

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 13 June 2019

**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**  
**Victims' response to the Requests for Leave to Appeal filed by the Prosecution and  
by other victims**

**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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## INTRODUCTION

1. This response is filed pursuant to regulation 65(3) of the Regulations of the Court. 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>1</sup>

### I. PROCEDURAL HISTORY

2. On 12 April 2019, Pre-Trial Chamber II (“the Chamber”) refused the Prosecutor’s request to open an investigation in the situation in Afghanistan<sup>2</sup> and on 31 May 2019 a concurring separate opinion was filed by Judge Mindua<sup>3</sup> (together, “the Decision”).
3. On 7 June 2019, pursuant to article 82(1)(d), the Prosecution filed its 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” (“the OTP Request for Leave”).<sup>4</sup>

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<sup>1</sup> The seven Victims are represented by four separate legal teams: r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) by Katherine Gallagher and the Center for Constitutional Rights; 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 and r/60009/17 by Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed. The first three legal teams filed a joint Notice of Appeal before the Appeals Chamber on 10 June 2019. *See* ICC-02/17-38. The fourth legal team also filed a Notice of Appeal before the Appeals Chamber on 10 June 2019. *See* ICC-02/17-40-Corr.

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 four groupings of victims remains separate and does not imply collective representation, and therefore that joint filings cannot be guaranteed in every instance.

<sup>2</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.

<sup>3</sup> Concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, ICC-02/17-33-Anx-Corr, 31 May 2019.

<sup>4</sup> 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” ICC-02/17-34, 7 June 2019.

4. On 10 June 2019, pursuant to article 82(1)(d), a further Request for Leave to Appeal was filed by victims who had made representations to the Chamber under article 15(3) (“the Victims’ Request for Leave”).<sup>5</sup>
5. Also on 10 June 2019 filings were made requesting leave to engage in the proceedings from a group of proposed *amicus curiae* (“*Amicus curiae* Request”),<sup>6</sup> and the Office of Public Counsel for Victims (“OPCV Request”).<sup>7</sup>
6. Also on 10 June 2019, pursuant to article 82(1)(a), three notices of appeal were filed before the Appeals Chamber by victims who had made representations to the Chamber under article 15(3) (including those who make the current submissions, and those who filed the Victims Request for Leave).<sup>8</sup>
7. On 12 June 2019, the Prosecution filed identical “observations” before the Chamber and the Appeals Chamber regarding the filings which had been made by victims, proposed *amicus curiae*, and the OPCV on 10 June 2019.<sup>9</sup>

## II. SUBMISSIONS

### *Response to the issues as identified by the Prosecution and victims*

8. The Prosecution Request for Leave identifies three proposed grounds of appeal:
  - (i) Whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that

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<sup>5</sup> 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, ICC-02/17-37, 10 June 2019.

<sup>6</sup> Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan, ICC-02/07-35, 10 June 2019.

<sup>7</sup> Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, ICC-02/07-39, 10 June 2019.

<sup>8</sup> 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-02/17-38, 10 June 2019; Victims’ Notice of Appeal of the “Decision Pursuant o Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, ICC-02/07-36, 10 June 2019; Corrected version of the Notice of appeal against the “Decision Pursuant to Article 15 of the Rome Statue on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (ICC-02/17-33), ICC-02/17-40-Corr, 12 June 2019.

<sup>9</sup> 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-02/17-41 and ICC-02/17-42, 12 June 2019.

investigations would be in the interests of justice (“the OTP’s First Issue”);

- (ii) Whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors (“the OTP’s Second Issue”); and
- (iii) Whether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents (“the OTP’s Third Issue”).

