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No. ICC-02/17 OA OA2 OA3 OA4

Date: 22 November 2019

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost**

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public document

Decision on the conduct of the hearing before the Appeals Chamber

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

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

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

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 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),

Noting the ‘Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters’ of 27 September 2019 (ICC-02/17-72-Corr) and the ‘Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims’ of 24 October 2019 (ICC-02/17-97),

Issues the following

DECISION

1. Over the three days scheduled for the hearing in these appeals (4 to 6 December 2019) the Appeals Chamber invites the Prosecutor, the three groups of appealing victims (‘LRV 1’, ‘LRV 2’ and ‘LRV 3’), the victims participating pursuant to rule 93 of the Rules (‘Cross-border Victims’), the Office of Public Counsel for victims (the ‘OPCV’), and the *amici curiae* (collectively the ‘Participants’) to address the Appeals Chamber as outlined below.
2. On 4 December 2019, the Appeals Chamber will hear submissions on the issue of the standing of victims to bring an appeal under article 82(1)(a) of the Statute (‘First Issue’) and whether 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’ (‘Impugned Decision’) may be considered to be a ‘decision with respect to jurisdiction or admissibility’ within the meaning of article 82(1)(a) of the Statute (‘Second Issue’ and, collectively, ‘First and Second Issues’). On 5 and 6 December 2019, submissions on the merits (‘Third Issue’) will be heard.

3. To assist the Participants in the presentation of their submissions, the Appeals Chamber has provided a list of questions (section I below) that address each of the abovementioned three issues. These questions are meant to guide the Participants and need not be answered individually. In particular, as the *amici curiae* (including the Office of Public Counsel for the defence ('OPCD')) and the Cross-border Victims were authorised to make observations based on the specific issues identified in their respective applications, it follows that they need not be guided by the questions posed in this decision when making their observations.¹
4. The separate and distinct teams of counsel representing appealing victims within the LRV 2 group may address the Appeals Chamber separately, if they so wish, within the time allocated for this group in the schedule set out in Section II below.²
5. The *amici curiae* who indicated their intention to appear at the hearing and the OPCD³ will be permitted to address the Appeals Chamber in relation to the issues outlined in their requests under rule 103 of the Rules of Procedure and Evidence ('Rules') and regulation 77(4)(c) of the

¹ See [‘Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims’](#), 24 October 2019, ICC-02/17-97 ('Decision of 24 October 2019') paras 33, 40, 50.

² See [‘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-02/17-38, footnote 1, emphasising that the six victims are represented by three separate legal teams and that the representation of their clients remains separate and will not be combined under a ‘common legal representation scheme’.

³ [‘Confirmation that Mr Jay Alan Sekulow Will Make Oral Submissions at the Oral Hearing to be held between 4 and 6 December 2019’](#), dated 24 October 2019 and registered on 25 October 2019, ICC-02/17-98; [‘Notice of Intent to Make Oral Submissions Between 4 and 6 December 2019’](#), 29 October 2019, ICC-02/17-100; [‘Notice that Professor Hannah R. Garry Will Make Amicus Curiae Oral Submissions in the Appeals Hearing of 4-6 December 2019’](#), 29 October 2019, ICC-02/17-101; [‘Notice of intention to attend oral hearings and request for leave’](#), 29 October, ICC-02/17-102; [‘Global Rights Compliance’s Indication of Intention to Appear at the Oral Hearing Scheduled for 4-6 December 2019’](#), 29 October 2019, ICC-02/17-103; [‘Notice of Intent on Behalf of David J. Scheffer to Appear at Oral Hearing’](#), 29 October 2019, ICC-02/17-104; [‘Notice of Intention to Appear at the Oral Hearing Scheduled for 4-6 December 2019’](#), 29 October 2019, ICC-02/17-105; [‘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’](#), 25 September 2019, ICC-02/17-70.

Regulations of the Court in accordance with the schedule set out in Section II below.⁴

6. The *amici curiae* may be present throughout the three days of the hearing. Only one person may be present in the courtroom for each of the *amici curiae* at all times.

I. QUESTIONS TO BE ADDRESSED BY THE PARTIES AND PARTICIPANTS

A. Group A: Standing of victims to bring an appeal under article 82(1)(a) of the Statute

- a) Should victims be considered parties in the proceedings under article 15 of the Statute in comparison to other phases of the criminal proceedings?
- b) The victims submit that a decision under article 15(4) is a decision with respect to jurisdiction within the meaning of article 82(1)(a) of the Statute. Is the right to appeal a decision with respect to jurisdiction (last sentence of article 19(6) of the Statute) limited to those who may challenge the Court's jurisdiction (article 19(2)) or seek a ruling on jurisdiction (first sentence of article 19(3) of the Statute)?
- c) Does the right of victims to make representations under article 15(3) of the Statute entitle them to appeal a decision pursuant to article 15(4) of the Statute?
- d) In light of article 21(3) of the Statute, do the internationally recognised human rights of access to justice and to obtain an effective remedy for human rights

⁴ The Appeals Chamber notes that three of the *amici curiae* who intend to appear at the hearing specified that they would address only the Third Issue, while the remaining four *amici curiae* chose to address the First Issue and/or the Second Issue, as well as the Third Issue. See [‘Request Seeking Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan’](#), 25 June 2019, ICC-02/17-55, paras 2, 7-12; [‘Request for Leave to File Amicus Curiae Submission on Behalf of David J. Scheffer’](#), 15 October 2019, ICC-02/17-79, paras 5-10; [‘Request of Former UN Special Rapporteurs for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence’](#), 15 October 2019, ICC-02/17-81, paras 6-11; [‘Request for Leave to Submit Observations on behalf of Human Rights Organisations’](#), 15 October 2019, ICC-02/17-87, paras 5-10; [‘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”’](#), 15 October 2019, ICC-02/17-88, paras 5-16; [‘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”’](#), 15 October 2019, ICC-02/17-90, paras 8-11; [‘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, paras 8-10.

violations⁵ entail a right for victims to appeal a decision that rejects a request under article 15(4) of the Statute?

