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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

Observations by Professor Jennifer Trahan as *amicus curiae* on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019

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This amicus brief is submitted regarding the appeal of Pre-Trial Chamber ('PTC') II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019 ('the Decision'). The brief will show that the PTC incorrectly engaged in a review of whether it is ***in*** 'the interests of justice' to proceed with the Afghanistan investigation; alternatively, even if such review were appropriate, the PTC did not engage in ***review*** of the Prosecutor's determination, but made its own *de novo* assessment of 'the interests of justice'. While the Decision should be reversed on these grounds alone, if the Appeals Chamber considers the substance of the PTC's Decision, it should find that the criteria utilized to evaluate 'the interests of justice' do not fit within the ordinary meaning of the phrase and set an unworkable standard for future ICC situations.

I. Reviewability of 'positive' and 'negative' determinations. Rome Statute Article 53(1)(c) grants the Prosecutor discretion to determine that there is ***not*** a sufficient basis to initiate an investigation based on 'the interests of justice' (*i.e.*, a 'negative determination'), and it is the negative determination that is subject to PTC review. Here, the Prosecutor found it was ***in*** 'the interests of justice' to proceed (*i.e.*, a 'positive determination'), which the Rome Statute does not make subject to PTC review.

Due to page limitations, this brief will trace the analysis of Gilbert Bitti without citing the underlying documentation he references.[1] Bitti explains that when the phrase 'the interests of justice' was introduced during the 1996 Session of the Preparatory Committee, the United Kingdom (somewhat inconsistently) suggested both language whereby the Prosecutor could

[1] See Gilbert Bitti, 'The Interests of Justice-Where Does that Come from? Part I', (*EJIL:Talk!*, 13 August 2019), *at* https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i/; 'Part II', (*EJIL:Talk!*, 14 August 2019), *at* https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/.

determine not to file an indictment when it was ***not*** in 'the interests of justice', but also language where the Prosecutor would need to show it was ***in*** 'the interests of justice' to proceed. By the 1997 Session, the phrase came to be used regarding the decision whether to open an investigation and was formulated as a positive determination. A positive determination was also required in a Working Paper leading into the Rome Conference.[2] At Rome, however, as reflected in the final text, what was agreed on was the negative formulation: discretion is left to the Prosecutor to determine it is ***not*** 'in the interests of justice' to proceed with an investigation. While this drafting history does not need to be reached (as the Rome Statute's language is clear in containing only a 'negative determination'), it is helpful to show the drafters knew the difference between positive and negative determinations,[3] and it was the latter they chose to use in Article 53. The final text also adds that the Prosecutor must have 'substantial reasons' to believe an investigation would not serve 'the interests of justice', suggesting a *presumption of proceeding* with investigations absent 'substantial reasons' ***not*** to do so. Thus, the Rome Statute grants the Prosecutor discretion to determine there are 'substantial reasons' it would ***not*** serve 'the interests of justice' to proceed to an investigation; it nowhere requires the Prosecutor to demonstrate it would be ***in*** 'the interests of justice' to proceed.[4]

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[2] *Id.*

[3] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, 8 ILM 679 ['VCLT'], Art 32 (*travaux préparatoires* may be considered to confirm treaty language).

[4] See also Talita 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', 30(3) *Leiden Journal of International Law* 731 (2017), p 735 ('A decision on the basis of the "interests of justice" is a negative one, i.e., a decision that an investigation is *not* in the interests of justice. This means that the Prosecutor does not need to make a positive assessment as to whether an investigation *is* in the interests of justice, or at least not an explicit one. Rather, it is only if the interests of justice weigh *against* an investigation that the Prosecutor must make a formal decision pursuant to Article 53(1)(c). This means that there is a strong presumption in favour of an investigation'.).

