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1. A NEW LIFE FOR ARTICLE 18 OF THE ROME STATUTE? AN APPRAISAL OF THE RECENT PRACTICE ON DEFERRAL AND RESUMPTION OF INVESTIGATIONS AT THE ICC

1. *Introduction*

On 18 July 2023, the Appeals Chamber (AC) of the International Criminal Court (ICC or the Court) confirmed, by majority, Pre-Trial Chamber I's (PTC) decision of 26 January 2023, which authorized the Office of the Prosecutor (OTP) to resume its investigation in the situation in the Republic of the Philippines. Less than a month earlier, the same Pre-Trial Chamber authorized the resumption of the investigation in the situation regarding the Bolivarian Republic of Venezuela. Pre-Trial Chamber II did the same in October 2022 with regard to the situation in Afghanistan. These are the first three instances of interaction between a State Party, the Prosecutor and the Court under the procedure established by Article 18 of the Rome Statute, and constitute interesting judicial developments with regard to the mechanics of complementarity, one of the structural features of the ICC. Before turning to the analysis of the relevant decisions and the future prospects of the on-going investigations, in this comment I will briefly sketch out the purpose and structure of the provision in the broader procedural framework of the Court.

Article 18 of the Statute («Preliminary rulings regarding admissibility») establishes first and foremost the Prosecutor's duty, whenever the Office initiates an investigation pursuant to a State referral or *proprio motu* with the PTC's authorization, to notify its decision to all States Parties and to those States that would normally exercise jurisdiction on the alleged crimes. The notification is a procedural condition for the exercise of the right granted to States by paragraph 2 of the provision. According to it, within one month of receipt of the notification, a State may inform the Court that it is investigating or has investigated on the acts referred in the notification and that may constitute crimes under the jurisdiction of the Court, and request the Prosecutor to defer to national proceedings. If such a request is made, the Prosecutor «shall defer to the State's investigation of those persons, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation». The deferral is open to review by the Prosecutor six months after the request or at any time when a significant change in the circumstances reveal the State's unwillingness or inability to genuinely carry out the investigation (paragraph 3). The decision of the PTC can be appealed by the State or the Prosecutor, and the appeal heard on expedited basis (paragraph 4). This "triangular" mechanism is backed by the States' obligation, if so requested, to periodically update the OTP on the progress of domestic proceedings (paragraph 5), and is assisted by a

judicial remedy – the Prosecutor's request to the PTC to obtain the authorization to resume the investigation – to overcome the lack of genuine national proceedings.

Although the negotiating history of the Statute suggests that the provision – strongly advocated for by critics of an independent Prosecutor – was a concession to State sovereignty, it is in line with the principle of complementarity that informs the Statute and that assigns the primary responsibility for the investigation and prosecution of international crimes to national authorities (on the genesis of the provision, see D. D. N. NSEREKO and S. J. VENTURA, Article 18, in K. AMBOS (ed.), *Rome Statute of the International Criminal Court. Article-by-Article Commentary*, München/Oxford/Baden-Baden, 2021, pp. 1010-1014). Its purpose is to strike a reasonable balance between different (and potentially competing) interests, namely, States' interest to assert their national jurisdiction; the need to obtain at an early stage of the proceedings a determination on the admissibility of the potential cases that might emerge from an investigation; and the need to subject to judicial supervision the Prosecutor's discretionary decision to continue with the investigation despite the deferral request.

2. *The revival of Article 18 in the recent practice*

After twenty years of dormancy, the procedure under Article 18 of the Statute was revived by the deferral request made by the Government of Afghanistan, later followed by analogous requests made by the Governments of the Philippines and Venezuela. The three situations, which will be examined more closely in the next paragraphs, present both similarities and differences.

