

**Cour
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**International
Criminal
Court**

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APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Corrected version of the 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)

Source: Legal Representatives of victim r/60009/17

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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I. INTRODUCTION

1. The Legal Representatives of victim r/60009/17 (“Representatives”) submit this notice of appeal pursuant to articles 68(3) and 82(1)(a) of the Rome Statute (“Statute”), rule 154 of the Rules of Procedure and Evidence (“RPE”) and regulation 64 of the Regulations of the Court (“RoC”).
2. The Representatives of victim r/60009/17 file this notice of appeal in the situation of Islamic Republic of Afghanistan 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” (the “Decision”)¹ issued by the Pre-Trial Chamber II on 12 April 2019; concurring opinion of Judge Antoine Kesia-Mbe Mindua, notified on 31 May 2019.²
3. This notice of appeal concerns the issue of jurisdiction,³ specifically, the part of the Decision in which the Pre-Trial Chamber erroneously determined that “alleged war crimes whose victims were captured outside Afghanistan fall out of the Court’s jurisdiction due to the lack of the nexus with an internal armed conflict which is required to trigger the application of international humanitarian law as well as the Court’s jurisdiction”⁴. Representatives of victim r/60009/17, for reasons that will be provided in the appeal brief, will further request the Appeals Chamber to reverse the Decision.
4. As regards other erroneous findings of the Decision, the Representatives fully support the request for leave to appeal filed by the Prosecutor on 7 June 2019,⁵ and will respond to it accordingly within the time limit prescribed in RoC.
5. By filing this notice of appeal, the Representatives of victim r/60009/17 take the position that victims who submitted representations in the course of proceedings

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.

² Concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr.

³ Public Redacted version of the Prosecutor’s ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Red (the “Request”).

⁴ Decision, para. 55, also paras. 51-54.

⁵ 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.

under article 15(3) of the Statute have standing to appeal the Decision, specifically in light of articles 68(3) and 21(3) of the Statute. The Representatives are aware of the novelty of this position. Therefore, by filing this notice of appeal they not only declare their intention to appeal the Decision with regard to the issue of jurisdiction identified above, but also take the opportunity to substantiate their position as to the standing of victim r/60009/17 to appeal the Decision.

II. SUBMISSIONS

A. Victim r/60009/17 is a participant in article 15 proceedings before the Court

6. The Representatives submit that victim r/60009/17 whom they represent should be considered by the Chamber as a participant to article 15(3) of the Statute proceedings. This stems clearly from article 15(3), article 68(3) and article 53(1)(c) of the Statute as well as from rule 50 RPE. Specifically, participatory rights of victims in article 15 proceedings include: the right to be informed by the Prosecutor about the fact that he/she would seek authorisation of an investigation (rule 50(1) RPE), the right to make representations to the Chamber in writing (rule 50(3) RPE), the possibility for those victims to provide additional information to the Chamber (rule 50(4) RPE) and the Chamber's obligation to notify these victims about the decision taken pursuant to article 15(4) of the Statute (rule 50(5) RPE).
7. The Representatives further submit that in proceedings pertaining to authorisation of investigation, including in review of the Pre-Trial Chamber decisions, rules 89, 91, and 93 RPE should not be seen as limiting the possibility of the Chamber to obtain views from victims who submitted their representations under article 15(3) of the Statute. To require from victims to submit additional applications (separate from previously submitted representations) to participate in such review proceedings is unjustified under the Statute.
8. Moreover, representation submitted in the course of article 15(3) proceedings on behalf of r/60009/17 fulfils the requirements required by the RPE and by the

jurisprudence of the Court with regard to victims' applications for participation. The identity of victim r/60009/17 and the fact that he had suffered harm from acts of torture which constitute crimes under the Statute have been duly established by the content of the representation submitted on his behalf to the Court by properly authorised Representatives. The fact that r/60009/17 suffered from acts of torture has been also determined and recognized by the European Court of Human Rights both in its judgement of 24 July 2014 in the case *Al Nashiri v Poland* and its judgement of 31 May 2018 in the case of *Al Nashiri v. Romania*.⁶ Representation submitted on behalf of r/60009/17 in detail describes the acts of torture, from which r/60009/17 suffered in the context of and in relation with the non-international armed conflict in Afghanistan. This representation should be therefore treated as a complete application for the purpose of participation in any proceedings (including review or appeals) related to authorisation of investigation before the Court pursuant to article 15 of the Statute.

