

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/17

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:**

**The Office of the Prosecutor**

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Mr James Stewart  
Ms Helen Brady

**Counsel for the Defence**

**Legal Representatives of the Victims**

Katherine Gallagher  
Margaret L. Satterthwaite and Nikki Reisch  
Tim Moloney QC and Megan Hirst  
Nancy Hollander, Mikołaj Pietrzak, and  
Ahmad Assed

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

Spojmie Nasiri  
Dimitris Christopoulos

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. This response is filed pursuant to Regulation 24(2) of the Regulations of the Court (“RoC”) in relation to the “Prosecution’s notice of joined proceedings, and request for extension of pages” (“Prosecution’s notice of joined proceedings”).<sup>1</sup> It is submitted jointly by the respective Legal Representatives for Victims (“LRVs”) of victims r/60009/17, r/00751/18, r/00750/18, r/00749/18, r/00635/18, r/00636/18 and r/00638/18 (“Victims”).<sup>2</sup>

2. The LRVs support joinder of proceedings initiated before the Appeals Chamber by the LRVs and the Legal Representatives of eighty-two Afghan Victims (“Afghan VictimAfghan Victims”)<sup>3</sup> under article 82(1)(a) with the proceedings stemming from the Pre-Trial Chamber II’s “Decision on the Prosecutor and Victims’ Request 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’” (“Certification Decision”)<sup>4</sup>.

3. For the reasons set out below, the LRVs request the Appeals Chamber not to amend the schedule for appeal proceedings as requested by the Prosecutor but to maintain the schedule as provided for in the “Order suspending the time limit for the filing of an appeal brief and on related matters”.<sup>5</sup>

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<sup>1</sup> ICC-02/17-63.

<sup>2</sup> The seven Victims are represented by three separate legal teams: r/60009/17 (Abd Al Rahim Al Nashiri) by Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed; r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) by Katherine Gallagher and the Center for Constitutional Rights in New York; r/00749/18 (Mohammed Abdullah Saleh al-Asad) by Margaret Satterthwaite and Nikki Reisch of the Global Justice Clinic at New York University School of Law; and r/00635/18, r/00636/18 and r/00638/18 by Tim Moloney QC and Megan Hirst, instructed by Reprieve.

This filing has been agreed jointly by the LRVs, and the LRVs will continue to seek common positions to the extent possible in order to ensure expedition and efficiency in the proceedings. However, they emphasize that the representation of these two groups of clients remains separate and does not imply collective representation, and therefore that joint filings cannot be guaranteed in every instance.

<sup>3</sup> Fergal Gaynor and Nada Kiswanson van Hooydonk.

<sup>4</sup> ICC-02/17-62.

<sup>5</sup> ICC-02/17-54.

## II. RELEVANT PROCEDURAL BACKGROUND

4. On 12 April 2019, Pre-Trial Chamber II rejected the Prosecutor's request for authorization to open an investigation of the situation in Afghanistan ("Impugned Decision").<sup>6</sup>

5. Pursuant to article 82(1)(d) of the Rome Statute, the Prosecution filed a request for leave to appeal the Impugned Decision on 7 June 2019 and the Afghan Victims filed a request for leave to appeal the Impugned Decision on 10 June 2019 (together, "Requests for Leave to Appeal").<sup>7</sup>

6. On 10 June 2019, pursuant to article 82(1)(a) of the Rome Statute, three notices of appeal were filed before the Appeals Chamber by legal representatives of victims<sup>8</sup> (together "Victims' Notices of Appeal").

7. The Afghan Victims filed the "Victims' Appeal Brief" on 24 June 2019.<sup>9</sup> On the same day, the LRVs jointly filed a motion for an extension of time to file their consolidated appeal brief and for an extension of page limit ("Request for Extension").<sup>10</sup>

8. 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").<sup>11</sup>

9. On 13 September 2019, the LRVs and the Afghan Victims filed "Victims' Request for a Scheduling Order" ("Victims' Request"),<sup>12</sup> noting the lack of a decision from

the Pre-Trial Chamber on the Requests for Leave to Appeal and requesting the

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<sup>6</sup> 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").

<sup>7</sup> ICC-02/17-34; ICC-02/17-37 (collectively, "Requests for Leave to Appeal"). The legal representatives for this set of victims shall be referred to as "LRV 1" to accord with the Appeals Chamber description of legal representatives for victims in the Order.

<sup>8</sup> ICC02/17-38; ICC-02/07-36; ICC-02/17-40-Corr.

<sup>9</sup> ICC-02/17-53.

<sup>10</sup> ICC-02/17-52.

<sup>11</sup> ICC-02/17-54.

<sup>12</sup> ICC-02/17-61.

Appeals Chamber to lift the suspension of time limits and to allow the Victims' appeals to proceed expeditiously.

10. On 17 September 2019, the Pre-Trial Chamber II issued the Certification Decision, and the following day, the Prosecution's notice of joined proceedings was filed.

