Cour Pénale Internationale

International Criminal Court

Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan

1. I agree with the outcome of the Judgment to unanimously amend 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' (the 'Impugned Decision'),[1] in order to authorise the Prosecutor's request to initiate an investigation into the situation of Afghanistan under the terms and scope she requested. I agree with the findings (i) that Pre-Trial Chamber II (the 'Pre-Trial Chamber') erred in deciding that an investigation would not serve the interests of justice, and (ii) that the Impugned Decision should have addressed only the requirements of article 15(4) of the Statute.[2] I also agree with the findings that the scope of the investigation is broad and includes crimes outside Afghanistan, as per the Appeals Chamber's interpretation of common article 3 of the 1949 Geneva Conventions.[3]

2. However, while I agree that the pre-trial chamber, when seised with a request for authorisation to initiate an investigation, is called to address the requirements of article 15(4), I disagree with statements made *in passing*, in paragraphs 29 to 33 of the judgment, that the Prosecutor has absolute discretion to decide whether or not to open *proprio motu* investigations and that paragraphs (1) and (3)(b) of article 53 apply *only* to referrals. I am of the view that, to entertain the present appeal, it is unnecessary to make those statements. They rather refer to issues outside the scope of this appeal and should consequently be read *without prejudice* to scenarios that could potentially arise in the future, whenever the Prosecutor, hypothetically speaking, were to close any of her *proprio motu* preliminary examinations and the pre-trial chamber were to eventually act on its own initiative under article 53(3)(b) of the Statute.

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[1] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33.
[2] Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 (hereinafter: 'Appeal Judgment'), para. 46.
[3] Appeal Judgment, paras 51-79.

3. Consequently, to reach the unanimous outcome that the Pre-Trial Chamber erred in addressing, in the Impugned Decision, criteria other than those of article 15(4), it was unnecessary to make the assertions listed below, and for equally informative purposes, I contrast them with alternative views, all of which shall be properly entertained by the Appeals Chamber when the time comes to address article 53(3)(b):

i) Paragraph 29 and footnote 50 state that articles 53(1) and 53(3)(b) only apply to referrals,[4] while I find that nothing in the express wording of those articles indicates such a restriction;

ii) Paragraph 30 and footnote 53 state the Prosecutor has under article 15 discretional powers that are not under review of the pre-trial chamber,[5] while I note that articles 53(1) and 53(3)(b) provide checks and balances to any of the Prosecutor's decisions not to initiate an investigation;

iii) Paragraph 31 states that the drafters rejected the proposal to allow for notification and judicial review of decisions of the Prosecutor not to request authorisation of an investigation under article 15(6) of the Statute,[6] while I observe: (a) that the judgment refers to the drafting history of the Rules of Procedure and Evidence and not to the drafting history of the Statute, and (b) that article 15 must in any event be read in light of the Statute's object and purpose to put an end to impunity for atrocious crimes;

iv) Paragraph 32 says that the pre-trial chamber has a role *only* if the Prosecutor determines that there *is* a basis to initiate an investigation,[7] while I observe that the wording of the last sentence of article 53(1) and article 53(3)(b) is unqualified with respect to scenarios where the Prosecutor decides not to initiate an investigation; and

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[4] Appeal Judgment, para. 29 and n. 50.
[5] Appeal Judgment, para. 30 and n. 53.
[6] Appeal Judgment, para. 31.
[7] Appeal Judgment, para. 32.

v) Paragraph 33 says that articles 15 and 53(1) of the Statute are separate provisions on the initiation of an investigation in 'two distinct contexts',[8] while the Statute, including those two provisions, must be systemically read in context with each other.[9] I note that Part 5 of the Statute is simply regulating with some more detail issues regarding 'Investigations and Prosecutions' covered in its Part 2 about the Court's 'Jurisdiction, Admissibility and Applicable Law'.[10]

4. Unless those assertions are *obiter dicta*, my colleagues went *ultra petita* and acted *ultra vires* by indicating what happens when the Prosecutor decides not to initiate a *proprio motu* investigation with regards to matters she has been examining. They would be *ultra petita* because, the question not having being addressed in the Impugned Decision, hardly any appellant or the Appeals Chamber could raise it. They would be *ultra vires* because, even when the Appeals Chamber may dictate the law under the principle *iura novit curia*, it is limited to the Impugned Decision, what the chamber *a quo* said and should have said. For one obvious reason, there was no need nor possibility to address in the Afghanistan situation the question of what happens when the Prosecutor does not request authorisation to initiate an investigation following a preliminary examination: *She has requested such an authorisation*.

