

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/17

Date: 15 November 2019

THE 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 Document

Amicus curiae observations submitted pursuant to Rule 103 of the Rules of
Procedure and Evidence

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

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1. Pre-Trial Chamber II's ('the PTC') decision that it would not serve the 'interests of justice' to authorise the Prosecutor's request to initiate an investigation in Afghanistan (the 'Impugned Decision')¹ contains fundamental errors that misinterpret and misapply the Rome Statute and are inconsistent with internationally recognised human rights. As a result, the Impugned Decision unfairly denied victims' access to justice, truth and reparation before the ICC, which should be remedied on appeal.

I. ERRORS IN THE PTC'S INTERPRETATION AND APPLICATION OF THE INTERESTS OF JUSTICE

2. Regardless of how the Appeals Chamber determines the important question of whether the PTC was permitted by the Statute to assess the 'interests of justice' in reviewing the Prosecutor's application, the Appeals Chamber should address the following errors in the PTC's interpretation and application of Article 53(1)(c) to ensure there is no doubt that victims in the Afghanistan situation can access justice before the ICC and that such errors are not repeated in other situations.

(i) The PTC misinterpreted the 'interests of justice' criterion in Article 53(1)(c)

3. The PTC misinterpreted the interests of justice, when it held that 'at the very minimum, 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 frame'.²

4. In reaching this interpretation, the PTC stated incorrectly that there is an absence of guidance on the meaning of 'interests of justice' in the statutory texts.³ On the contrary, a plain reading of Article 53(1) as a whole clearly establishes that, if the requirements of jurisdiction and admissibility are met, the interests of justice may be applied as a

¹ 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').

² Impugned Decision, para. 89.

³ Impugned Decision, para. 89.

bar to an investigation only in extremely narrow circumstances. There must be ‘*substantial reasons*’ (emphasis added) – implicitly specific to the situation - that must outweigh the ‘gravity of the crime’ and the ‘interests of victims’. Considering that crimes under the Rome Statute are among the ‘most serious crimes of concern to the international community as a whole’⁴ and that in most situations, including the Afghanistan situation, victims look to the ICC as a last resort to realise their internationally recognised human right to effective remedies,⁵ reasons not to initiate an investigation can only prevail over these two mandatory considerations in truly exceptional circumstances.

5. This narrow reading of Article 53(1)(c) is supported by the travaux préparatoires of the Rome Conference, which contain a footnote to the draft article recognising that ‘[s]ome delegates expressed concern regarding the reference to the interests of justice’.⁶ According to one commentary, delegations were concerned that powerful states would push the Prosecutor to use the interests of justice as a basis not to investigate in order to protect their nationals, including by refusing cooperation.⁷ They therefore sought to restrict the use of the criterion at the stage of the initiation of the investigation.⁸ These concerns are also evident in Article 53(3), which provides that a decision by the Prosecutor not to initiate an investigation based on the interests of justice may be subject to judicial review.

⁴ Rome Statute, Preamble.

⁵ See for example: Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2(3); American Convention on Human Rights, Article 25(1); European Convention on Human Rights, Article 13; Convention against Torture and Other Cruel, Inhumane or Degrading Punishment, Article 14; 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 and Guidelines), A/RES/60/147, 16 December 2005, Principle 11.

⁶ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7.

⁷ G. Bitti, The Interests of Justice – where does that come from? Part I, EJILTalk, 13 August 2019, citing G. Bitti, ‘Article 53: Ouverture d’une enquête’ in J. Fernandez, X. Pacreau and L. Maze (eds) *Statut de Rome de la Cour pénale internationale* (Editions A.Pedone, Paris 2012).

⁸ G. Bitti, The Interests of Justice – where does that come from? Part 2, EJILTalk, 14 August 2019.

6. Contrary to Article 53(1) and the intent of the drafters, the PTC invented radically broad general criteria under the umbrella of the ‘interests of justice’ that could be applied to bar most ICC investigations. The underlying logic of the PTC’s solely teleological interpretation - that certain situations are too complex and challenging to even attempt an ICC investigation - defeats rather than reflects the object and purpose of the Rome Statute. It neglects the determination of States Parties set out in the Preamble to put an end to impunity and thus to contribute to the prevention of crimes under international law. It fails to recognise that the ICC was created specifically to step in to investigate and prosecute crimes when relevant national authorities are either unable or unwilling to do so.⁹ Either way, all ICC investigations will be inherently complex and challenging.

