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Not just another ‘crisis’: Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part I)

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By Sergey
Vasiliev

April 19, 2019

This is a two-part post on the PTC’s Afghanistan non-investigation decision. Part I discusses the PTC’s analysis of the interests of justice requirement. Part II will focus on the decision’s broader implications.

Judicial meltdown

The Decision of Pre-Trial Chamber II of 12 April 2019 to turn down the Prosecutor’s 20 November 2017 Request for authorization to commence an investigation in Afghanistan came as a shock to many observers. It is the anti-climax of more than a decade-long preliminary examination by the Office of the Prosecutor and one-and-a-half years of judicial deliberations. Although it was always within the range of possibilities that the PTC would decline, it was the least expected outcome. In her Request, the Prosecutor had shown—and the Chamber agreed—that there existed reasonable grounds to believe that crimes within the ICC’s jurisdiction had been committed in the situation since 1 May 2003 and the potential cases would have been admissible before the Court. The judges differed from the Prosecutor in one decisive respect on which the rejection essentially—and problematically—rests: the opening of the investigation would not have satisfied Article 53.1.c of the Statute, i.e. there were substantial reasons to believe that the investigation would *not* serve the “interests of justice”.

It is far from clear whether the Prosecutor will be able or indeed willing to appeal the PTC Decision (my preliminary answer is no on both points). Moreover, Article 15.4 authorizes the Prosecutor to file a new request ‘based on new facts or evidence regarding the same situation’. While this could be the way to resuscitate the procedure, it is uncertain whether the OTP would consider using it – or whether ‘new’ facts or evidence could show a change in relevant circumstances (see para. 94) and reverse the PTC’s ‘interests of justice’ assessment. The other avenue discussed on Twitter would be for one or more of the States Parties to refer the situation in Afghanistan to the Prosecutor, thus enabling her to circumvent the authorization obstacle. The problem would be to find such a State Party, that would be prepared to take on the wrath of the US. Palestine and Venezuela come to mind but the discussion whether hinging this



investigation on those states' referral is optimal or desirable is rather left for another day. As matters stand, it is more likely than not that the PTC's decision has effectively sealed the fate of situation in Afghanistan before the ICC.

'Crisis' has been the buzzword courtesy the ICC for some time now. But this is not your average 'crisis'. Many of the flaws in the PTC's decision have been helpfully dissected by Heller, Jacobs, Labuda, Rona, de Vos and other commentators. However, the ruling is not just unnerving on multiple counts of form and substance. A thinly-guised surrender to power politics, it is nothing short of a judicial meltdown. Its significance and implications for the institution and international criminal justice more generally are profound, fitting neatly in the patterns decried in the 'radical critiques' of international criminal law.

This (first) part of the post shows how the PTC's treatment of the 'interests of justice' requirement went astray, bringing legally irrelevant desiderata within the judicial determination. Part II of the post offers a few unconsoling thoughts on the impact of the Afghanistan decision on the ICC's credibility and what it may bode for the future of international criminal justice.

'Interests of justice' or 'interests of the ICC'?

The PTC reminds us that the assessment of the 'interests of justice' requirement 'must be conducted with the utmost care, in particular in light of the implications that a partial or inaccurate assessment might have for paramount objectives of the Statute and hence the overall credibility of the Court'. (para. 88). It is therefore particularly ironic that its own interpretation and application of this parameter is so fundamentally flawed and has led to those very implications.

My quarrel with the PTC's 'interests of justice' determination revolves on two points: the content it gives to this notion and the standard of proof it uses. Regarding the former, the PTC decision hollowed this notion of its normative content, supplanting it with extraneous considerations and thus effectively misapplying it. Although the criterion of 'interests of justice' is rather vague, it is not devoid of statutory meaning, contrary to what the Chamber claims (para. 89). Article 53.1.c states that 'the gravity of the crime' and 'the interests of victims' should be two factors taken into account when making this determination.

In its Request, the OTP addressed these elements at some length. It devoted no less than 28 paragraphs to the issue of gravity of potential cases to arise from the situation against the members of the Taliban and affiliated groups, the Afghan National Security Forces and the members of the US military and the CIA (Request, paras 336-64). Even though the PTC acknowledges the grave nature of the alleged crimes as part of its admissibility assessment (Decision, paras 84-86), this consideration perplexingly neither comes back in, nor has any impact on, its treatment of the 'interests of justice' in section VII of the Decision. In fact, the word 'gravity' occurs only once in that section, and even then that was only in the PTC's statement of the text of Article 53.1.c.

