

Afghanistan Investigation Gets the Green Light from the Appeals Chamber of the International Criminal Court

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By: James Hendry

On March 5, 2020, the Appeals Chamber of the International Criminal Court decided to authorize the Prosecutor to investigate the situation in the Islamic Republic of Afghanistan by amending the Pre-Trial Chambers's controversial decision to refuse her request to do so. This Journal commented on the lower chamber's decision no-investigation-in-afghanistan.

This case was the first time the Appeals Chamber had to consider the scope of the Pre-Trial Chamber's authority to authorize an investigation. Its unanimous decision to allow the investigation to proceed did provoke some disagreement about interpreting the Rome Statute set out in a concurring set of reasons for judgment. The Appeals Chamber held that the Pre-Trial Chamber had erred by considering the 'interests of justice' as reason to refuse the request, materially affecting its decision; but it had also found that 'there is a reasonable basis to believe that the incidents underlying the Request occurred' and that all relevant jurisdictional requirements were met. Thus, the Pre-Trial Chamber made all the requisite findings under article 15(4) and so the Appeals Chamber amended the impugned decision rather than reverse and remand it to the lower chamber, which would simply have necessitated authorizing the investigation in any event. Also, the Appeals Chamber widened the scope of the investigation by interpreting its statutory parameters.

Facts

The Prosecutor submitted a Request to commence an investigation 'in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002'. The Request involved allegations:

- against the Taliban and affiliated armed groups of crimes against humanity (murder, imprisonment and persecution on political and gender grounds) and of war crimes (murder, intentionally directing attacks on civilians and humanitarian personnel, protected objects, using child soldiers, killing or wounding treacherously a combatant adversary, paras. 72 and 123 of the Request),
- against the Afghan National Security Forces of the war crimes of torture and cruel treatment, outrages against personal dignity and sexual violence, para. 161 of the Request)
- against the armed forces of the United States of America in Afghanistan and the Central Intelligence Agency in Afghanistan and on the territories of other States Parties to the Rome Statute of war crimes of torture, cruel treatment, outrages against personal dignity, rape and sexual violence, para. 187 of the Request).

Issues

The Prosecutor alleged that (a) the Pre-Trial Chamber had erred in law by refusing her request because it was not in the interests of justice to grant it, and (b) further had abused its discretion in assessing the interests of justice (para. 6, all subsequent references are to the Appeals Chamber's decision).

The Pre-Trial Chamber's determination under article 15(4)

The Appeals Chamber held that the real first issue was whether the Pre-Trial Chamber had erred in interpreting article 15(4)'s requirement of a reasonable basis to include its assessment of the interests of justice factor in article 53(1)(c) (para. 23). Its answer was yes (para.25).

The Appeals Chamber reasoned that article 15(4) provides that the Pre-Trial Chamber shall authorize a Request by the Prosecutor to investigate crimes proprio motu (by her own motion) where the Request and supporting material persuades it (para. 45) that there is a reasonable factual basis to proceed with an investigation, in the sense that crimes have been committed, and that the potential case(s) arising from the investigation appear to fall within the jurisdiction of the Court. Article 53(1) provides that the Prosecutor shall proceed with an investigation based on the information she has gathered considering the factors (a) whether the available information provides a reasonable basis to believe a crime in the Court's jurisdiction has been committed (b) whether the case is admissible and (c) whether, considering the gravity of the crime and the interests of victims, there are substantial reasons to believe the investigation would not serve the interests of justice (para. 37).

No need for the Pre-Trial Chamber to assess the interests of justice in *proprio motu* investigations

The Appeals Chamber held that a Pre-Trial Chamber was not bound to assess the article 53(1) factors in deciding to authorize an investigation under article 15(4) (para. 25). It noted that the Prosecutor's statement of the issue in this case and previous Pre-Trial Chambers had all proceeded on the basis that the three factors in article 53(1) should be considered by the Prosecutor and Pre-Trial Chamber for authorizations under article 15(4). The Appeals Chamber noted that this interpretation originated in the Kenya Authorization Decision where the Pre-Trial Chamber had noted the identical requirements in articles 15(4) and 53(1) for a 'reasonable basis to proceed', the drafting history linking the two articles, and the objective of providing a supervisory role over proprio motu investigations (para. 24). This approach had been followed since that case until the Appeal Chamber rejected it here.

