

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/17
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
with Public Annexes**

**Request of Former UN Special Rapporteurs for Leave to Submit *Amicus Curiae*
Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence**

**Source: Prof. Hannah R. Garry, University of Southern California Gould School of
Law**

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

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I. Introduction

1. This Request of former UN Special Rapporteurs for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence (‘Request’) is made on behalf of Professor Pablo De Greiff, Professor Juan E. Méndez and Professor Manfred Nowak (‘Applicants’) pursuant to the Appeals Chamber’s invitation in its “Corrigendum of Order Scheduling a Hearing before the Appeals Chamber and other Related Matters” of 27 September 2019 in the Situation in the Islamic Republic of Afghanistan (‘Scheduling Order’).¹

2. In this Request, as former UN Special Rapporteurs and distinguished professors of international human rights law, Applicants respectfully request leave to make observations on “(iii) the merits of the appeals filed by the Prosecutor and the victims”² 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” of 12 April 2019 (‘Pre-Trial Chamber Decision’).³ As detailed below, Applicants seek to provide expertise on whether the Pre-Trial Chamber Decision is in error because it is in violation of the rights of victims of torture to an effective remedy, reparations and truth under international human rights law.

II. Applicants’ Expertise⁴

3. Professor Pablo de Greiff is Senior Fellow and Director of the Transitional Justice Program at the Center for Human Rights and Global Justice at New York University School of Law. He is also UN Rapporteur for the Human Rights Council Experts’ Group on Prevention. From 2012-2018, he was the first UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. He has lectured and published extensively in the areas of transitional justice, reparations and development.⁵

4. Professor Juan E. Méndez is Professor of Human Rights Law in Residence and Faculty Director of the Anti-Torture Initiative, Center for Human Rights and Humanitarian Law, at the American University Washington College of Law. From 2010-2016, he was the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. As professor and scholar of international human rights law, his areas of expertise include the rights of persons deprived of liberty, the right to personal integrity, transitional justice, and prevention

¹ Scheduling Order, para. 21.

² Scheduling Order, para. 3.

³ ICC-02/17-33 12-04-2019 1/32 EK PT.

⁴ See Applicants’ Curriculum Vitae in the attached Annexes.

⁵ See Professor de Greiff’s detailed biography here:

<https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=41728>

of genocide and mass atrocities. Professor Méndez has held a number of high level positions within the United Nations, and is the recipient of several prestigious human rights awards. Relevant to this Request, as a result of his defence of human rights for political prisoners, Professor Méndez was arrested and subjected to torture and administrative detention for over a year in Argentina for which he was named a “Prisoner of Conscience” by Amnesty International.⁶

5. Professor Manfred Nowak is Professor of International Law and Human Rights at the University of Vienna. From 2004-2010, he was the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. As a scholar and professor, Professor Nowak has produced over 600 publications, including commentaries on the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights. He has served in a number of other expert functions for the United Nations, including as UN Expert on Enforced Disappearances, as well as in the Council of Europe and the European Union. Currently, he is the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty.⁷

III. Summary Conclusions

6. Applicants note that in the Pre-Trial Chamber Decision, the Chamber was satisfied that there is a reasonable basis to believe that the incidents underlying the Prosecutor’s request to investigate the situation in Afghanistan occurred.⁸ Specifically, the Chamber highlighted the Prosecutor’s submissions that, as of 1 May 2003, “torture was widely practiced in Afghan government detention facilities [by the Afghan National Security Forces] against any persons suspected to belong to anti-government armed groups, with a view either to forcing confessions or obtaining information, or as a form of punishment”⁹ and “members of the US armed forces and the CIA have committed the war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the US authorities.”¹⁰ As such, the Chamber found that such incidents may qualify as torture as a war crime,¹¹ and that they are admissible because of the “*gravity per se* of the crime of torture, which is *radically banned by international law*, and the circumstance that the conducts have

⁶ See Professor Méndez’s detailed biography here:

<https://www.wcl.american.edu/community/faculty/profile/jmendez/bio>

⁷ See Professor Nowak’s detailed biography here:

<https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/IE.aspx>

⁸ Pre-Trial Chamber Decision, para. 60.

⁹ Pre-Trial Chamber Decision, para. 21.

¹⁰ Pre-Trial Chamber Decision, para. 24.

¹¹ Pre-Trial Chamber Decision, para. 61.

allegedly been committed by public officials in their functions.”¹² Nevertheless, the Chamber concluded that an investigation in Afghanistan would not be in the interests of justice in part because “it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively [contribute] to it.”¹³

7. Applicants respectfully disagree. In view of the Pre-Trial Chamber’s finding that there is a reasonable basis that torture has occurred as of 1 May 2003, and considering the rights to an effective remedy, reparations and truth for victims, as well as the requirements of accountability and redress for torture under international law, the Applicants submit that the Chamber was in error to deny the Prosecutor’s investigation request for the following reasons.

