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Date: **14 November 2019**

THE APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public with Public Annex

Written Submissions in the Proceedings Relating to the Appeals Filed 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' Issued on 12 April 2019 (ICC-02/17-33) and Pursuant to 'Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims' Issued on 14 October 2019 (ICC-02/17-97)

Source: **Professor Dr. Dr. h.c. Kai Ambos, Dr. Alexander Heinze**

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1. On 15 October 2019, Prof. Dr. Dr. h.c. Kai Ambos and Dr. Alexander Heinze sought leave to submit observations as *amicus curiae* pursuant to the Appeals Chamber's order of 27 September 2019.[1] The present observations are filed pursuant to the Appeals Chamber's decision of 24 October 2019 granting the request.[2]

I. The Pre-Trial Chamber II (hereinafter: 'the Chamber') interpretation of article 53(1)(c) ICC Statute contradicts the wording, drafting history and *telos* of the norm

2. The 'interests of justice' is a normative, potentially broad concept. The drafters of the Statute of the International Criminal Court (hereinafter: ICC Statute) wanted to give the Prosecutor – albeit without having a clear or even unanimous understanding of the concept – an additional instrument to exercise her discretion going beyond the rather 'technical' requirements of Article 17.[3]

1. 'Justice'

3. In both adversarial and inquisitorial procedural systems[4] the prosecutor is, regardless of other specific duties, expected to seek justice.[5] While the particular features of what constitutes justice vary between, and sometimes within, legal systems, the concept is always tied to the principle of fairness.[6]

4. With regard to the decision-making process of a prosecutor, three types of fairness are relevant: substantive, procedural, and distributive fairness.[7] Thus, the prosecutor's specific obligations in preliminary examinations involve both deontological and consequentialist norms.[8] This has also been acknowledged by Judge Mindua in his concurring and separate opinion to the Chamber's decision.[9] While a prosecutor's

[1] *Amicus Curiae* Request.
[2] Participation Decision.
[3] Ambos, p. 389 with further references.
[4] About the meaning Heinze, pp. 117 *et seq.*; Ambos and Heinze (2017), pp. 28 *et seq.*
[5] Boyne, p. 5. The fact that the search for truth in inquisitorial systems is a constitutive feature (Heinze, p. 107) does not render the search for justice as an ethical obligation of the prosecutor less relevant, see Peters, p. 82. In the same vein Kubicek, p. 37 with further references; Ingraham, p. 13.
[6] See, e.g., *Lubanga* Jurisdiction Appeal Judgment, para. 37. See also Namakula, 936. See generally Heinze and Fyfe, p. 51.
[7] On their meaning Heinze and Fyfe, pp. 7 *et seq.*
[8] *Ibid*, p. 8.
[9] Separate Opinion, para. 39, footnotes omitted.

conduct should always be limited by deontological constraints,[10] as acknowledged in several OTP policy papers,[11] it is appropriate, and perhaps even obligatory in some instances, for him/her **to consider the potential consequences** of the decisions she makes regarding which situations to investigate and which individuals to prosecute. In every legal system, concerns about the substantive outcomes of criminal trials, the overall performance or record of a prosecutor, or the social and political impacts of criminal trials play a role in prosecutorial decision-making.[12] A prosecutor with an impeccable record of respect for defendants' rights, faced with the prospect of removal due to her failure to convict several of these defendants, must consider whether she should treat a few defendants as means to her end of staying employed.[13] Thus, an inquiry into whether an investigation would not be in the 'interests of justice' **may involve consequentialist political considerations**. And the most appropriate place for an expanded use of consequentialist considerations is prior to the trial.

5. However, it would go too far to construe the interests of justice clause as granting an **unlimited political discretion**.[14] Otherwise, there is a risk of making political judgements that would ultimately undermine the Prosecutor's work (or more exactly: her authority) and subject her to enormous political pressures and attempted manipulations by governments, rebel groups and other actors.[15] The Prosecutor must always 'judicialize the politics' without being a political actor herself.[16] This view is also supported by a **historical interpretation of Article 53**: As Gilbert Bitti – member of the French delegation – wrote on the basis of his personal recollection of the debates in Rome, the developments in the negotiations regarding 'the interests of justice' criterion were spurred on by a fear of unequal treatment of States before the Court.[17] Delegations expressed concerns throughout the negotiations in Rome that (powerful)

[10] Danner, pp. 536–537.
[11] For an extensive analysis see Heinze and Fyfe, pp. 35 *et seq*.
[12] Markovits, p. 8; Jehle and Wade, pp. 24, 60–61.
[13] Heinze and Fyfe, p. 11.
[14] See Olásolo, pp. 110–111, 135 *et seq*., esp. 141.
[15] Ambos, p. 388.
[16] Stegmiller, p. 379; in a similar vein Brubacher, p. 95.
[17] Bitti (2012), p. 1196.