### III. SUBMISSIONS

11. The LRVs fully support joinder of the appeal proceedings against the Impugned Decision, for procedural efficiency. Such joinder, however, should not result in limiting the appeal proceedings to the scope granted by the Pre-Trial Chamber's Certification Decision. The Appeals Chamber remains seized of the appeals by the LRVs and the Afghan Victims under article 82(1)(a) of the Rome Statute.

12. Contrary to the Prosecution's notice of joined proceedings, the LRVs submit that the Certification Decision has no direct bearing on the status or scope of the appeals proceedings initiated by the LRVs and the Afghan Victims before the Appeals Chamber pursuant to article 82(1)(a) of the Rome Statute. As such the Certification decision does not warrant amendments to the schedule provided for by the Appeals Chamber in the Order. Moreover, although the two issues certified for appeal by Pre-Trial Chamber II indeed correspond with some of the issues identified in Victims' Notices of Appeal, there are key matters raised by the LRVs and the Afghan Victims which do not necessarily fall within the scope of Pre-Trial Chamber II's certification. At a minimum this relates to the issues pertaining to Pre-Trial Chamber II's position on the scope of authorisation expressed in the Impugned Decision.<sup>13</sup>

13. The Prosecution suggests in its notice of joined proceedings that the Certification Decision renders the appeal proceedings initiated before the Appeals Chamber by the LRVs and the Afghan Victims pursuant to article 82(1)(a) of the

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<sup>13</sup> These are set out in paragraphs of 38-40 of ICC-02/17-38 and paragraphs of 3 and 24 of ICC-02/17-40-Corr.

Rome Statute moot.<sup>14</sup> However, the sole fact that Certification Decision pertains to the same Impugned Decision neither resolves nor requires dismissal of the proceedings initiated before the Appeals Chamber by the LRVs and the Afghan Victims. First, the Certification Decision does not, and respectfully cannot, determine the question of the admissibility of Victims' appeals.<sup>15</sup> Second, it does not, and again respectfully cannot, limit the issues on appeal arising before the Appeals Chamber. These are matters for the Appeals Chamber to decide. It certainly is not grounds for limiting the LRV and Afghan Victims appeals under article 82(1)(a) to only those issues certified by the Pre-Trial Chamber II. An opposite conclusion would suggest that the Appeals Chamber is bound by the decision made by the Pre-Trial Chamber II on the Requests for Leave to Appeal.

14. All appellants therefore should be granted equal opportunity to present their appeal briefs and to respond to each other's briefs. This is particularly important given the broader scope of the Victims' Notices of Appeal. In particular, it will be important for the Appeals Chamber to have the Prosecution's views on the matters raised in the Victims' appeal briefs which fall outside the scope of the scope of the issues certified by the Pre-Trial Chamber.

15. Given that Pre-Trial Chamber II issued the Certification Decision, there is no longer need to lift the suspension on the time limits for the filing of appeal brief and responses put in place by the Order. The LRVs consider that the schedule indicated by the Appeals Chamber Order of 24 June 2019 remains applicable. As indicated in the Victims' Request for a Scheduling Order, the LRVs intend to submit their appeal brief within the deadline provided for in the Scheduling Order – 10 days after notification of the Certification decision (30 September 2019).

16. Regarding page limits, the LRVs do not oppose the Prosecution's request for an extension of page limits up to 75 pages. However, should the Prosecution's request be granted, the LRVs should also be granted an increased page limit,

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<sup>14</sup> Prosecution's notice of joined proceedings, ICC-02/17-63, para. 7.

<sup>15</sup> The LRVs observe that the Pre-Trial Chamber's findings regarding victims' standing were not unanimous.

especially given that the scope of the Victims' appeals will include additional issues beyond those in respect of which the Prosecutor was granted leave by the Certification Decision.

#### IV. CONCLUSION

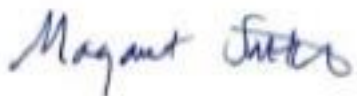
17. For the reasons set out above, the LRVs request that the Appeals Chamber:
- a. maintain the scheduling order provided for in its Order of 24 June 2019 with regard to appeal briefs from the LRVs and Afghan Victims;
  - b. grant the LRVs a page limit of at least 50 pages.

Respectfully submitted,




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Katherine Gallagher  
Legal Representative for r/00751/18 and r/00750/18





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Margaret Satterthwaite                      Nikki Reisch  
Legal Representatives for r/00749/18




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Tim Moloney QC                      Megan Hirst  
Legal Representatives for r/00635/18, r/00636/18 and r/00638/18






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Nancy Hollander                      Mikołaj Pietrzak                      Ahmad Assed  
Legal Representatives for r/60009/17

Dated this 19<sup>th</sup> of September 2019

At New York, USA; Phnom Penh, Cambodia; Albuquerque, USA; Warsaw, Poland.