5. My colleagues unnecessarily disjointed article 53(1) from article 15, resulting in an *ultra vires* and *ultra petita* (or otherwise *obiter*) erosion of the powers of the pre-trial chambers under article 53(3)(b) of the Statute in preliminary examination where the Prosecutor decides not to request authorisation to initiate an investigation. It unnecessarily limited the scope of articles 53(1) and 53(3)(b) of the Statute. Not being the circumstances of the appeal before us, where the Prosecutor, quite to the opposite,

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[8] Appeal Judgment, para. 33.
[9] *See* Vienna Convention on the Law of Treaties, 1155 UNTS 18232, 23 May 1969 (hereinafter: 'VCLT'), art. 31(1). *See also* O. Dörr, 'Article 31. General rule of interpretation', in O. Dörr, et al (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521 at para. 45. ('The entire text of the treaty is to be taken into account as 'context', including title, preamble and annexes […] and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure of scheme of the treaty'.).
[10] *See*, Part 2 of the Statute, entitled 'Jurisdiction, Admissibility and Applicable Law', and Part 5 of the Statute, entitled 'Investigations and Prosecutions'.

requested authorisation to initiate an investigation into crimes she has been examining, the abovementioned assertions in paragraphs 29 to 33 of the judgment ought to be read as *obiter dicta*. In that regard, I recall that article 21(2) of the Statute grants chambers discretion whether or not to follow previous decisions, and I also recall that *obiter dicta*, not being part of the *ratio decidendi*, do not make for *stare decisis* nor does it create jurisprudence for this Court.

6. It is not simply a matter of disagreement between the majority's and my views regarding article 53(1) of the Statute. My colleagues could appear to be advancing and prematurely forming an opinion for future decisions of the pre-trial chamber under article 53(3)(b), and potential appeals thereof, that may arise from ongoing preliminary examinations that the Prosecutor has been examining for years but may all of a sudden decide to close and not investigate *proprio motu*. The only way to read the abovementioned assertions in a way that does not compromise the Appeals Chamber in future appeals is to consider them as *obiter dicta*. As such, those statements have no binding effect on the jurisprudence of the Appeals Chamber, just as my opinion below, regarding the relationship between articles 15 and 53(1).

7. *In concreto*, for the reasons that follow, I find that the views of the majority ought to be read with caution:

i) From the plain reading of article 53(1), there is nothing in its last sentence that restricts the application of article 53(1) to only referrals,[11] as opposed to the last sentence of article 53(2).[12] Such a plain reading indicates that article 53(1) in its last sentence does not allude to States or the Security Council. This is precisely because article 53(1) is regulating *proprio motu* investigations. In contrast, article 53(2) does refer to States and the Security Council in its last paragraph and, importantly, regulates prosecutions of cases rather than investigations. This is because the Prosecutor does not need to seek

[11] Last sentence of paragraph 1 of article 53 reads: 'If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber'.
[12] Last sentence of paragraph 2 of article 53 reads: 'the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion'.

authorisation to investigate when referrals are made; she can simply proceed with prosecutions.

ii) Part 5 of the Statute is simply regulating with some more detail issues regarding the investigations and prosecutions at this Court, which may have been addressed, for other purposes, in Part 2 about the Court's jurisdiction, admissibility and applicable law.

iii) I note that when referring to 'the drafters', footnote 54 refers to the drafting history of the Rules of Procedure and Evidence and not article 15. The drafting history of article 15 of the Statute shows that its drafters intended that the pre-trial chamber 'represents the inherent constitutional check on the Prosecutor'.[13] In any event, I note that, under the Vienna Convention on the Law of Treaties (the 'VCLT'), the *travaux préparatoires* of a treaty are supplementary means of interpretation,[14] while its object and purpose are a primary source of interpretation.[15] *Par excellence*, the primary way to interpret the Statute is to read it in good faith, according to the ordinary meaning of its terms, in their context, and in light of its object and purpose: The States Parties, *inter alia*, '[a]ffirm[ed] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured', and they were '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[16]

iv) Additionally, article 21(3) of the Statute commands that our interpretation 'must be consistent with internationally recognized human rights', thereby

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[13] *See* M. Bergsmo, J. Pejić, 'Article 15: Prosecutor', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*: *Observers' Notes, Article by Article* (Beck *et al*., 2nd ed., 2008), pp. 726-729, mns1-6.
[14] Article 32 reads: 'Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'. VCLT, art. 32.
[15] Article 31(1) reads: '*General rule of interpretation*. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. VCLT, art. 31(1).
[16] Preamble of the Statute.

