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The International Criminal Court Appeals Chamber on Afghanistan and the role of the 'interests of justice' criterion

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The International Criminal Court Appeals Chamber on Afghanistan and the role of the ‘interests of justice’ criterion.

Afghan National Army soldiers with the 3rd Company, 6th Battalion help rescue a 3-year-old boy who had fallen into a well in Maiwand district, Kandahar province, Afghanistan, April 7, 2013. (U.S. Army photo by Capt. Jennifer Dyrcz/Released)

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By Dr. Paolo Caroli, Alexander von Humboldt Fellow at the University of Hamburg.

Introduction

A previous post on this blog highlighted the relevance of the decision of 9 March 2020 of the Appeals Chamber of the ICC on the admissibility of the case against Saif-Al-Islam Gaddafi for the legitimacy of amnesty for international crimes.

Just few days before, on 5 March 2020, the Appeals Chamber issued a decision in the Situation in the Islamic Republic of Afghanistan which is also relevant for the relationship between transitional justice mechanisms and the ICC, as it deals with the controversial formula 'interests of justice'.

Background: The Pre-Trial II decision

There has been much discussion about the decision issued by PTC II on 12 April 2019 rejecting the Prosecutor's request to open an investigation into the Situation in Afghanistan. On 20 November 2017, the Prosecutor had requested authorisation from Pre-Trial Judges to initiate an investigation *proprio motu* into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan, as well as regarding similar crimes related to that conflict allegedly committed in the territory of other States Parties. A section of the Request was devoted to the policies allegedly pursued by US Forces and CIA with regard to the interrogation of detainees. The Prosecutor believed that, since May 2003, members of the US armed forces and the CIA had committed the war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the US authorities.

The PTC rejected the request because such an investigation would not serve 'the interests of justice'. This was the first time that this ambiguous criterion, which appears in article 53(1)(c) ICC St, was applied. This vague formula is the result of a compromise at the Rome Conference[1] and is meant as an exceptional, negative criterion, which is to be invoked by the Prosecutor only if he/she is of the view that an investigation or prosecution is *not* in the interests of justice. Should that happen, the Prosecutor's determination may be subject to a process of review by the PTC under article 53(3)(b) ICC St.

Previous to this decision, many scholars agreed on the idea that the resort to the 'interests of justice' must be initiated by the Prosecutor since this criterion was created to introduce prosecutorial discretion and represents as a 'safety valve' for the Prosecutor in the light of major 'policy considerations'.[2] The content of such policy considerations is unclear. While some scholars have suggested a wide interpretation of the notion of 'justice' in order to include restorative justice and transitional justice mechanisms which include a conditional or limited amnesty,[3] the attitude of the OTP has been more cautious.[4]

In the 2019 decision, while called upon to decide on the Prosecutor's request to commence an investigation pursuant to article 15(4) ICC St, the PTC resorted to the 'interests of justice' criterion on its own initiative as a ground for rejecting the request. The Court did not provide for a definition of the 'interests of justice', but offered some factors that ought to be considered relevant: «*(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a*

preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage»[5]. According to these criteria, the Chamber decided that an investigation into the situation in Afghanistan would not serve the interests of justice.

The Appeals Chamber Decision

The AC underlines that the criterion of the 'interests of justice' is formulated in the negative and the Prosecutor need not affirmatively determine that an investigation would be in the interests of justice. The AC also notes that the PTC's reasoning in support of its conclusion regarding the 'interests of justice' was cursory, speculative and did not refer to information capable of supporting it.[6] Therefore, the Chamber amended the PTC's decision to the effect that the Prosecutor is now authorised to commence an investigation in the Situation of Afghanistan.

