

THE ROLE OF ICC PROSECUTOR IN THE AFGANISTAN SITUATION

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Abstract: *The present paper is concentrated on the analysis of the role of Prosecutor from a procedural and substantive point of view in the ICC according the sentence of the Appeal Chamber of 5 March 2020. The Pre-Trial Chamber has denied authorization to continue and open investigations in Afghanistan that can be prosecuted by the Prosecutor. The Appeal Chamber after Prosecutor's question overturned the preliminary ruling by deciding to continue the evaluation of the investigation into crimes against humanity and war in the Afghan territory. So are these judgments political or legal? Are the Chambers based on the ICC statute or on the commands of US foreign powers? What is the Prosecutor's role in these admissibility cases or investigations? These are some of the questions that this paper discusses and tries to clarify.*

Keywords: *ICC, Prosecutor, StICC, art. 53StICC, art. 17StICC, art. 15 StICC*

INTRODUCTION

The Afghan situation and the investigation of crimes against humanity and war¹ dates back to about 2003 when for the first time American military, CIA agents, Taliban and a strong debate of the international community in global version² came to conclude with the authorization of investigations and the related judgment of the Appeal Chamber of the International Criminal Court (ICC) of 5 March 2020³.

It is the first time the Pre-Trial Chamber has not accepted the request for authorization to open the investigation proposed by Prosecutor Fatou Bensouda. Up to now, all the authorizations for the opening of investigations based on initiatives and within the limits of the powers of the Prosecutor of the court date back to art. 15, par. 3 Statute of the International Criminal Court (StICC)⁴. The open debate is not so much based on procedural bases and principles but within a wider and at the same time narrow circle of the notion of interests of justice, rectius interests of justice and substantive international criminal law⁵.

¹D. Liakopoulos, "*Justicia dura: anatomia e interpretaciòn en la exclusiòn de la responsabilidad penal individual en la justicia penal internacional*", in *Revista Electrònica de Estudios Penales y de la Seguridad*, 2019, n. 4. R.J.A. Morales, "*Definiciòn de los crìmenes internacionales y responsabilidad penal internacional*", ed. *Juridicos Olejnik*, Santiago de Chile, 2020.

²For more comments see: C. Ankersen, W. Pal Singh Sidhu, "*The future of global affairs. Managing discontinuity, disruption and destruction*", Palgrave Macmillan, Springer Nature, Basel, 2020, pp. 141ss.

³ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Decision of 5 March 2020. R. Vogel, "*Situation in the Islamic Republic of Afganistan*", in *International Legal Materials*, 60 (1), 27, 2020. Y. Ihiil, "*Situation in the Islamic Republic of Afganistan*", in *American Journal of International Law*, 115 (4), 2021, pp. 650ss.

⁴D. Liakopoulos, "*The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence*", ed. Maklu, Antwerp, Portland, 2019 (second edition).

⁵A. Heinze, V.E. Dittrich (eds.), "*The past, present and future of the International Criminal Court*", TOAEP, Bruxelles, 2021. J. Tchinda Kenfo, A. Zozime Tamekamta, "*La Cour pènale internationale*", Presses de l'Université du Quèbec, Quèbec, 2022. F. Klose, "*In the cause of humanity. A history of humanitarian intervention in the long Nineteenth century*", Cambridge University Press, Cambridge, 2022.

THE SENTENCE OF THE PRELIMINARY CHAMBER

Is it a political or legal sentence? In reality, the question of the Pre-Trial Chamber regarding the authorization of the investigations that date back to the Prosecutor himself from 2007 to 2017 not only in the afghan territory⁶ but also in the general relationship of the afghan conflict certainly also has a political character, of an international nature. Hence, an Afghan conflict and the participation of military from states such as Poland, Romania and Lithuania. Crimes committed by countries that do not belong to the circle of great powers but are simply members of the Security Council of the United Nations⁷ and certainly such investigations have not been well received even by international doctrine⁸.

It is true that any kind of investigation was opposed by the United States⁹, not a member of the ICC and also because they were involved both politically and militarily in the afghan situation, going so far as to openly accuse the ICC as meddling in questions concerning their own sovereignty. On the other hand, the ICC was not bound since the United States is not part of the Rome Statute¹⁰ and does not constitute an obstacle to the repression of crimes committed by American soldiers and CIA agents. Furthermore, Afghanistan has ratified the statute as early as 10 February 2003¹¹.

The competence of the ICC deals with crimes against humanity and war and includes crimes committed on the territory of a Member State regardless of the nationality of the perpetrators as well as those crimes committed by the nationals of the Member States¹² also on the territory of a third state. We are talking about territorial as well as personal competence concerning our case of the investigations proposed by the Prosecutor¹³.

⁶M. Vagias, *"The territorial jurisdiction of the International Criminal Court"*, Cambridge University Press, Cambridge, 2014, pp. 90ss.

⁷J. Marc De La Sablière, *"Le Conseil de sécurité des Nations Unies"*, ed. Larcier, Bruxelles, 2018. D. Liakopoulos, *"Autonomy and cooperation within the International Criminal Court and United Nations Security Council"*, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020.

⁸S. Maupas, *"La Cour pénale internationale face aux critiques"*, in *Revue Internationale et Stratégique*, (4) 2019, pp. 84ss

⁹M. Jorgensen, *"American foreign policy ideology and the international rule of law"*, Cambridge University Press, Cambridge, 2020.

