

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/17
Date: 18 September 2019

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

Urgent

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

Source: Office of the Prosecutor

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
Ms Helen Brady

Counsel for the Defence

Legal Representatives of the Victims

Ms Katherine Gallagher *et al*
Mr Fergal Gaynor *et al*
Ms Nancy Hollander *et al*

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

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Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

Introduction

1. Both the Prosecution and the legal representatives of certain victims (“Legal Representatives”) have sought, by different procedural means, to appeal the Pre-Trial Chamber’s recent decision declining to authorise the opening of an investigation into the situation in Afghanistan.¹ While the Appeals Chamber allowed the Legal Representatives to file submissions directly before it under article 82(1)(a), it did so without confirming their admissibility.² Meanwhile, the Prosecution sought leave from the Pre-Trial Chamber under article 82(1)(d).³
2. Now that the Pre-Trial Chamber has unanimously certified two issues for appeal,⁴ the Prosecution has been joined as an appellant in the existing proceedings before the Appeals Chamber. As a result, the Appeals Chamber may wish to consider consequential amendments to its scheduling order, in order to further clarify the issues on appeal and to simplify the briefing structure.
3. In addition, and in any event, the Prosecution requests an extension of the Prosecution’s appeal brief to no more than 75 pages, in recognition of the exceptional circumstances of this appeal. The Prosecution does not oppose any consequential increase to the page limit for the submissions filed by the Legal Representatives.
4. This request for extension of pages is brought on an urgent basis since the Prosecution currently intends to maintain the deadline for submission of its appeal brief (30 September 2019). Given the nature of the relief sought, an expedited decision is necessary in order to enable the Prosecution to implement in good time whatever outcome is decided by the Appeals Chamber. The Prosecution requests that, if necessary, this expedited decision is issued separately and prior to any further order which might be made concerning the scheduling of these appeal

¹ [ICC-02/17-33](#) (“Decision”).

² [ICC-02/17-54 OA OA2 OA3](#) (“Appeals Chamber’s Order”), paras. 7, 10.

³ [ICC-02/17-34](#) (“Certification Request”).

⁴ [ICC-02/17-62](#) (“Certification Decision”), paras. 36-41.

proceedings. This request is brought as promptly as possible after notification of the Certification Decision.

Notice of joined proceedings

5. As a result of the Certification Decision, the Appeals Chamber is now seised of appeals by the Legal Representatives, under article 82(1)(a), and the Prosecution, under article 82(1)(d), relating to the same subject matter. As illustrated by the existing record, the Prosecution anticipates that the submissions of the Legal Representatives and the Prosecution will be mutually supporting on all issues pertaining to the merits of the Decision.⁵ It also notes that the issues previously identified by the Legal Representatives either fall within the issues certified for appeal by the Pre-Trial Chamber, or are “inextricably linked” to them, and so may be heard in that context.⁶

6. The Appeals Chamber may consider that these new circumstances warrant consequential amendments to the schedule for hearing this appeal.

7. In particular, the current briefing schedule—premised on an appeal under article 82(1)(a)—assumes that the Legal Representatives and the Prosecution are appellant and respondent, respectively. Yet, in light of the Certification Decision, the Prosecution is now also an appellant. Accordingly, while the Prosecution maintains its view that article 82(1)(a) is not procedurally amenable to the current circumstances,⁷ this question is now moot insofar as article 82(1)(d) ensures that the Appeals Chamber is properly seised of these proceedings.

⁵ Compare, e.g., [Certification Request](#), paras. 15-23, with [ICC-02/17-36](#) (“Notice of Appeal (Mr Gaynor)”), [ICC-02/17-38](#) (“Notice of Appeal (Ms Gallagher)”), [ICC-02/17-40-Corr](#) (“Notice of Appeal (Ms Hollander)”). See also [ICC-02/17-53](#). Concerning the different structuring of the issues, see e.g. [ICC-02/17-42](#) (“Prosecution Observations”), para. 26; [ICC-02/17-60](#) (“Prosecution Response to *Amici Curiae*”), paras. 8-13 (noting that the additional matters raised by the Legal Representatives fall within the second issue now certified by the Pre-Trial Chamber).

⁶ See e.g. [ICC-01/13-98 OA2](#), para. 56; [ICC-02/11-01/15-744 OA8](#), para. 13; [ICC-02/11-01/15-369 OA7](#), paras. 25-26; [ICC-01/04-01/07-521 OA5](#), para. 37; [ICC-01/04-01/06-1486 OA13](#), paras. 14, 17.

⁷ See [Prosecution Observations](#), paras. 12-21 (standing); see also paras. 22-26 (nature of the decision); [Prosecution Response to *Amici Curiae*](#), paras. 17-24 (standing).

