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APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter

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I. INTRODUCTION

1. Kate Mackintosh and Göran Sluiter hereby respectfully submit their amicus curiae observations,¹ pursuant to the Appeals Chamber's Decision of 24 October 2019.²

II. Article 21(3) requires the Court to apply and interpret law consistent with internationally recognized human rights.

2. The Appeals Chamber has clarified the overarching status of Article 21(3), explaining that it “makes the interpretation as well as the application of the law applicable under the Statute **subject to** internationally recognised human rights”³ (emphasis added). The Chamber continues: “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.”⁴
3. The content of “internationally recognised human rights” is not defined in the Statute. In a separate opinion, one judge of the Appeals Chamber considered that “internationally recognized may be regarded as those human rights acknowledged by customary international law and international treaties and conventions.”⁵ Different Chambers of the Court have referred to provisions of the major human rights treaties as well as to soft law in applying Article 21(3).⁶

¹ The Amici Curiae are grateful for the assistance of Francesca Allegra, Claudia Iseli and Cecilia Kustermann.

² ICC-02/17-97 24-10-2019 1/16 NM PT OA OA2 OA3 OA4.

³ Prosecutor v. Lubanga, ICC-01/04-01/06-772, 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), para.36-37 (Dec. 14, 2006).

⁴ *Id.*

⁵ Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Prosecutor's “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d'appel du Procureur,’” Separate opinion of Judge Georgios M. Pikis, para.3 (Sept. 12, 2006).

⁶ Prosecutor v. Lubanga, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, para.310 (Jan. 29, 2007) (Convention on the Rights of the Child); Prosecutor v. Gagbo, ICC-02/11-01/11-432, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(ci)(i) of the Rome Statute, para.39 (June 3, 2013) (European Court of Human Rights); Prosecutor v. Bemba, ICC-01/05-01/08-475, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, para.35 (Aug. 14, 2009) (Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights). For soft law, see Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, PRS 4, VPRS 5 an VPRS 6, para.115 (Jan. 17, 2006); Prosecutor v. Jean Pierre Bemba Gombo, ICC-1/05-01/08-320, Fourth Decision on Victims' Participation, para.16 (Dec. 12, 2008).

4. The range of situations in which Article 21(3) has been applied makes clear that not only the rights of accused persons are relevant.⁷ In the case of *Prosecutor v. Katanga and Ngudjolo*, the Appeals Chamber applied Article 21(3) in deciding whether detained witnesses who had requested asylum in the Netherlands should be returned to DRC, as well as whether they could continue to be detained by the court, and whether they should have access to their lawyers; the ruling against return to DRC and in favour of contact with the lawyers was based on the internationally recognised human rights of the witnesses.⁸
5. It can therefore be said that “internationally recognised human rights” encompass at least those acknowledged in the major international treaties as well as in custom, and appear to attach to every person directly affected by a decision of the Court.

III. Suggested framework for applying internationally recognized human rights in the context of the ICC

6. Since human rights obligations formally bind States, it has been argued that their application to international criminal tribunals requires a degree of adaptation to the specific character of these courts, or contextualization.⁹
7. There are a number of reasons why the exercise of contextualization should be undertaken with great caution and restraint. First there is the dominant status of human rights, as evidenced in Article 21(3). Then many characteristics commonly cited as unique to international tribunals and so justifying a departure from international norms, such as an overburdened court system

⁷ It has also been argued as a matter of construction that “internationally recognised human rights” must be broader than fair trial rights, which are referred to throughout the Statute simply as “rights” – see Rebecca Young, *‘Internationally Recognized Human Rights’ Before the International Criminal Court*, INT’L & COMP. L. Q. 60(1) (2011), p. 193, contrasting the language of Article 21(3) with Articles 54, 55 and 67.

⁸ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-3003-tENG, Decision on Amicus Curiae Application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile,” (June 9, 2011).

