

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**No. ICC-02/17**

**Date: 15 October 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 with public annex**

**Request for Leave to Submit *Amicus Curiae* Observations Pursuant to “*Corrigendum* of order scheduling a hearing before the Appeals Chamber and other related matters”**

**Source:** Armanshahr/OPEN ASIA, International Federation for Human Rights (“FIDH”), Afghanistan-Transitional Justice Coordination Group (“TJCG”), European Center for Constitutional and Human Rights (“ECCHR”), Human Rights Watch (“HRW”), No Peace Without Justice (“NPWJ”), The Center for Justice & Accountability (“CJA”), REDRESS, Women’s Initiatives for Gender Justice (“WIGJ”).

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***

**to:**

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Legal Representatives of the Victims**

Mr Fergal Gaynor & Ms Nada

Kiswanson van Hooydonk

Ms Katherine Gallagher

Ms Margaret L. Satterthwaite

Ms Nikki Reisch

Mr Mikołaj Pietrzak, Ms Nancy

Hollander & Mr. Ahmad Assed

Mr Tim Maloney, QC & Ms Megan Hirst

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

Afghanistan-TJCG

Armanshahr/ OPEN ASIA

CJA

ECCHR

FIDH

HRW

NPWJ

REDRESS

WIGJ

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**Registrar**

Mr Peter Lewis

## I. INTRODUCTION

1. The International Federation for Human Rights (“FIDH”), Armanshahr/OPEN ASIA, the Transitional Justice Coordination Group-Afghanistan (“TJCG”), the European Center for Constitutional and Human Rights (“ECCHR”), the Center for Justice & Accountability (“CJA”), Human Rights Watch (“HRW”), No Peace Without Justice (“NPWJ”), REDRESS, and Women’s Initiatives for Gender Justice (“WIGJ”) (collectively “the Applicants”) respectfully request the Appeals Chamber (the “Chamber”) for leave to submit *amicus curiae* observations pursuant to “*Corrigendum* of order scheduling a hearing before the Appeals Chamber and other related matters”<sup>1</sup> and rule 103 of the Rules of Procedure and Evidence (“RPE”) in the Situation in the Islamic Republic of Afghanistan (“Afghanistan”).
2. The Applicants, collectively, have varied and extensive expertise on matters of justice and accountability, including within Afghanistan, and have a long history of engagement with the Court.<sup>2</sup> Armanshahr/OPEN ASIA, FIDH and TJCG have previously submitted *amicus curiae* submissions to Pre-Trial Chamber II in relation to the Prosecution and Victim 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’ (“Decision on Authorisation”).<sup>3</sup>
3. The Applicants submit that their expertise is ‘desirable for the proper determination of the case’ given the novelty of the issues raised in this situation.<sup>4</sup> Furthermore, their submissions will assist the Court in achieving ‘the end[s] of justice’<sup>5</sup> and are ‘in the interest[s] of the proper administration of justice.’<sup>6</sup>
4. The Applicants seek to provide the Chamber with *amicus curiae* submissions on:
  - a) the standing of victims to bring an appeal under article 82(1)(a) of the Statute;
  - b) the question on whether a decision under article 15 is a decision on jurisdiction; and
  - c) the merits of the appeals filed by the Prosecutor and the victims.

<sup>1</sup>Corrigendum to Order scheduling a hearing before the Appeals Chamber and other related matters, 27 September 2019, ICC-02/17 OA OA2 OA3 OA4.

<sup>2</sup>See Public Annex for a detailed summation of the Applicants’ relevant expertise.

<sup>3</sup>*Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/17-58, 12 July 2019.

<sup>4</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the “Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence” 13 September 2013, para.10.

<sup>5</sup>See for example *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, “Order Granting Leave for Amicus Curiae to Appear”, 12 February 1998.

<sup>6</sup>Rule 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of *amicus* briefs.)

## II. SUBMISSIONS

### *The standing of victims to bring an appeal under article 82(1) (a) of the Statute*

5. The Applicants submit that the question of whether victims have standing to bring an appeal under article 82(1)(a) of the Statute and the merits of the appeals filed by the Prosecutor and the victims are interrelated, given that the grounds of appeal submitted by the Legal Representatives for Victims (“LRVs”) are broader in scope than those presented by the Prosecutor.<sup>7</sup>
6. The LRVs have *inter alia* argued that victims have standing as a “party” at this limited stage of the proceedings, which enables them to trigger appellate proceedings under article 82(1)(a) of the Statute.<sup>8</sup> Victims and the Prosecutor are the two sole actors in the proceedings at this stage. Logically, therefore, in proceedings under article 15 of the Statute, only the Prosecutor and the victims may be “parties” to those proceedings for the purposes of article 82(1)(a) of the Statute as there is no defence at this stage of the proceedings.
7. Armanshahr/OPEN ASIA, FIDH and TJCG have previously submitted that article 15(3) reflects the drafters’ intention to provide victims with a specific statutory right, granting victims procedural standing in this process for triggering the jurisdiction of the Court. This right is independent of the victims’ participatory rights under article 68(3) of the Statute and grants them direct access, exceptionally, to the Appeals Chamber at this very specific stage of the proceedings.<sup>9</sup>
8. The submission of victim representations in relation to the authorisation of an investigation is dealt with by rule 50 of the RPE, whereas the submission of victim observations under article 19(3) of the Statute is dealt with rule 59 of the RPE. As a result of their detailed regulation in these provisions, they operate independently of the regime created by rules 89 to 93 of the RPE. Neither rule 50 nor rule 59 makes reference to article 68(3) of the Statute. Rather, they state that victims may make representations in writing directly to the Chamber within the prescribed time limits.
9. The Applicants argue that from this specific and exceptional right conferred upon victims by article 15(3) of the Statute flow all other rights that victims have under the Rome Statute

<sup>7</sup>Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019.