8. First, there is an absolute prohibition on torture under international law, *from which no derogation is permitted*, even in times of armed conflict. Afghanistan and the United States are bound to abide by this *jus cogens* prohibition under customary and treaty law, specifically the United Nations Convention Against Torture (‘CAT’), International Covenant on Civil and Political Rights (‘ICCPR’) and common Article 3 of the 1949 Geneva Conventions applicable in times of armed conflict.¹⁴

9. Second, where acts of torture are alleged, all States have an obligation under international law to criminalise, investigate, prosecute and punish such acts wherever they occur under the principle of *aut dedere aut judicare*.¹⁵ Perpetration of torture in armed conflict amounts to a war crime and is also a crime against humanity,¹⁶ and “it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes.”¹⁷ There is no discretion to address the breach otherwise.¹⁸ Here, as found by the Pre-Trial Chamber, *not one State* with jurisdiction over the incidents alleged in the Prosecution’s request has exercised it, including Afghanistan and the United States.¹⁹ Failure by States to initiate a prompt investigation is *de facto* a denial of the rights to an effective remedy, reparations and redress to victims of torture under treaty and customary international law.²⁰ Further, it is a denial of the

¹² Pre-Trial Chamber Decision, para. 85 (emphasis added).

¹³ Pre-Trial Chamber Decision, para. 96.

¹⁴ Afghanistan is a party to the CAT (1987), see Art. 2; the ICCPR (1983), see Art. 7; and the 1949 Geneva Conventions (1956), see common Art. 3(1)(a). Likewise, the United States is States Party to the CAT (1994), ICCPR (1992) and 1949 Geneva Conventions (1955).

¹⁵ CAT, Arts. 5-8.

¹⁶ Rome Statute, Arts. 7, 8.

¹⁷ Rome Statute, Preamble.

¹⁸ CAT, Arts. 4-8; Rome Statute (2002), Arts. 7(1)(f), 8(2)(c); ICTY, *The Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 128-142.

¹⁹ Pre-Trial Chamber Decision, paras. 76-79.

²⁰ CAT, Arts. 12, 14; see also Committee Against Torture, General Comment, no. 3: Implementation of Article 14 by State Parties (2012). ICCPR, Arts. 2 (3), 7; see also Human Rights Committee, General Comment, no. 7,

right to truth in the face of gross and systematic violations of human rights, available to victims and society in the face of institutional policies enabling their occurrence.²¹

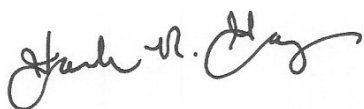
10. Third, prompt initiation of criminal investigation into allegations of torture provides an effective remedy and reparation for victims.²² Failure by States to do so results in further injury to victims and may constitute, in and of itself, a violation of the prohibition against torture.²³

11. Finally, contrary to the Pre-Trial Chamber's conclusion, initiation of an investigation by the Prosecutor into the situation in Afghanistan *is* in the interests of justice for victims. While this request does not address victims' standing to file an appeal, victims of torture often serve as "parties" in national criminal and/or civil proceedings, and such a role for victims in these proceedings is compatible with their rights under international human rights law.²⁴ Applicants submit that, *regardless of outcome*, an investigation is necessary to the rights of torture victims to an effective remedy, reparations and truth. Failure to authorise investigation into this *per se* grave violation of international law in the face of complete abdication of States, is itself an abdication from justice, fundamentally at odds with the purposes of the Court to end impunity for international crimes and thereby contribute to their prevention.²⁵

IV. Request

12. On the basis of the foregoing, Applicants request (a) leave to submit written observations pursuant to Rule 103 of the Rules of Procedure and Evidence; and (b) permission to participate in the hearing of the appeal in this matter scheduled for 4-6 December 2019.

Respectfully submitted,



Prof. Hannah R. Garry, Counsel for *Amicus Curiae* Applicants

Dated this 15th day of October 2019

At Los Angeles, California, USA

para. 1 (1982); General Comment no. 20, para. 14 (1992); General Comment no. 31, para. 15 (2004). Rome Statute, Art. 75.

²¹ See, e.g., Report of the UN Office of the High Commissioner for Human Rights, E/CN.4/2006/91 (8 February 2006); Human Rights Commission and Human Rights Council (resolution 2005/66 of 20 April 2005 of the Commission; decision 2/105, 27 November 2006; resolutions 9/11, 18 September 2008, and 12/12, 1 October 2009 of the Council). See also Yasmin Naqvi, *The Right to Truth in International Law*, International Review of the Red Cross, No. 862, 2006.

²² UN General Assembly, Promotion of Truth, Justice, Reparation, and Guarantees of Non-recurrence, U.N.Doc. A/69/518, 4 October 2014, para. 17.

²³ See ECtHR, *Aksoy v. Turkey*, para. 98 (1996); ECtHR, *Assenov v. Bulgaria*, para. 102 (1998). See also ECtHR, *Labita v. Italy*, para. 131 (2000); *Ilban v. Turkey* [GC] (no 22277/93) ECHR 2000-VII, paras. 89-93; *Bueno-Alves v. Argentina* (2007) Series C No. 164, paras 88-90 and 108.

²⁴ CAT, Art. 14.

²⁵ Rome Statute, Preamble.