Speaking of commonalities, two of the three situations (Afghanistan and Philippines) were triggered by *proprio motu* action of the Prosecutor under Article 13(c) and 15 of the Statute. The situation regarding Venezuela, to the contrary, was triggered by the first-ever multilateral inter-state referral in the history of the Court, made in 2018 by six States Parties. Moreover, in all three situations, a substantial part of the alleged crimes seems to have been committed by governmental authorities or by other subjects or groups closely tied to them. This circumstance might explain the States' interest to use their right to seek a deferral, in order to halt the proceedings before the ICC and engage in a dialogue with the OTP on the existence and adequacy of national proceedings. Whether Afghanistan, the Philippines, and Venezuela resorted to this procedure in good faith or with dilatory intent will be analyzed by reference to the content of their deferral requests and their subsequent procedural behavior in the unfolding of Article 18 proceedings.

Turning to dissimilarities, the three situations concern States with very different political backgrounds. The case of Afghanistan is heavily influenced by the degree of international involvement in the country and the changes of governmental authority over the years, which contributed to significant shifts in the State's approach towards the Court. The case of Venezuela is concerned with alleged crimes occurred at a time of severe political instability in the country, which led to a constitutional crisis and to conflicting claims to legitimate governmental authority. The case of the Philippines, conversely, is not characterized by political instability or regime-change dynamics, but is part of the trend, common to other situations, of progressively deteriorating relations between the Court and the authorities of States whose territory and nationals were placed under preliminary examination and investigation, leading to the State's withdrawal from the Statute (the same pattern can be seen, for instance in the situation in the Republic of Burundi). In the next

paragraphs, it will be shown how the evolution of the political scenario in the three countries is relevant for the purpose of Article 18 proceedings.

a) *The situation in Afghanistan: the Taliban's return to power as a fundamental change of circumstances warranting the resumption*

Afghanistan became a State Party to the Rome Statute on 1 May 2003. Based on a number of communications on alleged crimes committed in the country, the OTP conducted a long and complex preliminary examination, and requested *proprio motu* the authorization to open an investigation under Article 15 of the Statute. In its request, the Prosecutor focused on three main categories of alleged crimes, namely those attributable to: a) the Taliban and affiliated armed groups; b) the Afghanistan National Security Forces (ANSF); and c) members of US armed forces and the CIA. The competent Pre-Trial Chamber, for the first time in the Court's history, denied the authorization on the main ground that the investigation would not have served the interests of justice. The decision, strongly criticized by the majority of international criminal law scholars and civil society organizations (see, e.g., S. VASILIEV, *Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part I)*, in *EJIL:Talk!*, 19 April 2019; L. 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*, 2019, Vol. 17, Issue 3, p. 585-608, and the position expressed by Human Rights Watch), was later reversed by the Appeals Chamber, which authorized the OTP to proceed with the investigation. The decision to open the investigation was notified to the Afghan authorities on 12 March 2020. On 26 March 2020, within the one-month deadline set by Article 18(2), the Government of Afghanistan formulated its request of deferral, providing in support only a summary outline of the relevant national proceedings, alleging practical difficulties related to the COVID-19 pandemic. Additional material was provided in the following months, through various exchanges with the Prosecutor. From the OTP's public updates on the status of the deferral request it appears that national authorities submitted a large set of documents relating to national proceedings, at least some of which may have sufficiently mirrored the scope of the ICC investigation. Nevertheless, most of the documents were submitted in Pashto and Dari language, forcing the Office to analyze and translate on its own the materials. While the Office was seeking further clarifications on these materials, the Taliban took over governmental authority by seizing control of Kabul in August 2021. As a consequence, the OTP made an expedited request to the PTC in order to be authorized to resume the investigation, alleging that the political developments in the country constituted a fundamental change of circumstances warranting the resumption. In the OTP's judgement there would be no reasonable prospects that national investigations could continue in such a way as to satisfy the requirements of complementarity. After having set the procedure to decide on the OTP's request, collected further submissions and heard other participants (such as victims' groups, but not the new Afghan authorities, which despite multiple communication efforts did not participate in the proceedings), the Chamber delivered its decision on 31 October 2022 (PTC Afghanistan Decision).