¹⁰M. Cormier, *"The jurisdiction of the International Criminal Court over nationals of non-States parties"*, Cambridge University Press, Cambridge, 2020, pp. 95ss.

¹¹For further analysis see also: A.M. Hazim, *"A critical analysis of the Rome statute implementation in Afghanistan"*, in *Florida Journal of International Law*, 31 (1), 2019, pp. 10ss.

¹²See also in argument: ICC, Prosecutor v Muthaura, Kenyatta and Ali, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11-274, Appeals Chamber, 30 August 2011, para 40 (Muthaura and Others, Appeals Chamber Judgment on Admissibility); Yekatom, Trial Chamber v Decision on Admissibility (n. 13) para 21 ("(...) the Chamber concludes that the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom's Case is concerned. For this reason alone, and irrespective of the CAR authorities' hypothetical willingness or ability to investigate and prosecute, the Chamber is of the view that the case against Mr Yekatom is admissible. Consequently, the Chamber will not address the question of willingness and ability (...).

¹³ICC, Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Islam Al-Gaddafi', ICC-01/11-01/11 OA 4, Appeals Chamber, 21 May 2014, para 73; Gaddafi and al-Senussi, Appeals Chamber Judgment on Admissibility (n 40) para 119.

¹³L. Badaågård, M. Klamverg, *"The gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court"*, in *Georgetown Journal of International Law*, 48, 2017, pp. 640 (noting that "Office of the Prosecutor (OTP) policy and strategy straddles law and politics at multiple levels and describing the evolving relationship with domestic processes"). In argument see also: M.A. Newton, A synthesis of community-based justice and complementarity, in C.D. Vos, S. Kendall, C. Stahn (eds), *"Contested justice: The politics and practice of International Criminal Court interventions"*, Cambridge University Press, 2015, pp. 122ss.

By decision of 12 April 2019 the Pre-Trial Chamber based on article 15 par. 4 StICC¹⁴ had denied the authorization justifying its sentence based on the total lack of the interests of justice ignoring from the procedural point of view and the Statute according to art. 53 relating to the Prosecutor's action to open investigations proposed by a Member State or by the United Nations Security Council itself. We can mention this situation (rectius, the jurisprudence) as an extremely elastic situation, which allows the prosecution body to balance the exercise of the punitive pretension with other requirements expressly provided for by the Statute, such as the protection of victims and the seriousness of crimes, or implicitly inferred from the system, such as the compatibility of the procedure with the experiment of national reconciliation processes. In this case, the Pre-Trial Chamber, if it considers that the prejudice to the interests of the prosecutor's alleged justice does not justify the renunciation of the action, can review (review), even ex officio, the decision of the prosecuting body and obliging him to start an investigation or to prosecute (article 53 paragraph 3 letter b) Statute and Rule 110 RPP)¹⁵.

The Prosecutor of the ICC can only exceptionally refuse the opening of investigations if he considers that the grounds of a reasonable nature for a judicial action are absent and always based on the principles and competences of the ICC. Therefore, admissibility according to art. 17 StICC (inadmissibility)¹⁶ and that the investigations are not contrary to the interests of justice according to art. 53, par. 1 letter c) StICC, which refers to the concept of gravity only in generic terms¹⁷. In these cases, therefore, the Pre-Trial Chamber, if it does not agree with the reasons justifying the decision of the prosecution body, may force it to start an investigation. It is, in fact, a not very satisfactory explanation-and, moreover, denied by the practice given that¹⁸-, while aiming at the shared objective of ensuring a more stringent control over the prosecutor's discretion, in fact does not clarify the scope of application art. 53 par. 1 lett. c) and of the art. 17 par. 1 lett. d). StICC¹⁹. Art. 17 (1) as well as art. 53 StICC²⁰ is an expression of the principle of subsidiarity, which is the cornerstone of the system and is one of the distinctive aspects of

¹⁴M.M. Degman, V. Oosterveld, *"The Elgar companion to the International Criminal Court"*, Edward Elgar Publishers, Cheltenham, 2020, pp. 328-330.

¹⁵G. Sluiter et al. (eds), *"International criminal procedure-Principles and rules"*, Oxford University Press, Oxford, 2013.

¹⁶W.A Schabas, *"The International Criminal Court: A commentary on the Rome Statute"*, 2nd edn, Oxford University Press, Oxford 2016, "(...) prosecutorial decision making does not derive from] apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity. According to this approach, a State would be judged on its compliance with the duty to prosecute by an analysis of its motives rather than its actions.

¹⁷As we can just see in the past cases (Katanga, Appeals Judgment on Admissibility (n 41) para 78): "(...) Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.

¹⁸In fact, the Pre-Trial Chamber invited the Prosecutor to review his decision not to open an investigation, considering that the prosecution body had wrongly assessed the seriousness of the crimes. The Court considered it appropriate to apply the art. 17 lett. d) of the RPE, omitting any reference to art. 53 par. 1 lett. c). Specifically, the affair concerned the clashes between activists of some non-governmental organizations and Israeli soldiers on the ship Mavi Marmara, which, together with other vessels, had tried to force the naval blockade imposed by Israel with the aim of bringing humanitarian aid. in Gaza. On that occasion, nine people had lost their lives. See, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

¹⁹G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà (eds), *"International Criminal Procedure. Principles and Rules"*, Oxford University Press, Oxford, 2013, pp. 1299-1374.

