



Original: English

No. ICC-02/17 OA OA2 OA3 OA4

Date: 27 September 2019

THE 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 document

**Corrigendum of order scheduling a hearing before the Appeals Chamber and
other related matters**

Order and 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 L. Satterthwaite

Ms Nancy Hollander

Mr Mikołaj Pietrzak

The Office of Public Counsel for Victims

Ms Paolina Massidda

Applicants to participate as Amicus

Curiae

Spojmie Nasiri

Dimitris Christopoulos

States Representatives

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, in the Situation in the Islamic Republic of Afghanistan 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),

Issues the following

ORDER

1. The time limit for the filing of the victims’ appeal brief and updated appeal brief is Monday, 30 September 2019.
2. The time limit for the victims to respond to the Prosecutor’s appeal brief is extended and any responses must be filed by Tuesday, 22 October 2019.
3. A hearing before the Appeals Chamber will be held for three days between Wednesday, 4 December 2019, and Friday, 6 December 2019, to hear oral arguments on the following three issues: (i) 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’ is one that may be considered to be a ‘decision with respect to jurisdiction or admissibility’ within the meaning of article 82(1)(a) of the Statute; (ii) the standing of victims to bring an appeal under article 82(1)(a) of the Statute; and (iii) the merits of the appeals filed by the Prosecutor and the victims. Further directions on the schedule and conduct of the hearing will be issued in due course.
4. Interested States are invited to submit observations, not exceeding 35 pages in length, on issues arising from the above-mentioned appeals by 16h00 on Friday, 15 November 2019, and are invited to indicate whether they will attend the above-mentioned hearing.

5. Professors of criminal procedure and/or international law, including international human rights law, as well as organisations with specific legal expertise in human rights may, by 16h00 on Tuesday, 15 October 2019, file a request, not exceeding four pages, for leave to submit observations on the distinct legal issues described in paragraph 3 above.
6. The Office of Public Counsel for victims is invited to file consolidated written submissions not exceeding 35 pages on the Prosecutor and victims' appeal briefs as well as on the victims' standing to appeal under article 82(1)(a) of the Statute by Tuesday, 22 October 2019.

REASONS

I. PROCEDURAL HISTORY

1. On 12 April 2019, Pre-Trial Chamber II (the 'Pre-Trial Chamber') rejected the Prosecutor's request under article 15(3) of the Statute for authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (hereinafter: 'Afghanistan'), deciding that 'an investigation into the Situation in Afghanistan at this stage would not serve the interests of justice' (the 'Impugned Decision').¹
2. On 7 June 2019, the Prosecutor requested leave to appeal the Impugned Decision before the Pre-Trial Chamber.²
3. On 10 June 2019, the legal representatives of 82 victims and two organizations in the situation in Afghanistan ('LRV 1'), the legal representative of six victims in the situation in Afghanistan ('LRV 2') and the legal representatives of an individual victim ('LRV 3') filed notices of appeal against the Impugned Decision under article

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'](#), 12 April 2019, ICC-02/17-33, (the 'Impugned Decision') p. 32.

² ['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"'](#), 7 June 2019, ICC-02/17-34; ['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"'](#), 10 June 2019, ICC-02/17-37.

82(1)(a) of the Statute (collectively, the ‘Notices of Appeal’).³ LRV 1 requested leave to appeal the Impugned Decision before the Pre-Trial Chamber on the same date.⁴

4. On 12 June 2019, the Prosecutor filed observations in which she submits, *inter alia*, that the victims who submitted the Notices of Appeal are not ‘parties’ in terms of article 82(1) of the Statute and are therefore not entitled to file an appeal and that the Impugned Decision is, in any event, not a decision in respect of jurisdiction or admissibility that can be appealed under article 82(1)(a) of the Statute.⁵

5. On 19 June 2019, LRV 2 and LRV 3 filed a joint response to the Prosecutor’s observations.⁶

6. On 24 June 2019, LRV 1 filed an appeal brief.⁷

7. On 24 June 2019, the Appeals Chamber extended the time limit for the filing of LRV 2 and LRV 3’s joint appeal brief to ten days after the notification of the Pre-Trial Chamber’s decision on the requests for leave to appeal the Impugned Decision, extended the page limit for the appeal brief to 35 pages and allowed for an updated version of LRV 1’s appeal brief to be filed within the same time frame.⁸

8. On 25 June 2019, the Afghanistan Human Rights and Democracy Organization, the Afghanistan Human Rights Organization, the Afghanistan Forensic Science

³ [‘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”](#), ICC-02/17-36 (OA) (‘LRV 1 Notice of Appeal’); [‘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 \[sic\]”](#), ICC-02/17-38 (OA2) (‘LRV 2 Notice of Appeal’); [‘Notice of 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” \(ICC-02/17-33\)’](#), ICC-02/17-40 (OA3); a corrected version was registered on 12 June 2019 (ICC-02/17-40-Corr (OA3)) (‘LRV 3 Notice of Appeal’).