Article 15 then empowers the PTC to review the Prosecutor's submission when a preliminary examination is initiated *proprio motu.* Because the Prosecutor is nowhere required to show an investigation is ***in*** 'the interests of justice' (as she found here), there was no determination regarding 'the interests of justice' for the PTC to review. Thus, for example, in both *Kenya* and *Côte d'Ivoire*, the PTC affirmed that its review power is limited to reviewing a Prosecution determination ***not*** to open an investigation.[5] Article 15(4) states: '[i]f the Pre-Trial Chamber, . . . considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation'. Here, because the PTC found a 'reasonable basis to believe that the incidents underlying the [Prosecutor's] [r]equest occurred' and 'may constitute crimes within the jurisdiction of the Court',[6] the PTC should have authorized the investigation.

Alternatively, even if the Prosecutor's determination as to 'the interests of justice' were reviewable, the PTC would need ***to review*** the Prosecutor's determination for reversible error—based on having received full and reasoned submissions evaluating 'the interests of justice'. The PTC is nowhere empowered to make its own *de novo* assessment of 'the interests of justice', as it did. In short, Article 53 creates discretion *for the Prosecutor*, not the PTC, which must confine itself to a review function.

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[5] 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19, 31 March 2010, para 63; Côte d'Ivoire Decision, ICC-02/11-14-Corr, paras 207–08; Georgia, ICC-01/15-12, para 58; Burundi, ICC-01/17-9-Red, para 190. See also 'Decision on the Request of the Legal Representative of Victims VPRS 3 and VPRS 6 to Review an Alleged Decision of the Prosecutor Not to Proceed', ICC-01/04-582, 25 October 2010, p 4 (where the Prosecutor made no decision *not* to proceed against Mr Bemba on the basis of 'the interests of justice', PTC I concluded there was no basis for it to exercise its review powers); 'Decision on Application under Rule 103' (situation in Darfur, Sudan), ICC-02/05-185, 4 February 2009, para 21 ('the Chamber emphasizes that article 53(3)(b) of the Statute only confers upon the Chamber the power to review the Prosecution's exercise of its discretion when it results in a decision *not* to proceed') (emphasis added).

[6] Decision, para 60.

II. The meaning of 'the interests of justice'. Alternatively, if the Appeals Chamber considers the merits, it should find the PTC's criteria used to evaluate 'the interests of justice' fail to fall within the 'ordinary meaning' of the phrase and set an unworkable standard for future cases.

(a) ***Interpretative sources.*** As to treaty interpretation, the VCLT requires consideration of: (i) the 'ordinary meaning' of text; (ii) in light of 'context' and the treaty's 'object and purpose'.[7] The VCLT and Rome Statute also mandate consideration of relevant 'rules of international law'. These interpretative sources all suggests a narrow reading of the phrase.

Ordinary meaning. While admittedly 'the interests of justice' is not a phrase in common usage, nonetheless, the 'ordinary meaning' of the language suggests something like 'in furtherance of justice' or 'in order that justice may be done'. That language is not infinitely malleable; any interpretation of the phrase must fit within that language. For example, Article 53(2)(c) suggests that factors to be considered 'includ[e]' gravity and the interests of victims, or the age or infirmity of the alleged perpetrator, and his or her role in the alleged crimes.[8] While the word 'includ[e]' makes clear that list is not exhaustive, and it may not be possible to articulate all the factors that could be considered either under Article 53(1)(c) or 53(2)(c), additional factors should at least be of the same type.[9] For instance, furthering the interests of peace[10]

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[7] VCLT, Art 31(1); *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, 1950 ICJ Rep 4, p 5 (Mar. 3) ('The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur'.).

[8] This is admittedly for purposes of Article 53(2)(c), but there is no reason a completely different reading should attach to the same language in Article 53(1)(c). Article 53(1)(c) lists only two factors.

[9] HRW, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute', 1 June 2005, *at* https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute#.

[10] This issue arose in the context of the situation in Northern Uganda as to which it was argued there was a tension between 'peace and justice'.

does not appear to fit (although this debate does not need to be resolved here).[11] Furthering impunity, considering the 'political climate', or conserving the Court's budget, for example, also do not appear to fit within the language. Thus, whatever criteria are employed in considering application of the phrase must be ones that fit within its ordinary meaning.

