

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/17**
Date: **15 October 2019**

APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
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

Request by Kate Mackintosh and Göran Sluiter for Leave to Submit Observations

Source: Kate Mackintosh, Promise Institute for Human Rights, University of California Los Angeles School of Law
Göran Sluiter, University of Amsterdam and Open University

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
Ms Helen Brady

Counsel for the Defence

Legal Representatives of the Victims

Mr Fergal Gaynor *et al.*
Ms Katherine Gallagher
Ms Margaret Satterthwaite *et al.*
Mr Tim Moloney *et al.*
Mr Nancy Hollander *et al.*

Common Legal Representative for Victims

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms Paolina Massidda

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

Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. Kate Mackintosh and Göran Sluiter (“Applicants”) request leave to submit *amici curiae* observations, in accordance with Rule 103 (1) and pursuant to the Appeals Chamber’s order of 27 September 2019.¹ The Applicants request leave to submit observations on legal issues arising in the appeal of the Prosecutor² against 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”).³

II. SUMMARY OF INITIAL OBSERVATIONS AND CONCLUSIONS

2. The Applicants propose to assist the Appeals Chamber as *amici curiae* by offering focused observations on the effect of Article 21 (3) of the Statute on the interpretation of and application of the interests of justice, as mentioned in Article 53 (1) (c) of the Statute, in the present case. The argument relates to ground II.D of the Prosecutor’s appeal, that the Pre-Trial Chamber failed to take sufficient account of relevant factors,⁴ in that not only the interests but also the rights of the victims favoured an investigation and should have been explicitly weighed in the balance.
3. The effect of the Pre-Trial Chamber’s interpretation and application of the ‘interests of justice’ is that there will be no investigation into the serious crimes allegedly committed in Afghanistan.
4. The Applicants will, on the basis of their observations, conclude that the Pre-Trial Chamber should have examined, pursuant to Article 21 (3) of the Statute, whether its interpretation and application of Article 53 (1) (c) of the Statute was consistent with internationally recognized human rights.
5. When interpreting Article 21 (3) of the Statute in accordance with its ordinary meaning, the reference to internationally recognized human rights should be understood to encompass all human rights and thus include the human rights of individuals who have become victims of serious human rights violations.

¹ ‘Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters’, ICC-02/17 OA OA2 OA3 OA4, 27 September 2019.

² ‘Prosecution Appeal Brief’, ICC-02/17, 30 September 2019 (“Prosecution Appeal Brief”).

³ ‘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, 12 April 2019.

⁴ Prosecution Appeal Brief paras. 157-166.

6. International human rights systems oblige States to use criminal justice mechanisms as part of effective reparations for victims of gross human rights violations. The scope of this duty has been variously described; however, it can be concluded as a minimum that *criminal investigations* into gross human rights violations, including serious violations of international humanitarian law, should be conducted to satisfy the rights of victims to an effective remedy.
7. The Trial Chamber failed to examine whether its decision to reject the Prosecutor's request to open an investigation into the situation in Afghanistan was consistent with this internationally recognised principle of human rights law.
8. The Applicants will also consider how this duty to investigate serious human rights violations should be interpreted and applied in the context of the Court. Being rooted in the inherent human dignity of every individual, human rights should, in principle, have practical and meaningful effect irrespective of the context in which they are being applied. Their application to matters before the Court, however, may require contextualisation in light of the potential qualitative difference between the duties of States under international human rights law and those of the Court.
9. The scholarly literature on this issue offers useful frameworks to address this tension and apply human rights obligations in context. In the present case, the methodology to be applied could consist of the following steps: (i) determining the applicable human rights norm; (ii) determining the nature scope and content of the applicable right; (iii) analysing the context in which the right must be applied, and (iv) interpreting and applying the right in the context. The Applicants' will further offer reflections on the appropriate outcome of the application of this framework to the present case.
10. The Applicants will conclude that the Trial Chamber's failure to explicitly apply a contextualised understanding of internationally recognised human rights represents a violation of Article 21 (3) of the Statute.

III. EXPERTISE

11. Kate Mackintosh is Executive Director of the Promise Institute for Human Rights at the University of California Los Angeles School of Law. She has practiced in and published on

international human rights law, international criminal law and international humanitarian law for over 20 years.

12. Göran Sluiter is Professor of international criminal law at the University of Amsterdam and Professor of criminal law and procedure at the Open University. He is a partner at Dutch law firm Prakken d'Oliveira Human Rights Lawyers. His research has focused on various aspects of international criminal procedure and he has published widely in that field.

IV. RELIEF SOUGHT

13. For the reasons stated above, the Applicants request leave to file their more elaborate observations.

Respectfully submitted,



Göran Sluiter

Also on behalf of Kate Mackintosh

Dated this fifteenth day of October, 2019

At Amsterdam, Netherlands