7. Furthermore, the PTC’s interpretation of the interests of justice is inconsistent with internationally recognised human rights, and therefore contrary to Article 21(3) of the Rome Statute. It requires the ICC to prejudge the outcome of an investigation, which according to international human rights law must be thorough and effective,¹⁰ and thus determine whether victims are able to access remedies before the ICC based on vague assumptions. The PTC’s focus on the need for investigations to lead to the prosecution of cases within a reasonable timeframe is inconsistent with the findings of the European Court of Human Rights and the Inter-American Court of Human Rights that an effective investigation is a matter of means not results.¹¹ Without a full investigation, it is impossible for the Prosecution to make an informed decision on whether an ‘effective prosecution’ is possible or even required.

⁹ Rome Statute, Article 17.

¹⁰ See for example : European Court of Human Rights (ECtHR), *Kaya v. Turkey*, 222729/93, Judgment, 19 February 1998, para. 107; African Commission on Human and Peoples’ Rights (ACHPR), General Comment 4, para. 25.

¹¹ ECtHR, *Aslakhanova and others v. Russia*, 2944/06, 8300/07, 50184/07, 332/08, 42509/10, Judgment, 18 December 2012, para. 124; Inter-American Court of Human Rights (IACtHR), *Gomes Lund et al. (“Guerrilha do Araguaia”)*, Judgment (*Preliminary Objections, Merits, Reparations, and Costs*), 24 November 2010, para. 138.

(ii) The PTC misapplied the ‘interests of justice’ by subordinating the interests of justice to inappropriate political and inaccurate budgetary considerations

8. The Impugned Decision acknowledged that the interests of victims must be taken into account in applying Article 53(1)(c).¹² It recognised that 680 out of the 699 applications by victims ‘welcomed the prospect of an investigation’.¹³ However, it failed to proceed to conduct a proper examination of the interests of victims, beyond its controversial paternalistic concluding remarks that ‘far from honouring the victims’ wishes and aspiration that justice be done, [an unsuccessful investigation] 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’.¹⁴ Disturbingly, this speaks more to the interests of the ICC than the interests of victims.

9. The failure of the PTC to fully take into account the interest of victims in applying Article 53(1)(c) is a serious omission that is inconsistent with the Statute and internationally recognised human rights. In particular, pursuant to Article 21(3), the PTC should have considered the rights of victims to effective remedies - including their rights to equal and effective access to justice,¹⁵ to truth¹⁶ and to reparation¹⁷ - as part of a detailed assessment of the interests of victims and given significant weight to those rights in determining whether ‘there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’.

¹² Impugned Decision, para. 87.

¹³ Impugned Decision, para. 87.

¹⁴ Impugned Decision, para. 96.

¹⁵ See for example: Basic Principles and Guidelines, Principles 3(c) and 11 (a); ACHPR, General Comment 4, para. 23; Committee against Torture (CAT), General Comment 3, para. 32.

¹⁶ See for example: Basic Principles and Guidelines, Principle 24; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 2; CAT, General Comment 3, para. 16; ACHPR, General Comment 4, para. 44.

¹⁷ See for example: Human Rights Committee (HRC), General Comment 31, para. 16; Principles and Guidelines, Principle 18; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 31; CAT, General Comment 3, para. 5

10. Moreover, the PTC's conclusion that a successful investigation and prosecution is "extremely unlikely"¹⁸ relied on three vague and untested assumptions, which do not stand up to scrutiny. Firstly, although the PTC was right to highlight the significant challenges posed by the excessive length of the Office of the Prosecutor's ('OTP') preliminary examination,¹⁹ it is impossible at this stage in the process to determine the extent to which the delays would affect the OTP's ability to investigate and prosecute crimes committed in the Afghanistan situation. That can only be determined through a full investigation, including a detailed assessment of the evidence available.

11. Secondly, although the PTC may be correct that the ICC would face challenges in obtaining cooperation from some states,²⁰ this is a political issue that has no place in an independent, impartial and objective determination of whether to initiate an investigation. The Impugned Decision invites allegations that the ICC is open to political pressure. It emboldens states opposed to ICC investigations to obstruct international justice by refusing to cooperate with the Court. It ignores the procedures put in place by the Assembly of States Parties to address non-cooperation when it occurs.²¹

12. Thirdly, the PTC's finding that there are insufficient resources to conduct the investigation misrepresents the Court's financial situation and endorses the OTP's concerning and unsustainable practice of submitting to inappropriate pressure from a small group of 'Western European and Other' governments not to request additional resources, even when the Statute demands that new investigations be initiated. In reality, there is nothing to prevent the OTP from requesting additional resources from the Assembly to conduct the investigation, either in its regular annual budget proposal or through a supplementary budget request.²² The OTP has a duty under the

¹⁸ Impugned Decision, para. 96.

