

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/17  
Date: 22 October 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' Joint Response and Request for Reply**

**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**

Ms Fatou Bensouda, Prosecutor  
Mr James Stewart, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**

Katherine Gallagher  
Margaret L. Satterthwaite and Nikki Reisch  
Tim Moloney QC and Megan Hirst  
Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed  
Fergal Gaynor and Nada Kiswanson van Hooydonk

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Paolina Massidda

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis, Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verill, Chief

**Detention Section**

**Victims Participation and Reparations  
Section**

Philipp Ambach, Chief

**Other**

1. This filing is submitted pursuant to the Appeals Chamber's Order of 27 September 2019 which granted victims until 22 October 2019 to respond to the Prosecution's Appeal Brief.<sup>1</sup> It is filed jointly on behalf of seven Victims by their respective legal representatives ("Legal Representatives of the Victims" or "LRVs").<sup>2</sup>

2. This appeal presents the opportunity for the Appeals Chamber to right a deeply flawed decision by the Pre-Trial Chamber and to authorize an overdue investigation into grave crimes within the jurisdiction of the Court and sufficiently linked to, or committed in connection with, the situation of Afghanistan. On this point, all appellants agree: the Pre-Trial Chamber's "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")<sup>3</sup> must be overturned. It erroneously confined the scope of the requested investigation to specific incidents cited in the Prosecutor's request; wrongly excluded from the Court's jurisdiction crimes that originated or occurred in whole or in part outside of Afghanistan, regardless of whether they commenced in or continued on the territory of a State Party to the Rome Statute; and, most dramatically, incorrectly considered that an investigation would not serve the interests of justice. It did so against the backdrop of brazen political interference.

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<sup>1</sup> Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019 ("Scheduling Order").

<sup>2</sup> The seven Victims are represented by four separate legal teams: r/60009/17 by Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed; r/00751/18 and r/00750/18 by Katherine Gallagher of the Center for Constitutional Rights; r/00749/18 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. [\*Communications from clinics at NYU School of Law do not purport to represent the school's institutional views, if any.] This joint filing has been agreed to by the LRVs, in order to ensure expedition and efficiency in the proceedings, but does not imply collective representation. The LRVs emphasize that the representation of named clients remains separate.

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

3. As the Appeals Chamber has anticipated correctly, the circumstances of this appeal are unusual, including in that “[t]he 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.”<sup>4</sup>

4. Conscious of the appellants’ broad agreement on the *merits*, and of the considerable weight of written material with which the Appeals Chamber is already seized, the LRVs do not propose to respond at length to the Prosecution or the other victims. Rather, the LRVs use this opportunity to briefly address only two differences of emphasis and in the approach taken which could bear on the Appeals Chamber’s analysis of the Impugned Decision and the relief afforded: (a.) whether the Rome Statute permits the Pre-Trial Chamber to consider if there are “substantial reasons to believe that an investigation would not serve the interests of justice” when the Prosecutor has found no such reasons and has accordingly *requested* authorization to investigate under article 15, not *declined* to pursue an investigation; and (b.) whether the limits the Pre-Trial Chamber placed on the scope of the requested investigation erroneously excluded from the Court’s jurisdiction (i) categories of victims, including the individuals represented in this Appeal, and (ii) modes of liability for alleged crimes that otherwise fall within the jurisdiction of the Court.

a.) On the first issue, the Prosecutor asserts: “a correct interpretation of articles 15(4) and 53(1)(c) only requires or permits the Pre-Trial Chamber to determine whether it agrees with the Prosecutor that there are *no* substantial reasons to believe that an investigation would *not* serve the interests of justice.”<sup>5</sup> LRVs respectfully disagree: the only role for a pre-trial chamber in relation to the “interests of justice” contemplated in the Statute is possible review of a decision

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<sup>4</sup> Scheduling Order, para. 16.

<sup>5</sup> Prosecution Appeal Brief, Public with Public Annex A, ICC-02/17-74, 30 September 2019 (“Prosecution Appeal Brief”), para. 18.

by the Prosecution *not* to proceed with investigation or prosecution, as set forth in article 53(3).<sup>6</sup> The Pre-Trial Chamber has no authority to make its own, *de novo* determination as to whether an investigation the Prosecution seeks to pursue would be in the interests of justice. The LRVs disagree with the Prosecutor that, despite no findings by the Prosecution against the interests of justice, a pre-trial chamber may “consider whether in its view there is any *self-evident or ostensible concern*—primarily with reference to any representations of victims received under article 15(3)—that opening an investigation would not serve the interests of justice.”<sup>7</sup> The LRVs decline to read this standard into the Statute, and respectfully urge the Appeals Chamber not to do so. On appeal, the primary question is not whether the Pre-Trial Chamber appropriately exercised its discretion in assessing the interests of justice, as the Prosecutor implies.<sup>8</sup> Rather, it is whether it was within the Pre-Trial Chamber’s discretion to opine on this factor at all. The LRVs contend that the Pre-Trial Chamber acted *ultra vires* in undertaking its own assessment of whether a requested investigation would serve the interests of justice, and that such legal error requires that the Impugned Decision be vacated.

b.) On the second issue, the LRVs’ analysis goes beyond that of the Prosecutor with respect to the Impugned Decision’s exclusion from the scope of an investigation *modes of liability* for the crime of torture other than direct perpetration through

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<sup>6</sup> Corrigendum of Victims’ Joint Appeal Brief 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” of 30 September 2019, ICC-02/17-75, ICC-02/17-75-Corr, 1 October 2019 (“Victims’ Joint Appeal Brief”), para. 61.