8. If the Appeals Chamber agrees with this view, and thus proceeds with this appeal simply on the basis of article 82(1)(d), the Prosecution indicates its willingness to forego the response brief previously allowed by the Appeals Chamber.⁸ Subject to the preferences of the Legal Representatives, the Prosecution also indicates its willingness to file its appeal brief first (on 30 September 2019),⁹ so that the Legal Representatives may file their submissions on the merits with sight of the Prosecution's submissions. The Appeals Chamber may also decide to grant such an opportunity to potential *amici curiae*.¹⁰

9. Given the short 10-day deadline for the Prosecution to file its appeal brief, the Prosecution has filed this submission without the opportunity for *inter partes* consultation with the Legal Representatives. However, it has provided them with a courtesy copy today, and of course welcomes their views on how the Legal Representatives' and the Prosecution's mutual concerns about the correctness of the Decision may be presented most fairly and expeditiously.

Request for extension of pages

10. In any event, the Prosecution submits that there are "exceptional circumstances" in this appeal, justifying the extension of the page limit for the Prosecution's appeal brief, in the meaning of regulation 37(1).

11. First, the Appeals Chamber has already recognised the exceptional nature of the present appeal, in granting the Legal Representatives' prior request for an extension of pages.¹¹

⁸ [Appeals Chamber's Order](#), para. 9. Due to the apparent agreement between the Prosecution and the Legal Representatives, this response is likely only to have addressed questions of admissibility under article 82(1)(a), which is no longer strictly germane to the Appeals Chamber's decision on the merits.

⁹ See [Regulations of the Court](#), regulation 65(4).

¹⁰ See e.g. [ICC-02/17-55](#). The Prosecution also notes that the Office of Public Counsel for Victims sought to participate in the proceedings before the Pre-Trial Chamber, and may renew this request before the Appeals Chamber: [ICC-02/17-39](#); [ICC-02/17-43](#).

¹¹ [Appeals Chamber's Order](#), para. 8.

12. Second, while the Legal Representatives only requested (and were granted) an appeal brief of up to 35 pages,¹² a greater extension is no less proportionate to the significance and complexity of the issues to be decided in this appeal.

13. Not only do all parties and participants in these proceedings agree that the Pre-Trial Chamber's decision raises matters of constitutional importance for the Court, but these issues bear particularly on the operations of the Prosecution—not just in this situation but in *all* situations.¹³ This relates in particular to the first issue certified for appeal.¹⁴

14. Furthermore, given the Prosecution's particular familiarity with the details and circumstances of its own request under article 15(3) of the Statute, it is also uniquely placed to identify and correct some legal and factual matters which appear to have been overlooked or misinterpreted in the Decision. These matters directly inform the content of the second issue which is certified for appeal,¹⁵ and consequently will require elaboration in some detail in order to ensure that the appeal may be adjudicated fairly and expeditiously.

15. For this reason, although mindful of its practice in the recent *Comoros* appeal in seeking to file an appeal brief of 50 pages,¹⁶ the Prosecution considers that an additional increment is justified in this instance (to a maximum of 75 pages). This takes account of the fact that, in contrast to *Comoros*, the matters to be decided in this situation include the Pre-Trial Chamber's assessment of multiple factors under article 53(1)(c), pertaining to three different potential major lines of inquiry.

16. The Prosecution does not oppose any consequential increase to the page limit for the submissions filed by the Legal Representatives in this appeal.

¹² [Appeals Chamber's Order](#), paras. 5, 8.

¹³ See [Certification Decision](#), para. 38. See also para. 37.

¹⁴ See [Certification Decision](#), para. 34.

¹⁵ See [Certification Decision](#), para. 34.

¹⁶ See [ICC-01/13-80 OA2](#), paras. 9, 11. In this situation, the Pre-Trial Chamber likewise certified two issues for appeal: [ICC-01/13-73](#).

Conclusion

17. For all the reasons above, the Prosecution requests the Appeals Chamber to:

- i) take notice that the Prosecution is now joined to these proceedings as an appellant, and to make any consequential orders it considers necessary to promote the fair and expeditious resolution of this appeal; and,
- ii) in any event, to grant an extension of pages so that the Prosecution may file an appeal brief not exceeding 75 pages; and
- iii) to issue its decision on the requested extension of pages on an expedited basis, in order to allow the Prosecution reasonable time to prepare its appeal brief accordingly prior to the 10-day deadline of 30 September 2019.



Fatou Bensouda, Prosecutor

Dated this 18th day of September 2019

At The Hague, The Netherlands