B. Victim r/60009/17 has standing to appeal the Decision

9. Neither the Statute nor the RPE envisage any specific procedure for appealing or revision of decisions of the Pre-Trial Chamber taken under article 15(4) of the Statute.
10. According to rule 48 RPE, in determining whether there is a reasonable basis to proceed with an investigation under article 15(3) of the Statute, the Prosecutor shall consider the factors set out in article 53 (1)(a-c) of the Statute. Article 53 in paragraph 3 provides for judicial review over Prosecutor's decision not to proceed with an investigation. Accordingly: when the Prosecutor decides that there is no reasonable basis to proceed with an investigation only on the basis of his/her assessment that there are substantial reasons to believe that an investigation would not serve the interests of justice, the Pre-Trial Chamber needs to approve such a decision (article 53(3)(b) of the Statute). Therefore, in a reverse

⁶ European Court of Human Rights, Judgement in the case of *Al Nashiri v. Poland*, application no. 28761/11, 24 July 2014 and in the case of *Al-Nashiri v. Romania*, application no. 33234/12, 31 May 2018.

situation at hand, the only possibility to challenge the Decision of the Pre-Trial Chamber II is by the way of an interlocutory appeal.

11. Victims who communicated with the Prosecutor and who submitted their representation in the article 15 process are directly affected by the Chamber's decision under article 15(4) of the Statute. Therefore, victims should be able to initiate and to actively participate in the review of the Decision, which seems to exclude the possibility of investigating and prosecuting war crimes from which they have suffered harm.
12. This position is further justified by the fact that, in line with article 53(1)(c) of the Statute, in deciding that investigation requested by the Prosecutor would not serve the interests of justice, the Pre-Trial Chamber took into account "the gravity of the crimes and the interests of victims". The Pre-Trial Chamber II in the Decision concluded that although, generally, "both jurisdiction and the admissibility requirements are satisfied",⁷ "it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it".⁸ Victims should be given a possibility to review such a conclusive assessment of their interest, especially as the decision based on that assessment effectively bars victims' right to truth and to effective investigation of the crimes from which they have suffered.
13. Explicit wording of the Statute may wrongly suggest that victims have no possibility to initiate any judicial review in this regard. Pursuant to article 82 of the Statute: "[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence [...]". The term 'party' is not defined in the Statute. As noted above, Regulations of the Court use the (potentially broader) term 'participant'.

⁷ Decision, paras 87, 96.

⁸ Decision, paras 88-96.

14. The specificity of the process concerning authorisation of an investigation under article 15 of the Statute is that the only ‘parties’ involved in it are: the Prosecutor, and victims who communicated with the Prosecutor and/or submitted their representations to the Chamber. Importantly, at this stage no suspects or accused are involved. Therefore, the term ‘either party’ used in article 82 of the Statute should be read depending on the circumstances and stage of the proceedings in which it is used. For the purpose of appealing a decision of the Pre-Trial Chamber issued in the authorisation proceedings, ‘either party’ should include also victims who communicated with the prosecutor and/or submitted representations under article 15(3) of the Statute, who in legal texts and in the Court’s practice are referred to as participants.
15. In proceedings concerning authorisation of the commencement of the investigation under article 15, victims are regular and ongoing participants, from the time they communicate with the court and submit their representations. Article 68(3) of the Statute provides that “when personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be *appropriate* by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. Other provisions of the Statute should be read together with article 68(3) and in a manner that is consistent with it.
16. There are several instances in which the Statute and the Rules of Procedure and Evidence use the terms ‘parties’ or ‘party’ to refer to procedural steps which have in practice been made available by the Court to participating victims. For example: articles 64(6)(d), 64(8)(b) and 69(3) of the Statute refer to the ‘parties’ being able to submit evidence; article 64(9) of the Statute refers to the possibility of ‘a party’ to apply to a trial chamber regarding the admissibility of evidence; rule 132(2) RPE empowers trial chambers to confer with “the parties” by holding status conferences; rules 132*bis*(4) RPE and 132*bis*(5)(a) RPE enable a single judge to establish a work plan concerning obligations which “the parties” are required

to meet, and to ensure proper disclosure between “the parties”; rules 155(2) and 157 refer to notifications which must be made to “parties” in respect of decisions on requests for leave to appeal or notices of discontinuance of appeal. The practice of the Court shows that the rationale of each of these provisions applies equally to participating victims.

