Cour
Pénale
Internationale

International
Criminal
Court

Original: ***English***

No.: ***ICC-02/17***
Date: **14 October 2019**

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
JudgeLuz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document

Request for Leave to Submit Amicus Curiae Observations 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 the 12 April 2019 (ICC-02/17-33) and Pursuant to 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters' issued on 27 September 2019 (ICC-02/17-72-Corr)

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

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
Mr Fergal Gaynor and Ms Nada Kiswanson van Hooydonk
Ms Megan Hirst and Mr Tim Moloney
Ms Nancy Hollander et al
Ms Margaret Satterthwaite and Ms Nikki Reisch

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
Mr Nigel Verill, Chief

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach, Chief

Other

I. Object of the Request

1. This request for leave to submit Amicus Curiae Observations is filed following order ICC-02/17-72-Corr of the Appeals Chamber.[1]

II. Expertise of the Authors

2. **Kai Ambos** holds the Chair of Criminal Law, Criminal Procedure, Comparative Law, International Criminal Law and International Law at the Georg-August-University Göttingen, Germany. He served as a Judge at the Provincial Court (Landgericht) of Lower Saxony in Göttingen from 24 March 2006 to 7 February 2017; with his appointment as Judge at the Kosovo Specialist Chambers (KSC), The Hague, on 7 February 2017 he took leave from this judicial position. On 6 December 2017 he has been appointed as Advisor (Amicus Curiae) to the Colombian Special Jurisdiction for Peace. He is also List Counsel at the International Criminal Court. Publications relevant for the legal questions presented:

- *Treatise of International Criminal Law*, Vol. III, OUP, 2016

- (editor with Otto Triffterer), *The Rome Statute of the International Criminal Court. A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, 2016, 2352 pp

- 'The International Criminal Justice System and Prosecutorial Selection Policy', in Ackerman/Ambos/Sikirić (eds.), *Visions of Justice,* Duncker & Humblot, 2016, 23-55

- 'Prosecuting international crimes at the national and international level: Between justice and Realpolitik', in: Kaleck/Ratner/Singelnstein/Weiss (eds.), *International prosecution of human rights crimes*, Springer, 2006, 55-68

3. **Alexander Heinze** is an Assistant Professor at the University of Göttingen School of Law, Department of Foreign and International Criminal Law. He holds a PhD in International Criminal Law, and received his Magister in Utroque Jure (LLM) from Trinity College Dublin with distinction. His research and publications deal with various aspects of international criminal law, comparative law, media law, legal

[1] *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr (27 September 2019), disposition para. 5 and para. 21.

theory, philosophy and sociology of law. He is an elected member of the ILA Committee on Complementarity in International Criminal Law, co-editor of the German Law Journal and book review editor of the Criminal Law Forum. Publications relevant for the legal questions presented:

- *International Criminal Procedure and Disclosure*, Duncker & Humblot, 2014

- 'Prosecutorial Ethics and Preliminary Examinations at the ICC' (with Shannon Fyfe), in: Bergsmo/Stahn (eds.), *Quality Control in Preliminary Examination*, Vol. II, Torkel Opsahl, 2018, 1-75

- 'The Role of the Prosecutor' (with Shannon Fyfe), in: Ambos et al. (eds.), *Core Concepts in Criminal Law and Justice*, Vol. I, CUP (forthcoming Nov. 2019)

III. Summary of the Arguments

4. 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:

5. The prosecutor's specific obligations in preliminary examinations involve both deontological and consequentialist norms. While a prosecutor's conduct should always be limited by deontological constraints, 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. Thus, an inquiry into whether an investigation would not be in the 'interests of justice' **may involve consequentialist political considerations**.

6. However, it would go too far to construe the interests of justice clause as granting an **unlimited political discretion**. 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. This view is also supported by a historical interpretation of Article 53.

7. 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. **Feasibility in itself cannot be one of those considerations**. 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.

8. 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**. The Chamber's decision lacks this balancing. 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 interests of justice clause into a mere, free floating policy factor which gives a Chamber an unfettered discretion.

9. **Article 53(1)(c) is formulated in a negative manner** ('… not serve…'); this entails the 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. 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. This is not the case with article 53(1)(c). 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.

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. The term 'substantial' reasons/grounds stands, according to ICC case law, on an equal footing with 'strong', 'significant' or 'solid' grounds. **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.

11. It is the Chamber who carries the burden of proof/persuasion that the investigation would not be in the interests of justice. It has the authority to conduct a review of the negative 'interests of justice' criterion within article 53(1)(c), even if the Prosecution makes no 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. This is also supported by a reading of the Georgia and Burundi Authorisation Decisions.

Prof. Dr. Dr. h.c. Kai Ambos Dr. Alexander Heinze, LL.M. (TCD)

Dated this 14th of October 2019

At Göttingen, Germany