²⁰K. Ambos, *"Rome statute of the International Criminal Court"*, Hart/Beck/Nomos, Cheltenham, Baden-Baden, 2022.

the process before the ICC compared to other international criminal tribunals, which exercise primary jurisdiction over the crimes under their jurisdiction. Article 17 StICC identifies a series of situations in which the Prosecutor must refrain from exercising the indictment function. This happens when they are in progress (letter a) or there have been investigations on the same facts and the national judicial authority has decided not to exercise criminal prosecution (letter b); when the investigated or accused person has already been judged by a national court (letter c); when the criminal conduct is not sufficiently serious (letter d)²¹. It is therefore necessary to clarify the relationship between these rules, given that the application of one or the other implies significant consequences on the level of jurisdictional checks that the Pre-Trial Chamber exercises on the Prosecutor's decision not to open an investigation. In fact, if we consider the seriousness of the crimes as a situation that determines the inadmissibility of the case before the ICC, the Pre-Trial Chamber will only have the power to review the decision of the prosecution body, without this is bound by the decisions of the judging body²²; if, on the other hand, the seriousness of the crimes is considered an indication of the potential opposition to the interests of justice, the StICC recognizes to the Pre-Trial Chamber, if it does not agree with this assessment the power to oblige the Prosecutor to open an investigation.

Returning to the first decision of 2019 of rejection that was subjected to scrutiny by the Pre-Trial Chamber, we can say that a denial from a jurisprudential point of view was based on the general idea that opening the investigation would not favor the interests of justice. For the Pre-Trial Chamber, an investigation can be considered favorable to the interests of justice when it is necessary that there are prepositions and the possibility that it will end with a positive outcome²³. But in which investigation is a preliminary investigation always able to have a favorable and procedural outcome?

The interest of justice and the evaluation, opening, authorization of investigations for the Prosecutor means the guarantee for the pursuit and purposes of the StICC. The related Policy paper on the interests of justice dates back to 2007 from the Prosecutor's Office which underlined the nature of the circumstances justifying the final decision not to open investigations in the name of the interests of justice²⁴, despite the relative evaluation criteria²⁵ but specifying the not exhaustive nature of the specificity of the cases submitted to the Prosecutor based on criteria based on the StICC or on clearly political reasons?.

The Prosecutor should explicitly acknowledge the possible assessment that the final investigation will be successful and according to the "Paper on some policy issues before the Office of the Prosecutor", should have every investigation: "Feasibility of conducting an effective investigation in a particular territory"²⁶ according to the "Policy paper on preliminary examinations". It is obvious that the evaluation of "feasibility" cannot constitute an autonomous criterion for the purpose of deciding on the opening of investigations²⁷.

²¹W. Joecks, K. Miebach (Hrsg.), *"Münchener Kommentar zum Strafgesetzbuch"*, C.H. Bech, München, 2017.

²²M.A. Newton, *"Absolutist admissibility at the ICC: Revalidating authentic domestic investigations"*, in *Israel Law Review*, 54, 2021, pp. 147ss.

²³ICC, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision of 12 April 2019, par. 89-90.

²⁴For a further analysis see also: L.M. Keller, *"Comparing the 'interests of justice'. What the International Criminal Court can learn from New York law"*, in *Washington University Global Studies Law Review*, 12 (1), 2013, pp. 6ss.

²⁵According to the paper: "(...) as a pragmatic matter, the OTP concedes that it suffers from "overall basic size and capacity constraints (...)".

²⁶Annex to the Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 1

²⁷Policy papers on preliminary examinations, November 2013, par. 70. An important recognition of the new policy paper is the adoption of a new approach to evidence. As discussed above, accusations of sexual violence before international criminal trials have often failed, not because of problems related, for example, to the evidence of international crimes or to the choice of the

The ICC invoked through the evaluation criteria the relative time elapsed between the Commission of the crimes and the request for authorization to open the investigations, as well as the cooperation of the states involved²⁸ and the availability of acquisition and acceptance of the relevant evidence as well as the possibility of apprehending potential perpetrators²⁹ and their witnesses if they exist. The absence of such conditions, such as the reference to the ten years elapsed between the start of the preliminary investigations and the submission of the request for authorization to open the investigations, and the political changes that have taken place in the states involved would have made the cooperation between the latter with the ICC, according to par. 92-94 of the related sentence, particularly difficult³⁰.

It is obvious that the Pre-Trial Chamber has decided in this way to avoid other pressures of a political nature from the United States, but legal arguments also remain. Arguments relating to the reasons on which the Appeal Chamber accepted the appeal of the Prosecutor, thus authorizing the opening of the investigation, and will be analyzed below.

INTEREST OF JUSTICE...

When we talk about the "interests of justice" we must distinguish a double dimension: A procedural and a substantial one. The Prosecutor based the appeal against the first instance decision on the substantive aspects and in the appeal sentence the evaluation of the procedural dimension is instead central. The procedural nature took on a preliminary character in ICC's reasoning and was decisive for the purpose of overturning the contested decision.