The decision offers some general clarifications on the 'interests of justice'. The judges find that the PTC erred in its interpretation of article 15(4) ICC St when it found itself bound to assess the factors under article 53(1) ICC St, since article 15(4) ICC St requires a pre-trial chamber to determine only whether 'there is a reasonable basis to proceed with an investigation', and whether 'the case appears to fall within the jurisdiction of the Court'.[7] The AC considers that the content and placement of articles 15 and 53(1) ICC St make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 ICC St governs the initiation of a *proprio motu* investigation, while article 53(1) ICC St concerns situations which are referred by a State Party or the Security Council.[8] The Prosecutor has a discretionary power to trigger an investigation *proprio motu* and the legal framework does not envisage judicial review of their conclusion.[9] This implies that the judicial review under article 53(3)(b) ICC St does not extend to decisions not to request authorisation of an investigation under article 15 ICC St.[10] Judge Ibáñez Carranza dissented on this point[11].

Further consequences

This decision has two direct consequences on ICC procedure:

1) The absence of 'interests of justice' can be used by the Prosecutor to support the decision not to open an investigation, but not by the Pre-Trial Chamber to contrast such decision.

2) When acting *proprio motu*, the Prosecutor has discretionary power in closing the preliminary examination and deciding not to request authorisation to investigate on the basis of the absence of 'interests of justice', without any judicial review. Article 53(3)(b) does not apply.

While the first consequence is in line with a view supported by many scholars, [12] the second one is not clearly grounded in any statutory provision and might rise some debate.

Although this decision does not deal expressly with transitional justice, its indirect impact on this area can be relevant. First, in *proprio motu* preliminary examinations, the Prosecutor has an absolute discretion in evaluating transitional justice mechanisms that abandon, in general or in part, retributive justice in favour of amnesty, restorative justice or other forms of accountability. If the Prosecutor accepts such a model and closes the examination on the basis

of the 'interests of justice' criterion, no agreement of the PTC is required. On the contrary, in all kinds of investigations, if the Prosecutor refuses to accept transitional justice mechanisms that depart from retributive justice and opens an investigation, the PTC has no power to stop the investigation on the basis of the 'interests of justice' criterion. The only possible tool for policy consideration would be the exercise of the power of deferral by the UN Security Council. This decision can be read alongside the decision in the Gaddafi case – which seems to leave a possible role for amnesty – as a timid recognition of a 'political' role of the Prosecutor and a defence of a necessary degree of legal 'mess'[13] in relation to political transitions.

[1] On the origins of the 'interests of justice', G. Bitti, 'The Interests of Justice – where does that come from?'*Part I* and *Part II* (*EJIL:Talk!*, 13-14.04..2019); T. De Souza Dias, ''Interests of justice': Defining the scope of Prosecutorial **discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2018) *LJIL* 731.**

[2] K. Ambos, 'The legal framework of transitional justice: a systematic study with a special focus on the role of the ICC', in Id. et al. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009), 84.

[3] *Ex plurimis* E. Maculan, 'La corte penal internacional' in A. Gil Gil-Id. (eds.), *Derecho Penal Internacional* (Dykinson 2019), 96; M. Varaki, 'Revisiting the 'Interests of Justice' Policy Paper' (2017) JICJ 455; C. Cárdenas Aravena, 'Revisión crítica del criterio "interés de la justicia" como razón para no abrir una investigación o no iniciar un enjuiciamento ante la Corte Penal Internacional' (2011) RDUCN 21; J.A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) JICJ 383; P. Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice' (2005) *Crim.L.Q.* 305; D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) EJIL 481.

[4] OTP, *Policy Paper on the Interests of Justice*, 2007; OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 10 ff.

[5] Para. 91.

[6] Para. 49.

[7] Para. 34.

[8] Para. 33.

[9] Para. 30.

[10] Para. 30, fn. 52.

[11] Separate opinion of Judge Ibáñez Carranza.

[12] Against this, K.J. Heller, 'The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong' (*OpinioJuris*, 09.03.2020).

[13] C. Bell, 'The «New Law» of Transitional Justice', in *Building a Future*, 106.

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