States may push the Prosecutor, by threatening for example not to cooperate with the Court, to use the 'interests of justice' criterion in order not to start an investigation or a prosecution for the purposes of protecting their own nationals.[18]

6. Weighing deontological and consequentialist norms in prosecutorial decision-making, the interests of justice clause **may only involve the following consequentialist (political) considerations**: First, when an investigation might endanger the continued existence and functioning of the ICC as a legitimate international institution; second, when an investigation can *never and under no circumstances* lead to a prosecution.[19] **Feasibility in itself cannot be one of those considerations**.[20] Indeed, by recurring to feasibility arguments, the Chamber invoked the interests of justice clause in the opposite direction, ultimately undermining the legitimacy of the Court. The Chamber's decision is likely to vindicate the criticism of many African states that have accused the ICC for being neo-colonialist or even racist[21] – an observation that is confirmed by the recent expressions of satisfaction for the Pre-Trial Chamber's decision from the US administration.[22]

2. Gravity and the Interests of Victims as Factors in the Interests of Justice Clause

7. Even if one, for the sake of argument, considered that the Chamber's decision with regard to the interests of justice clause was legitimately based on political factors – these factors should have been **balanced against gravity and the interests of victims**. In the Chamber's decision this balancing exercise is missing. Even though the Chamber rightly points out at the beginning of its analysis (paras. 87 *et seq*.) that 'the gravity of the crime and the interests of victims' have to be taken into account, the term 'gravity' does not appear again in the analysis, neither do considerations that could count as

[18] Bitti (2019a); cf. Bitti (2012), p. 1196.
[19] For examples see Ambos, p. 389.
[20] OTP Preliminary Examination Policy, para. 70.
[21] Ambos and Heinze (2018); de Vos.
[22] See U.S. Secretary of State.

such.[23] Within the Chamber's 'interests of justice' analysis, the interests of victims are only addressed in para. 96:

> It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.

Not only can this section hardly demonstrate that the interests of victims have been taken into account. It is also overly paternalistic.[24] Moreover, that 'victims' expectations will not go beyond little more than aspirations' is speculative. Last but not least, even though the reference to possible hostilities against the Court is a legitimate consequentialist motive (see above, para. 6), it is unsubstantiated (see below, paras. 9 *et seq*.). The same applies to Judge Mindua's remarks in his concurring and separate opinion: By asking '[H]ow can the ICC proceed smoothly if the Prosecutor cannot collect or preserve evidence, because of security problems?',[25] he apparently addresses the Court's self-preserving motive, too. However, it is unsubstantiated to see the existence of the Court in danger if it cannot 'proceed smoothly'.

8. While the term 'nonetheless' in article 53(1)(c) makes clear that there may be countervailing considerations which may speak against the opening of an investigation despite gravity and victims' interests, these countervailing considerations must be **thoroughly substantiated** and, at any rate, do not turn the

[23] In the same vein Rossetti, pp. 597-598.
[24] *Ibid*.
[25] Separate Opinion, para. 44.

interests of justice clause into a mere, **free floating policy factor** giving a Chamber an unfettered discretion.