The Appeal Chamber accepted the Pre-trial Chamber's control over the Prosecutor's requests for authorization to open investigations and ruled on the relative competence of the "interests of justice" as the fundamental elements on the basis of which it had to decide whether to accept or reject the application. This is a question based on the ways in which the ICC should keep a balance between the Prosecutor's prosecution and the control of the Pre-Trial Chamber according to the StICC. The Appeal Chamber introduced a clear distinction between the bases in which the ICC is seized on the initiative of a Member State or the United Nations Security Council and that in which the Prosecutor acts *motu proprio*³¹.

There is thus the possibility of opening investigations for which the authorization of the Pre-Trial Chamber is not required. Possibility in which the Prosecutor could intervene and at the same time should ascertain the absence of a reasonable basis for a judicial action following the criteria established by art. 53 StICC and oppose the opening of investigations.

Within this reasoning, the Appeal Chamber clearly demonstrates the specular significance of the assessment made by the judicial body with respect to that of the Prosecutor. In order to deny the opening of the investigations, the Chamber will be able to assess whether these are actually unfavorable to the "interests of justice" according to the requirements of the StICC or to guarantee a fair and rapid process, which allows him to reach a "just" solution for the specific case. This is a peculiar aspect for a criminal justice system and that opens up many problematic

appropriate form of liability of the accused. See also in argument: M. Varaki, "Revisiting the "interests of justice" policy paper", in *Journal of International Criminal Justice*, 14 (3), 2017, pp. 458ss

²⁸D. Liakopoulos, "International cooperation, legal assistance and the case of lacking states collaboration within the International Criminal Court", in *Revista CES Derecho*, 10 (1), 2019, pp. 374-417.

²⁹ICC, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, *op. cit.*, par. 91.

³⁰O. Turlan, L'efficacité de l'enquête et la coopération avec les Etats: l'accès aux preuves et aux personnes d'intérêt, in T. Herran, "Les 20 ans du Statut de Rome. Bilan et perspectives de la Cour Pénale Internationale", ed. Pedone, Paris, 2020, pp. 263ss.

³¹ICC, The Appeals Chamber, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Decision of 5 March 2020, par. 33ss.

profiles also on the level of the independence of the Public Prosecutor's Office. In fact, if the system of checks and balances required by the Rome Statute guarantees a certain balance of the system, which aims to prevent the Prosecutor from exercising arbitrarily the discretion that is recognized, the distortions caused by the creative work of the judges involve, instead, an undue alteration of the relationship between the Chambers and the indictment body, whose autonomy spaces are significantly reduced. On the other hand, the role attributed to the control of the Pre-Trial Chamber is different when, according to the former art. 15, the Prosecutor decides on her own initiative to submit a request to open investigations which, as provided for in art. 48 of the Rules of Procedure of the ICC, also in this case its decision is based on the evaluation of the same elements set forth by art. 53³². Although in this case the intervention of the Chamber is essential³³, according to the Appeal Chamber (which denied the previous practice, and in particular the decisions of the Pre Trial Chambers relating to the situations in Kenya, Côte d'Ivoire, Georgia, Burundi and Myanmar)³⁴ the examination must be based on art. 15 par. 4 StICC³⁵, that is, on the verification of the existence of a reasonable basis for judicial action "(...)" in the limited sense that crimes have been committed - and of the fact that the situation appears to fall within the competence of the ICC (...)"³⁶.

According to the relevant ruling, art. 15, par. 4, does not contain any reference to the "interests of justice" or to art. 53 StICC³⁷. In particular, gravity in its relative sense under the art. 53 StICC "interests of justice" provisions can be considered by the prosecutor when exercising prosecutorial discretion. Before the Pre-Trial Chamber decision in the Comoros

³²See also: D. Kaye, "Who's afraid of the International Criminal Court? Finding the Prosecutor who can set it straight", in *Foreign Affairs*, 118, 2011, pp. 124ss. A.S. Weiner, "Prudent politics: The International Criminal Court, international relations and prosecutorial independence", in *Washington University Global Studies Law Review* 12 (3), 2013, pp. 549ss. According to the author: "(...) Prosecutors' legitimate interests in issuing indictments against the most senior leaders in a situation over which the Court has jurisdiction does not mean they should ignore the potential practical political implications of their actions in deciding when the time is right to issue those indictments. Prosecutors need not alter their decisions about who should be indicted based on political factors, but it may be appropriate for them to alter their position about which particular charges to bring, or to think carefully about potential domestic political impacts in determining how to draft an indictment so as to minimize controversy or domestic backlash. Though the Court's prosecutors should be skeptical of claims that the Court's efforts to secure justice will interfere with attempts to make peace, they should at the same time not categorically reject the possibility that this may be true in some cases, and they should in such cases calibrate their prosecutorial strategies so as to minimize threats to international peace and security (...)".

³³See also from past jurisprudence when the Chamber did note that it considered the term "case" to be a broad term (ICTR, Prosecutor v. Bagaragaza, Decision on Rule 11bis Appeal, ICTR-05-86-AR11bis, Appeals Chamber, 30 August 2006, para 17). In particular the Appeals Chamber: "(...) agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal (...)"

