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THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public Document

Observations by Queen's University Belfast Human Rights Centre as amicus curiae on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019

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1. On 12 April 2019, the Pre-Trial Chamber rejected the Prosecutor’s request for authorisation of an investigation under Article 15(3) into the situation in Afghanistan.¹ On 7 June 2019, the Office of the Prosecutor requested leave to appeal the decision of the Pre-Trial Chamber,² and on 10 June 2019, the Legal Representatives of the Victims gave notice of their appeal.³ Queen’s University Belfast’s Human Rights Centre (HRC) requested leave to file observations in light of the Appeals Chamber’s call for ‘professors of criminal procedure and/or international law, including international human rights law’ to file observations on the distinct legal issues highlighted by the Appeals Chamber.⁴ The HRC with others was granted leave to submit written submissions by the Chamber on 24 October 2019.⁵ Our submission focuses on two areas: the interests of justice and the interests and role of victims in investigations.

INTERESTS OF JUSTICE

2. The observations in this section focus on the procedural content of the interests of justice as decided in the Pre-Trial Chamber (PTC) decision. The section address the specific issues of prosecutorial discretion based on resources, the special nature of the alleged crimes (historic/time lapse), preservation of evidence, and the interests of justice and peace processes in incentivising perpetrators and states.

Prosecutorial Discretion and the Interests of Justice

3. There are good reasons to protect prosecutorial independence of which their discretion is a key part, namely to preserve prosecutorial independence from external influence (for example, State influence), deference to special prosecutorial experience and expertise, the need for pragmatism in light of the broad crime-base, the limited resources of the ICC, and considerations of judicial economy. The “interests of justice” criterion is to ensure prosecutorial discretion to evaluate the prospects of whether or not to initiate an investigation or prosecution within its own exclusive expertise.⁶ Some recent PTC decisions have given a wide leeway for OTP decisions to investigate, as there is ‘no reason to

* This submission is written by Luke Moffett, Lauren Dempster, Nikhil Narayan, Daniela Suarez Vargas, Louise Mallinder
¹ ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, 12 April 2019, ICC-02/17-33.

² Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, ICC-02/17-34, 7 June 2019.

³ Victims’ Notice of Appeal of the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17-36, 10 June 2019.

⁴ Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019, para.21.

⁵ Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims, ICC-02/17-97, 24 October 2019.

⁶ Complementarity: Suggested Amendments to ILC Draft, United Kingdom, 26 March 1996, Arts. 26(4),27(1); Discussion paper: International Criminal Court, Complementarity, UK, 29 March 1996, paras.29-30.

disbelieve’⁷ or ‘disagree’,⁸ indicating a prima facie presumption the prosecutor is acting in good faith. The exercise of discretion by the OTP on decisions not to investigate or prosecute cannot be exercised by the PTC.⁹ The PTC’s authority with this respect only extends to review¹⁰ of the OTP decision once a decision *not* to proceed with an investigation or prosecution has been made.¹¹

4. The PTC’s power to review the issue only applies where the OTP invokes the interests of justice, and inviting, if it believes the criterion is not met, the OTP to open an investigation or at least revisit or elaborate further its negative determination, as it has in other situations.¹² By providing an express and specific process of review where the OTP invokes interests of justice to not pursue a matter, it follows by implication that, where the OTP has not presented evidence or arguments on the “interests of justice” issue and is seeking leave to appeal, the PTC’s *proprio motu* review authority does not extend to this issue where materials have not been presented before it in order to close or reject a request to proceed.¹³ That is, the PTC’s review authority here is to prevent the invocation of this exceptional criterion as a means to avoid investigation and prosecution – not as a means to prevent investigation and prosecution. The PTC’s role in this respect is to “confirm” or reject the OTP’s assessment of the interests of justice in a negative determination. Accordingly the PTC in assessing in the impugned decision acted *ultra vires*.

Prosecutorial Discretion and Resources

5. While prosecutorial discretion is a vital part in guaranteeing the impartiality and independence of the ICC Prosecutor from the judiciary during the investigation stage, there are limits to this discretion. First, the OTP cannot investigate all the situations in which crimes within the jurisdiction of the ICC have been committed due to limited resources. Naturally, the Prosecutor will prioritise situations based on their gravity and level of responsibility of the perpetrators.¹⁴ However, the OTP has emphasised that the operational feasibility of an investigation is not a separate factor under the Statute when determining whether to open an investigation, as weighing this factor could affect the consistent

⁷ *DRC*, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582 26-10-2010, p4.

⁸ ICC-01/19-27, para.119.

⁹ See, e.g., Gilbert Bitti, “The Interests of Justice-Where does that come from? Part II”, EJIL: Talk! 14 August 2019, available at <https://ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/>

¹⁰ See Rule 109(1) and Regulation 48(1).

¹¹ Situation in Darfur, Sudan, Decision on Application under Rule103, ICC-02/05, 4 February 2009, para.21.

¹² *Situation on the Registered Vessels of the Union of the Comoros*, ICC-01/13, 16 July 2015, paras.12-14.

¹³ Bitti (2019).