3. 'there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice'

9. **Article 53(1)(c) is formulated in a negative manner** ('… not serve…'). Thus, there is a presumption that the investigation is in the interests of justice. Negative formulations have not just the effect that the party invoking the clause must make this assessment public or explicit.[26] They **reverse the burden of proof/persuasion**. A negative statement can only be disregarded as to its effects as long as it would carry the same meaning when formulated positively.[27] This is not the case with article 53(1)(c), as has been confirmed by Pre-Trial Chamber III in the *Burundi* Authorisation Decision.[28] What is similar in both a negative and positive formulation is the analysis of the *meaning* of 'interests of justice' but not *whether* the investigation is not in those interests. The equation of 'is' and 'is not' stands in contradiction with the **wording** of article 53(1)(c) and with the **drafting history** of the norm. Many rules are constructed like this: leading condition + legal rule + exception.[29] Given that the drafters decided to formulate the interests of justice as an exception, it would go beyond all rules of interpretation to treat the exception as a leading condition. The drafting history of article 53 is very telling in this regard: From the Draft Statute of the International Law Commission to the Rome Conference, drafts of article 53 either included a positive or negative formulation of the 'interests of justice' clause.[30] At no point was there a premise that both formulations carried the same meaning. On the contrary, comparing the draft Statute as it stood on 18 June 1998 with the text of article 53 adopted during the last week of the Rome Conference – as Bitti does – shows that a negative formulation of the clause was expressly preferred over a positive one.[31]

[26] In this vein Akande and de Souza Dias.
[27] Salambier, p. 72.
[28] *Burundi* Authorisation Decision, para. 190.
[29] Salambier, p. 52.
[30] Bitti (2019a).
[31] Bitti (2019b).

10. Both article 15(4) and 53(1)(a) ICC Statute stipulate a 'reasonable basis to proceed' standard. The exception in (1)(c), however, provides for a '**substantial reasons to believe**' standard. This higher standard is logical given that the relevant part of subpara. (1)(c) – referring to interests of justice – constitutes an exception. If the drafters wanted subparagraph 1(c) to be another leading condition, they would have drafted it in connection with the same 'reasonable basis to proceed' standard. However, during the Rome Conference, the drafters deliberately inserted a high standard in relation to the 'interests of justice' criterion ('substantial reasons') in comparison to the lower standard ('reasonable basis') for the two other criteria provided for in article 53(1)(a) and (b).[32] The inclusion of this higher standard fulfilled two purposes: First, it was supposed to compensate the fact that the 'interests of justice' clause is formulated rather vaguely; second, it worked as a compromise to motivate delegations to eventually agree on the inclusion of the clause.[33] In other words: Both the negative formulation of the clause and the high standard of proof have been **adopted deliberately** and have a great significance in drafting the provision.

II. The Substantial Reasons Test and an Ensuing Subsumtion

11. The term 'substantial' reasons/grounds stands, according to ICC case law, on an equal footing with 'strong', 'significant' or 'solid' grounds.[34] **The reasons provided by the Chamber why an investigation would not be in the interests of justice do not meet this standard**. Instead, it rests largely on assumptions, conjecture, and speculations.[35] For instance:

12. The Chamber notes for instance that,

> even by international criminal justice standards, the preliminary examination in the situation in Afghanistan was particularly long. As many as about eleven years (which were marked by heightened political instability, in Afghanistan and

[32] *Ibid*.
[33] *Ibid*.
[34] See, on the one hand, *Lubanga* Confirmation Decision, para. 38 ('strong') and, on the other hand, *Bemba* Confirmation Decision, para. 29 ('significant', 'solid', 'material', 'well built', 'real').
[35] In the same vein Vasiliev.

> elsewhere) elapsed between the start of the preliminary examination and the filing of the Request.[36]

To meet the required standard of proof, the following questions remain unanswered by the Chamber: First, what exactly are 'the international criminal justice standards'? Second, the Chamber apparently compares the length of the investigation in the Afghanistan situation to other (unnamed) investigations. What are the comparative categories here? Intuitively, it should be a preliminary examination that involves a state such as the USA. This, however, is apparently not what the Chamber is referring to.

13. In para. 94, the Chamber remarks:

> *[S]ubsequent changes within the relevant political landscape* both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future […].[37]

Why are changes within the relevant political landscape so peculiar in this situation? To say it with Judge Keith Raynor of the Kosovo Specialist Chambers: 'What then is the current political landscape and the surrounding political reality? Well, the landscape has changed in the past 20-odd years and it continues to change by the month, week and day'.[38] The standard of proof/persuasion would have required the Chamber to provide concrete information.

14. The Chamber continues, that 'it seems *reasonable* to assume that these difficulties will prove even trickier in the context of an investigation proper'.[39] However, a formulation of this kind – 'seems reasonable to assume' – does not meet the required standard of proof/persuasion.