No need for judicial review of the Prosecutor's conclusion in proprio motu investigations, only referrals

The Appeals Chamber held that the 'delicate balance' between prosecutorial and judicial powers in the Rome Statute should be managed by considering the requirements of the two ways an investigation might be commenced. Articles 13 and 14 allow a State Party or the Security Council to refer a situation. Such a referral creates an obligation on the Prosecutor to investigate subject to refusing to do so based on the factors in article 53(1) and where article 53(3) ensures judicial review of the obligation in referrals (para. 29).

The Appeals Chamber contrasted this with discretionary *proprio motu* ('may initiate') investigations under article 15. Where she refuses to proceed with an investigation, the Prosecutor has a duty to inform those who provided information and allow them to resubmit further evidence to change her mind under article 15(6): but there is no provision for judicial review of the conclusion (para. 30). In the view of the Appeals Chamber, this conclusion was consistent with (a) the discretionary nature of the Prosecutor's power under article 15, which was inconsistent with a power in the Pre-Trial Chamber to impose a duty to investigate, (b) the rejection by drafters of a proposal to allow notification of the Pre-

Trial Chamber and judicial review of refusals to investigate under article 15(6), and (c) the existence of an alternative to a proprio motu investigation in the right of States Party and the Security Council to refer such a refused case (para. 31).

There is a role for judicial review only where the Prosecutor requests to proceed under article 15(4) and the Appeals Chamber held that once authorized to go ahead with an investigation, she could do so directly without having to reconsider the factors under article 53(1) which the Statute requires her to have already considered before making the Request (para. 32).

The text

The Appeals Chamber reviewed textual arguments that supported its decision:

- articles 15 and 53's content and placement in two separate parts of the Statute make it clear that the first deals with proprio motu investigations and the latter, referred investigations (para. 33)
- the text of article 15(4) does not refer to article 53 or the interests of justice, only a 'reasonable basis to proceed' and jurisdiction (para. 34). This was to be contrasted with the requirement in Rule 48 that requires the Prosecutor to consider the factors in article 53(1) in deciding whether to make a Request under article 15(3), but not the Pre-Trial Chambers in reviewing the request based on those factors under article 15(4) (para. 35). This obscured the difference between the subject-matter of the Prosecutor's decision and the assessment by the Pre-Trial Chamber (para. 36)
- Regulation 49 requires the Prosecutor to provide in the Request a statement of the facts supporting the reasonable basis to believe crimes were committed and a reasoned declaration that the Court has jurisdiction, but not information at this early phase about the interests of justice or complementarity, further supporting the limited judicial review under article 15(4) (paras. 38-9)
- a full judicial review of the article 53(1) factors under article 15(4) would include admissibility, which must be considered by the Prosecutor under 15(3), but not by the Pre-Trial Chamber which would not have sufficient information from the Prosecutor at this stage of proceedings to determine the issue (para. 40)
- the drafting history of article 15 disclosed that a provision expressly requiring the Pre-Trial Chamber consider admissibility issues at the authorization stage was deleted during the Rome Conference (para. 41)
- the specific procedure requiring the Prosecutor to notify States involved after the investigation is authorized for the purpose of testing the admissibility and jurisdiction under articles 18 and 19 in a case also supported the interpretation of article 15(4) that excludes the factors under article 53(1) from judicial review at the authorization stage (para. 42).

Shedding some light on the 'interests of justice' factor

Though the Appeals Chamber had decided that the consideration of the 'interests of justice' issue was not for the Pre-Trial Chamber to make, it decided to provide some guidance on interpreting the article 53(1) 'interests of justice' factor because the Prosecutor did have to consider it before making an article 15(3) request and it was a significant concept in the Statute on which it heard extensive

submissions (para. 48). Therefore, the Appeal Chamber held that the Pre-Trial Chamber had not properly assessed the ‘interests of justice’ because (a) that factor was formulated in article 53(1) in the negative so it should be considered as a reason for not proceeding rather than as an issue of whether the investigation would be in the interests of justice (b) the information the Pre-Trial Chamber relied on was cursory, speculative and did not refer to information capable of supporting its conclusion and (c) the Pre-Trial Chamber did not appear to have considered the gravity of the crimes and interests of the victims as articulated by the victims themselves (para. 49).