¹⁹ Impugned Decision, para. 93.

²⁰ Impugned Decision, para. 94.

²¹ Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5, as amended by ICC-ASP/17/Res.5, Annex II.

²² Financial Rules and Regulations, Regulation 3.

Statute to do so and the Assembly must consider such requests in good faith. In the meantime, the OTP can access the Contingency Fund to cover the immediate costs of a new investigation.²³

13. Had the PTC properly considered the gravity of the crimes identified in the OTP's application and the interests and rights of the victims in the Afghanistan situation, it could not have reasonably concluded that these three vague and unconvincing assumptions individually or collectively justified a determination that it would not serve the interests of justice to conduct an investigation.

II. THE ERRORS UNFAIRLY DENIED VICTIMS ACCESS TO JUSTICE, TRUTH AND REPARATION BEFORE THE ICC

14. Although it is not the role of the ICC to deliver justice for victims of all crimes under its jurisdiction, the Court must independently²⁴ and impartially²⁵ determine whether or not to initiate investigations in accordance with the Statute. As explained in Part I, the Impugned Decision contains serious errors that misinterpret and misapply the interests of justice criterion in Article 53(1). Moreover, the PTC's failure to fully consider the interests of victims, including their internationally recognised human right to effective remedies, is also inconsistent with Article 21(3); Article 68(1) and other international human rights standards that require the Court to treat victims with dignity and respect for their human rights;²⁶ and Article 68(3) that requires the Court to consider the views and concerns of victims at appropriate stages of the proceedings.

²³ Financial Rules and Regulations, Regulation 6.6 provides that the Contingency Fund can be used to meet costs associated with a decision by the Prosecutor to open a new investigation. In 2019, the notional level of the Contingency Fund is €7 million, see ICC-ASP/17/Res. 4, section D.

²⁴ Rome Statute, Articles 40 and 42(1).

²⁵ Rome Statute, Articles 41(2) and 45.

²⁶ See for example: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly Resolution 40/34 of 29 November 1985, Principle 4; Basic Principles and Guidelines, Principle 10.

15. As a result of these errors, the PTC's decision not to authorise the investigation unfairly denied victims access to justice and other remedies before the ICC. The PTC's approach is inconsistent with the findings of other ICC Chambers, which have emphasised the obligation on the Prosecutor to respect the rights of victims, 'to know the truth, to have access to justice and to request reparations'.²⁷ Recognising that investigations are essential for victims to access justice,²⁸ critical to realising their rights to truth²⁹ and reparation,³⁰ and that a failure by authorities to investigate can in and of itself give rise to a separate breach of internationally recognised human rights,³¹ the Impugned Decision disturbingly reinforces trends of impunity that the Rome Statute was intended to shatter.

III. THE RIGHT OF VICTIMS IN THE ROME STATUTE AND INTERNATIONALLY RECOGNISED HUMAN RIGHTS TO APPEAL THE DECISION

16. If the ICC is to be just, fair and effective it must ensure that rights holders are able to realise their rights in the Statute and that the law is applied consistent with their internationally recognised human rights pursuant to Article 21(3). If the Court denies persons their rights or infringes on them, they should - consistent with internationally recognised human rights - be able to seek remedies before the Court.

²⁷ See for example: 'Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'', Pre-Trial Chamber I, 6 September 2018, ICC-RoC46(3)-01/18, para 88.

²⁸ See for example: Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 1; Basic Principles and Guidelines, Principle 4 ; HRC, General Comment 31, para. 18.

²⁹ See for example: ECtHR, *El Masri v. The Former Yugoslav Republic of Macedonia*, 39630/09, Judgment, 13 December 2012, paras 191-193 ; IACtHR, *Contreras et al. v. El Salvador*, Judgment (Merits, Reparations and Costs), 31 August 2011, para. 170.

³⁰ See for example: CAT, General Comment 3, para. 17; IACtHR, *Gomes Lund et al.*, para. 201.

³¹ HRC, General Comment 31, para. 15; CAT, General Comment 3, para. 17.