⁴ [‘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”](#), 10 June 2019, ICC-02/17-37.

⁵ [‘Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 \(filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber\)’](#) ICC-02/17-42 (OA) (‘Prosecutor’s Observations’), paras 12-26.

⁶ [‘Victims’ response to the Prosecutor’s “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15”](#), dated 19 June 2019 and registered on 20 June 2019, ICC-02/17-50 (OA).

⁷ [‘Victims’ Appeal Brief](#), 24 June 2019, ICC-02/17-53 (OA).

⁸ [‘Order suspending the time limit for the filing of an appeal brief and on related matters’](#), 24 June 2019, ICC-02/17-54 (OA, OA2, OA3).

Organization, the Feminine Solidarity for Justice Organization and the Afghan Victims' Families Association (collectively: 'Afghanistan Human Rights Organisations') requested leave of the Appeals Chamber to participate in the appeals as *amici curiae*.⁹

9. On 16 September 2019, the LRVs filed a joint request urging the Appeals Chamber to lift the suspension of the time limits imposed for the filing of their appeal briefs and to allow them to be filed within 10 days of the Appeals Chamber's decision on their request.¹⁰

10. On 17 September 2019, the Pre-Trial Chamber dismissed, *in limine*, LRV 1's request for leave to appeal the Impugned Decision and granted, in part, the Prosecutor's request for leave to appeal the same decision under article 82(1)(d) of the Statute.¹¹

11. On 18 September 2019, the Prosecutor requested an extension of the page limit for her appeal brief and suggested that the Appeals Chamber proceed with the appeal simply on the basis of article 82(1)(d) of the Statute and amend the briefing schedule so that she would file her appeal brief on 30 September 2019 and the victims would file their submissions later.¹²

12. On 19 September 2019, LRV 1, and LRV 2 and LRV 3 requested a page extension for their appeal briefs.¹³ LRV 1 supported the Prosecutor's suggestion regarding the timing of the appeals briefs and requested that the deadline for the

⁹ ['Request Seeking Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan'](#), ICC-02/17-55 (OA OA2 OA3) (hereinafter: 'Request of the Afghanistan Human Rights Organisations').

¹⁰ ['Victims' Request for a Scheduling Order'](#), dated 13 September 2019 and registered on 16 September 2019, ICC-02/17-61 (OA OA2 OA3), para. 15.

¹¹ ['Decision on the Prosecutor's 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"'](#), ICC-02/17-62 ('Decision Granting Leave to Appeal'), p. 16. *See also* ['Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua'](#), ICC-02/17-62-Anx.

¹² ['Prosecution's notice of joined proceedings, and request for extension of pages'](#), ICC-02/17-63 (OA4) ('Prosecutor's Notice'), paras 8, 17.

¹³ ['Victims' response to "Prosecution's notice of joined proceedings, and request for extension of pages"'](#), ICC-02/17-66 (OA OA2 OA3 OA4) ('LRV 1's Response'); ['Victims' response to Prosecution's notice of joined proceedings, and request for extension of pages'](#), ICC-02/17-65 (OA4) ('LRV 2 and LRV 3's Response').

victims appeal briefs be set to two weeks after the filing of the Prosecutor's appeal brief.¹⁴

13. On 20 September 2019, the Appeals Chamber granted the Prosecutor's Request and extended the page limit for her appeal brief to 75 pages.¹⁵

14. On 20 September 2019, the Office of Public Counsel for victims ('OPCV') requested leave to appear before the Appeals Chamber by filing written submissions not exceeding 35 pages in relation to the issues which the Prosecutor was granted leave to appeal.¹⁶

15. On 24 September 2019, the Appeals Chamber extended the page limit for the victims' appeal briefs to 75 pages each.¹⁷

II. MERITS

16. The circumstances of the present appeals proceedings are unusual in that the Appeals Chamber has before it an appeal from the Prosecutor under article 82(1)(d) of the Statute, as well as appeals from three groups of victims under article 82(1)(a) of the Statute against the same decision. The appellants do not oppose each other's positions on the merits in the manner typical of criminal proceedings; the grounds of appeal are similar and there is likely to be significant overlap in the arguments presented in all appeals.¹⁸

17. The question remains as to whether all appeals will be addressed on their merits. In particular, before entering into the merits of the victims' appeals, the Appeals Chamber must determine the preliminary questions of whether: (i) the victims have standing within the Court's legal framework to bring an appeal under article 82(1)(a) of the Statute; and (ii) the appeals are admissible, meaning whether the Impugned Decision is one that may be considered to be a 'decision with respect to jurisdiction or

¹⁴ [LRV 1's Response](#), para. 24.