The scope of the investigation: the Prosecutor must investigate the situation as a whole

The Appeals Chamber also considered that it should clarify erroneous statements by the Pre-Trial Chamber that would have restricted the scope of the investigation (para. 56). Further, this clarification was relevant to the scope of the Pre-Trial Chamber’s review under article 15(4) because it was unnecessary to achieve the objective of article 15(4) to prevent a ‘frivolous or politically motivated investigation’ (para. 61).

The Appeals Chamber held that the Prosecutor is not restricted to the incidents specifically mentioned in the Request and incidents ‘closely linked’ to them as stated by the Pre-Trial Chamber (para. 61). It noted that the various duties of the Prosecutor after the authorization supported an interpretation of the Statute that she must investigate the situation as a whole (para 60).

The Pre-Trial Chamber’s restrictions on the scope of investigation to the incidents and others ‘closely linked’ to them erroneously inhibited the Prosecutor’s truth-seeking function (para. 61). The Appeal Chamber noted that the Prosecutor’s power to analyze the seriousness of crimes within the Court’s jurisdiction and make a request for authorization under article 15(2) and (3) based on her belief that there is ‘a reasonable basis to proceed’ is made with limited investigative powers. Barring exceptional circumstances, she could not be expected to identify exhaustively and specifically each incident, crime and perpetrator that could be investigated at that stage, nor identify crimes committed after the Request is made. Thus, examples of crimes presented in the Request should be sufficient to define the broad terms of the contours of the situation she wants to investigate fully (para. 59).

The Appeals Chamber noted the various duties of the Prosecutor after the investigation was authorized supported an interpretation of the Statute that she must investigate the situation as a whole (para 60): article 54(1)(a) requires her to cover all facts and evidence relevant to criminal responsibility as well as exonerating circumstances; article 54(1)(b) requires an effective investigation and prosecution of crimes; and generally, article 54(1) requires her to establish the truth. This required a full picture of the facts, their potential legal characterization as crimes and the responsibility of various actors involved entailing a broad investigation into the situation as a whole. Thus, the Prosecutor should be authorized to carry out the investigation according to the terms noted above which sufficiently defined the parameters of the situation (para. 62).

The Appeals Chamber found further support for its approach by noting that the narrow interpretation of the scope of the investigation envisaged by the Pre-Trial Chamber would be unworkable (para. 63). It would be impossible for the Prosecutor to determine which incidents were closely linked to those authorized, potentially requiring her to continually make new and unnecessary requests as new facts came to light. Further, such continuous monitoring of the Prosecutor's actions was contrary to the statutory scheme which recognized her independence in article 42(1), while assigning specific functions to the Pre-Trial Chamber in articles 56 (eg. measures to take and preserve evidence) and 57 (eg. warrants, protecting evidence, cooperation of states). The narrow interpretation could compromise an investigation where the Prosecutor was not clear whether the evidence to be collected from a witness related to an 'authorized' or 'unauthorized' incident or both (para. 63).

Investigation over certain acts outside Afghanistan

The Appeals Chamber's concern over the scope of the authorization also led it to decide that merely because an individual was captured outside Afghanistan and the alleged criminal act also occurred outside, the conduct might still be found to have taken place in the context of the armed conflict there (para. 76). This issue arose specifically in respect of alleged apprehensions of individuals outside Afghanistan and mistreatment on the territory of other States Party with a nexus to the armed conflict in Afghanistan enumerated in the Request (para. 66). The Appeal Chamber decided that issue of the nexus is a jurisdictional matter to be determined on a case by case basis after the circumstances have been established by an investigation into the whole situation (paras. 76-8). The Appeals Chamber noted that article 8 of the Elements of Crimes requires that conduct alleged to constitute war crimes take place in the context of and associated with the armed conflict. The point was to distinguish war crimes from 'ordinary crimes.' The sufficiency of connection is shown by such factors as the fact that the perpetrator was a combatant, the victim a non-combatant, that the act served the military goal and was committed in the context of the perpetrator's official duties (para. 69, referring to paras. 58-60 of the Kunarac Appeal (ICTY) and endorsed by the ICC in para. 68 of Ntaganda Appeal on Jurisdiction on Charges). The Appeals Chamber also disagreed with the Pre-Trial Chamber's reading of Common Article 3 of the Geneva Conventions which had interpreted it to refer only to duties of parties to a non-international conflict within the territory of one of the high Contracting Parties. The Appeals Chamber interpreted it to describe the circumstances in which Common Article 3 applies (the conflict) and that it bound Parties to the conflict anywhere (para. 74). Thus, the place of capture is relevant but not determinative (para. 76).