⁹ See, *inter alia*, L. Gradoni, ‘International Criminal Courts and Tribunals: Bound by Human Rights Norms... or Tied Down?’, 19 *Leiden J Int’l L* (2006), p. 855; E. Mose, ‘Impact of Human Rights Conventions in the Two Ad Hoc Tribunals’, in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Ashjorn Eide* (Martinus Nijhoff, Leiden 2003), p. 179, p. 189 and p. 208; O. Swaak Goldman, ‘The ICTY and the Right to a Fair Trial: A Critique of the Critics’, in 10 *Leiden J Int’l L* (1997), p. 221; C. Warbrick, ‘International Criminal Courts and Fair Trial’, 3 *J Armed Conflict* (1998), at 51. In the context of the ICTY/ICTR, see *Prosecutor v. Galic*, IT-98-29-A, Appeals Judgement, Separate Opinion of Judge Shahabuddeen (30 November 2006), 25.

or limited resources, can also be relevant to domestic jurisdictions and tend not be accepted by international human rights courts as grounds for States' restriction of human rights.¹⁰

8. Further, not every international criminal tribunal appears to support a contextualized application of human rights law: the Constitutional Chamber of the Kosovo Specialist Chambers rejected such an approach.¹¹ In applying human rights law fully and unconditionally, the Chamber found a number of draft rules of that court to be in violation of internationally recognized human rights.¹²
9. A proper contextualization of internationally recognized human rights, therefore, must be based on a solid methodology and sufficiently reasoned. Zeegers has suggested the following four steps, which we propose for the assistance of the Chamber.¹³
10. First, the Chamber should identify the possible impact of its decision on human rights, triggering the applicability of Article 21 (3) of the Statute, and the *prima facie* relevant human rights norm(s).
11. Second, the Chamber should determine the nature, scope and content of the relevant right. In doing so, the Chamber should assess the principles and interests that the right in question is meant to protect and set out the legal test that has been used in the national context to determine whether or not a certain interpretation or application of the law would interfere with the right in question. This requires study of relevant case law of international human rights courts and supervisory organs, which the ICC should recognize as persuasive authority.
12. Third, the Chamber should analyze the context in which it is called to interpret and apply the right in question and indicate whether any elements of this context might impact this interpretation and application. For example, fair trial rights are unlikely to need much, if any, adaptation in the context of the ICC, whose core business is the investigation and prosecution of crimes. There has, however, also been case law dealing with asylum and *non-refoulement*,

¹⁰ See, e.g., on the obligation for States to organize their judicial system in such a way that courts can meet all requirements of the right to a fair trial, including the obligation to hear cases within a reasonable period of time: ECtHR, Judgement, *Cocchiarella v. Italy* (App No 64886/01), 29 March 2006, para. 74.

¹¹ Judgement on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05-L-053 on SC and SPO, Case No. KSC-CC-PR-17-01, Constitutional Court Chamber, 26 April 2017.

¹² *Id.*, para. 215, holding nine rules to be inconsistent with human rights law.

¹³ Krit Zeegers, *International Criminal Tribunals and Human Rights Law – Adherence and Contextualization* (Asser Press/Springer 2016), pp. 380 – 392.

in which the context of not having a territory resulted in the adaptation of the *non-refoulement* principle.¹⁴

13. Fourth and finally, the Chamber should interpret and apply the right it has identified in the specific context it has analyzed under step three. Especially when this process of contextualization results in reduced protection, the Chamber should sufficiently explain the factors justifying its interpretation.

IV. Application of suggested framework to the present case

A. Relevant human rights norms

14. As far as the first step is concerned, the Impugned Decision significantly impacts the rights of individuals to have the serious human rights abuses they have suffered effectively investigated. As a result of the Impugned Decision, no criminal investigations will take place.

B. Nature, scope and content of victims' rights to an investigation

15. The second step involves a determination of the nature, scope and content of the victims' right to an investigation. This right is contained in all the relevant major human rights instruments, often deriving from the duty to ensure respect for human rights and the right to an effective remedy.
16. The right to an effective remedy for victims of serious human rights violations is internationally recognized. Proclaimed in Article 8 of the Universal Declaration of Human Rights, the right also appears in Article 2(3) of the International Covenant on Civil and Political Rights; Article 6 of the Convention for the Elimination of all forms of Racial Discrimination; Article 14 of the Convention against Torture; Article 39 of the Convention on the Rights of the Child, as well as in Article 13 of the European Convention on Human Rights and Article 1 and 25 of the American Convention on Human Rights.¹⁵ It is central to

¹⁴ Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-3003-tENG, Decision on Amicus Curiae Application and on the «*Requête tendant à obtenir présentations des témoins DRC-02-P-0350, DRC-02-P-0236, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*», para. 64 (June 9, 2011).