<sup>8</sup>Corrigendum of Updated Victims’ Appeal Brief, ICC-02/17-73-Corr, 2 October 2019, Corrigendum to 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,” ICC-02/17-75-Corr, 1 October 2019.

<sup>9</sup>ICC-02/17-58, pp.17-21.

framework, including the right of victims to participate in proceedings as well as their right to reparations.<sup>10</sup>

***The question on whether a decision under article 15 is a decision on jurisdiction***

10. The Applicants maintain that a decision on the exercise of jurisdiction is a decision on jurisdiction pursuant to article 82(1)(a) of the Statute and as such should be appealable as of right. Indeed, as stated by Judge Eboe-Osuji in his partially dissenting opinion:

All this is to say that, by general linguistic usage, the term ‘jurisdiction’ would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court, as a matter of its mandate.<sup>11</sup>

11. A decision under article 15 of the Statute is undoubtedly a decision on whether or not to commence an investigation and therefore should be considered as a decision on jurisdiction. This is even more so as a decision on article 15 refusing to authorise the initiation of an investigation is binding upon the Prosecutor, whereas a decision under article 53(3)(a) simply requests the Prosecutor to reconsider her decision not to investigate.

***The merits of the appeals filed by the Prosecutor and the victims***

12. The Applicants submit that the issues on appeal presented by the Prosecutor<sup>12</sup> and the LRVs<sup>13</sup> are meritorious and deserve the benefit of appellate review. The Applicants’ proposed *amicus* submissions are intended to aid the Chamber in ensuring a clear interpretation of the ‘interests of justice.’

13. Further, as highlighted above, the Applicants submit that LRVs raise several grounds of appeal that have not been raised as stand-alone grounds of appeal by the Prosecutor, but rather are collapsed within the Prosecutor’s second ground of appeal. For example, the LRVs of 82 victims contend that the Pre-Trial Chamber erred in attempting to restrict the scope of the Prosecution’s investigation<sup>14</sup> and in concluding that the Court may only exercise jurisdiction over torture if (a) the infliction of severe physical or mental pain took place at least in part on

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<sup>10</sup>Decision on applications for Participation in the proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, ICC-01/04, 17 January 2006, para. 62: ‘the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.’

<sup>11</sup>Partially dissenting opinion Eboe-Osuji, para. 19, ICC-01/13-98-Anx, 2 September 2019.

<sup>12</sup>ICC-02/17-74, 30 September 2019.

<sup>13</sup>ICC-02/17-73-Corr, ICC-02/17-75-Corr.

<sup>14</sup>Paras. 144-166, ICC-02/17-73-Corr.

the territory of a State Party; and (b) the victim was captured within the borders of the State in which the armed conflict is taking place.<sup>15</sup>

14. The Applicants submit that the additional grounds of appeal raised by the LRVs are not secondary issues and are as equally important to victims as ensuring a clear interpretation of the ‘interests of justice’.
15. Although the Prosecutor sought to incorporate the scope of the investigation; the exercise of jurisdiction over torture; state cooperation; the passage of time and the prospects for securing relevant evidence and apprehending any identified suspects within its second ground of appeal, the Applicants submit that victims will be left without recourse should the Chamber only grant the Prosecutor’s first ground of appeal or should the Chamber decide that the Prosecutor is not allowed to raise before it the ground related to the scope of the investigation for which Pre-Trial Chamber II denied leave to appeal,<sup>16</sup> or other issues which were not even presented by the Prosecutor for leave to appeal before Pre-Trial Chamber II such as the exercise of jurisdiction with regard to the crime of torture.

#### IV. RELIEF SOUGHT

16. The Applicants submit that given the novelty of the issues presented, it would be beneficial for the Appeals Chamber to receive detailed submissions from the Applicants given their expertise on these matters and their presence and/or expertise relating to Afghanistan.
17. Therefore, the Applicants respectfully request the Chamber for leave to submit *amicus curiae* submissions on the matters outlined above and to provide oral submissions in the hearing listed from 4-6 December 2019.

Respectfully submitted,



**Dimitris Christopoulos,**  
**President, FIDH, on behalf of the Applicants**

Dated this 15<sup>th</sup> day of October 2019

At Kabul, Afghanistan; Paris, France; The Hague, The Netherlands; Berlin Germany; San Francisco, New York, United States.

<sup>15</sup> *Ibid*, paras. 172-184. See also grounds III and IV, ICC-02/17-75-Corr.

<sup>16</sup> ICC-02/17-62, paras 40-41.