The PTC began its consideration by reminding that Rule 55(2) of the Rules of Procedure and Evidence mandates judges to consider, in deciding on Article 18(2) requests, the factors of Article 17 concerning admissibility, the same that come into play in the context of admissibility challenges relating to cases under Article 19. Therefore, the Court considered

that case law on these provisions could provide – *mutatis mutandis*, and bearing in mind the distinction between the situation and the case phases – interpretive guidance also in the context of deferral and resumption proceedings (PTC Afghanistan Decision, paras. 43-44). The Court determined that in Article 18 proceedings the onus to substantiate a deferral request rests on the State, which must provide enough information to show that criminal investigations and prosecutions are being actively conducted at the national level, and that they «cover the same individuals and substantially the same conduct as the investigations before the Court» (PTC Afghanistan Decision, paras. 45-46). Furthermore, the Court, after having established that Afghan authorities behaved inconsistently with the intention to pursue the deferral request, considered that Afghanistan had not satisfied the required onus. The Court determined that even if a limited number of national cases «covered the same individuals and substantially the same conduct as the ICC investigations, it is evident that the cases presented by Afghanistan only address a very limited fraction of the crimes and individuals responsible for them» (PTC Afghanistan Decision, para. 55). As a consequence, judges concluded that Afghanistan «is not presently carrying out genuine investigations and that it has not acted in a manner that shows an interest in pursuing the Deferral Request» (PTC Afghanistan Decision, para. 58), and granted the OTP's request, authorizing the resumption of the investigation.

b) *The situation in the Philippines: a withdrawn State challenging the Court's involvement on complementarity grounds*

The second situation that gave rise to Article 18 procedures concerns the Republic of the Philippines, and more specifically alleged crimes committed in the context of the so-called "war on drugs" implemented under the presidency of Rodrigo Duterte. The OTP, after concluding the preliminary examination initiated *proprio motu*, requested the authorization to open the investigation, which was granted by PTC I on 15 September 2021. Soon after the preliminary examination and investigation were announced, the Philippines started to act in a confrontational manner vis-à-vis the Court, and eventually decided to withdraw from the Statute pursuant to Article 127(1). After the OTP's notification, the Government of the Philippines made a deferral request on 10 November 2021, triggering Article 18 proceedings. The Office, after having assessed the situation and the state of national proceedings, sought the PTC's authorization to resume the investigation on 24 June 2022 (on the interaction between the OTP and the Government in this regard, see A. O. KHO, *Recent Developments Concerning the ICC Investigation into the Situation of the Philippines*, in this journal, 2022, pp. 1329-1337). According to the OTP national proceedings could not substantiate the deferral request due the fact that: a) most of them were not criminal in nature; b) they did not focus on the existence of a State or organizational policy to commit the crimes, overlooking the responsibility of high-level perpetrators; and c) they did not sufficiently mirror the investigation at the ICC.

The Pre-Trial Chamber handed down its decision on 26 January 2023 (PTC Philippines Decision). The Pre-Trial Chamber, confirming the approach to the review of national proceedings adopted in the Afghanistan decision (PTC Philippines Decision, paras. 10-17), accepted the OTP's arguments in their entirety, considering that, based on the information made available by the Government of the Philippines, the national proceedings could not quantitatively and qualitatively substantiate the deferral request. In particular, the Court stressed that, considering the State or organizational policy contextual element of crimes

against humanity, national proceedings were expected to focus on patterns of criminality and high-level perpetrators, and not only on isolated, low-level material perpetrators (PTC Philippines Decision, para. 68). It concluded that «domestic initiatives and proceedings relied on by the Philippines do not amount to tangible, concrete and progressive investigative steps being carried out with a view to conducting criminal proceedings, in a way that would sufficiently mirror the Court's investigation as authorised in the Article 15 Decision» (PTC Philippines Decision, para. 96). For these reasons, it authorized the OTP to resume the investigation.