¹⁵ Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), para. 166 (1988).

the conception of the Convention for the Protection of All Persons from Enforced Disappearances.¹⁶

17. In the case of gross human rights violations, including serious violations of international humanitarian law, such as those alleged by the Prosecutor in this case, the right to an effective remedy entails at minimum the responsibility of the state to carry out a criminal investigation.
18. According to the UN Human Rights Committee, the duty to investigate allegations of human rights violations derives from the right to an effective remedy.¹⁷ “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”.¹⁸ In cases such as the current one, involving violations of the right to life or the prohibition of torture, the Human Rights Committee has articulated that the investigation must be criminal in nature: it must be done “promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty”.¹⁹
19. Both the Convention against Torture and the Convention for the Protection of All Persons from Enforced Disappearance impose a duty on States parties to criminalize, investigate and punish those responsible for torture, or enforced disappearances.²⁰
20. The Inter-American Court for Human Rights has determined that States must prevent, investigate and punish any violation of the rights recognized by the Convention as part of their obligation to ensure full and free exercise of those rights. In the case of serious human rights violations, investigations have to be criminal in nature and it is the State’s responsibility

¹⁶ Article 24 *International Convention for the Protection of All Persons from Enforced Disappearance* (2006). See also *Id.*, Article 12.

¹⁷ UN Human Rights Committee (HRC), *Barbato v. Uruguay*, Communication No. 84/1981, U.N. Doc. CCPR/C/OP/2, Vol. 2, Sel. Decis. Hum. Rights Comm. Optional Protoc., para. 11 (1982).

¹⁸ HRC, *General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para 15 (2004). See also *General Comment No. 36 on Article 6: Right to Life*, para. 27 (2018), which derives the duty to investigate from Article 2(1), the general duty to protect and ensure the rights present in the Covenant, read in conjunction with Article 6, as well as from the obligation to provide effective remedies.

¹⁹ HRC, *Benítez v. Paraguay*, Communication No. 1829/2008: *Views adopted by the Committee at its 104th session, 12–30 March 2012*, para. 7.5 (2012), <https://digitalibrary.un.org/record/730329> (last visited Nov. 05, 2019). General Comment 36 provides: “Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.” para. 27.

²⁰ See Article 12 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); UN Committee Against Torture, *Report of the Committee against Torture: Twenty-fifth session (13-24 November 2000) Twenty-sixth session (30 April-18 May 2001)*, A/56/44, para. 97 (2001); Article 12 UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).

to undertake them, even *ex officio*.²¹ The right to have serious human rights violations investigated and prosecuted has also been derived from Article 8, the right to fair trial, in conjunction with Article 25, the right to judicial protection.²²

21. According to the European Court of Human Rights, the obligation to ensure respect for human rights in Article 1 of the Convention entails the duty to criminalize serious offences, the duty to put in place a criminal law system, and the duty to conduct effective criminal proceedings.²³ The right to an investigation also derives from the notion of an effective remedy under Article 13 of the Convention. In cases involving violations of the right to life or the prohibition against torture, Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives or complainant to the investigatory procedure.²⁴
22. Finally, the duty to criminally investigate is articulated in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles”),²⁵ as well as in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.²⁶ In adopting the Basic Principles, the UN General Assembly emphasized that they were designed to assist

²¹ Inter-American Court of Human Rights, *Case of Bámaca-Velásquez v. Guatemala*, Judgment of November 25, 2000 (Merits), para. 212 (2000); Inter-American Court of Human Rights, *Case Of Gomes Lund et al. (“Guerrilha Do Araguaia”) v. Brazil*, Judgment Of November 24, 2010 (Preliminary Objections, Merits, Reparations, And Costs), para. 256c (2010).

