

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/17**

Date: **13 September 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' Request for a Scheduling Order**

**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  
Fergal Gaynor and Nada Kiswanson van  
Hooydonk  
Nancy Hollander, Mikołaj Pietrzak, and  
Ahmad Assed

**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the  
Defence****States' Representatives**

**Amicus Curiae**  
Spojmie Nasiri  
Dimitris Christopoulos

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations  
Section****Other**

## I. INTRODUCTION

1. This request is submitted jointly by the legal representatives of 82 victims in the situation in Afghanistan (the 'LRV 1'), the respective legal representatives of six victims in the situation in Afghanistan (the 'LRV 2') and the legal representatives of an individual victim (the 'LRV 3').<sup>1</sup> It is filed pursuant to regulation 35(1) of the Regulations of the Court ("Regulations) in relation to the "Order suspending the time limit for the filing of an appeal brief and on related matters," issued by the Appeals Chamber on 24 June 2019 ("Order").<sup>2</sup> For the reasons set out below, the LRVs respectfully request that, in accordance with paragraph 11 of the Order, the Appeals Chamber now issue a revised timetable for appeal filings.

## II. RELEVANT PROCEDURAL BACKGROUND

2. On 12 April 2019, Pre-Trial Chamber II rejected a request by the Office of the Prosecutor ("Prosecution") for authorization to open an investigation of the situation in Afghanistan ("Impunged Decision").<sup>3</sup>

3. Pursuant to article 82(1)(d) of the Rome Statute, the Prosecution filed a request for leave to appeal the Impunged Decision on 7 June 2019 and the LRV 1 filed a

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<sup>1</sup> The Victims are represented by several separate legal teams which have been coordinating so as to file jointly where appropriate. Eighty-two victims are represented by Fergal Gaynor and Nada Kiswanson van Hooydonk ("LRV 1"). Victims r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) are represented by Katherine Gallagher of the Center for Constitutional Rights, r/00749/18 (Mohammed Abdullah Saleh al-Asad) by Margaret Satherthwaite 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 (collectively, "LRV 2"). Victim r/60009/17 (Abd Al Rahim Al Nashiri) is represented by Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed ("LRV 3").

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

<sup>2</sup> ICC-02/17-54.

<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. On 31 May 2019, Judge Mindua filed a separate concurring opinion. Concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr ("Concurring and Separate Opinion").

request for leave to appeal the Impunged Decision on 10 June 2019 (together, “Requests for Leave to Appeal”).<sup>4</sup>

4. On 10 June 2019, pursuant to article 82(1)(a), three notices of appeal were filed before the Appeals Chamber by the LRV 1, the LRV 2, and the LRV 3 (together, “Victims’ Notices of Appeal”).<sup>5</sup>

5. The LRV 1 filed the “Victims’ Appeal Brief” on 24 June 2019.<sup>6</sup> On the same day, the LRV 2 and LRV 3 jointly filed a motion for an extension of time to file their consolidated appeal brief and for an extension of page limit (“Request for Extension”).<sup>7</sup>

6. In the Order, the Appeals Chamber:

“consider[ed] that it is appropriate to suspend the time limits for filing of the appeal brief in the present proceedings by the LRV 2 and the LRV 3 until the Pre-Trial Chamber has determined the requests for leave to appeal as well as the time limit for the response to the LRV 1 Appeal Brief. Once the Pre-Trial Chamber has issued its decision on the requests for leave to appeal, the LRV 2 and the LRV 3 shall have ten days for file their joint appeal brief, while the LRV 1 shall have ten days to file an updated version of the LRV 1 Appeal Brief, should they so wish.”<sup>8</sup>

7. The Appeals Chamber further indicated that it “may review the suspension of the time limits as per the present order and will do so, should the Pre-Trial Chamber not have determined the requests for leave to appeal by 1 September 2019.”<sup>9</sup>

8. The Pre-Trial Chamber has yet to rule on the Requests for Leave to Appeal.

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<sup>4</sup> ICC-02/17-34; ICC-02/17-37 (collectively, “Requests for Leave to Appeal”). The legal representatives for this set of victims shall be referred to as “LRV 1” to accord with the Appeals Chamber description of legal representatives for victims in the Order.