The Philippines appealed the decision on various grounds. In particular, regarding the deferral, the State challenged the Chamber's approach to the allocation of the burden of proof and argued that applying in the context of Article 18 proceedings the same threshold for the review of national proceedings applied in the context of Article 19 would make it almost impossible for the State to successfully substantiate a deferral. The AC delivered its judgment, adopted by majority, on 18 July 2023 (AC Philippines Judgment). With regard to the burden of proof, the AC plainly confirmed that it is the State making a deferral request that bears the onus to substantiate it, since it is the party that affirms the existence of a set of facts (*i.e.* national investigations) in order to modify the course of proceedings at the ICC, and the one that is in the best position to produce information and documents to support the request (AC Philippines Judgment, paras. 74-80). In relation to the standard of review of national proceedings, the Majority did not find any discernible error of law in the approach taken by the PTC, concluding that it had «correctly assessed whether there exists an advancing process of domestic investigations or prosecutions of the same groups or categories of individuals […] which sufficiently mirrors the scope of the Prosecutor's intended investigation, taking into account the stage of a situation, as well as the specific circumstances and parameters of the Philippines Situation» (AC Philippines Judgment, para. 110). Two judges of the AC appended a dissenting opinion (Philippines Dissenting Opinion). In their view, as argued by the Philippines, the PTC erred in law in affirming that it had jurisdiction on the situation in the Philippines despite the State's withdrawal from the Statute. As a consequence, they would have granted the ground of appeal on jurisdiction and found moot all other grounds of appeal raised under Article 18, directing the PTC to withdraw the authorization to investigate and discontinue all proceedings (Philippines Dissenting Opinion, para. 37).

c) *The situation in Venezuela: a difficult balance between cooperation efforts and the pursuit of accountability*

The third and last Article 18 procedure to date relates to the situation in the Bolivarian Republic of Venezuela. On 3 November 2021, the Prosecutor announced that the preliminary examination of the situation had been concluded with a decision to open an investigation. In the same public statement, the Office announced that it had concluded a Memorandum of Understanding (MoU) with the Government of Venezuela to the effect of fostering the promotion and support of genuine national proceedings, and enhancing the cooperation between the parties. The decision was notified to States Parties on 16 December 2021. Therefore, the one-month period to request a deferral would have normally elapsed on 16 January 2022. Nevertheless, the Office informed the PTC that it had granted a three-month extension to national authorities to inform of the status of domestic investigations. According to the OTP, this was done «in a spirit of cooperation» and in line with the MoU

signed in 2021, despite the fact that Article 18(2) of the Statute seems to set a peremptory time limit for making a deferral request. On 15 April 2022, the Government of Venezuela formally made its deferral request under Article 18(2) of the Statute, without providing any additional supporting materials. Venezuela merely referred to nine reports on domestic proceedings, which had already been reviewed by the OTP in the context of its preliminary examination.

The Prosecutor, on 1 November 2022, forwarded to the PTC its request of authorization to resume the investigation, which he had already announced in its notification to the Chamber on the status of the deferral request of 20 April 2022. The OTP's request was premised on the alleged inadequacy of national proceedings, due the fact that Venezuela: (i) is not investigating the patterns and policies underlying the contextual elements of crimes against humanity; (ii) has only taken very limited investigative steps; (iii) has been unjustifiably delaying domestic proceedings; (iv) has focused on direct and low-level perpetrators; (v) is carrying out proceedings that fail to sufficiently mirror the forms of criminality that the Prosecution intends to investigate; (vi) is investigating crimes of alleged minor gravity compared to those that might form part of the ICC investigation; (vii) is not conducting national proceedings independently or impartially. Venezuela, in its reply, moved from the categorical assumption that crimes against humanity *had not been committed* in the country, and that as a consequence most of the OTP's arguments on the quality and nature of national proceedings were either not pertinent or unfounded. The Chamber handed down its decision on 27 June 2023 (PTC Venezuela Decision). The judges, after having dismissed certain preliminary jurisdictional challenges raised by Venezuela (PTC Venezuela Decision, paras. 22-50) , ruled on the merits of the resumption request, accepting the OTP's arguments summarized in points (i)-(iv) above (*ibid.*, paras. 107, 116-119, 121-122). The Court did not make a determination on the arguments presented under points (v) and (vi) above, due to the lack of sufficient information (PTC Venezuela Decision, paras. 124, 126). Finally, concerning point (vii) above, it declined to make a general finding on the alleged lack of impartiality and independence of the Venezuelan judicial system as a whole (PTC Venezuela Decision, paras. 127-129). For these reasons, the Chamber concluded that Venezuela «is not investigating or has not investigated criminal acts which may constitute crimes referred to in article 5 of the Statute that sufficiently mirror the scope of the Prosecution's intended investigation» (PTC Venezuela Decision, para. 130). Venezuela appealed the decision and, at the time of writing, the matter is still under consideration by the Court.