²² Inter-American Court of Human Rights, *Case of the “Street Children ” (Villagran-Morales et al.) v. Guatemala*, Judgment of November 19, 1999 (Merits), para. 199 (1999); *Durand and Ugarte Case*, Judgment of August 16, 2000, paras. 130, 146 (2000); *Case of La Cantuta v. Perú*, Judgment of November 29, 2006 (Merits, Reparations and Costs), para. 193 (2006).

²³ European Court of Human Rights, *Case of X. and Y. v. The Netherlands*, Application no. 8978/80, 27 (1985); *Case of A. v. The United Kingdom*, Application no. 100/1997/884/1096, 22 (1998); *Case of Mahmut Kaya v. Turkey*, Application no. 22535/93, 85 (2000). See also *Case of Hugh Jordan v. The United Kingdom*, Application no. 24746/94, para. 105 (2001), and *Case of Öneriyildiz v. Turkey*, Application no. 48939/99 (2004).

²⁴ European Court of Human Rights, *Case of Aksoy v. Turkey*, Application no. 21987/93, para. 98 (1996), and *Case of Aksoy v. Turkey*, Application no. 21987/93, para. 98 (1996).

²⁵ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly* (2006), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (last visited Nov. 04, 2019).

²⁶ Economic and Social Council, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Resolution 1989/65* (1989) <https://www.un.org/ruleoflaw/files/PRINCI~2.PDF>.

implementation of “**existing legal obligations** under international human rights law and international humanitarian law” (emphasis added).²⁷

23. The underlying goals protected by the right to criminal investigation in cases of serious violations of human rights are variously listed as prevention, accountability and avoiding a denial of justice.²⁸

C. Application and interpretation of victims’ rights to investigation in the current context

24. The third and fourth steps in this process involve analyzing the specific context of the Court and how that may impact on the interpretation and application of the right.

25. As a point of departure, we note that the principles and interests protected by the victims’ rights to investigation appear to align completely with the underlying goals of the Court. This would militate against adaptation of the right in this context.

26. However, one clear difference between the context of ICC investigations and those of domestic systems is the limited focus of the Court. It cannot be that every victim of a crime within the jurisdiction of the Court has a right to have the Prosecutor investigate it, in the same way that this claim can be made against national authorities. Much of the necessary adaptation of the victims’ right to an investigation, and the corresponding duty to investigate, to this context occurs through the application of the admissibility criteria, screening out cases which are being properly investigated at the national level as well as those which are of insufficient gravity.²⁹ Article 53(1) of the Statute permits additional factors to be considered in the interests of justice; where these tend against an investigation they must take into account the interests of victims (and the gravity of the crimes). In our view, to the extent that the rights of the victims to an investigation are not included in this reference to their interests, they are introduced by Article 21(3).

²⁷ Basic Principles, para. 8 (2006), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (last visited Nov. 04, 2019). See also UN Office of the United Nations High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (2017), <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>.

²⁸ HRC, General Comment No. 36 para. 27; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), para. 175; European Court of Human Rights, *Case of Hugh Jordan v. The United Kingdom*, Application no. 24746/94, para. 105 (2001).

²⁹ Article 17(1).

27. There are two possible outcomes of this analysis. If the Chamber deems that the Pre-Trial Chamber erred in considering the interests of justice under Article 53(1) then the rights of the victims plainly required an investigation into the crimes alleged to have been committed against them. Any appropriate adaptation of this right to the context of the Court was already performed by the application of the admissibility criteria, which the Pre-Trial Chamber confirmed had been satisfied.³⁰
28. If on the other hand it is the Chamber's view that the Pre-Trial Chamber was right to consider the interests of justice, the factors which led to the rejection of the Prosecutor's request to investigate should have been explicitly considered with reference to the internationally recognized rights of the victims to an investigation.
29. The Chamber bases its ruling in essence on the impossibility of, or enormous difficulty in, conducting effective investigations.³¹ The Chamber refers first to its view that "an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time".³² It cites the length of time since the commission of the alleged crimes; resulting challenges in getting hold of both evidence and suspects, and poor cooperation (presumably of State authorities).³³
30. Difficulties in investigation, particularly of atrocity crimes, are not unusual. In crimes such as these, not subject to a statute of limitations, there will in many cases be a delay between commission and investigation, and their often political nature will create other obstacles. These problems have been considered by international human rights bodies in the context of victims' rights to an investigation. The Inter-American Court of Human Rights has held that: "[i]n certain circumstances, it may be difficult to investigate acts that violate an individual's

³⁰ Impugned Decision, paras 79, 86 and 87.