[36] Decision, para. 92.
[37] Decision, para. 94, emphasis added.
[38] Raynor.
[39] Decision, para. 94, emphasis added.

III. The Chamber's Review Authority and Burden of Proof

15. It is the Chamber who carries the burden of proof/persuasion that the investigation would not be in the interests of justice. If the Chamber in reviewing the decision of the Prosecutor (under article 15(4)) does not see any reasons why the investigation would not be in the interests of justice, it does not have to spend a single word on that issue, as it decided to do in the *Kenya* Authorisation Decision:

> Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation 'would not serve the interests of justice', which would prevent him from proceeding with a request for authorization of an investigation. […] It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.[40]

That the Chamber formulates 'that a review of this requirement is unwarranted', in combination with the referral to article 53(3)(b), which triggers the 'review power' of the Chamber, suggests that it understands unwarranted as 'unlawful' or not based on any authority. A similar wording can be found in the *Côte d'Ivoire* Authorisation Decision.[41] This first and foremost underlines the burden of proof in article 53(1)(c). However, it even goes beyond that burden, suggesting that a review is prohibited by law. This, in our view, is a too **narrow reading**.

16. The Chamber has of course the **authority to conduct a review of the negative 'interests of justice' criterion** within article 53(1)(c), even if the Prosecution makes no

[40] *Kenya* Authorisation Decision, para. 63.
[41] *Côte d'Ivoire* Authorisation Decision, para. 207 *in fine*.

determination to that end. Otherwise, a negative condition that has been left untouched in the first place (due to the burden of proof) could never be reviewed. A different conclusion – such as denying the Chamber the authority to conduct a review of the negative 'interests of justice' criterion within article 53(1)(c) – would openly disregard the **drafting history** of article 53 as will be shown in turn.

17. As already mentioned above, delegates would not have agreed upon the inclusion of the clause if it had been formulated positively and connected with a low standard of proof. They would also not have agreed upon an inclusion if there was not a specific mechanism of judicial review under article 53(3)(b) of the Statute with regard to the 'interests of justice' criterion.[42] Of course, the procedural constellation is different here, with the Prosecutor submitting a request for authorisation of an investigation pursuant to article 15, since she decided to proceed with an investigation and saw no indication that the investigation would not be in the interests of justice. However, the *telos* of inserting a procedural control remains the same in both procedural constellations: a judicial review needs to make sure that the negative 'interests of justice' criterion was not used as a gateway for political pressure.

18. Surely, the architects of the Statute neglected the problem of prosecutorial inaction.[43] Nevertheless, the Prosecutor's decision to investigate upon the – albeit negative – criterion that this investigation does not violate the interests of justice **is not 'prosecutorial inaction'**. The *ratio* of refraining from judicial review when the prosecutor decides *not* to investigate is that a Chamber is 'not empowered to substitute a negative decision with its own prosecution'.[44] After all, the decision to investigate or prosecute belongs to the realm of the Prosecutor, being the *dominis litis* over this part of the proceedings, and thus cannot be substituted by a judicial organ.[45]

19. By contrast, a decision *to* investigate can indeed be reviewed – including all conditions of the underlying rule, whether positive or negative. Thus, in contrast to

[42] Bitti (2019b).
[43] cf. Stahn, p. 267.
[44] Friman et al., p. 390.
[45] Ambos, p. 255.

the *Kenya* and *Côte d'Ivoire* Authorisation Decisions, Pre-Trial Chamber I in the *Georgia* Authorisation Decision acknowledged that the interests of justice clause is formulated negatively and that both Prosecution and victims 'overwhelmingly speak in favour of the opening of an investigation'.[46] Yet, the Chamber did not conclude that it therefore had no power or authority to review the decision in that regard but formulated it rather lightly: 'the Chamber *considers* that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice'.[47] The use of the word 'considers' shows that the Chamber *decided* not to review the negative interests of justice element – juxtaposed to a *prohibition* to review it. The same wording appears in the *Burundi* Authorisation Decision.[48]

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Dated this 14 November 2019

At Göttingen, Germany

[46] *Georgia* Authorisation Decision, para. 58 *in fine*.
[47] *Ibid.*, emphasis added.
[48] *Burundi* Authorisation Decision, para. 190 *in fine*.