17. Accordingly, where a particular step in the proceedings is open to “parties”, and, in the light of article 68(3) of the Statute, it would be *appropriate* to open it also to victims, this should be allowed. The Representatives submit that exactly such a situation arises in relation to the Decision of the Pre-Trial Chamber II which directly affects personal interests of victims. Importantly, as noted above, in article 15 proceedings there are no accused, not even suspects, whose rights could be jeopardized by the participation of victims. Moreover, such a permission would not mean that victims should have a general and *in blanco* right to submit interlocutory appeals.
18. Given that the Court has not yet had an opportunity to rule on the matter, it is worth pointing to jurisprudence of the Special Tribunal for Lebanon (STL) which concerns the possibility of participating victims to request leave to appeal an interlocutory decision.⁹ The STL Appeals Chamber concluded that participating victims had a narrow right to an interlocutory appeal on certification (leave for appeal). The STL Appeals Chamber noted that “in the absence of prejudice to the Accused, we must seek to give full effect to the rights of the victims as mandated by Article 17 of the STL Statute [equivalent of article 68(3) of the Statute]. In any event, if it were demonstrated that there was such harm, the Appeals Chamber would retain the discretion to reject an appeal on that basis”.¹⁰
19. Victims should be able to initiate and to actively participate in the review of the Pre-Trial Chamber’s conclusive assessment of their interest and of the Court’s jurisdiction over the crimes that they have suffered from.

⁹ Special Tribunal for Lebanon, The Appeals Chamber, Decision on Appeal by Legal Representative of Victims against Pre-Trial Judge’s Decision on Protective Measures, Case No, STL-11-01/PT/AC/AR126.3, 10 April 2013 (the STL Decision).

¹⁰ STL Decision, para.16

20. This position is further supported by victims' right to truth and to effective investigations into the crimes from which they have suffered, which are guaranteed by internationally recognized human rights. Specifically, with regard to the crime of torture, the established jurisprudence of the European Court of Human Rights is clear. Victims of violations of the prohibition of torture, cruel or inhumane treatment have the right to effective and expeditious investigation of these violations and to participate effectively in such investigations.¹¹ It is therefore necessary to reemphasise that pursuant to article 21(3) of the Statute the application and interpretation of the Statute and RPE must be consistent with internationally recognized human rights.

21. The Decision of the Pre-Trial Chamber II effectively bars victims' right to truth and to participate in investigations into the crimes from which they have suffered. To ensure effective realisation of victims' rights under international human rights treaties, but most of all, under the Statute, victims must have the right to initiate and to participate in the judicial review of the Decision.

C. The impugned part of the decision directly affects the interests of victim r/60009/17 and is appealable under article 82(1)(a)

22. As noted in the Introduction part, this notice of appeal concerns the issue of jurisdiction. The Representatives are aware of the Appeals Chamber's position, according to which appeals under article 82(1)(a) of the Statute must concern decisions which "consist of or are based on a ruling that a case is admissible or inadmissible and that the operative part of the decision must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case".¹²

23. Accordingly, the Representatives submit that the impugned part of the Decision is appealable under article 82(1)(a) of the Statute as it concerns the Chamber's provisional assessment of the Court's jurisdiction over the "case". As noted in the

¹¹ European Court of Human Rights, Judgement in the case of *Al Nashiri v. Poland*, application no. 28761/11, 24 July 2014, paras 485-486.

¹² The Appeals Chamber, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", ICC-01/13 OA, 6 November 2015, para. 49.

Decision “authorisation can only be granted if the jurisdictional criteria are met” (jurisdiction *ratione loci* or *ratione personae*, jurisdiction *ratione materiae* and jurisdiction *ratione temporis*).¹³

24. The Chamber’s assessment of jurisdiction led to the conclusion which seems to exclude from the Court’s jurisdiction crimes of which r/60009/17 is a victim. This is because the Pre-Trial Chamber II concluded: “alleged war crimes whose victims were captured outside Afghanistan fall out of the Court’s jurisdiction due to the lack of the nexus with an internal armed conflict which is required to trigger the application of international humanitarian law as well as the Court’s jurisdiction”.¹⁴ More specifically, the Chamber noted that “for the Court to have jurisdiction on the crime of torture, it is necessary that the alleged conduct of ‘inflicting severe physical or mental pain’ [...] takes place at least in part in the territory of a State Party; provided that the victims were captured in Afghanistan”.¹⁵ As noted in the Introduction, the Representatives of victim r/60009/17 consider these findings to be erroneous for reasons that will be provided in the appeal brief.

III. CONCLUSION

25. For the reasons above, the Representatives request the Appeals Chamber to accept this appeal pursuant to article 82(1)(a) of the Statute, to reverse the impugned Decision, and to authorise the investigation as requested by the Prosecutor in her Request.

Respectfully submitted,

¹³ Decision, para. 45.

¹⁴ Decision, para. 55, also paras. 51-54.

¹⁵ Decision, para. 54.



Mikołaj Pietrzak



Nancy Hollander

Dated this Monday, 12 June 2019

At Warsaw, Poland and Albuquerque, USA