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No.: ICC-02/17
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THE APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

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”

Source: Global Rights Compliance

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

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I. Introduction

1. This request for leave to submit observations is made by Global Rights Compliance (“GRC”) pursuant to the Appeals Chambers’ invitation¹ in the 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.”²
2. The Appeals Chamber has asked applicant *amici curiae* to describe their particular expertise and/or interest in the legal issues presented in the appeal, and summary conclusions as to those issues.³

II. GRC’s particular expertise and interest in the legal issues presented

3. GRC is an organisation registered in the UK, The Netherlands and Ukraine comprising experienced international legal practitioners. It has “specific legal expertise in human rights”,⁴ specialising in providing legal services associated with bringing accountability for atrocity crimes and other violations of international human rights law and international humanitarian law. GRC advises and assists governments, non-governmental organisations, companies and civil society organisations on issues of transitional justice, accountability strategies, and seeking remedies for violations.
4. Of particular relevance is GRC’s participation, as the legal representative of 400 Rohingya women and children, in making submissions⁵ complementing the ICC Prosecutor’s request seeking a ruling on the exercise of the Court’s jurisdiction over the alleged deportation of the Rohingya people from Myanmar to

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

² 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 (“Impugned Decision”).

³ Order, para. 21.

⁴ *Ibid.*

⁵ Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ICC-RoC46(3)-01/18-9, 30 May 2018.

Bangladesh.⁶ GRC supported the Prosecutor's request but submitted *inter alia* that her approach to jurisdiction was unjustifiably narrow, arguing that the Court could also exercise jurisdiction over crimes other than deportation. Pre-Trial Chamber I agreed that "the rationale of its determination as to the Court's jurisdiction in relation to the crime of deportation may apply to other crimes within the jurisdiction of the Court as well"⁷ including – as argued by GRC – persecution under article 7(1)(h) of the Statute.

5. GRC also has expertise in training civil society organisations, national prosecutors and judicial institutions on the preparation and drafting of communications to the Prosecutor on crimes within the jurisdiction of the Court for the purpose of initiating investigations under article 15 of the Statute.
6. Given this experience and expertise in representing victims in the very earliest stages of a situation before the Court, GRC has particular interest in the legal issues of: (a) the standing of victims within the Court's legal framework to bring an appeal under article 82(1)(a) of the Statute; and (b) the merits of the Prosecutor's and victims' appeals.⁸
7. It is respectfully submitted that the Appeals Chamber would be assisted by focussed and concise submissions from GRC that complement and supplement the Prosecutor's⁹ and victims' appeal briefs.¹⁰

⁶ Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018.

⁷ Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018, para. 74.

⁸ The third legal issue raised by the Appeals Chamber *ie* the admissibility of the victims' appeals (whether the Impugned Decision is a decision with respect to jurisdiction or admissibility), is certainly an issue in which GRC has particular expertise and interest, but it appears to have been fully addressed in the Victims' appeals such that repetition would be unlikely to provide assistance.

⁹ Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019 ("Prosecution Brief").

¹⁰ 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", ICC-02/17-75, 30 September 2019; Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-Corr, 2 October 2019 (collectively, "Victims' Briefs").

III. Summary conclusions on issues presented in the appeals

(a) The standing of victims to appeal against the Impugned Decision

8. In summary, GRC would, if granted leave, argue that victims have standing to bring an appeal against the Impugned Decision under article 82(1)(a). The first main line of argument would be that a purposive interpretation of the Statue and the Rules of Procedure and Evidence clearly provide for victims to be accorded the status of “party” in accordance with article 82. The second main line of argument would be that the meaning of “party” is not fixed but is to be determined based on the particular circumstances of the ruling under appeal. It is recognised that the issue of the category of actors that may be heard as a “party” has been addressed in the Victims’ Briefs, but GRC would propose to engage in additional analysis of the Court’s caselaw and foundational texts in support of its position.

(b) The merits of the appeal

9. In summary, GRC would, if granted leave, argue that the Pre-Trial Chamber erred in its factual and legal assessment of the interests of justice. Had the errors, individually or collectively, not been made, the Pre-Trial Chamber would not have arrived at its conclusion in the Impugned Decision and would necessarily have authorised the Prosecutor’s requested investigations.
10. The first main line of argument would be that the Pre-Trial Chamber fell into error in determining that it was entitled to make a positive finding about whether a prospective investigation would be in the interests of justice. It would be argued that the Pre-Trial Chamber had no *vires* to consider the interests of justice.
11. The second main line of argument would be that even if the Pre-Trial Chamber *were* permitted to consider the interests of justice in the context of a request to

authorise an investigation, it erred in law by: (i) failing to ensure the parties had been given a full opportunity to make submissions on the matter; (ii) unreasonably taking into account factors that it ought not to have considered; and (iii) unreasonably failing to take into account factors that it ought to have considered. Again, it is recognised that these lines of argument have been pursued in the Prosecution's and Victims' Briefs, but GRC would propose to engage in additional analysis of the Court's caselaw, as well as a review of domestic practice, in support of its position.

12. If granted leave to submit observations on the aforementioned issues, GRC would additionally request that it be allowed the right to be heard in the course of the oral arguments scheduled from 4 to 6 December 2019.

Respectfully submitted,



Wayne Jordash QC



Iain Edwards

Dated this 15th day of October 2019
At The Hague, The Netherlands