

**Cour
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Internationale**



**International
Criminal
Court**

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Date: 15 October 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 Document

Request by Professor Jennifer Trahan for leave to submit observations on the legal questions presented regarding Pre-Trial Chamber II'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' of 12 April 2019

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

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Legal Representatives of the Applicants

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(Participation/Reparation)**

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States' Representatives

Amicus Curiae

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

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Detention Section

Victims Participation and Reparations Section

Philipp Ambach, Chief

Other

Request for leave to submit observations on legal questions presented by the current appeal in the Afghanistan situation

This is a request by Professor Jennifer Trahan pursuant to the order of the Appeals Chamber entitled ‘Corrigendum of Order Scheduling a Hearing Before the Appeals Chamber and Other Related Matters’, dated 27 September 2019, which invited expressions of interest in submitting observations to serve as *amici curia* regarding Pre-Trial Chamber II’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’ of 12 April 2019 (ICC-02/17-33) (‘the Decision’).

Particular expertise of Professor Trahan relevant to the legal questions presented

Professor Jennifer Trahan (AB Amherst College, JD NYU School of Law, LLM Columbia University School of Law) is a Clinical Professor at NYU’s Center for Global Affairs where she teaches, *inter alia*, International Law, International Justice (*i.e.*, International Criminal Tribunals and their law), and directs the concentration in International Law & Human Rights. As an NGO observer, she has attended sessions of the ICC’s Preparatory Commission, the Special Working Group on the Crime of Aggression, the Kampala Review Conference, and numerous meetings of the ICC Assembly of States Parties. She is also Chair of the American Branch of the International Law Association’s ICC Committee. Professor Trahan’s ICC-related publications include: ‘The Assembly of States Parties’, in *The Elgar Companion to the International Criminal Court*, ed. by Margaret M. deGuzman and Valerie Oosterveld (forthcoming Edward Elgar Publishing 2020); ‘The Crime of Aggression and the International Criminal Court’, in *Seeking Accountability for the Unlawful Use of Force*, ed. by Leila Sadat (Cambridge Univ. Press 2018); ‘Revisiting the Role of the Security Council Regarding the International Criminal Court’s Crime of Aggression’, *J. of Int’l Criminal Justice* (2019); ‘The International Criminal Court’s Libya case(s)—The Importance of

the Court Being Consistent with International Human Rights, and Negotiating Diplomatic Assurances of Non-Use of the Death Penalty’, 17 Int’l Crim. Law Rev. 803 (2017); ‘The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices’, 24 Criminal Law Forum 417 (2013); and additional law review articles on the ICC crime of aggression. As Chair of the ABILA ICC Committee, Professor Trahan was principle or sole author of numerous Committee position papers, including recommendations for U.S. policy towards the ICC.

Previously, Professor Trahan served as Counsel and of Counsel to the International Justice Program of Human Rights Watch where she, *inter alia*, was primary author of ‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ (HRW 2005).

Outline of issues to be examined by the proposed amicus submission and initial conclusions

If granted leave, Professor Trahan would make submissions *amicus curia* primarily on the merits of the appeal and anticipates reaching conclusions along the following lines:

1) Reviewability of ‘positive’ and ‘negative’ determinations. The amicus submission initially would examine the question of which organ within the ICC is charged under the Rome Statute with making the determination that there is not a sufficient basis to initiate an investigation based on ‘the interests of justice’ under Rome Statute Article 53(1)(c) (*i.e.*, a “negative determination”), and whether that determination is subject to judicial review. The amicus would conclude that it is for the ICC Office of the Prosecutor (‘OTP’) to make the determination that a situation is not ‘in the interests of justice’, and that, pursuant to Article 53(3)(b), such a determination not to proceed is reviewable by the Pre-Trial Chamber. However, nothing in the Rome Statute suggests the Prosecutor must make a positive showing that a situation is in the

‘interests of justice’ in order to proceed (a ‘positive determination’), nor does the Rome Statute provide for Pre-Trial Chamber review of such a ‘positive determination’. Moreover, even if the Pre-Trial Chamber were able to review a ‘positive determination’ that a situation is in ‘the interests of justice’, the Pre-Trial Chamber would need to confine itself to a *review* of the Prosecutor’s determination, not make its own *de novo* determination, as it did.

2) Merits. Alternatively, in the event that the Appeals Chamber considers the merits of the Pre-Trial Chamber’s application of the ‘interests of justice’, the amicus would start by examining the interpretative sources to use in order to understand the meaning of the phrase. The amicus would then consider the criteria the Pre-Trial Chamber appears to have utilized, and whether they are in accordance with the meaning of the phrase as gleaned through application of the interpretative sources. The submission would conclude that the criteria utilized are not in accordance with the meaning of the phrase as understood through application of the interpretative sources.

Interpretative sources. Specifically, the submission would examine the sources suggested in the Vienna Convention on the Law of Treaties¹ related to treaty interpretation, including: (i) the ‘ordinary meaning’ of the text; (ii) the negotiating history (as appropriate); and (iii) the phrase in light of its ‘context’ and the ‘object and purpose’ of the Rome Statute. The submission would then analyze, pursuant to Rome Statute Article 21(1)(b), relevant ‘applicable treaties and the principles and rules of international law’—particularly, obligations to ‘extradite or prosecute’ various international crimes—as informed by Article 21(3)’s requirement that any

¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, 8 ILM 679.

‘application and interpretation of law’ ‘must be consistent with internationally recognized human rights’.

The Pre-Trial Chamber’s criteria. The submission would next examine whether the criteria that the ICC Pre-Trial Chamber appears to have utilized fall within the meaning of ‘the interests of justice’ as gleaned through considering the interpretative sources—namely: (i) the time period the preliminary examination has taken, (ii) the anticipated future prospects for successful investigations and/or prosecutions (including whether or not there would be state cooperation and available evidence, and anticipated prospects for surrender of potential accused), (iii) whether the victims could end up frustrated, (iv) the ‘complexity and volatility of the political climate’, and (v) budgetary/financial constraints. The submission would conclude that the criteria utilized do not fall within the meaning of the phrase as understood through application of the interpretative sources. The submission would further examine whether the criteria provide a workable standard for future ICC cases, and would conclude that they do not.

Conclusion. The submission would ultimately suggest that any interpretation of the phrase ‘the interests of justice’ must accord with the ordinary meaning of the words, their ‘context’, the Rome Statute’s ‘object and purpose’, and relevant obligations under international law; it also should set a workable standard for future ICC cases. Utilizing a narrowly construed interpretation of the phrase, the Appeals Chamber should reverse the Pre-Trial Chamber’s Decision not only on procedural grounds (as set forth above) but also on the merits.

Respectfully submitted,



Professor Jennifer Trahan

Dated 15 October 2019, New York, NY