

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document

Application for leave to submit *amicus curiae* observations

Source: Amnesty International

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

Counsel for the Defence

Legal Representatives of the Victims

Ms Katherine Gallagher et al

Mr Fergal Gaynor et al

Ms Nancy Hollander et al

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

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence and the Appeals Chamber's invitation to organisations with "specific expertise in human rights law",¹ Amnesty International requests leave to submit written observations, as *amicus curiae*, on the merits of the appeals of Pre-Trial Chamber II's ('PTC') decision not to authorise an investigation into the situation in Afghanistan (the 'Impugned Decision')² and preliminary questions of standing and admissibility.

I. REQUEST FOR LEAVE

2. Amnesty International has extensive knowledge and expertise in international human rights law having worked for more than 50 years documenting and campaigning against human rights violations and abuses around the world. Its expertise has been recognised by numerous international and national courts, which have permitted the organisation to submit *amicus curiae* briefs to assist in resolving significant questions of international law.³ It has Special Consultative Status to the Economic and Social Council of the United Nations, among others.

3. Amnesty International has documented crimes under international law committed in the Afghanistan situation for decades, as well as the impunity that has prevailed denying justice to victims. The organisation played an active role in the adoption of the Rome Statute and the establishment of the International Criminal Court ('ICC'). It has a specific project dedicated to promoting the human rights compliance of the ICC and other international justice mechanisms.

4. Amnesty International requests leave to make observations as an *amicus curiae* in order to assist the Appeals Chamber in determining the appeals against the Impugned

¹ 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters', 27 September 2019, ICC-02/17-72-Corr, para. 21.

² 'Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 12 April 2019, ICC-02/17-33, (the Impugned Decision).

³ For further information see Amnesty International's webpage on Strategic Litigation: <https://www.amnesty.org/en/strategic-litigation/>.

Decision in a manner that is consistent with the rights of victims in the Statute and internationally recognised human rights.

II. SUMMARY OF AMNESTY INTERNATIONAL'S SUBMISSIONS

5. If granted leave to submit observations, Amnesty International will argue that: (1) the PTC erred by applying the interests of justice inconsistently with the Statute and internationally recognised human rights resulting in victims being unfairly denied access to justice and reparation before the ICC; (2) the Appeals Chamber should resolve preliminary questions of standing and admissibility consistent with the Statute and internationally recognised human rights ensuring that victims are given access to effective remedies by allowing them to appeal errors in the decision; and (3) consistent with internationally recognised human rights, the Appeals Chamber should provide effective remedies to the victims.

1. Submissions on the merits of the appeal

6. Amnesty International notes that a key issue in this appeal is whether the PTC is permitted by the Statute to assess the interests of justice in reviewing the Prosecutor's application for authorisation. Victims and other commentators have made strong arguments that the PTC's assessment was *ultra vires*.⁴ Amnesty International will argue that, should the Appeals Chamber find that the PTC erred by applying the interests of justice, it should nonetheless continue to consider other grounds of appeal relating to the PTC's application of the interests of justice criterion to provide vital legal clarity on its application in future situations and cases.

7. Amnesty International will argue that the PTC erred in its application of the

⁴ 'Corrigendum of Updated Victims Appeal Brief' 2 October 2019, ICC-02/17-73-Corr, paras. 106-116; '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"', 1 October 2019, ICC-02/17-75-Corr., paras 55-69.

interests of justice criterion unfairly denying victims their rights in the Statute and internationally recognised human rights to access justice and reparation by:

- adopting and applying a radically broad interpretation of the interest of justice criterion, which is not supported by the text or the drafting history of the Statute, inconsistent with internationally recognised human rights and antithetical to the object and purpose of the Statute;
- dismissing out of hand the interests of hundreds of victims, who made submissions prior to the decision supporting an investigation, contrary to Articles 53(1), 68(1) and 68(3) of the Statute;
- subordinating the rights and interests of victims to inappropriate political and inaccurate budgetary considerations that go beyond the scope of any prosecutorial or judicial review of the interests of justice.

2. Submissions on Preliminary Issues of Standing and Admissibility

8. Pursuant to internationally recognised human rights, persons whose rights have been infringed have a right to an effective remedy and must be able to seek such remedies before competent judicial authorities.⁵ In this case, the competent judicial authority is the ICC and the appropriate mechanism for victims to seek remedies is an appeal. Amnesty International therefore strongly supports the compelling arguments in favour of granting victims standing to appeal the Impugned Decision, set out in submissions of the legal representative for victims⁶ and the partially dissenting opinion of Judge Antoine Kesia-Mbe Mindua to the PTC's decision granting only the Prosecution leave to appeal pursuant to Article 82(1)(d).⁷ In particular, the

⁵ See for example Article 2(3) of the International Covenant on Civil and Political Rights.

⁶ 'Corrigendum of Updated Victims Appeal Brief' 2 October 2019, ICC-02/17-73-Corr, paras. 32-87; '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"', 1 October 2019, ICC-02/17-75-Corr., paras 6-41.

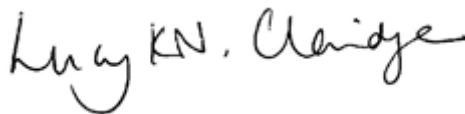
⁷ 'Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan''. 17 September 2019, ICC-02/17-62-Anx, paras 18-51.

organisation agrees that victims must be able to seek remedies before the ICC in their own right rather than rely on the Prosecution to appeal.

9. Supplementing the detailed arguments that have already been presented, Amnesty International will argue that, should the Appeals Chamber determine that it is not possible to read a right of appeal of victims into the provisions of the Rome Statute, the Appeals Chamber must, consistent with its previous practice,⁸ create a new procedural remedy for victims pursuant to Article 21(3). Amnesty International will further set out legal arguments that this approach is consistent with Article 21.

3. Submissions on Effective Remedies

10. In light of the errors by the PTC, Amnesty International will submit that the Appeals Chamber should ensure that its decision provides effective remedies to victims. To assist the Appeals Chamber, the *amicus curiae* observations will examine remedies for denial of access to justice in international human rights law and practice, including considering the resource and cooperation challenges identified by the PTC in the Impugned Decision.



Lucy Claridge
Director of Strategic Litigation
on behalf of
Amnesty International

Dated this 15 October 2019

At London, United Kingdom

⁸ See in particular ‘Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, para. 37.