

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/17 OA OA2 OA3 OA4

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

**Request for Leave to Submit Observations on behalf of Human Rights
Organisations**

Source: *Amicus Curiae* Organisations

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

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Ms Helen Brady

Counsel for the Defence

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Fergal Gaynor *et al.*

Katherine Gallagher *et al.*

Tim Moloney QC *et al.*

Nancy Hollander *et al.*

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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

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States' Representatives

Applicants to participate as Amicus Curiae

Spojmie Nasiri

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Steven Kay QC *et al.*

REGISTRY

Registrar

Peter Lewis

Victims Participation and Reparations Section

Philipp Ambach

I. INTRODUCTION

1. This Request for leave to submit Observations on the legal issues identified in the Appeals Chamber's Scheduling Order dated 27 September 2019 is filed pursuant to paragraph 5 of that Scheduling Order and Rule 103.¹
2. The Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, The Lawfare Project, and UK Lawyers for Israel (together, the "*Amicus Curiae* Organisations") possess specific legal expertise in human rights.²
3. The Prosecution acknowledge that the Pre-Trial Chamber's Decision is "*not only of decisive significance for this situation but all situations.*"³ This is arguably true with respect to the *Situation in Palestine* as well as the *Situation on the Registered Vessels of Comoros, Greece and Cambodia*. As human rights organisations supporting affected communities' rights in Israel and Jewish communities in the diaspora, the *Amicus Curiae* Organisations are uniquely placed to make Observations in this matter given their extensive experience working in and with both affected communities as well as with victims of crimes proscribed by Article 5 of the Rome Statute.

II. SUMMARY OF OBSERVATIONS

4. The Scheduling Order identifies three issues on which the Appeals Chamber has requested assistance; each are considered below. The *Amicus Curiae* Organisations offer an alternative point of view not covered so far in the appeal briefs and pleadings. Their contribution provides a safeguard against a process

¹ ICC-02/17 72-Corr 27-09-2019 1/9 RH PT OA OA2 OA3.

² See Annex.

³ Prosecution Appeal Brief, ICC-02/17-74 30-09-2019 1/77 RH PT OA OA2 OA3 OA4, 30 September 2019 (hereinafter "OTP Appeal Brief"), para. 4.

which might be perceived as seeking views only from those advocating for an expansive view of the ICC's jurisdiction.

a. Issue 1: Whether Pre-Trial Chamber II's decision is one that may be considered a decision with respect to jurisdiction or admissibility under Article 82(1)(a)

5. The *Amicus Curiae* Organisations remain neutral but would, if granted leave, submit observations on broader considerations underlying this issue, namely the interpretation of provisions of the Rome Statute that touch upon the question of jurisdiction, including Articles 5, 12, 13 and 53. An important question which arises is the distinction between the existence and circumstance of "*jurisdiction*" and the "*exercise of jurisdiction*" and whether this impacts on how the applicable legal (and therefore procedural) framework is to be interpreted.

b. Issue 2: The standing of victims to bring an appeal under Article 82(1)(a)

6. The *Amicus Curiae* Organisations remain neutral on this issue but would, if granted leave, submit observations on policy considerations that should be considered. Firstly, when interpreting Article 82(1)(a), the general object and purpose of the preliminary examination phase must be considered. The process, as designed by the drafters, aims at ensuring that all interested parties are heard, including States and affected communities. Second, the criminal law nature of ICC proceedings must be acknowledged. This raises questions relating to the process and the effect of formal recognition of persons as "*victims*" at such an early stage. Third, the Prosecutor's and the Pre-Trial Chamber's accountability for their decisions is an important consideration. An interpretation of Article 82(1)(a) which allows for a lack of judicial oversight on such important issues would not be conducive to bolstering the ICC's legitimacy in the eyes of affected communities.

c. *Issue 3: The merits of the appeals filed by the Prosecutor and the victims*

7. Textual and contextual interpretation of Article 53(1)(c) show that consideration of the “*interests of justice*” requires the Prosecutor to consider matters which go beyond the gravity of the crime and the interests of victims. The principle of comity is, for example, widely referred to in the case law of domestic courts and is an important principle safeguarding the interests of peace and security in international relations, as well as the interests of justice.
8. The appeal briefs do not address, however, whether such considerations may properly be considered as part of an assessment of whether there are substantial grounds to believe that an investigation would not be in the “*interests of justice*”. The *Amicus Curiae* Organisations request leave so that the Appeals Chamber may be assisted by observations as to the principles of justice which may properly be considered as part of an interests of justice assessment - including comity - and whether the Pre-Trial Chamber erred in applying the factors which it did consider pertinent, as is argued by the LRVs.⁴
9. The *Amicus Curiae* Organisations observe that the Prosecutor’s appeal brief arguably misconstrues the nature of cooperation obligations with respect to the arrest of suspects which may arise upon the commencement of an investigation.⁵ This also requires specific consideration of the relationship between the Rome Statute system and national legal systems.⁶ If granted leave, the *Amicus Curiae*

⁴ 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-Corr 01-10-2019 1/74 RH PT OA2 OA3, 1 October 2019, paras. 72 to 78.

⁵ See, e.g. OTP Appeal Brief, para. 126.

⁶ See, e.g. Article 59(2) of the Rome Statute, mandating that “a person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person’s rights have been respected.”

Organisations will further observe that States' cooperation obligations under the Rome Statute remain subject to a residual discretion which the Statute affords to States to determine whether an ICC arrest request is made in accordance with its national law.⁷ The *Amicus Curiae* organisations will observe that the legal effect of the Rome Statute's cooperation obligations may properly be taken into account as part of an assessment of whether an investigation in such circumstances would not be in the interests of justice.

10. Finally, the *Amicus Curiae* organisations observe that the Prosecutor concedes that the Pre-Trial Chamber has the power to review her determinations under Article 53(1)(c), irrespective of their outcome.⁸ The proposed observations would address the procedural consequences of such a claim, namely that it places a burden on the Prosecutor to explain and justify in any request (or, arguably, decision) to open an investigation how Article 53(1)(c) was applied in the particular situation.

Respectfully submitted,

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Steven Kay QC, Dov Jacobs, Joshua Kern

On behalf of the Human Rights Organisations listed in the Annex

Dated this 15th day of October 2019

At London, England and The Hague, Netherlands

⁷ See Articles 59(1), 59(2), 89(1) of the Rome Statute.

⁸ OTP Appeal Brief, para. 34.