9. The Victims’ Request for Leave which was filed on 10 June 2019 set out six proposed issues:

- (i) Whether the Pre-Trial Chamber has jurisdiction to review the Prosecutor’s assessment of ‘the interests of justice’, after the Prosecutor has determined that there is a reasonable basis to proceed with an investigation pursuant to article 15(3) (“First Issue from Victims’ Request for Leave”);
- (ii) Whether the Pre-Trial Chamber may consider the extent of cooperation that the Prosecution has received from a State Party during a preliminary examination, before the duty to cooperate under Part 9 of the Statute has been fully triggered, in deciding whether to authorize an investigation (“Second Issue from Victims’ Request for Leave”).
- (iii) Whether the Pre-Trial Chamber may deny a request for authorisation to investigate on the basis that it believes that the investigation is unfeasible (“Third Issue from Victims’ Request for Leave”).
- (iv) Whether the Pre-Trial Chamber may restrict the scope of the investigation to incidents specifically mentioned in the Prosecution’s

request, as well as those 'comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it, as opposed to authorizing an investigation into all crimes within the Court's jurisdiction arising in the situation, including those committed after authorisation of investigation ("Fourth Issue from Victims' Request for Leave").

- (v) Whether the Pre-Trial Chamber may deny a request for authorisation on the basis that it believes that the Prosecutor should allocate its resources to other preliminary examinations, investigations or cases which the Pre-Trial Chamber considers might have 'more realistic prospects to lead to trials' ("Fifth Issue from Victims' Request for Leave").
- (vi) Whether, for the Court to exercise jurisdiction over the war crimes of torture, cruel treatment and inhuman treatment, it is necessary that the infliction of severe physical or mental pain took place at least in part on the territory of a State Party, and whether the victim must have been captured within the borders of the State in which the armed conflict is taking place ("Sixth Issue from Victims' Request for Leave").

10. The LRVs submit that the issues identified in the OTP's Request for Leave and in the Victims' Request for Leave correspond with one another and concern the same fundamental questions which arose from the Decision. The argumentation raised in both Requests breaks down to three general issues: (i) the extent of a Pre-Trial Chamber's authority to make a determination about the interest of justice; (ii) the Pre-Trial Chamber's understanding and assessment of the "interests of justice", including which factors are relevant to this question;<sup>10</sup> (iii) whether the Prosecutor is required to pre-identify every incident in respect of which an investigation is authorised. The LRVs agree that these issues meet the

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<sup>10</sup> The Victims represented by the LRVs further advise that the error regarding the Pre-Trial Chamber's assessment of "interests of justice" is further compounded by its failure to meaningfully consider the Victims' views on the "interests of justice" and incorporate such views into its analysis.

requirements for certification for appeal, without prejudice to full consideration of the Notices of Appeals filed by LRVs.

11. The LRVs submit that the Sixth Issue from the Victims' Request for Leave is connected in part to the OTP's third issue regarding the requirement to identify specific incidents, in that it concerns whether the Chamber erred in specifically addressing and excluding a particular category of "incidents" – namely war crime involved in detention and torture in CIA rendition centres. However, the reasons given by the Chamber for excluding this particular category of incidents also introduce a question of jurisdiction – since the Chamber appears to have taken the view that such crimes fall outside jurisdiction (albeit in a way which appears to conflate jurisdiction and the question of nexus to an armed conflict). This question is central to the interests of the Victims represented by the LRVs and it has been addressed by the LRVs in their respective notices of appeal to the Appeals Chamber.<sup>11</sup> In the event that the Appeals Chamber considers that this issue is not of a jurisdictional character, the LRVs support the request for this issues to be certified by appeal under article 82(1)(d).

*Proposed alternative formulation of two issues*

12. The LRVs submit that a two specific issues are encompassed in the scope of the issues already identified by the Prosecution and in the Victims' Request for Leave, but which require separate elucidation in order to ensure that they are sufficiently addressed by on appeal. The question of whether the LRVs may, in a response, request a different formulation for the certification of the issues raised in a Request for Leave to Appeal is addressed below.