³⁴ICC, Situation in the Republic of Côte d'Ivoire, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, Pre-Trial Chamber III, 3 October 2011, para 206 (Côte d'Ivoire, Admissibility Decision); ICC, Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, Pre-Trial Chamber II, 31 March 2010, para 54 (Kenya, Admissibility Decision). For further details see also: D. Liakopoulos, "International Criminal Court: Impunity status and the situation in Kenya", in *International and European Union Legal Matters*, 2014. "(...) this issue was not prioritised in the Kenya and Côte d'Ivoire situations and Kenya. With respect to Kenya, the use of "inaction" or inactivity to determine Kenya's challenge of jurisdiction represented a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in proprio motu proceedings. The adoption of "inaction" or inactivity as a basis of the intervention of the ICC under article 15 of the Statute raises fundamental questions for the Prosecutor during preliminary examinations (...)"

³⁵S. Gless, "Internationales Strafrecht. Grundriss für Studium und Praxis", Helbing Lichtenhahn Verlag, Basel, 2021.

³⁶ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit. par. 34-35.

³⁷ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit. par. 34.

island situation³⁸, it was established and emphasised that the prosecutor in effect exercised a broad discretion, which we could call legal interpretive discretion; In relation to the prosecutor's proprio motu power, the extent of prosecutorial discretion the prosecutor can exercise is not clear. Art. 15 (1) StICC clearly authorises the prosecutor to exercise prosecutorial discretion³⁹. However, paragraph (3) of the same Article contains an obligatory language enforcing the prosecutor to proceed with the investigation. The ICC has not made any clear judgment on this question, and the matter is still debated; With respect to the selection of admissible cases, the StICC are silent. According to the Appeal Chamber, this is not a check on the investigation activity of the Prosecutor's Office but a verification of the minimum conditions so that an intervention by the ICC "can be considered reasonable"⁴⁰. The basis of the complaint against the decision on appeal on this argument clearly of a procedural nature, excludes the possibility that the assessment of the Chamber goes beyond what is literally required by art. 15, par. 4, and the appeal relating to "the content of the notion of interests of justice" and in particular the elements used at first instance in order to assess their existence in the context of the investigation in question⁴¹.

In the light of the criticisms which had accepted the contested decision, the Appeal Chamber considered it appropriate to make certain observations as well⁴². The Chamber contested the positive meaning attributed by the Pre-Trial Chamber to judicial control relating to the "interests of justice", thus helping to reduce its scope. Regarding the Prosecutor's proposal for the opening of investigations, the verification does not consist in the search for investigations "that actually pursue these interests but rather whether the fact of conducting them could conflict with them (...)"⁴³. The Appeal Chamber without dwelling specifically on the meaning of the "interests of justice"-and without analyzing analytically the approach adopted by the Pre-Trial Chamber with the scope of the notion resulting from the relevant documents of the Prosecutor's Office-the Appeal Chamber limited itself to interpreting the reasoning of the Pre-Trial Chamber as "cursory, speculative"⁴⁴, highlighting it as "did not refer

³⁸Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

³⁹T. De Souza Dias, "Interests of justice: Defining the scope of prosecutorial discretion in art. 53 (1) (c) and (2) (c) of the Rome Statute of the International Criminal Court", in *Leiden Journal of International Law*, 30 (3), 2017. in particular was stated that: "(...) The Chamber sets forth three guidelines for determining if the jurisdictional standard is met: Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, as stated in Article 53, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration (...), or be committed by a national of any such State (...) then articulates the guidelines for assessing a "potential case" (...) admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation (...)"

⁴⁰ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 45.

⁴¹ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 47

⁴²ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 48

⁴³ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 48

⁴⁴The same expression was used in the past case: ICC, Prosecutor v Simone Gbagbo, Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo", ICC-02/11-01/12 OA, Appeals Chamber, 27 May 2015, para 131.

to information capable of supporting it" and highlighted the lack of consideration of the gravity of the crimes and the interests of the victims⁴⁵.

On the contrary, it seems more correct to consider that the "legislator" intended to emphasize the importance of the concept of sufficient gravity, which must be understood as a fundamental criterion for the division of jurisdiction between the States and ICC, which must restrict its intervention only in relation to the most serious crimes. However, this causes considerable uncertainty, given that the application of one or the other provision is left to the full discretion of the bodies of ICC and, in particular, of the Prosecutor, who may opt for a solution from which a more on its decision not to open investigations⁴⁶.

In addition to the seriousness of the crime and the protection of victims, which are indexes expressly identified by the StICC, the judgment of balancing the interests of justice also involves needs implicitly inferable from the system. It alludes to the compatibility of the procedure with the experiment of national reconciliation processes, the realization of which could be hindered by the intervention of international criminal justice⁴⁷.

The Prosecutor of the ICC often intervenes during or at the end of an armed conflict. These are extremely delicate situations, which may involve two or more states, their government authorities, the civilian population. In a similar context, the prosecutor's action, called to select only those responsible for international crimes, could jeopardize the process of national reconciliation, if, for example, it deems to pursue only one of the parties to the conflict.

The protection of interests of justice, it should be emphasized that the Prosecutor carries out an activity that has a significant impact on a community, which may not be interested in the celebration of a proceeding before the ICC, but the development of alternative solutions to international criminal justice that allow a more adequate protection of the interests at stake. The need to protect the victims, who could be in danger if they were involved as witnesses and allow the realization of national reconciliation processes, could be considered, in fact, prevailing needs regarding the ascertainment of the criminal responsibilities of those who have committed international crimes, thus justifying a waiver of prosecutor prosecution even after the prosecution has been promoted.