<sup>7</sup> Prosecution Appeal Brief, para. 37.

<sup>8</sup> Prosecution Appeal Brief, paras. 61-62. In contrast to the Prosecution Appeal Brief, the LRV’s alternative argument that the Pre-Trial Chamber erred in the way it undertook its assessment of the “interests of justice,” characterizes those errors as errors of law, not abuses of discretion. See Victims’ Joint Appeal Brief, paras. 70-99. As the LRVs contend, even if the Pre-Trial Chamber were permitted to assess the interests of justice, its assessment would be limited to *reviewing* the Prosecution’s discretionary determination, not substituting its own discretion for that of the Prosecutor. Victims’ Joint Appeal Brief, para. 79.

infliction of severe physical or mental pain or suffering.<sup>9</sup> In focusing its analysis of alleged crimes committed under the US torture program solely on the conduct of inflicting severe physical or mental pain or suffering,<sup>10</sup> the Pre-Trial Chamber ignores the possibility that perpetrators over whom the Court has personal jurisdiction could be liable for aiding and abetting or other modes of liability, as co-perpetrators of crimes within the jurisdiction of the Court.<sup>11</sup> This has the effect of omitting certain categories of perpetrators from an investigation. The Pre-Trial Chamber's analysis also prematurely prescribes the legal characterization of alleged criminal conduct before an investigation has been conducted. As is particularly relevant to the Victims, the Pre-Trial Chamber's jurisdictional analysis presumed that the alleged abuses could only be categorized as war crimes, when, as LRVs have argued, the conduct at issue could qualify as a crime against humanity.<sup>12</sup> The combination of restricting the scope of any investigation to the incidents specifically referenced in the request and misinterpreting the Court's territorial jurisdiction<sup>13</sup> has the effect of categorically excluding crimes committed against victims who were abducted and first transferred into the US torture program outside of Afghanistan, notwithstanding that these persons were detained incommunicado and subjected to torture, both within and outside of Afghanistan, including on the territories of other States Parties to the Rome Statute, such as Lithuania, Poland, Romania, Jordan, and Djibouti. It also effectively nullifies the Victims' Representations under article 15(3): unlike previous article 15(4) decisions, the Impugned Decision does not permit the Prosecutor the latitude

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<sup>9</sup> See also Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-Corr, 2 October 2019, paras. 173-176 (discussing the Pre-Trial Chamber's failure to distinguish between modalities of participation in crimes within the Court's jurisdiction).

<sup>10</sup> Impugned Decision, para. 54.

<sup>11</sup> See, e.g., Article 25(3) (setting forth various modes of criminal responsibility and liability for punishment for a crime within the jurisdiction of the Court).

<sup>12</sup> Victims' Joint Appeal Brief, para. 119.

<sup>13</sup> See Victims' Joint Appeal Brief, paras. 122-145.

to widen the investigation to encompass those crimes identified by victims, or to recharacterize criminal conduct based on the findings of an investigation.<sup>14</sup>

5. Despite broad agreement on the merits, the LRVs anticipate that substantive disagreement may arise in relation to the jurisdictional nature of the Impugned Decision and victims' standing to appeal it – the first two issues identified by the Appeals Chamber for oral argument in the Scheduling Order –<sup>15</sup> matters on which the Prosecution did not present its position and argument in its Appeal Brief.<sup>16</sup> The LRVs believe that it will advance the proceedings for the Appeals Chamber to receive a concise written reply to Prosecutor's response to the Victims' Joint Appeal Brief (due to be filed today) on these points.<sup>17</sup> Moreover, the LRVs also note that there may be matters requiring a response in the anticipated submissions from the Office of Public Counsel for Victims ("OPCV").<sup>18</sup>

6. The LRVs therefore propose that they be granted a period of ten days to file a consolidated submission in which they may reply to new issues raised in the Prosecution's response as well as to the OPCV submissions. In so proposing, the LRVs respectfully reassure the Appeals Chamber that they are mindful of the judicial resources being expended on these proceedings.

7. The victims of the US torture program,<sup>19</sup> including the individuals represented in this appeal, have a right to a remedy. And such a right begins, necessarily, with a thorough investigation, which examines all criminal conduct that falls within the temporal, personal, territorial, and material jurisdiction of the Court.

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<sup>14</sup> See Victims' Joint Appeal Brief, para. 121.

<sup>15</sup> Scheduling Order, para. 3.

<sup>16</sup> But see, 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), 12 June 2019, paras. 12-26.

<sup>17</sup> Any such reply will focus on matters not previously or fully addressed in Victims' response to the Prosecutor's 'Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15', ICC-02/17-50, 19 June 2019 (notified 20 June 2019), and the Victims' Joint Appeal Brief.

<sup>18</sup> Scheduling Order, para. 22.

<sup>19</sup> See Victims' Joint Appeal Brief, note 13 and sources cited therein.

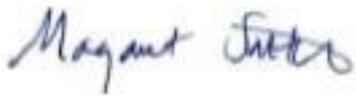
8. For the reasons set out above, the LRVs:
- a. support the appeals of the Prosecutor and of the other LRVs, noting the differences set out above; and
  - b. request leave to file a consolidated reply to new issues raised in the Prosecution's response as well as to the OPCV submissions.

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

Dated this 22 October 2019

At Taipei, Taiwan; New York, USA; London, UK; Albuquerque, USA; Warsaw, Poland.