'Context' and 'Object and Purpose'. VCLT Article 31(1) also mandates that 'ordinary meaning' be considered in 'context' and in light of a treaty's 'object and purpose'. Here, the 'context' is the Rome Statute[12]—aimed at prosecuting the most serious crimes of concern to the international community.[13] One clearly sees this 'context', as well as the 'object and purpose', in the preamble:

> **Affirming** *that the most serious crimes of concern to the international community as a whole must not go unpunished . . .*,
> **Determined** *to put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
> **Recalling** that it is the *duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes,
> **Determined** . . . to establish an independent permanent International Criminal Court . . . *with jurisdiction over the most serious crimes* of concern to the international community as a whole,
> **Resolved** to guarantee lasting respect for and *the enforcement of international justice* . . . .[14]

Thus, the preamble clearly emphasizes that the goal of the Rome Statute system is that the most serious crimes—including war crimes and crimes against humanity—*must* be prosecuted and punished. Any reading of 'the interests of justice' necessarily *must* be consistent with this

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[11] Under Article 16 it is the Security Council that is charged with determining whether an investigation or prosecution should be deferred for 12 months based on considerations of international peace and security. Thus, there is an alternative mechanism to evaluate these concerns. See Rome Statute, Art 16.
[12] VCLT, Art 31 (2) ('context' shall comprise the treaty 'text, including its preamble' . . . and additional sources).
[13] Rome Statute, pmbl, Arts 1, 5. In terms of 'context', the phrase also appears in various other Rome Statute Articles and the Rules of Procedure and Evidence. See, eg, Rome Statute, Arts 55(2)(c), 61 (2), 65(4), 67(1)(d); ICC RPE, *at* https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf, Rules 68(2)(b)(i), 69, 73(6), 82, 100(1), 134*quater*(2), 136(1), 165(3). Examining these, the phrase seems to mean 'so that justice may be administered in an orderly way' or the 'good administration of justice'. HRW, *supra* note 9.
[14] Rome Statute, pmbl (emphasis added).

'context' and 'object and purpose'; treaty language cannot be construed in a way that ignores 'context' or thwarts a treaty's 'object and purpose'.[15]

Relevant rules of international law. Finally, both the VCLT and Rome Statute direct one to consider relevant 'rules of international law'.[16] Here, as the investigation would examine war crimes and crimes against humanity, including the underlying crime of torture,[17] relevant rules of international law include treaties and other sources that mandate such crimes be investigated and/or prosecuted. One sees such prosecution obligations in the 1949 Geneva Conventions at least as to 'grave breaches'[18] and probably war crimes more broadly,[19] and the Torture Convention;[20] a similar obligation exists as to crimes against humanity based on customary international law.[21] International law also establishes a legal obligation to

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[15] The ordinary meaning cannot be 'incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained'. Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL, 2008), p 427, at http://ebookcentral.proquest.com/lib/nyulibraryebooks/detail.action?docID=468491.

[16] VCLT, Art 31(3)(c) ('[t]here shall be taken into account' 'applicable' 'relevant rules of international law'); Rome Statute, Art 21(1) (directing consideration of the 'Statute, Elements of Crimes and . . . Rules of Procedure and Evidence', and, 'where appropriate, applicable treaties and the principles and rules of international law').

[17] Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, ICC-02/17-7-Conf-Exp (20 November 2017), *at* https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

[18] See, eg, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art 146 (obligation to prosecute grave breaches).

[19] Common Article 1 to the 1949 Geneva Conventions and to Protocols I and III mandates that respect for convention provisions be 'ensure[d]'. See ICRC, *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 (in discussing 'ensur[ing] respect' under Common Article 1, listing 'investigating possible violations, creating *ad hoc* tribunals and courts, [and] creating the International Criminal Court' as ways to ensure respect if violations occur). The 1949 Geneva Conventions also specify: '[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention[s] other than grave breaches . . .'. Geneva Convention I, Art 49, para 3; Geneva Convention II, Art 50, para 3; Geneva Convention III, Art 129, para 3; Geneva Convention IV, Art 146, para 3.