SPECIFICITY, SUBSTANCE AND INTERPRETATION OF THE SENTENCE

Analyzing the sentence under two different profiles, namely one of a general nature and one more specific, both linked to the particular situation in Afghanistan, we must note that the important contribution, of a general nature and aimed at the future activity of the ICC investigations, always based on and respect to the question of the relationship between art. 15 and 53 of the Statute that the Appeal Chamber has interpreted this position in the expression of a "delicate balance regarding the Prosecutor's discretionary power to initiate investigations and the extent to which judicial review of these powers would be permitted"⁴⁸. From a general point of view, as well as, the Appeal Chamber was based on the effects on the present case and on the intervention of the ICC with respect to the crimes committed in Afghanistan and certainly punishable and therefore prosecutable by the Prosecutor.

⁴⁵ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 49

⁴⁶E. Fry, "Legal recharacterization and the materiality of facts at the International Criminal Court: Which changes are permissible?", in *Leiden Journal of International Law*, 29 (2), 2016, pp. 578ss.

⁴⁷P. Webb, "The ICC Prosecutor's discretion not to proceed in the "interests of justice"", in *Criminal Law Quarterly*, 51 (2), 2005, pp. 340ss.

⁴⁸ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 26.

The Appeal Chamber has ruled out that the Pre-Trial Chamber is referred to by the Prosecutor in order to obtain authorization to open the investigation and can assess the conditions set by art. 53 StICC, subsequently noting the possible opposition of the investigations according to the "interests of justice", and on this basis denied the authorization. The Appeal Chamber recognized and relied on the absolute freedom of the Prosecutor who decides, *motu proprio*, to open the investigations according to the ex art. 15 StICC⁴⁹. The role of the Pre-Trial Chamber is limited only to the mere verification of the elements explicitly established by art. 15, par. 4 StICC. The reasoning of the Appeal Chamber is centered on the different nature, i.e. from the formulation of the position of the Statute and related provisions⁵⁰, between the control of the Pre-Trial Chamber, pursuant to art. 53, on the refusal of the Prosecutor to open investigations in the face of a positive presumption of opening, and "(...) the one concerning the discretionary decision of the Attorney to present an application for authorization. Confirming the limits set on the intervention of the Pre-Trial Chamber, the sentence also notes the summary nature of the information that the Prosecutor is required to provide at this stage of the procedure, therefore incompatible with a more in-depth judicial review (...)"⁵¹.

The Appeal Chamber admitted that the Pre-Trial Chamber for the purposes of the decision can certainly include the elements of art. 53 StICC and the latter would thus carry out an assessment on the admissibility of the case which for the above reasons "would necessarily have a limited and therefore partial scope"⁵². This interpretation of the reading of the Statute clearly seems to have "locked" the initiative of the Prosecutor pursuant to art. 15 StICC⁵³. It is not clear, except in cases of manifest unreasonableness, in what circumstances the Chamber could oppose the opening of the investigation. The Prosecutor's discretion is no longer limited to proposing the opening of investigations but, *de facto*, to opening them. We speak about a "temperate" discretion, since an elaborate system of checks and balances on the discretionary choices of the Prosecutor is envisaged⁵⁴. The Prosecutor in his role of discretion has made no decision on the basis of prosecutorial discretion to select the current situations. As we can see in the African situations have been selected on the basis of the satisfaction of the legal requirements, but not prosecutorial discretion. In *speciem*, the situations that were rejected were dismissed on the basis of the non-satisfaction of the legal requirements. Accordingly, the focus of the examination of the charges of politicisation, derived from the exercise of selective justice, in fact, informs as technically the Prosecutor has not made any situational decision so far on the basis of prosecutorial discretion. For this reason, this study sought a different approach to analyse why the Prosecutor receives the charges of politicisation, derived from the exercise of discretion. The problem may lie with the hidden sense of discretion that has been effectively and widely exercised by the Prosecutor when interpreting the legal requirements for initiating investigations or prosecuting cases. In particular, on the term "sufficient gravity" that constitutes the key legal admissible criterion for initiating investigations or prosecuting cases.

However, in our case the interest of this sentence lies in the innovative position adopted by the Appeal Chamber, with respect to the previous jurisprudence of the Pre-Trial Chambers, regarding the introduction of the "interests of justice" which go back to the parameters of the

⁴⁹S. Gless, "*Internationales Strafrecht. Grundriss für Studium und Praxis*", op. cit.

⁵⁰ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 33.

⁵¹ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 38ss.

⁵²ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 40.

⁵³S. Gless, "*Internationales Strafrecht. Grundriss für Studium und Praxis*", op. cit.