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<sup>11</sup> The Victims represented by the LRVs emphasize that the legal error with regard to the formulation on the limitation of the "scope of authorisation" should not be considered narrowly as one of identifying incidents with specificity, but also encompasses the errors related to requiring specific identification of alleged offenders or foreclosing a change in the legal classification of crimes.

13. The first separate issue proposed by the LRVs is linked to the OTP's First Issue and the Victims' First Issue. It is:

*In the event that a Pre-Trial Chamber does have the power to review the Prosecutor's determination in respect of article 53(1)(c), what is the standard of review to be applied by the Pre-Trial Chamber in that process?*

14. This first issue arises out of the Decision. The Decision nowhere specifically addresses the standard of review. However implicit in the Chamber's reasoning is the assumption that a Pre-Trial Chamber must conduct a full merits review of the "interests of justice" requirement under article 53(1)(c), *de novo*; and that wherever a Pre-Trial Chamber *itself* considers that there exist "substantial reasons" to believe an investigation does not support the interests of justice it may (or must) refuse to authorise the investigation. As a preliminary matter, the LRVs reiterate that the Statute provides the Pre-Trial Chamber no such power to review. *See* art. 53(1)(c): "...The Prosecutor shall consider whether...[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." In the event it is determined that the Pre-Trial Chamber can conduct a full review of the "interests of justice," the Decision gives no consideration to the possibility that the omission of this requirement from article 15(4) could indicate that it is subject to a different standard of review. This is notwithstanding that the legal framework of the Court, including the role envisaged for the Prosecutor, arguably suggests such an interpretation. Had the Pre-Trial Chamber considered this question, and applied a judicial review standard (not "was the Prosecutor right?" but "was the Prosecutor's conclusion one which a reasonable prosecutor could have reached?"), it would almost certainly have reached a different conclusion on the facts. This first issue therefore arises out of the Decision. For similar reasons the first issue clearly requires a decision for its resolution. A different approach taken by the Chamber on this issue would almost certainly have resulted in a different outcome.

15. The first issue is not a mere disagreement with the Chamber. As the OTP Request for Leave identified,<sup>12</sup> the absence of any previous instance in which a Pre-Trial Chamber has disagreed with the Prosecutor's assessment on article 53(1)(c) means that there is no precedent for determining the standard to be applied in such a case. The question is one of fundamental importance to the functioning of the Court, bearing as it does on the balance between prosecutorial independence and judicial oversight.

16. The second issue is linked to the OTP's First Issue:

*Whether the Chamber's decision is flawed by procedural error because it turned on issues on which the Prosecution and participating victims had not been given a chance to be heard.*

17. Based on the established jurisprudence of the Court, neither the Prosecution nor victims who communicated with the Court under article 15(3) could have foreseen that the Chamber would adopt the approach that it did on the "interest of justice" or on the specificity with which the Prosecution must identify "incidents" in order to establish the scope of the investigation. Indeed the Decision notes that the Prosecution "consistently with the approach taken in previous cases, does not engage in detailed submissions on the matter and simply states that it has not identified any reason which would make an investigation contrary to the interests of justice".<sup>13</sup> The Chamber therefore had no submissions before it on these issues as applied by the Pre-Trial Chamber. The only relevant material before the Chamber appears to have been the victims' support for an investigation: the Decision noted that "680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth".<sup>14</sup> Yet the Chamber proceeded to a decision contrary to the victims' position without requesting any elaboration of their

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<sup>12</sup> OTP Request for Leave, para. 22.

<sup>13</sup> Decision, para. 87.