<sup>5</sup> ICC02/17-38; ICC-02/07-36; ICC-02/17-40-Corr.

<sup>6</sup> ICC-02/17-53.

<sup>7</sup> ICC-02/17-52.

<sup>8</sup> Order, para. 7. The Appeals Chamber further granted the request for an extension of the page limit. *Id.* at para. 8. It also ordered the Prosecutor to file its consolidated response to the Victims’ appeal briefs 21 days after notification of the last brief. *Id.* at para. 9. The orders were “without prejudice to the Appeals Chamber’s eventual determination of the admissibility of the present appeals.” *Id.* at 10.

<sup>9</sup> Order, para. 11.

### III. REQUEST FOR LIFTING OF THE SUSPENSION OF TIME LIMITS

9. In the Order, the Appeals Chamber noted “that there are currently proceedings concerning requests for leave to appeal pending before the Pre-Trial Chamber, which, if leave were to be granted, would result in appeals against the same Impugned Decision that is the subject of the present proceedings.”<sup>10</sup> Accordingly, the Appeals Chamber suspended filing deadlines until after the issuance of a decision by the Pre-Trial Chamber.

10. The LRVs fully appreciate the Appeals Chamber’s rationale for suspending the time limits for filings until after resolution of the Requests for Leave to Appeal.

11. The Appeals Chamber nevertheless made clear that proceedings could not be delayed indefinitely; it indicated that it “will” review the suspension of time limits, “should the Pre-Trial Chamber not have determined the requests for leave to appeal by 1 September 2019.”<sup>11</sup>

12. On behalf of the Victims, the LRVs respectfully offer the following factors for the Appeals Chamber’s consideration in undertaking its review of the suspension of time limits:

- a. The existence of a preliminary examination in the situation in Afghanistan by the Prosecution became public in 2007. A full decade elapsed before the Prosecution filed the “Request for authorisation of an investigation pursuant to article 15” (“Request for Authorisation”).<sup>12</sup>
- b. The time between the filing of the Request for Authorisation and the Impugned Decision was an unprecedented seventeen months, including more than a year from the time of reassignment of the Pre-Trial Chamber in March 2018 until the Impugned Decision was rendered on 12 April 2019.<sup>13</sup>

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<sup>10</sup> Order, para. 7.

<sup>11</sup> Order, para 11.

<sup>12</sup> ICC-02/17-7-Red.

<sup>13</sup> The Victims note that the Situation was initially assigned to Pre-Trial Chamber II. In the time the Request for Authorisation was before that pre-trial chamber, two orders for additional information

- c. A further six weeks elapsed between the issuance of the Impunged Decision and the issuance of a 19-page concurring and separate opinion by Judge Mindua, which further delayed the appeal process.
- d. Five months have now elapsed since the Impunged Decision was issued. The last submissions relating to requests for leave to appeal were filed with the Pre-Trial Chamber eight weeks ago.

13. Meanwhile, the situation for victims has further deteriorated during the course of this appeal process:

- a. In Afghanistan the situation remains volatile. There has been a sharp increase in air strikes and 22 suicide attacks, ten of which took place in Kabul, between June and August 2019.<sup>14</sup> The recent collapse of talks between the United States and the Taliban have led to renewed fears of instability in Afghanistan. The Taliban and the United States have reportedly said they will now redouble military operations, which will lead to further intense armed conflict and, inevitably, civilian casualties and significant suffering.<sup>15</sup> Accountability was seemingly not on the agenda of the talks between the United States and the Taliban.<sup>16</sup>
- b. As relates to one of the victims who remains detained in Guantánamo (where he was transferred following his detention in Afghanistan (and Jordan)), it was recently publicly revealed that Sharqawi Al Hajj (r/00751/18) attempted suicide on 19 August 2019. Mr. Al Hajj's counsel alerted a court in the United States the his "life and health are

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were issued. *See* ICC-02/17-8 and ICC-02/17-23. After the case was assigned to Pre-Trial Chamber III, as currently composed, no further such orders were issued. The LRV for r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) further notes that she sent two supplemental letters to the Pre-Trial Chamber during the pendency of the Request for authorisation (in April 2018 and December 2018) to apprise the Pre-Trial Chamber of further factual developments relevant to the investigation and the victims, and to reiterate the offer to provide further information, in writing or in person, to assist in deciding the Request; she received no response from the Pre-Trial Chamber to those letters.

