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-OsujiTitle
Judge Howard MorrisonTitle
JudgeLuz del Carmen Ibáñez CarranzaTitle
Judge Solomy Balungi BossaTitle

SITUATION IN THE ISLAMIC REPUBLIC OF AFGANISTAN

Public Document

Request for leave to file observations in the Appeal on 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'

Source: **Paweł Wiliński**

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 et al., 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

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. On the September 27th, 2009, Appeal Chamber issued an Order scheduling a hearing before the Appeals Chamber and other related matters (No.ICC-02/17 OA OA2 OA3 OA4)[1]. Responding to the p.3 of the Order hereby I express my interest to participate as amicus curiae in the proceedings and request for leave to submit observations.

2. I am a Professor of criminal procedure at Adam Mickiewicz University, Poznań, Poland, with 20 years of experience in reaserch on different issues related to criminal proceedings, including national and international criminal law. For 16 years I run classes on introduction to international criminal law and procedure and/or jurisprudence of international criminal courts, publishing several studies (mostly in Polish) about the ICC (i.a. as co-autor of books in Polish: International Criminal Court, 2004, pp. 696, Basics of International Criminal Law, Wolters Kluwer 2008, pp. 394; International Criminal law. Selection of Sources, WKL 2010) and other issues in English i.a. Improving Protection of Victims' Rights: Access to Legal Aid, ed. P. Wilinski, P. Karlik, Poznan 2014, ISBN 978-83-936620-4-6, p.263; Handbook of Polish Law, ed. W. Dajczak, A. J. Szwarc, P. Wiliński, Warsaw 2011, ISBN 978-83-262-0987-1, pp.664 (Criminal Procedure, p.201-242).

3. I limit my remarks mostly to external observations in relation to the Court's case-law, considering that the Court seeks all relevant arguments necessary to consider before deciding, arising i.a. from the essence of law, legal culture and various points of view.

4. Starting by noticing that there is in fact one preliminary question of the admissibility of the victims' appeal against the Impugned Decision before the Pre-Trial Chamber from 7 June 2019, ICC-02/17-34 and the essential question about understanding of premise of „interest of justice" in the sense of art. 53 (1) (c) of the Rome Statute I wish to concentrated on following observations.

5. The observation on the admissibility of the victims' appeal concentrate on the following:
   5.1. recognition that victims are/shall be considered as parties to this specific initial proceeding if only and becouse the potential decision may close their way to receive justice – as it is a decision of initiation or not the whole proceedings;
   5.2. victims are already parties to the appeal proceedings as their appeal is to be proceeded - even if question of admissibility is to be clarified first;
   5.3. victims are actors of a situation and parties of a conflict arising from the crime – therefore have good standing to represent their interests already at this stage - as the decistion is likely to determine further existence of proceedings;
   5.4. person become a victim long before the criminal investigation is initiated, for this reason it is not consistent with the common sence of justice depriving

[1] See Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019, para.21.

him/her/it of the possibility to participate to procedure of controlling the decision to initiate proceedings – if such procedure exists;

5.5. common sense and the interest of justice requires such an understanding of art. Art. 82(10(a) of the Statute where decision of authorisation of an investigation is recognized as 'decision with respect to jurisdiction or admissibility' and the victims have the right to appeal against decision of non-authorisation of an investigation requested by the Prosecutor.

6. The observation on the understanding of the premise of „interest of justice" in the sense of art. 53(1)(c) of the Rome Statute will concentrate on the following:
   6.1. Even the pre-trial stage of proceedings shall serve the interest of justice;
   6.2. No straight rule requires precise and final determination at this stage of proceedings that the investigation would serve the interest of justice;
   6.3. If so, any interpretation imposing such an obligation is in fact a limitation of premise of „interest of justice";
   6.4. Such limitation may be recognized as further that Statutes' limitation of Prosecutor power and position of Prosecution, and the concept of pre-trial proceedings itself;
   6.5. There is no need nor possibility to establish any definition of 'interest of justice'; however, we shall find the common understanding of the premise by setting boundaries that must not be crossed;
   6.6. Instead we may consider introducing and expand the positive/negative test of existence of interest of justice;
   6.7. In the premise 'interest of justice' both 'interest' and 'justice' matters – together with connector 'of' and should not be read or interpreted separately;
   6.8. I recognize that according to the Rome Statute there is not straight relation nor dependence between 'admissibility' of the case and the 'interest of justice' in investigation of a case – i.e. in specific situation admissible case may not serve the interest of justice and opposite inadmissible case may potentially meets this premise;
   6.9. It should be seen that there is a concept of interest of justice in a descriptive sense (i.e. general) and the premise of interest of justice as directional directive of Courts' actions.