<sup>14</sup> Decision, para. 87. It is noted again that the Pre-Trial Chamber provided no detail of the factors or facts set forth by the victims in regards to "interest of justice" and did not include such views in its analysis in any meaningful way.

position or submissions from the Prosecution, violating a fundamental tenet of natural justice (*audi alteram partem*) which has been held to apply in international criminal proceedings, including at this Court.<sup>15</sup>

18. The second issue is not a mere disagreement with the Chamber's approach. It instead arises out of the erroneous procedure adopted by the Chamber which did not comply with a fundamental procedural principle.
19. The second issue arises out of the Decision because the issues on which the Prosecutor and victims were not heard are precisely the issues which formed the basis of the Chamber's conclusions.
20. The first and second issues would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial. Indeed a different approach on the first issue would almost certainly have led to a different outcome; whereas the second issue goes fundamentally to the fairness of the proceedings by which the Decision was reached.
21. Like the issues identified by the OTP and other victims, the first and second issues are of such a nature that their immediate resolution by the Appeals Chamber would materially advance the proceedings. The filing of a new article 15 application would not resolve this matter, even if such an application could be framed to again include the Victims represented by the LRVs. Regarding the second issue, the Chamber could not now reasonably be expected to approach the central issues with an open mind in order to properly evaluate a new request on which the Prosecutor and victims were adequately heard. Regarding the first issue, a fresh request under article 15 would clearly be highly inexpedient in circumstances where fundamental questions about this process have been thrown into uncertainty by the Chamber's decision. This issue must be resolved as quickly as possible in order to enable the Prosecutor to carry out her mandate

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<sup>15</sup> *Prosecutor v Abdallah Banda Abakaer Nourain*, Public Redacted Version of "Defence's Document in Support of Appeal against Trial Chamber IV's Decision issuing the 'Warrant of arrest for Abdallah Banda Abakaer Nourain' ", submitted on 12 January 2015, ICC-02/05-03/09-625-Red 1, 19 January 2015; ICTY, *Prosecutor v. Jelusic*, IT-95-10-A, Appeals Judgment, 5 July 2001, para. 27.

within clear and predictable parameters, and for victims to be informed of how best to present their representations as part of the article 15(3) process. In the absence of such clarity the Prosecution may at worst fail to meet its mandate to contribute to international accountability, and at best may waste significant resources submitting multiple requests in response to changeable standards and procedures adopted by different Pre-Trial Chambers.

22. The LRVs note that these two issues are not explicitly raised in the OTP Request for Leave or in the Victims' Request for Leave. However, the LRVs submit that they are implicit in the issues formulated by the Prosecution.
23. The OTP's first issue concerns the question of whether the Chamber may exercise some form of review power over the Prosecutor's decision. This implies a question about what form of review power the Chamber may exercise; what is the extent and nature of that power?
24. The OTP's second issue incorporates to the question of whether the Chamber erred in considering inappropriate factors when assessing the "interests of justice". This necessarily includes a question as to whether the factors considered were inappropriate (and/or whether they were properly appreciated) because they had not been put to the Prosecution and the victims.
25. Although these issues can be seen as implicit in the questions posed by the Prosecution and in the Victims' Request for Leave, the LRVs nonetheless consider that it is necessary for them to be reformulated as separate issues, since this will ensure that they are addressed in the submissions of the Prosecution and all others involved in the proceedings. The LRVs note that the Chamber has a "discretionary power to reformulate appealable issues".<sup>16</sup>

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<sup>16</sup> *Situation on the Registered Vessels of Comoros, Greece and Cambodia*, Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", ICC-01/13, 18 January 2019, para. 39; *Prosecutor v Thomas Lubanga Dyilo*, Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, 3 September 2009, paras 31 and 34.

### III. CONCLUSION

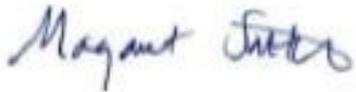
26. For the reasons set out above, the LRVs request that the Chamber grant the leave to appeal as requested in the OTP Request for Leave and the Victims' Request for Leave to Appeal, but reformulate the issues certified for appeal so as to articulate as separate issues the two additional issues identified in this response.

Respectfully submitted,




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Mikołaj Pietrzak



Ahmad Assed

Dated this 13<sup>th</sup> of June 2019

At New York, USA; London, UK; Dhaka, Bangladesh; Albuquerque, USA; and Warsaw, Poland