⁵⁴Of course with a similar also limits to the discretion of the Public Prosecutor in the *ad hoc* Tribunals are set by Rule 72 bis (D) and (E), which allows the Judges of the Chamber of Deputies to reduce, after consultation with the Prosecutor, the number of charges for fairness requirements and speed of the procedure.

control of the Pre-Trial Chambers. Trial Chamber on the Prosecutor's request to open the related investigations. The Appeal Chamber rejected the constant interpretation of the relationship between art. 15, par. 4, and 53, par.1 StICC⁵⁵, which we first noticed in the decision concerning the situation in the Republic of Kenya. In this case, the Pre-Trial Chamber had reached the conclusion that the judicial review⁵⁶ on the Prosecutor's decision is based on the same criteria considered by the latter. This approach of enhancing the identity of the criteria indicated in art. 15, par. 3 and 4, and 53, par. 1, for the purpose of the existence of a reasonable basis for initiating the investigations, as well as the close link between the two articles that would emerge during the drafting of the Statute and from the interpretation of art. 15 StICC as directed to attribute to the Pre-Trial Chamber a real control function on the Prosecutor's decision⁵⁷.

The two opposing orientations of both the Pre-trial Chambers and the Appeal Chamber are equally reflected in doctrine⁵⁸.

In fact, the control of the Pre-Trial Chamber extends to all elements considered by the Prosecutor. This approach is based on the interpretation of the expression "reasonable basis for a judicial action" as inclusive of the three criteria mentioned in art. 53 par. 3-jurisdiction of the Court, admissibility and interests of justice- "regardless of the different wording of the three provisions"⁵⁹.

There is also a second position of a negative nature of the assessment relating to the "interests of justice" referred to in art. 53 par. 1StICC compared to that of the other criteria, the Pre-Trial Chamber is competent to evaluate the "interests of justice" only and within the nature and spirit of the control over the Prosecutor's decision not to open the investigation. Some other arguments also remain open and debatable, such as the reference to the preparatory works⁶⁰ from which we can deduce that the sole purpose of the Pre-Trial Chamber's control over the Prosecutor's request is to avoid opening investigations of an abusive nature. It appears consistent that the Chamber only carries out a verification of the existence of the minimum requirements for introducing a judicial criminal action⁶¹.

Another way seems feasible and consists in admitting the competence of the Pre-Trial Chamber to carry out an evaluation of the "interests of justice", underlining a necessary self-restraint by the latter with respect to the evaluation of the proposal to open the Prosecutor's investigations.

The considerable extent of the contribution of the sentence with regard to the definition of the relationship between the Prosecutor and the Pre-Trial Chamber is evident. Without diminishing the importance of opening investigations as such, the effects of the sentence in relation to it are at least in a position to relativize some other points of research. The Appeal Chamber, while authorizing the opening of the investigations, also highlighted the possible subsequent examination of the admissibility of the case and the competence of the ICC according to the various provisions of the Statute that allow to take into consideration circumstances such as, for example (but not only), "certain agreements entered between the

⁵⁵S. Gless, *"Internationales Strafrecht. Grundriss für Studium und Praxis"*, op. cit.

⁵⁶For further analysis see also: V.V. Suhr, *"Rainbow jurisdiction at the International Criminal Court. Protection of sexual and gender minorities under the Rome statute"*, Springer, Basel, 2022, pp. 214ss.

⁵⁷ICC, Pre-Trial Chamber II, Corrigendum of the 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-Corr, Decision of 31 March 2010, par. 21-24.

⁵⁸L. Poltronieri Rossetti, *"The Pre-Trial Chamber's Afghanistan decision-A step too far in the judicial review of prosecutorial discretion?"*, in *Journal of International Criminal Justice* (17) 2019, pp. 586, 593ss.

⁵⁹Art. 15, par. 3 and par. 4, and art. 53 StICC.

⁶⁰S. Gless, *"Internationales Strafrecht. Grundriss für Studium und Praxis"*, op. cit.

⁶¹T. Mariniello, *"Judicial control over prosecutorial discretion at the International Criminal Court"*, in *International Criminal Law Review*, (19), 2019, pp. 979-991

United States and Afghanistan" with reference to the peace agreements concluded between the two states on 29 February 2019⁶². The Chamber refers in particular to art. 19 StICC which allows Member States to challenge the competence of the ICC. Moreover, regardless of the origin of the *notitia criminis*, art. 19 StICC recognizes the power to raise a question of procedural suitability pursuant to art. 17 StICC (challenge to the admissibility) for only once each and before the beginning of the trial, unless there are exceptional circumstances that justify its promotion after the first hearing. The hearing can be held even when the defendant has renounced the right to appear, or has escaped or is untraceable and all the necessary measures have been taken to ensure its presence and to inform it of the accusations. Thirty days before the confirmation of hearing charges, the indictment, together with the minutes of the evidence on which it is based, is notified to the suspect. For its part, the defense has a duty of disclosure of the evidence that it intends to bring to support its thesis, to which it must comply no later than fifteen days before the date set for the hearing (Rule 121 para 3 and 6 of Statute of Rules of Procedure and Evidence)⁶³.

Also according to art. 97 and 98 StICC which, in the context of cooperation between the ICC and the states⁶⁴, allow the latter to oppose the ICC's requests by invoking further obligations of an international nature that are incompatible with them⁶⁵. While not strictly speaking of the same aspects of a political nature invoked by the Pre-Trial Chamber in order to justify the rejection-and that the latter had unduly linked (according to the Appeal Chamber) to the notion of "interests of justice" -, it appears evident that these are concrete circumstances that could constitute obstacles to the continuation of the procedure.