<sup>14</sup> United Nations Secretary-General, '[The Situation in Afghanistan and its implications for international peace and security – Report of the Secretary General](#)', 3 September 2019.

<sup>15</sup> *See*, '[America calls off negotiations to end its 18-year war in Afghanistan](#)', *The Economist*, 12 September 2019.

<sup>16</sup> *See*, Qazi, '[Trump Cancels Taliban Talks: What does it mean for Afghanistan?](#)', 8 September 2019.

concretely, imminently at risk,” with his declining physical and mental health apparently linked to the despair arising out of his having been detained for 17-years without charge.<sup>17</sup> On 10 September 2019, the U.S. district court refused to order an independent medical evaluation of Mr. Al Hajj.<sup>18</sup>

- c. As relates to another victim, Abd Rahim Al-Nashiri, (r/60009/17) who remains in Guantánamo, where he has been since being transferred there from his final “black site” detention in 2006: Mr. Al-Nashiri is charged with crimes that could result in the death penalty but he has yet to be tried. His mental and physical health continues to decline as a result of his many years of torture in the black sites.

14. In light of the continued lack of a decision from the Pre-Trial Chamber on the Requests for Leave to Appeal, the LRVs respectfully request that the Appeals Chamber lift the suspension of time limits and allow the Victims’ appeals to proceed expeditiously. The LRVs respectfully note that doing so poses no procedural problems: If leave to appeal is granted by the Pre-Trial Chamber before these appeal proceedings are concluded, the Appeals Chamber may consider joining the proceedings and/or ordering that amended or supplementary appeal briefs be filed.

#### IV. CONCLUSION

15. For the reasons set out above, the LRVs request that the Appeals Chamber lift the suspension on the time limit for the filing of appeal briefs and responses, and issue a scheduling order such that:

- a. the consolidated appeal brief for LRV 2 and LRV 3 shall be filed 10 days after a decision on this request; and

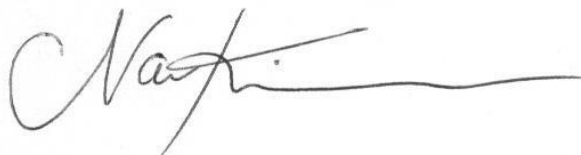
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<sup>17</sup> See *Sharqawi Al Hajj v. Donald J. Trump*, Case No. 09-cv-745 (D.D.C.), [Emergency Motion for Status Conference to Report Petitioner’s Recent Suicide Attempt and Obtain Decision on the Pending Emergency Motion for Independent Medical Relief](#), 22 August 2019.

<sup>18</sup> See [‘Judge Denies Independent Medical Eval for Suicidal Gitmo Prisoner’](#), Center for Constitutional Rights, 10 September 2019.

- b. an updated version of the LRV 1 Appeal Brief shall be filed 10 days after a decision on this request; and
- c. any responses shall be filed within 21 days.

Respectfully submitted,

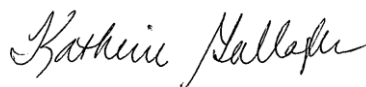




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Fergal Gaynor

Nada Kiswanson van Hooydonk

Legal Representatives for eighty-two victims in the situation in Afghanistan




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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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Nancy Hollander

Mikołaj Pietrzak

Ahmad Assed

Legal Representatives for r/60009/17

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

At New York, USA; Phnom Penh, Cambodia; Albuquerque, USA; Warsaw, Poland; and The Hague, the Netherlands.