[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984), Art 5.

[21] See, eg, Int'l L Comm'n, 1996 Draft Code Against the Peace and Security of Mankind with Commentaries, at 27, Art 8 ('Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity,] . . . or 20 [war crimes] is found shall extradite or prosecute that individual'.).

'investigate' in order to 'prosecute'.[22] Thus, 'the interests of justice' also must be read in a way that respects these legal obligations. All these interpretative tools therefore suggest a narrow construction of the phrase.

(b) ***The PTC's criteria fail to satisfy the VCLT.*** The PTC appears to have considered: (i) the time period the preliminary examination has taken,[23] (ii) the anticipated future 'prospects for successful . . . investigations'[24] and/or prosecutions (including whether or not there would be state cooperation and available evidence, and anticipated prospects for surrender of accused),[25] (iii) whether proceeding 'would result in creating frustration' for victims,[26] (iv) the 'complexity and volatility of the political climate',[27] and (v) budgetary constraints.[28]

First and foremost, these criteria fail to fit within the narrow construction of the phrase mandated by applying its ordinary meaning, considered in 'context', in light of the Rome Statute's 'object and purpose', and considering existing legal obligations to investigate and prosecute war crimes and crimes against humanity. Moreover, the duration of the preliminary examination does not suggest anything about whether it is in 'the interests of justice' to proceed; while delay is not ideal, the work of the Extraordinary Chambers in the Courts of Cambodia and prosecutions of aged Nazis that are *still occurring* demonstrate that successful

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[22] See Final Report of the Int'l L Comm'n, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) (2014), YB Int'l L Comm'n, Vol II (Part Two) (2014), para 20 (discussing the obligation to 'investigate' as part of the obligation to 'prosecute'), relying on Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 ICJ Rep 422, 453–54 (July 20); Claus Kress, 'Reflection on the *Judicare* Limb of the Grave Breaches Regime', 7 *Journal of International Criminal Justice* 789 (2009) ('What the *judicare* limb of the grave breaches regime actual entails is a duty to investigate and, where so warranted, to prosecute and convict'.).

[23] Decision, para 91.

[24] Decision, para 90.

[25] Decision, paras 91, 94.

[26] Decision, para 96.

[27] Decision, para 94.

[28] Decision, para 95.

investigations and prosecutions can occur decades after crimes are committed. Anticipating potential prospects for success (whether there would be cooperation, available evidence, and/or surrenders) is not only speculative,[29] but irrelevant to whether it would be in 'the interests of justice' to proceed.[30] Numerous ICC situations have faced cooperation difficulties (particularly as to arrests and/or evidentiary difficulties), yet had been permitted to proceed. Nothing in the Rome Statute suggests the OTP should only investigate where it anticipates a reasonable likelihood of success; in fact, given the Court's docket, it would be hard to make that prognostication about any of the ICC's cases, which all could face, and most have faced, such difficulties.[31] Whether victims could end up frustrated is again completely speculative and true of any ICC situation if outreach and victim representation are mishandled or a case results in acquittal, as has occurred.[32] Victims could be *even more frustrated* by the current Decision, which eliminated *even the prospect* of their obtaining justice in a context where investigations and prosecutions are not occurring within Afghanistan's justice system. Nor does anything in the PTC's Decision explains *why* the 'complexity and volatility of the political climate' should influence whether or not it is in 'the interests of justice' to proceed. For example, in the situation of Burundi, PTC III acknowledged that 'the Government of Burundi has interfered with, intimidate, or harmed victims and witnesses. . . . [and] . . . is suspending international

[29] It also ignores statements by Afghanistan that it would cooperate with the investigation. See Statement by Ambassador of the Islamic Republic of Afghanistan to The Netherlands at the 17th session of the Assembly of States Parties, 2018. See also Dias, *supra* note 4, p 743 (any harm from proceeding based on an assessment of 'the interests of justice' must be present or imminent and not speculative).