According to the sentence of the Appeal Chamber, the assessment of elements that can be provided by the related articles of the StICC is excluded only in the context of the control to be carried out at the stage of authorization for the opening of the investigations. It does not seem useless to highlight that at the outcome of this sentence, the fact of having authorized the opening of investigations on the basis of the general and non-specific redefinition of the role of the Prosecutor and of having censored the content given by the Pre-Trial Chamber to the notion of the "interests of justice", does not exclude that the mechanisms established by the relevant articles of the StICC and indicated by the Appeal Chamber itself, considerations (including political considerations), may prevent the further exercise of the Court's jurisdiction.

We can see how the action of the ICC fits into a context of growing tension between the actors involved. The reference is based on the concretization of threats of restrictive measures against ICC personnel, both economic (such as the freezing of assets located in the United States and the prohibition of using the American financial system) and to the free movement in some territories as in in particular, the ban on entering the United States⁶⁶.

⁶²Joint Declaration between The Islamic Republic of Afghanistan and the United States of America for bringing peace to Afghanistan

⁶³D. Liakopoulos, *"The right of disclosure in hybrid Tribunals"*, in *Juris Gradibus*, 2016.

⁶⁴D. Liakopoulos, *"Types of international cooperation and legal assistance in the ICC"*, in *Revista de Derecho Ciencias Sociales y Políticas. Universidad San Sebastián*, n. 25, 2019, pp. 104ss.

⁶⁵ICC, The Appeals Chamber, Situation in the Islamic Republic of Afghanistan, op. cit., par. 44.

⁶⁶Executive Order (E.O.) 13928 on Blocking Property of Certain Persons Associated with the International Criminal Court (ICC). See: White House Executive Order on the Termination of Emergency With Respect to the International Criminal Court, 1 April 2021. But the U.S. has continuously reiterated its refusal to accept the ICC exercise of jurisdiction over nationals of States non-parties, because in contrast with the fundamental principle of the law of treaties according to which *pacta tertiis neque nocent neque prosunt*. In revoking E.O. 13928, President Biden indicated that [t]he United States continues to object to the International Criminal Court's (ICC) assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction.

According to material obstacles to investigations, the measures in question raise questions in terms of compatibility with public international law⁶⁷. Especially, with the 1947 headquarters agreement between the United Nations and the United States. In fact, ICC officials, being the latter with observer status at the United Nations, have the right to access the organization's headquarters and therefore enter US territory. The possibility has also been advanced that in reaction to the adoption of the aforementioned restrictive measures, the ICC may resort as provided for in art. 70 par. 1 StICC which gives it the competence for crimes against the administration of justice⁶⁸.

Overall, in evaluating the sentence in question, the involvement of the ICC, especially at the investigative stage, in the context of the crimes committed in the afghan conflict, as well as the attempt by the Appeal Chamber to circumscribe the negative effects of the first decision, can certainly be welcomed. degree also through an innovative interpretation of the relationship between the activity of the Prosecutor and the judicial control to which it is subjected.

CONCLUDING REMARKS

The development of the international criminal law, rectius justice and the jurisprudence of international prosecutors all contributed to developing the role of an international prosecutor, as a new international player within the international legal arena and international politics. For instance, when the prosecutor stops the criminal proceedings, using her discretionary power, based on "the interests of justice", the prosecutor, in fact, may be addressing other values, such as stability or peace-related considerations. This process confesses the prosecutor's new roles to play alongside with her main mandate in delivering justice. Accordingly, the current international Prosecutor can/should exercise a multifunction of roles in order to promote those values. With the establishment of the ICC, we have begun to see a dramatic development in the idea of the prosecution in terms of both the legal level and practical level. It is a multi-functional prosecution. The creation of the ICC witnessed a formal emergence of a new sense of prosecution, where the role of the prosecutor has been formally widened, accordingly. Article 53 StICC was a product of the historical development of the exercise of the discretionary power by the previous prosecutors. Although this form of power was not clear enough either theoretically or practically in the work of the Military Tribunals, it was clear enough in the practice of the Special Criminal Tribunals. With the arrival of the ICC, we have begun to see that these developments have been embedded in the law.

According to our opinion, the consideration of peace processes (a political influence) on the basis of "the interests of justice" can be accounted for only when such processes are associated with some sort of justice mechanisms. This is often the case when international justice of the ICC is not attainable due to some obstacles, then other justice mechanisms might be more meaningful and needed. The use of the apologist considerations as a tool to achieve the utopian end, which is justice, in its broad sense, is the approach that may legitimately help justify the consideration of political factors. As the prosecutor is expected to be independent, respecting the rule of law when exercising her discretion, she is also expected to be flexible, as discretion is in nature a power that stands outside the law. The prosecutor may need to give

⁶⁷See in particular: L.A. Aledo, "*Le droit international public*", Dalloz, Paris, 2021. D. Alland, "*Manuel de droit international public*", PUF, Paris, 2021. C. Tomuschat, C. Walter, "*Völkerrecht*", Nomos, Baden-Baden, 2021. P. Daillier, M. Forteau, A. Miron, A. Pellet, N. Quoc Dinh, "*Droit international public*", ed. LGDJ, Paris, 2022.

⁶⁸D. Liakopoulos, "*The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence*", op. cit.

weight to considerations that are not warranted in law. The ignorance of one of these premises posed the prosecutor in the dyadic criticisms.

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