making our statutory interpretation dependant on the evolving recognition of human rights. The principle of evolving interpretation is based on the understanding that 'treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions'.[17] This is consistent with the rules of interpretation established in the VCLT.[18] The Statute is a living instrument that must be read in keeping with the conditions of our times.[19]

v) If article 53(1) and accordingly article 53(3)(b) are interpreted (wrongly, in my view) to say that they only apply to referrals, the Statute's object and purpose to put an end to impunity for such atrocious crimes would depend on the political will of States Parties and the Security Council and the supposedly unfettered will of the Prosecutor to request or not to request authorisations to initiate *proprio motu* investigations, without any judicial review when she does not. There would thus be a gap regarding atrocious crimes in regions within the jurisdiction of the Court where neither States Parties nor the Security Council make a referral and the Prosecutor decides not to initiate investigations *proprio motu*. If such a prosecutorial decision has no judicial review, impunity would be perpetuated in clear contradiction with the object and purpose of the Statute. Justice would be highly dependent on international politics. The only way to avoid this would be by allowing judges, who are politically independent, to make their judicial review under article 53(3)(b) of

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[17] IACtHR, *Atala Riffo and daughters v. Chile*, Judgment (Merits, Reparations, and Costs), 24 February 2012, Series C No. 239 (hereinafter: '*Atala Riffo and daughters v. Chile*'), para. 83; *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, Series C No. 134, para. 106; *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), 17 June 2005, Series C No. 125, para. 125; ECtHR, Grand Chamber, *Demir and Baykara v. Turkey*, Judgment, 12 November 2008, Application No. 34503/97, para. 68.

[18] Indeed, article 31(3) of the VCLT provides: '3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.' *See also* *Atala Riffo and daughters v. Chile*, para. 83.

[19] For instance, the ECHR 'is a living instrument […] which must be interpreted in the light of present-day conditions'. *See* ECtHR, Chamber, *Tyrer v. The United Kingdom*, Judgment, 25 April 1978, Application No. 5856/72, para. 31. Its 'provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago', ECtHR, Chamber, *Loizidou v. Turkey*, Judgment, 23 March 1995, Application No. 15318/89, para. 71.

any prosecutorial decision not to investigate a situation within the jurisdiction of the Court where there is no referral.

vi) Moreover, the word 'may' in article 15(1) is not indicative of an unfettered discretional power of the Prosecutor to request authorisations to initiate investigations *proprio motu*. While the first paragraph of article 15 includes the word 'may',[20] the third paragraph includes the word 'shall', thereby restricting the so-called absolute prosecutorial discretion:

> If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she ***shall*** submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected (emphasis added).

vii) Furthermore, in *Comoros OA2*, the Appeals Chamber limited the discretion of the Prosecutor. In paragraph 78, the Appeals Chamber said:

> The Appeals Chamber considers that where questions of law arise, the only authoritative interpretation of the relevant law is that espoused by the Chambers of this Court and not the Prosecutor. It is therefore not open to the Prosecutor, despite the margin of appreciation that she enjoys in deciding whether to initiate an investigation or not, to disagree with, or fail to adopt, a legal interpretation of the pre-trial chamber that is contained in a request for reconsideration. This applies both to the pre-trial chamber's interpretation of the substantive law as well as of the procedural law, for instance, in respect of the legal standards to be applied to the evaluation of evidence etc.[21]

viii) Principles of transparency and accountability of the international rule of law require that any decision, be it from the Prosecutor or first instance Chambers, must be subject to judicial review. While elected officials of this Court are independent, the proper administration of justice requires a system of checks and balances.

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[20] Paragraph 1 of article 15 reads: 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'

[21] *Situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', 2 September 2019, ICC-01/13-98, para. 78.

ix) I am unable to agree with imposing prohibitions and limitations not expressly made in the Statute on the power of judges when reviewing decisions where the Prosecutor decides not to investigate situations. In my separate and partly dissenting opinion in *Comoros OA2*, I further noted that prosecutorial decisions not to investigate are always subject to judicial review.[22] Judicial review is always possible whether through requests for reconsideration (art. 53(3)(a)) or at the initiative of the pre-trial chamber in concrete circumstances (art. 53(3)(b)).