Turning to the second criterion indicated by Article 53.1.c, the ‘interests of victims’, the OTP’s request similarly provided detailed information on the high level of support for the investigation among victims, bolstering its determination that the investigations would be in the ‘interests of justice’. This information was collected through direct consultations with victims’ organisations and in the form of communications and other sources (see paras 365-371).

Moreover, the PTC had the benefit of receiving victim ‘representations’ pursuant to Article 15.3 and Rule 50 (by the PTC’s own count, a total of 794 submissions on behalf of over 6,220 individuals, 1,690 families, and further 10 million persons and 26 villages (Decision, para. 27 and fn17)). These representations were collected in the difficult security circumstances, including in some of the least accessible locations in Afghanistan, over the short period of December 2017–January 2018. Although the Chamber noted that those ‘usefully complement and supplement’ the OTP’s submissions (para. 28), it is not evident from the Decision whether the PTC gave victim representations due consideration and weight when reaching its determination. In fact, one may wonder what sense it makes to have the resource-intensive victim participation procedure under Article 15(3) – other than using it as a façade to convey that victims’ views matter while ignoring them all the same.

Instead of taking the elements of ‘gravity’ and the ‘interests of victims’ into account, the PTC reframed the ‘interests of justice’ in a way that allowed it to sidestep the language of Article 53.1.c in favour of the more pragmatic and expediency-based concerns not contemplated by the provision, such as ‘the likelihood that investigation be feasible and meaningful under the relevant circumstances’ (para. 35), ‘its [the ICC’s] organisational and financial sustainability’ (para. 88), and resource constraints (para. 95). The Chamber states openly that ‘focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success’ (para. 90). Clearly, the ICC’s own ‘ultimate success’ is the Chamber’s primary concern here. The PTC found that the prospects of a successful investigation and prosecution were ‘extremely limited’ and pursuing them would be unlikely to meet the victims’ objectives (para. 96). Apart from the fact that this was not what victims apparently thought, this is not the same as to show that the investigation as such would *not* be in the interests of justice. This leaves no doubt that the PTC’s analysis conflates and supplants the ‘interests of justice’ with the narrow institutional ‘interests of the Court’. Whatever those perceived interests may be – the improved conviction record, financial sustainability, institutional survival or the comfort of those working for it (including unimpeded entry to the US) –, these considerations are legally irrelevant. They have little to do with issues such as gravity of the alleged crimes and the interests of victims Article 53.1.c directs to take into account.

The second major problem with the PTC’s application of the ‘interest of justice’ criterion concerns the standard of proof. The Chamber’s conclusion that that the ‘interests of justice’ would not warrant the commencement of the investigation comes nowhere close to satisfying the ‘substantial reasons to believe’ standard of Article 53.1.c. By (an

admittedly remote) analogy with the ‘substantial grounds to believe’ in the context of the confirmation of charges (‘concrete and tangible proof demonstrating a clear line of reasoning’), the standard of ‘substantial reasons’ arguably implies, at the very least, the existence of some evidence supporting the clear logic that the investigation would be *against* the interests of justice. The PTC’s reasoning in this respect is anything but clear and substantiated. It rests largely on assumptions, conjecture, and the PTC’s own tendentious reading of facts, for example regarding the limited prospects of cooperation in general and regardless of potential investigative targets (Decision, paras. 90-94; e.g. para. 90: “An investigation *can hardly be said* to be in the interests of justice if the relevant circumstances are such as to make such investigation *not feasible and inevitably doomed to failure*”; para. 94: “it *seems reasonable to assume...*”).

As noted on Twitter, the implication that follows from the PTC’s botched application of Article 53.1.c—that the investigation would have been against the interests of justice and, therewith the interests of victims—is deeply problematic. It is simply disingenuous and paternalistic for the Court to tell the victims that the investigation would not have been in their interest despite the fact that millions of them submitted the exact opposite during the Article 15.3 consultation process. While this trope bolsters the critique that the ICC instrumentalizes victims, it is also hard to see how victims in the Afghanistan can interpret it as anything other than a betrayal by the Court of their interests. It is no surprise that the decision has been met with utter dismay by the Transitional Justice Coordination Group (TJCG), a coalition of 26 NGOs working to support victims of alleged crimes in Afghanistan. Their statement labels the PTC decision as ‘one of the most shameful decisions the ICC has ever made’. In the circumstances, this is no mere hyperbole and one will struggle not to share this sentiment.

The second part of this post will address the implications of an overt reliance by the PTC on pragmatic and (political) expediency concerns, which it brought in through the backdoor of the ‘interests of justice’, for the credibility of the ICC as a judicial institution.