B. Group B: Whether the Impugned Decision is one that may be considered to be a ‘decision with respect to jurisdiction’ within the meaning of article 82(1)(a) of the Statute

a) Having regard to the existing jurisprudence of the Appeals Chamber,⁶ can the Impugned Decision be said to be a decision with respect to jurisdiction?

b) The victims argue that decisions with respect to the *exercise of* jurisdiction may be appealed as decisions with respect to jurisdiction under article 82(1)(a) of the Statute. Article 5 of the Statute enumerates the crimes falling under the Court’s material jurisdiction, while articles 12 and 13 indicate when and how the Court’s jurisdiction can be exercised. In interpreting the wording ‘decision with respect to jurisdiction’, would such wording include decisions making determinations on the pre-conditions to the exercise of the Court’s jurisdiction under article 12 or the exercise of the Court’s jurisdiction under article 13 of the Statute?

c) Pre-Trial Chamber II limited the scope of the investigation to incidents specifically mentioned in the Prosecutor’s request and authorised by the Chamber.⁷ Could this aspect of the Impugned Decision be considered to be a determination with respect to jurisdiction?

⁵ See e.g. article 2(3) of the [International Covenant on Civil and Political Rights](#), 16 December 1966, 999 United Nations Treaty Series; articles 13, 14 of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 10 December 1984, 1465 United Nations Treaty Series; articles 5, 41 of the of the [Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14](#), 213 United Nations Treaty Series; article 25(1) of the [American Convention on Human Rights](#), 22 November 1969, 1144 United Nations Treaty Series.

⁶ *Situation in the Republic of Kenya*, ‘[Decision on the admissibility of the “Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93\(10\) of the Statute and Rule 194 of the Rules of Procedure and Evidence”](#)’, 10 August 2011, ICC-01/09-78 (OA), para.16.

⁷ [Impugned Decision](#), para. 40.

C. Group C: Merits of the appeals filed by the Prosecutor and the victims

- a) When the Prosecutor requests authorisation to initiate an investigation having considered article 53(1)(c) of the Statute, does the pre-trial chamber have the power to consider the factors under article 53(1)(c) of the Statute itself?
- b) Are the factors considered by Pre-Trial Chamber II at paragraphs 91 to 95 of the Impugned Decision when determining that the authorisation of an investigation would not be in the interests of justice appropriate factors for such a determination?
- c) In deciding whether to authorise an investigation, may a pre-trial chamber limit the scope of the investigation to incidents specifically mentioned in the Prosecutor's request and authorised by the chamber?⁸

II. HEARING SCHEDULE

The order in which the Participants will address the Appeals Chamber and the time allocated for same over the course of the three hearing days is as follows:

A. Wednesday, 4 December 2019: (Group A and B questions)

- a. The Prosecutor (30 minutes)
- b. LRV 1 (30 minutes)
- c. LRV 2 (30 minutes)
- d. LRV 3 (30 minutes)
- e. The Cross-border Victims (15 minutes)
- f. The OPCV (15 minutes)
- g. *Amici curiae*:
 - Mr Paweł Wiliński (10 minutes)
 - Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, the Lawfare Project, and UK Lawyers for Israel (10 minutes)

⁸ [Impugned Decision](#), para. 40.

- European Centre for Law and Justice (10 minutes)
 - Global Rights Compliance (10 minutes)
- h. Response from the Prosecutor (5 minutes)
 - i. Response from LRV 1 (5 minutes)
 - j. Response from LRV 2 (5 minutes)
 - k. Response from LRV 3 (5 minutes)
 - l. Additional questions may be put to the Participants from the bench in relation to issues arising in this session. (30 minutes)

B. Thursday, 5 December 2019: (Group C questions)


- a. The Prosecutor (40 minutes)
- b. LRV 1 (40 minutes)
- c. LRV 2 (40 minutes)
- d. LRV 3 (40 minutes)
- e. The Cross-border Victims (20 minutes)
- f. The OPCV (20 minutes)
- g. *Amici curiae*:
 - The OPCD (15 minutes)
 - Afghanistan Human Rights Organisations (15 minutes)
 - Former UN Special Rapporteurs (15 minutes)
 - Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, the Lawfare Project, and UK Lawyers for Israel (15 minutes)
 - European Centre for Law and Justice (15 minutes)
 - Global Rights Compliance (15 minutes)
- h. Additional questions may be put to the Participants from the bench in relation to issues arising in this session. (30 minutes)

C. Friday, 6 December 2019: (Group C questions)

a. *Amici curiae*:

- Mr David J. Scheffer (15 minutes)
 - Mr Paweł Wiliński (15 minutes)
- b. Response from the Prosecutor (20 minutes)
 - c. Response from LRV 1 (20 minutes)
 - d. Response from LRV 2 (20 minutes)
 - e. Response from LRV 3 (20 minutes)
 - f. Additional questions may be put to the Participants from the bench in relation to issues arising in this session. (30 minutes)
 - g. Final submissions from the Prosecutor (10 minutes)
 - h. Final submissions from LRV 1 (10 minutes)
 - i. Final submissions from LRV 2 (10 minutes)
 - j. Final submissions from LRV 3 (10 minutes)

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



Judge Piotr Hofmański
Presiding

Dated this 22nd day of November 2019

At The Hague, The Netherlands