The separate opinion of Judge Luz del Carmen Ibáñez Carranza

The separate opinion agreed with the majority on the outcome and the scope of the investigation and that the Pre-Trial Chamber erred in deciding the investigation would not serve the interests of justice, that it should have addressed only the requirements of article 15(4) and in narrowing the scope of the authorization (para. 1). However, she disagreed with the idea that the Prosecutor has absolute discretion to open *proprio motu* investigations. Article 53(1) and (3)(b) might still apply when the Prosecutor decides not to proceed solely on the basis of article 15(1)(c) (gravity of the crime(s), the

victims' interests and a decision that proceeding was not in the interests of justice). This was because article 53(1)'s last sentence requires her to inform the Pre-Trial Chamber where her decision not to proceed is made solely on this basis and because 53(3)(b) allows the Pre-Trial Chambers to then act on its own initiative to review the Prosecutor's decision with the power to render it ineffective (para. 2). She questioned some of the assertions on which the majority based its view that the Prosecutor's decision is absolute in deciding whether to proceed to request a *proprio motu* investigation (para. 3). She thought that there was no need for the majority to recognize such absolute power in the Prosecutor when the case before it was not one of refusing to proceed (para. 4) and that the finding should be regarded as *obiter dicta* and not binding in the face of the text of article 53 (paras. 5-6). She was principally concerned with the exclusion of judicial review over the work of the Prosecutor (para. 7).

Conclusion

In the first ruling on an appeal from a Request to authorize a proprio motu investigation, the Appeals Chamber narrowed the power of the Pre-Trial Chamber to review the factors that the Prosecutor is bound to consider when making her decision to Request authorization of a proposed investigation under article 15(4).

The Appeals Chamber as noted above the concern about the delicate balance of Prosecutorial power to initiate a *proprio motu* investigation and judicial review of that power in the authorization process (para. 26). This delicate balance was to achieve the objective of article 15(4) to prevent a 'frivolous or politically motivated investigation' (para. 61). It appears to have been the solution to a hotly contested political issue at the Rome conference by major powers including the United States and China (RJ Currie and Dr J Rikhof, *International and Transnational Criminal Law* (3d.), 234). Kevin Jon Heller criticized the Appeals Chamber decision for having turned the authorization process into a 'box-ticking' exercise, especially because the Pre-Trial Chamber will not be able to review the Prosecutor's decision on admissibility, particularly the issues of gravity and complementarity. He stated a concern that states are not likely to participate in the Rome Statute in the future with this delicate balance skewed in favour of the Prosecutor by this decision. Jennifer Trahan noted the errors of the Pre-Trial Chamber that could have imperilled the future work of the Court by allowing the refusal of authorization where an investigation would be exceptionally challenging. She quoted from her brief to the effect that the consideration of future 'cooperation' and 'political climate' could entice larger states to refuse to cooperate and create roadblocks to the investigation thus enabling a Pre-Trial Chamber to refuse authorization, threatening the independence of the Court.

The Appeals Chamber was satisfied that the 'delicate balance' was kept by controlling the scope of review by the Pre-Trial Chamber to facts and jurisdiction, while emphasizing the Prosecutor's duty to consider the factors in article 53(1) before making the Request. It recognized the specific avenues for resolving matters such as admissibility in the Statute as part of that balance.

Given the parties to the case and its scope, the Appeal Chamber has effectively placed the future conflict with the Taliban, the Afghan government and most significantly, the United States over the investigation and the allocation of the significant amount of resources that will be necessary to investigate this situation almost solely in the bailiwick of the Prosecutor. At this point, she must be the most aware of all organs of the Court of the extent and challenges of the investigation that lies ahead. It is not likely that she is going to underestimate the gravity of the case or undervalue proceedings against nationals of the states involved for the crimes involved.

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About the author

James HendryJames Hendry is a Co-Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel in the Human Rights Law Section at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.