x) Any prohibition or limitation to a right must be expressly written in the law. The interpreter cannot create prohibitions where they are not written. That is the raison d'être of the principle of legality. As further noted in my *Comoros OA2* partly dissenting opinion, there is a general principle under international law indicating that what is not prohibited expressly is permitted, referred to as the *principle of presumptive freedom of action*.[23]

xi) I also noted in *Comoros OA2* that 'the right to have an administrative decision reviewed is one of the expressions of the internationally recognised human right to access to justice'.[24] In this regard, European law provides for victims' the

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[22] *See Situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 1 November 2019, ICC-01/13-98-AnxI, para. 2 ('mindful of the Rome Statute's object and purpose to put an end to impunity for atrocious crimes, I am unable to agree with imposing prohibitions and limitations on the power of judges when reviewing decisions where the Prosecutor decides not to investigate situations').

[23] *See Situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 1 November 2019, ICC-01/13-98-AnxI, paras 42-43, referring, *mutatis mutandis*, to Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, Judgment No. 9, 7 September 1927, pp. 19-20; H. Lauterpacht, The Development of International Law by the International Court (2nd ed., 1958), pp. 359-361.

[24] *See Situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 1 November 2019, ICC-01/13-98-AnxI, paras 36-39, referring to United Nations, General Assembly, Universal Declaration of Human Rights, 10 December 1948, U.N. Doc A/810, article 8; United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, articles 2(3)(a)-(c); Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955, article 25. The European Court of Human Rights has found that the right to a fair trial is violated due to 'the insufficiency of the judicial review' and 'the lack of a hearing' *See* European Court of Human Rights, Grand Chamber, *Ramos Nunes de Carvalho e SÁ v. Portugal*, 'Judgment', 6 November 2018, Application Nos. 55391/13, 57728/13 and 74041/13, para. 214. *See also* ECtHR,

'right to a review of a decision not to prosecute'.[25] No administrative decision is spared from judicial review.

8. Consequently, it was unnecessary, in the strict terms of this appeal, to make the assertions, in paragraphs 29 to 33 of the judgment, that the Prosecutor supposedly has absolute prosecutorial powers in closing preliminary examinations and deciding not to request authorisation to investigate *proprio motu* atrocious crimes falling within the Court's jurisdiction. The scope of article 53(1) of the Statute is broader than the limited scope that my colleagues unnecessarily delimited in passing in such paragraphs. The last sentence of article 53(1) includes decisions of the Prosecutor not to initiate investigations *proprio motu* under article 15, thereby entitling the pre-trial chamber to review on its own initiative such decisions, as per article 53(3)(b).

9. In any event, while there is a disagreement between the majority and me regarding the applications of article 53(1) when the Prosecutor decides not to request authorisation to initiate any *proprio motu* investigation into preliminary examinations, I insist that this is irrelevant because the matter is not before us. The appeal before us is the absolute opposite. The Prosecutor moved to request authorisation to initiate a *proprio motu* investigation into the Afghanistan situation that was under examination.

10. Importantly, the judges of the Appeals Chamber have unanimously decided to amend the Pre-Trial Chamber's decision which wrongly denied the Prosecutor's request to initiate an investigation into the Afghanistan situation. Instead, the Appeals

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Ramos Nunes de Carvalho e SÁ v. Portugal, Joint Concurring Opinion of Judges Raimondi, Nussberger, Jäderblom, Møse, Poláčková and Koskelo, Applications nos. 55391/13, 57728/13 and 74041/13, para. 13. Similarly, the Inter-American Commission on Human Rights has found that the right to judicial review of administrative decisions is one element of the right to a fair trial in administrative proceedings. *See* IACtHR, Access to justice as a guarantee of economic, social, and cultural rights, 7 September 2007, OEA/Ser.L/V/II.129, para. 178. *See also* Inter-American Commission on Human Rights, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights, 7 September 2007, OAE/Ser.L/V/II.129, para. 194, referring to Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116 (noting that '[j]udges should maintain at least baseline oversight of the legality and reasonableness of administrative law decisions in order to comply with the guarantees provided for in Articles XVIII and XXIV of the American Declaration and Articles 1(1) and 25 of the American Convention').

[25] European Parliament, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 25 October 2012, 2012/29/EU, article 11(1).

Chamber has granted the Prosecutor's request as per the scope she sought, including crimes outside Afghanistan with a nexus to the armed conflict.

Done in both English and French, the English version being authoritative.

Judge Luz del Carmen Ibáñez Carranza

Dated this 5th day of March 2020
At The Hague, The Netherlands