¹⁵ 'Decision on the Prosecutor's request for an extension of page limit', ICC-02/17-68 (OA OA2 OA3 OA4).

¹⁶ [Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court](#), 20 September 2019, ICC-02/17-67 (OA).

¹⁷ 'Decision on victims' requests for extensions of page limits', ICC-02/17-69 (OA OA2 OA3 OA4).

¹⁸ [LRV 1 Notice of Appeal](#); [LRV 2 Notice of Appeal](#); [LRV 3 Notice of Appeal](#); [Decision Granting Leave to Appeal](#); [Prosecutor's Notice](#), para. 5.

admissibility' within the meaning of article 82(1)(a) of the Statute. The Prosecutor opposes the victims' standing to appeal the Impugned Decision and the admissibility of their appeals under article 82(1)(a) of the Statute.¹⁹

18. Given the particular circumstances outlined above, the Appeals Chamber considers it appropriate to decide on the admissibility of the victims' appeals and their standing to appeal in conjunction with the merits. Therefore, it does not consider it necessary to revise the briefing schedule currently in place and requires all appellants' briefs to be filed by 30 September 2019.

19. The Appeals Chamber notes that responses to appeals filed under article 82(1)(a) of the Statute must be filed within 21 days of notification of the appeal brief, whereas responses to appeals filed under article 82(1)(d) of the Statute must be filed within 10 days of notification of the appeal brief.²⁰ In order to streamline the briefing schedule in the present appeals, the Appeals Chamber considers it appropriate to extend the time limit for the victims' responses to the Prosecutor's appeal brief to 21 days following notification of the appeal brief.

20. Given the importance of the legal issues under appeal, the Appeals Chamber considers it desirable to invite interested States to submit observations, not exceeding 35 pages in length, on issues arising from these appeals by 16h00 on Friday, 15 November 2019. The Appeals Chamber highlights regulations 23, 33, 36 and 37 of the Regulations of the Court and regulation 24 of the Regulations of the Registry in this regard.

21. Professors of criminal procedure and/or international law, including international human rights law, as well as organisations with specific legal expertise in human rights are also invited to express their interest in participating as *amici curiae* in the proceedings by requesting leave to submit observations on the merits of the appeal and/or the preliminary questions of standing and admissibility stipulated in paragraph 17 above. Any such request for leave shall be filed by 16h00 on Tuesday, 15 October 2019 and shall be accompanied by summary initial observations, in no

¹⁹ [Prosecutor's Observations](#), paras 12-26.

²⁰ Regulations 64(4) and 65(5) of the Regulations of the Court.


more than four pages, describing the applicant's particular expertise and/or interest in the legal issues presented, as well as summary conclusions as to those issues, specifying the main lines of argument that they may wish to submit before the Appeals Chamber. The Appeals Chamber emphasises that any request for leave to submit observations shall be filed in accordance with regulations 23, 33, 36 and 37 of the Regulations of the Court and regulation 24 of the Regulations of the Registry. The Appeals Chamber shall subsequently determine who will be granted leave to participate and the modalities of such participation. The Request of the Afghanistan Human Rights Organisations to participate as *amici curiae* in the appeal proceedings will also be addressed at that stage.

22. Regulation 81(4)(b) of the Regulations of the Court provides that the OPCV may appear, on the instruction or with the leave of the Chamber in respect of specific issues. The Appeals Chamber considers it appropriate to hear from the OPCV on the subject-matter of the appeals under consideration, as well as on the victims' standing to appeal under article 82(1)(a) of the Statute. Therefore, the OPCV is invited to file written submissions not exceeding 35 pages on the aforementioned matters by Tuesday, 22 October 2019.

23. In addition, the Appeals Chamber wishes to hear oral arguments from LRV 1, LRV 2, LRV 3, the Prosecutor, the OPCV, interested States and *amici curiae* on the questions of victims' standing to appeal, the admissibility of the victims' appeals under article 82(1)(a) of the Statute and the merits of the appeals. Consequently, a hearing is convened for three days from 4 to 6 December 2019.

24. A decision on the conduct and schedule of this hearing and on the applications received to participate as *amici curiae* will follow in due course.

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



Judge Piotr Hofmanski
Presiding

Dated this 27th day of September 2019

At The Hague, The Netherlands