3. *A preliminary assessment of the practice and future prospects in the three situations*

The unfolding of proceedings under Article 18 and the ensuing decisions of the Chambers seem to reveal, so far, common patterns of behavior on the part of the relevant actors.

In all three circumstances, the States requesting a deferral proved unable to substantiate the request to the requisite standard. Their procedural behavior, as well as the quantity and quality of the information provided to the OTP and the judges, showed that national proceedings were either not being actively and genuinely pursued, or were inadequate to properly reflect the range of criminality on which the OTP's investigation intended to focus. Therefore, it can be argued that deferral requests so far have been made primarily with a dilatory intent, on the basis of proceedings that, for the most part, were not designed to lead to effective criminal accountability of those bearing the greatest

responsibility for the relevant conducts. This intention can also be inferred from the manner in which the documents on national proceedings were communicated to the OTP. This was made by sending to the OTP voluminous, unorganized and heterogenous materials, sometimes not in the working languages other of the Court, putting the Office in a difficult position as to the appropriate way to select, categorize and translate them.

As regards the OTP's approach to Article 18 proceedings, the Office has consistently pursued its prerogatives by monitoring the status of national proceedings, requesting updates and, when the circumstances seemed to require it, requesting authorization to resume the investigation. Nevertheless, the Prosecutor's approach has been different depending on the state of communications and prospects of dialogue with the concerned State. For instance, in the case of Afghanistan, the Office deemed that the mere return to power of the Taliban was in itself enough to warrant the resumption, given the lack of any reasonable prospect for national proceedings and further cooperation with Court. Conversely, the OTP engaged in various efforts to foster positive complementarity in the Venezuelan situation (including through the signing of the MoU and various country visits), although with limited results.

With regard to the approach of the Chambers to decisions on Article 18 requests, a few observations can be made. First, all decisions have consistently confirmed that the same principles developed in the Court's case law concerning Articles 17 and 19 apply *mutatis mutandis* to the admissibility assessment under Article 18. The Chambers recognized that this requires some adaptations in the comparative analysis between national proceedings and the ICC investigation, due to the fact that at the situational stage the contours of the ICC investigation and of potential cases likely to arise from it are not very precise. Nevertheless, the «same individuals and substantially the same conduct» standard applies to determine whether or not national proceedings sufficiently mirror the ICC investigation.

Second, the Court has very carefully delimited the scope of Article 18 proceedings, clarifying, in particular, that they are not the appropriate legal avenue to decide on matters of jurisdiction. This was deemed necessary in order to avoid that States could surreptitiously raise jurisdictional challenges beyond the specific cases provided for in the Statute. In the case of *proprio motu* proceedings a preliminary determination on the existence of jurisdiction is already contained in the Article 15 decision to authorize the investigation, which is adopted as a result of a procedure to which the State does not participate, and which cannot be appealed by the State. In the case of State referrals, allowing jurisdictional challenges in the context of Article 18 proceedings would circumvent the absence of a provision in the Statute for the judicial review of the Prosecutor's discretionary decision to open an investigation. Judicial review is only possible at a later stage when the Prosecutor initiates the prosecution of an individual case or, under Article 53(3) of the Statute, in case of a decision *not to proceed* with the investigation or prosecution. While this strict approach is certainly justified, it should not be taken for granted that a decision under Article 18(2) is always completely devoid of jurisdictional character. In fact, when the AC decided on the appeal against the PTC's resumption decision concerning the situation in the Philippines, the dissenting judges criticized the approach taken by the Majority, arguing that it could not be maintained that the Chamber's decision did not also amount, in some respects, to a decision «with respect to jurisdiction» (Philippines Dissenting Opinion, paras. 9, 13). Nevertheless, this might be seen as a peculiar case, due to the fact that the Philippines had in the meantime become a non-Party State due to their withdrawal, and they were trying to challenge – at the first and possibly only occasion available – the Court's ability to exercise jurisdiction *ratione temporis*.

