured in Afghanistan and tortured or otherwise mistreated outside that country, or captured outside Afghanistan and tortured in circumstances where the conduct in question took place in the context of and was associated with the armed conflict in Afghanistan. It is vital that surviving victims and States Parties, as well as the Prosecution, have clarity as to whether the Court can exercise its jurisdiction in such circumstances.

¹¹ BBC, *Afghanistan war: Deadly Taliban attack 'destroys' hospital*, 19 September 2019.

¹² Concurring and Separate Opinion, para. 9.

IV. CONCLUSION

24. For the reasons above, the Victims do not oppose the Prosecution's request for an extension of the page limit for its appeal brief, and request that a similar extension be granted for all appeal briefs to be filed on behalf of victims. Further, the Victims support the Prosecution's suggestion that it be permitted to file its appeal brief first, and request that all other appeal briefs (including the Victims' updated appeal brief) may be filed within 14 days of notification of the filing of the Prosecution's appeal brief.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Legal Representatives for eighty-two victims in the situation in Afghanistan

Dated this 19th of September 2019

At The Hague, the Netherlands, and Vence, France.