³¹ Impugned Decision paras 87-96. A subsidiary argument involves the impact on resources (See Impugned Decision, para. 90, where the Pre-Trial Chamber mentions that the Court is not equipped to address all scenarios of international crimes, and para. 95 where reference is made to 'the foreseeable absence of additional resources for the coming years in the Court's budget (...)'). However, the ICJ rejected Senegal's argument that budgetary constraints could justify its failure to investigate and prosecute torture (Questions relating to the Obligation to Prosecute or Extradite, (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 422, para. 112). Especially in light of the peremptory status of this norm, we see no contextual reason which would permit the victims' right to investigation to be overruled on these grounds.

³² Impugned Decision, para. 89. We will not comment on whether the Chamber was correct in requiring a positive determination that the investigation was in the interests of justice.

³³ Impugned Decision, para. 91.

rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”³⁴ Similarly, the European Court of Human Rights has clarified that the obligation to investigate is not an obligation of result, but of means, and has laid out the elements that are required of an investigation in order to fulfil the State’s obligations under these circumstances.³⁵

31. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, relying on the authority of the Human Rights Committee, has explained how even situations of armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses: “It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation ... On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.”³⁶
32. We suggest that these careful examinations of the content of the duty to investigate in the face of practical obstacles under international human rights law are equally applicable to the Court, and that difficulties in investigation cannot eradicate the victims’ rights or the responsibilities of the duty bearer (especially when the Prosecutor has herself made a different assessment).
33. To the persuasive authority of international human rights jurisprudence we can add common sense: the use of anticipated complexity of investigations to justify failure to comply with the obligation to investigate is open to abuse and could arbitrarily deprive victims of their right to a remedy. It could render this right theoretical and illusory. The contrary should rather apply. Especially in complex circumstances all efforts must be made to conduct investigations

³⁴ Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), para. 177; *Godínez Cruz Case*, Judgment of January 20, 1989, para. 188.

³⁵ European Court of Human Rights, *Finucane v. the United Kingdom*, Judgment of July 1, 2003, para. 69 (2003).

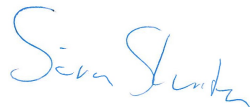
³⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 8 March 2006, para. 36.

and to deliver justice, as it is exactly in these situations that victims have hitherto been deprived of their right to a criminal investigation.³⁷

V. Conclusion

34. Article 21(3) required the Pre-Trial Chamber to ensure that its decision was consistent with the victims' rights to an investigation. Having found the jurisdiction and admissibility requirements satisfied, and once it proceeded to consider the interests of justice, the Chamber should have articulated and carefully taken into account this internationally recognized human right and the corresponding duties of the Court. We have suggested a methodology to do so, and through its application conclude that there is no valid justification for non-compliance with the Court's human rights obligations in the current matter.
35. It is therefore our view that the Impugned Decision is not consistent with internationally recognized human rights, and that the rejection of the Prosecutor's request for authorization to open an investigation into the situation in Afghanistan violates Article 21(3) of the Statute.

Respectfully submitted,



Göran Sluiter

Also on behalf of Kate Mackintosh

Dated this fifteenth day of November, 2019

At Amsterdam, Netherlands

³⁷ See, in a similar vein, Prosecution Appeal Brief, p. 10: '(...) the Pre-Trial Chamber's approach suggests that the Statute exhibits a marked preference for 'easier' investigations as opposed to 'harder' ones - which, in turn, may incentivize external actors to take early steps to frustrate the effectiveness of criminal investigations, in an effort to ward off any prospect of the Court's intervention.'