Third, in concluding that national proceedings could not be said to sufficiently mirror the ICC investigation, in all three cases the Chambers have resolved the complementarity assessment on the basis of the substantial inaction of national authorities, instead of dealing with it under the concepts of unwillingness and/or inability. While this approach is certainly convenient for reasons of judicial economy, it might have benefited from a stronger and more detailed reasoning, given the fact that the behavior of national authorities was not exactly one of complete inaction but more akin to the situations of unwillingness described under Article 17(2) of the Statute.

Lastly, both the PTC and AC have stressed that the determination under Article 18(2) is by nature preliminary and does not preclude the State from providing material in the future in order for the Prosecution, or the Chamber, to determine inadmissibility on the basis of complementarity. In this vein, the Court confirmed that «[a]ssessing the state of domestic proceedings is an ongoing process and requires continued dialogue between the State and the Court» (PTC Venezuela Decision, para. 134).

With regard to the future prospects of the resumed investigations, one cannot fail to observe that the obstacles faced by the OTP in pursuing accountability seem very difficult to overcome. In relation to the Philippines, while according to the judges the Court retains jurisdiction on conducts that took place before the coming into effect of the State's withdrawal (see PTC I's Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, ICC-01/21-12, 15 September 2021, paras. 109-111; PTC Philippines Decision, para. 26; AC Philippines Judgment, paras. 48-58) there seem to be very little prospects for viable prosecutions, also in light of the uncooperative position of the current Government led by President Marcos Jr (on this matters, see M. BEZHANISHVILI, *ICC Appeal Judgment on the Philippines – Keeping the Court's Post-Withdrawal Jurisdiction on Life Support?*, in *Opinio Juris*, 28 September 2023). With regard to Afghanistan, while the State remains to date a party to the Statute, the possibility of effective investigations and prosecutions seems very limited, at least in relation to the crimes allegedly committed by perpetrators linked to the ruling Taliban. Moreover, with regard to crimes allegedly committed by other groups (such as the ANSF, US armed forces and CIA), the OTP has clarified that this aspect of the investigation is currently being deprioritized, consistently with the new Policy on Situation Completion (for a critique of this decision, see N. KISWANSON, *Limits to Prosecutorial Discretion: The ICC Prosecutor's Deprioritisation Decision in Afghanistan*, in *Opinio Juris*, 26 November 2021). Finally, with regard to Venezuela, while the State and the OTP have continued to cooperate in recent years to the point of agreeing on a MoU for the establishment of an in-country office, relations might worsen as a result of the resumption of the investigation and its focus on alleged systematic patterns of criminality connected to governmental actions. In its notice of appeal against the PTC's decision, Venezuela argued that the resumption of the investigation is likely to have «irreversible consequences» on the MoU with the OTP. The possibility that Venezuela ceases cooperation entirely and eventually withdraws from the Statute cannot be entirely ruled out.

Obviously, these challenges should not deter the OTP and the Court from upholding their respective mandates, also in light of the strong demand of justice expressed by the victims of the alleged crimes and the pressing need to protect the Court's independence and legitimacy vis-à-vis States' attempt to damage it. Since the Statute imposes no time limit for investigations, keeping them alive and carrying out all feasible fact-finding activities may still contribute to potential judicial developments in the future, were the conditions – including the political course in the interested States – to change favorably. At the same time, the OTP,

in the context of its current prioritization strategy, will have to take into account the better prospect of success in other situations, in order to make efficient use of the Court's limited resources.

To conclude on Article 18 proceedings, it remains to be seen whether States, especially when the OTP is investigating on patterns of alleged government-linked criminality, will be further inclined to create the façade of domestic proceedings merely in order to activate the deferral mechanism. This could be made with the aim of delaying the ICC investigation, only to complain later on and withdraw cooperation once the OTP obtains permission to resume it on complementarity grounds. Given the time necessary to conclude proceedings under Article 18, if this becomes standard practice it may result in a 1 or 2-year further delay of investigations, to the detriment of the rights of the potential accused persons and victims, attracting further criticism on the Court and damaging its credibility.

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