[30] See eg Christian De Vos, 'No ICC Investigation in Afghanistan: A Bad Decision with Big Implication' (*International Justice Monitor*, 15 April 2019), *at* https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/ ('It defies logic that denying the Prosecutor enhanced powers to investigate would be the appropriate remedy for a lack of evidence'.).

[31] Moreover, there are mechanisms in Rome Statute Article 87(7) designed to address non-cooperation.

[32] It also appears more appropriate to consider the actual views of victims than for the PTC to speculate.

cooperation in connection with the alleged crimes' which could pose a risk to the integrity of the investigation; yet, the PTC authorized the investigation.[33] Finally, it is for the ICC's Assembly of States Parties to ensure the ICC has a sufficient budget, not for the PTC to make decisions based on budget considerations—which interfere with the Prosecutor's independence;[34] furthermore, as funding is in no way 'ear-marked', there is simply no basis to conclude there is *not* money for an Afghanistan investigation but *is* money for other investigations.

Thus, none of the PTC's criteria fits the narrow reading of the phrase mandated by applying the VCLT. Additionally, the PTC failed to cite jurisprudence or *travaux préparatoires* in support of its novel reading of the phrase, and none of its criteria has been evaluated by past Pre-Trial Chambers,[35] raising the question of why they first surfaced in the current situation.

(c) ***The PTC's criteria fail to provide a workable standard for future ICC cases.*** Finally, given that many ICC situations could present similar difficulties—with potential for non-cooperation, victim frustration (and budgetary concerns potentially impacting all situations)—affirming the PTC's Decision could have dramatically wide-ranging ramifications, endorsing unworkable criteria that suggest many situation currently under preliminary examination should not proceed. The most pernicious criteria are examining the potential for state non-cooperation and 'the political climate', which virtually *invite states not to cooperate* if they want a preliminary examination not to proceed,[36] and suggest the Court should openly consider

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[33] Burundi Article 15 Decision, ICC-01/17-9-Red, paras 13–14.

[34] See Rome Statute, Art 42(1)–(2) ('The Office of the Prosecutor shall act independently as a separate organ of the Court'; the Prosecutor has 'full authority over the management and administration of the [OTP], including the staff, facilities, and other resources'.).

[35] See note 5 (Article 15 rulings).

[36] '[F]easibility is not a separate factor under the Statute when determining to open an investigation', as doing so 'could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC

political factors in deciding where the Court should operate.[37] Endorsing these criteria would threaten not only the OTP's independence[38] but the Court's independence as a whole by essentially inviting political interference—nothing could be more damaging to the Court. These criteria would also skew the Court's docket towards proceeding only against non-state actors or state actors from politically less powerful states, where state cooperation may be more likely forthcoming or obtainable. Such double-standards are anathema to the functioning of a judicial institution.[39] At its most central core, the ICC must stand for equal application of the rule of law, and attempt, as much as possible, *to insulate* the operation of international criminal law from the impact of politics, not *invite* political interference in the work of a judicial institution.

For these reasons, the Appeals Chamber should reverse the PTC's Decision and authorize the opening of the Afghanistan investigation or direct the PTC to do so. Alternatively, the Appeals Chamber should direct the PTC to re-consider 'the interests of justice'.

Respectfully submitted,

Professor Jennifer Trahan

Dated 15 November, New York, NY

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intervention'. OTP, 'Policy Paper on the Interests of Justice' (2007), at https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

[37] See Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *EJIL* 481 (2003), p 483 ('The very purpose of the ICC was to ensure the investigation and punishment of serious international crimes, and to prompt states to overcome the considerations of expedience and *realpolitik* that had so often led them to trade away justice in the past'.).

[38] 'The perception of a Prosecutor sensitive to political circumstances, and perhaps to political pressure, would irreparably harm the Prosecutor's status as [independent]'. Dražan Đukić, 'Transitional Justice and the International Criminal Court – "The Interests of Justice"?', 89(867) *Int'l Rev of the Red Cross* 691 (September 2007).

[39] Double standards violate the principle of non-discrimination and right to equality before the law. See Rome Statute, Art 21(3) (any 'interpretation of law' 'must be consistent with internationally recognized human rights').