17. Amnesty International therefore strongly supports the compelling arguments made in the victims' appeal briefs³² and in a partially dissenting opinion by Judge Antoine Kesia-Mbe Mindua³³ interpreting Article 82 of the Rome Statute to grant victims standing to appeal the Impugned Decision in their own right, without having to rely on the Prosecution to appeal. However, should the Appeals Chamber determine that it is not possible to interpret Article 82 to permit victims to appeal the Impugned Decision, it should address the gap by providing victims with a new procedural remedy to appeal decisions that deny or infringe on their rights pursuant to Article 21(3).

18. The Appeals Chamber has previously applied Article 21(3) to stay proceedings in response to breaches of the fundamental rights of suspects, even though the procedural remedy was not foreseen in the Statute and the Rules.³⁴ Although the Appeals Chamber did not set out in detail the legal basis for its approach, ensuring that rights holders have access to effective procedural remedies is essential if the ICC is to interpret and apply the law consistent with internationally recognized human rights. Indeed, in the event of a gap in the Statute and Rules, Article 21(3) read together with Article 21(1)(b) requires the ICC to apply international human rights law as a secondary source of law to ensure that victims' right to access effective remedies before competent judicial authorities is respected. On the face of it, the scope of Article 21(1)(b) appears unclear. It states that 'in the second place, where appropriate, applicable treaties and the principles and rules of international law' shall be applied. However, human rights treaties must be 'applicable treaties' in order to meet the

³² '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.

³³ '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.

³⁴ 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.

requirements of consistency with internationally recognised human rights in Article 21(3), regardless of the fact that the ICC is not a party to them. Moreover, it must always be 'appropriate' to apply international human rights law to address gaps in the Statute in order to comply with Article 21(3).

IV. EFFECTIVE REMEDIES FOR UNFAIR DENIAL OF ACCESS TO JUSTICE, TRUTH AND REPARATION

19. In order to effectively remedy the unfair denial of access to justice, truth and reparation for victims caused by the Impugned Decision, the Appeals Chamber should overturn the PTC's flawed interpretation and application of the interests of justice and authorise the Prosecutor to initiate the investigation in Afghanistan. Given that the PTC has already determined that the requirements of jurisdiction and admissibility are met and in light of the delays in the Afghanistan situation, the Appeals Chamber should authorise the investigation without referring it back to PTC so that it can be commenced as soon as possible.

20. Moreover, the Appeals Chamber should consider other measures to address the challenges identified in the Impugned Decision. Firstly, in light of the delays, it should request the OTP to prioritise the investigation, taking all necessary measures to ensure that it is conducted promptly (as required by internationally recognized human rights), to preserve evidence and to protect victims and witnesses.

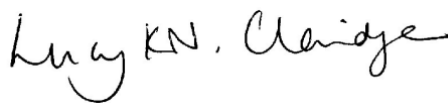
21. Secondly, the Appeals Chamber should emphasise the legal obligations of States Parties to cooperate with the investigation and instruct the OTP to bring instances of non-cooperation promptly to the attention of the PTC so that it can take appropriate steps, including referring such matters to the Assembly pursuant to Article 87(7).

22. Thirdly, the Appeals Chamber should instruct the OTP to submit a budget request to the Assembly of States Parties for sufficient resources to conduct an effective investigation and access the Contingency Fund to cover any immediate costs. The

Appeals Chamber should emphasise that even though Article 42(2) provides the Prosecutor with full authority over the management and administration of the OTP, the OTP also has a duty to seek sufficient resources in order to conduct prompt, thorough and effective investigations that comply with the principles of independence, impartiality and objectivity in the Statute, as well as with internationally recognised human rights. Moreover, the Appeals Chamber should clarify that it is an implicit requirement of the Statute that the Assembly of States Parties consider requests for additional resources to conduct new investigations required by the Statute in good faith and that State Parties must not politically interfere with the effective functioning, independence and impartiality of the Court through the budget process.

V. CONCLUSION

23. For these reasons, the Appeals Chamber should correct errors in the PTC's interpretation and application of the interests of justice in Article 53(1); recognise the standing of victims to appeal the Impugned Decision; overturn PTC's decision not to authorise the Prosecutor to initiate an investigation in the Afghanistan situation; and take appropriate measures to address challenges the OTP is likely to face in conducting the investigation.



Lucy Claridge
on behalf of Amnesty International

Dated this 15 November 2019

At London, United Kingdom