

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/17

Date: 15 October 2019

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
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 File Amicus Curiae Submission on Behalf of
David J. Scheffer**

Source: David J. Scheffer

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

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Victims Participation and Reparations

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I. INTRODUCTION

1. I, David J. Scheffer, hereby express my interest to participate as *amicus curiae* in the proceedings of the appeal by the Prosecutor filed pursuant to article 82(1)(d) of the Rome Statute and in accordance with the invitation of the Appeals Chamber in its 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters' of 27 September 2019 (ICC-02-17 OA OA2 OA3 OA4, par. 21).

2. I am the Mayer Brown/Robert A. Helman Professor of Law at Northwestern University Pritzker School of Law in Chicago, Illinois, USA, a position I have held since 2006. I teach international criminal law and international human rights law. I have published extensively on these and other legal and foreign affairs subjects. My faculty profile and CV (listing my publications) can be found at <http://www.law.northwestern.edu/faculty/profiles/DavidScheffer/>.

3. I was the U.S. Ambassador at Large for War Crimes Issues from 1997 to 2001, during which time I headed the U.S. delegation to the U.N. talks on creating the International Criminal Court, including the Rome Conference of June-July 1998, and the negotiations that led to the Rules of Procedure and Evidence and the Elements of Crimes during 1999 and 2000. During 1995 and 1996, I was the Deputy Head of the U.S. delegation to the U.N. talks on the International Criminal Court while I served as Senior Adviser and Counsel to Dr. Madeleine Albright, the U.S. Permanent Representative to the U.N. during the first term of the Bill Clinton Administration. I also served on the Deputies Committee of the U.S. National Security Council in the White House from 1993 to 1997, actively participating in deliberations regarding the work of the U.N. International Law Commission on its draft statute for an international criminal court during 1993 and 1994, and then the U.N. talks while I was a Deputy and later the Ambassador-at-Large. I signed the Rome Statute on behalf of the United States on 31 December 2000. From 2012 to 2018, I was the U.N. Secretary-General's Special Expert on U.N. Assistance to the Khmer Rouge Trials.

4. I bring to this issue my experience and knowledge as a founding drafter of the Rome Statute, Rules of Procedure and Evidence, and the Elements of Crimes and my scholarly expertise as a professor of international criminal law. I will endeavor in my *amicus* brief to describe original intention in the drafting of the Statute and the Rules.

II. SUBMISSIONS

5. The Pre-Trial Chamber misinterprets Articles 15 and 53 of the Statute and Rule 48 of the Rules of Procedure and Evidence. Its cumulative reading of these provisions in its 12 April 2019 decision leads the Pre-Trial Chamber to diverge from original intent and distorts how “interests of justice” should be addressed.

6. The procedure at issue in this appeal is how to judicially evaluate the “request for authorization of an investigation” by the *proprio motu* prosecutor. Article 15 governs that procedure and requires that the Pre-Trial Chamber find “a reasonable basis to proceed with an investigation” in the Prosecutor’s request in order to authorize launching the investigation. This was intended to be a rigorous exercise that the Prosecutor must demonstrate to the Pre-Trial Chamber with information (as emerging evidence) and in satisfaction of jurisdiction and admissibility requirements of the Statute. Rule 48 is an explicit direction to the *proprio motu* prosecutor, *not* the Pre-Trial Chamber, to incorporate the factors in Article 53, paragraph 1(a) to (c) in her determination to request authorization to investigate. Those factors are vital criteria that should be met, with the final one, however, being a calculation that we envisaged typically would focus on the presence of a truth commission, some kind of conditional amnesty deal to achieve peace, and/or other options for the victims to seek justice under complementarity.

7. If the *proprio motu* prosecutor were to find “substantial reasons to believe that an investigation would not serve the interests of justice,” then Article 53(1)(c) requires such representation. In contrast, there is no requirement that the *proprio motu*

prosecutor establish reasons why an investigation would serve the interests of justice. As drafters, we framed this requirement strictly in the negative because of the obvious purpose of the International Criminal Court, as with credible national courts, to operate within the framework of the interests of justice. Stipulating a requirement that the *proprio motu* prosecutor and the judges must demonstrate that they serve the interests of justice would be oddly self-evident drafting but also invite speculative and politically-influenced decisions.

8. Drafters understood that the situation is very different when the Prosecutor and Pre-Trial Chamber are acting strictly under Article 53 following a State Party or U.N. Security Council referral. The referring entity, and by extension the Assembly of States Parties, expect performance on the Prosecutor's part to follow through on the referral. She can demonstrate, in her preliminary examination, meeting the factors of Article 53(1)(a-c) but still object based on Article 53(1)(c)'s escape hatch with a negative determination that it would not be in the interests of justice to proceed. The Pre-Trial Chamber would have the Prosecutor's negative determination squarely before it and could decide, under Article 53(3)(b), not to confirm the Prosecutor's assessment and thus green light the investigation.

9. Delegations in the U.N. talks were concerned that the Prosecutor, under Article 53, not kill a referral of a situation on the basis of not serving the interests of justice without Pre-Trial Chamber agreement of that assessment. The U.S. delegation embraced that rescue function of the Pre-Trial Chamber because we understood its critical importance and trusted there would be a decision by judges who presumably would be less susceptible to political influence than the Prosecutor, or at least we surmised at the time. We had prevailed in obtaining Pre-Trial Chamber review and approval/disapproval of the *proprio motu* prosecutor's decision to seek authorization under Article 15 and that was our most critical objective in the negotiations on this issue. Negotiators did not endorse the Pre-Trial Chamber standing in the shoes of the

proprio motu prosecutor or the Prosecutor following a referral and *initiating* a determination that investigating the situation at hand would *not* be in the interests of justice. Rather, we granted clear statutory power to the Pre-Trial Chamber to review a prosecutorial determination that investigating the situation at hand would not be in the interests of justice.

10. Finally, my *amicus* brief would propose that the Appeals Chamber reverse the Pre-Trial Chamber's decision on interests of justice and approve the investigation of the Afghanistan situation to the extent that it meets jurisdiction and admissibility requirements. As a supplemental point, the Appeals Chamber should consider recommending to the Prosecutor that she further publicly describe, within a stipulated period of time and without further review by either the Pre-Trial Chamber of the Appeals Chamber but for the benefit of public understanding, why an investigation would be in the interests of justice in this particular situation. The Appeals Chamber also should convey a strong message to the Assembly of States Parties that additional funding for the International Criminal Court should be secured and that innovative means of raising funds should be explored expeditiously. The moral authority of the Appeals Chamber to lodge such a request with the Assembly of States Parties, in light of the challenges facing the Court not only in this situation but others, should not be underestimated. I respectfully seek the approval of the Appeals Chamber to file an *amicus curiae* brief expanding on these points by a time and date and under conditions stipulated by the Chamber.

Date: October 15, 2019


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