7. In my understanding we may (or we shall) distinguish internal and external elements of premise of interest of justice;
   7.1. Internal elements are those related to: crime and its gravity (see art. 53(1)(c) of the Statute), interest of victims, rights of the accused and essence of justice concept (however understood differently in legal systems). The Court shall and probably will have to define its own understanding of this essence considering all legal regional meanings, victims' point of view and international community expectations. Justice means not the same for everyone but in all cases must be understood the same way by the Court;
   7.2. External elements are those coming from outside and (possibly) affecting Courts' decisions, f.e. political pressure, financial dependence, substantial

resources of a Court, reconciliation and de-escalation of conflict and expected prospect of success in pending cases;

7.3. Both external and internal elements have impact on determination of 'interest of justice' or we would rather say on determination what 'serves the best to the interest of justice';

7.4. We shall not deny that political pressure exists and have an impact on efficiency of Courts activities and execution of its jurisdiction. It is not always against the interest of justice to recognize and consider such pressure;

7.5. Being under pressure is the essence of any courts' existence. If there would be no pressure on court nor on its execution of justice, there would be no reason to create independent courts. From another (opposite) point of view court exists if it can resist such a pressure;

7.6. I believe, that if there are enough grounds to recognize that any Courts' decision decisively follows from political pressure there is always and interest of justice to overrule such a decision.

8. For related arguments I understand that 'prospect of success' connot be deciding factor of the decision on opening the investigation;

8.1. It is the interest of justice to prosecute and make efforts to bring perpetrators to justice not only when relevant circumstances are favourable for the effective trial but also when they are (or seem to be) such to make investigation not feasible and inevitably doomed to failure. Justice demands/ requires action in both situations. It is not true that focusing only on scenarios where the prospect for successful investigation are serious serves the interest of justice;

8.2. Prospect of success may not be understood - in relations with premise „interest of justice" - only as a visible possibility of conduct and finishing the case (serving judgement). In the international criminal law, it is more bringing before justice than any other factor;

8.3. If we say prospect of success shall be considered as an argument to find no interest of justice in investigating the case, we admit than success is an element of justice. Which hopefully is not;

8.4. 'Success' of justice is not always based on effectiveness of proceedings itself. It seems to be that in some cases opening of a case (investigation) is all we can achieve but still cannot give it up;

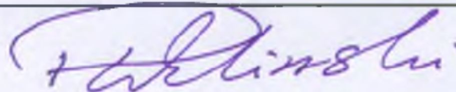
8.5. The ICC is not a Court for pending successful proceedings but for prosecuting crimes – as stated in Rome Statute.

9. Arguments on difficulties in running cases, securing minimal cooperation from State Parties and relevant authorities are not arguments derived from the concept of interest of justice.

10. Consuming substantial resources of a Court on investigation that seems to be likely fail could be an argument only if the Court can find and give compelling reasoning that particular proceeding will result in a direct negative effect on other pending (but not potential) proceedings. In this perspective also the Prosecution shall be given more

trust in determination of cases to be conducted – as Prosecution has full (and probably best) understanding of limited resources of the Court.

11. Prospect of success in investigation is not an argument for making decision whether prosecute or not but is a procedural obstacle (if exists) in conducting pending proceedings.
12. If we also consider effectiveness of current proceedings pending before the Court (f.e. Burundi, Georgia, CAR) we shall not use the argument of prospect of success as decisive argument. It was never so far, an argument connected with premise interest of justice.
13. Arguments of prospect of success in serving justice (mostly derived from luck of cooperation or objections of State Parties) are not therefore arguments derived from the concept of interest of justice.
14. I believe that attempt to define and understand interest of justice from a perspective of prospect of success of proceedings (investigation) would have freezing effect on international community and will obviously affect faith in credibility of the ICC.
15. If justice should be served and applied equally that interest of justice cannot be understood in a meaning that prospect of success is a decisive argument for decision of opening or not the investigation in Afghanistan and in any other case.
16. Pragmatic consensus may be but is not always a part of interest of justice in international criminal law.



Professor Paweł Wiliński
on behalf of
Adam Mickiewicz University
Ul. Św. Marcin 90, 61-809 Poznań, Poland
Phone: +48 606944303; e-mail: wilinski@amu.edu.pl

Dated this October 15, 2019, Poznań, Poland

At [place, country]