¹⁴ Paper on some policy issues before the Office of the Prosecutor, 2003, p.3; Policy Paper on Case Selection and Prioritisation, 2016, para. 49.

application of the Statute and might dissuade the Court's intervention.¹⁵ The European Court of Human Rights has held that while states have discretion on whether or not to investigate a case the 'bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden'.¹⁶ Second, the discretion to not open an investigation based on the "interest of justice" is also a limited power, given that investigations will be in the interest on justice, and therefore a decision not to proceed on these grounds would be exceptional.¹⁷ The lack of resources in domestic investigations may be a factor for admissibility before the ICC, but not as a reason to refuse to open an investigation at the Court.¹⁸

The Special Nature of International Crimes

6. The Rome Statute and the Rules of Procedure and Evidence do not have a specific length of time for the completion of an investigation by the Prosecutor. This was a deliberate decision by the Statute's drafters to ensure the Prosecutor's activity is adjusted to the specific features of each particular situation, which may include the availability of information, the nature of the crimes and the existence of national procedures in respect of alleged crimes.¹⁹ The special nature of international crimes by their mass perpetration and victimisation, along with the contextual factors that drive and maintain a culture of impunity afterwards provide a strong gravity for their prosecution despite the passage of time.²⁰ The ECtHR has been cognisant of the complexity of war and its impact on investigation timelines, wherein the scale of violence can cause prompt investigations to be impossible and choices have to be 'made in terms of post-war priorities and resources', making investigations over a decade later reasonably expeditious.²¹ Where new plausible or credible evidence emerges there is an obligation to take further investigative measures, even decades after the violation.²² Nonetheless the Court has found that 'there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of

¹⁵ Policy Paper on Preliminary Examinations, 2013, para.70.

¹⁶ *Osman v. the United Kingdom*, judgment of 28 October 1998, para.116; and *Brecknell v the United Kingdom*, (Application no. 32457/04), 27 November 2007, paras.69-70.

¹⁷ Policy Paper on the Interests of Justice, 2007, p.3; Policy Paper on Preliminary Examinations, 2013, para.71.

¹⁸ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red, para.210; Policy Paper on Preliminary Examinations, 2013, para.57.

¹⁹ Policy Paper on Preliminary Examinations, 2013, para.89-90; *CAR*, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-7, 15 December 2006, paras.9-10.

²⁰ See Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge (2014), p10-12.

²¹ *Palić v. Bosnia and Herzegovina*, App. no. 4704/04, 15 February 2011, para.70.

²² *Brecknell v UK*, para.71.

perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.’²³

7. There is some state practice that supports such an approach. New Zealand's and Northern Ireland's regulations on prosecutorial activities have recognised that even though delays between the commission of a crime, the start of its prosecution and the commencement of trial proceedings may give rise to a violation of a fair trial and weigh against prosecution, this circumstance should not be considered as an immediate bar to a criminal investigation. However, in both jurisdictions the seriousness and complexity of the crime, along with the role of the suspect in the delay, are strong presumptions that under the public interest test the offence requires prosecution.²⁴ In Northern Ireland a two-pronged test of whether the evidence that could be brought before the court would offer a reasonable prospect of conviction, and whether it would be in the “public interest” to do so, with public interest factors including the interests of victims (including detrimental effects) and the age and ill-health of defendants.²⁵ While the ‘public interest’ may have to be balanced by other pragmatic or political considerations, politics cannot directly dictate decisions not to proceed with an investigation or prosecution on political grounds would undermine public confidence in the administration of justice.²⁶

8. In the case of *Commonwealth v. Bruno*, the Supreme Court of Pennsylvania has also considered that the right of a speedy trial on criminal matters is not absolute and automatic, on the contrary, it is necessarily relative and it will depend on the specific circumstances. Therefore, if a delay is justifiable under the circumstances of the case, the right of public justice is not precluded.²⁷ Finally, in the decision *Rodrigues v. National Director of Public Prosecutions of South Africa and Others*, the court determined the societal need to ensure accountability for serious crimes, such as apartheid or crimes against humanity, was a main factor that weighed against the preclusion of the prosecution due to a delay.²⁸ We appreciate that these examples are individual cases in settled democracies, but the principle remains that the historic nature of crimes is often outweighed by their seriousness and complexity of the

²³ *Brecknell*, paras.69-70.

²⁴ New Zealand, Solicitor-General's Prosecution Guidelines, par. 5.9.4; and NI Code for Prosecutors, para.4.14; Report Investigations, Prosecutions, and the ‘Public Interest’, 2015, p.13.

²⁵ See Gordon Anthony, Luke Moffett, Kieran McEvoy & Louise Mallinder, “Investigations, Prosecutions, and the ‘Public Interest’”, March 2015, available at <https://www.dealingwiththepastni.com/project-reports>, citing PPSNI, Code for Prosecutors: Revised 2008 (PPSNI, 2008), para. 4.1.2.

²⁶ See Gordon Anthony and Luke Moffett, Northern Ireland Law, Politics, and the ‘Problem of the Past’, *European Public Law* 20(3) (2014), 395–406, p404.

²⁷ Supreme Court of Pennsylvania, 435 Pa. 200 (Pa. 1969), June 27, 1969, para.211.

²⁸ High Court of South Africa, (76755/2018), June 3, 2019, paras.35, 36, 39.

context, provided there is sufficient evidence and procedural protections for defendants. For international crimes their special nature, gravitates towards a positive decision to investigate and prosecute such crimes due to their impunity and scale of harm to victims.

Preservation of Evidence

9. The OTP has interpreted the ‘effectiveness’ of an investigation to be correlated with timeliness in the interests of obtaining digital, physical and forensic evidence, and witness and victim testimonies while they are fresh, of ‘high quality’, and can be adequately secured and preserved.²⁹ Both the Inter-American and European Courts of Human Rights have reaffirmed that effective investigations must be initiated as soon as practicable once facts of alleged crimes come to light, in particular for serious violations of human rights amounting to international crimes.³⁰ The European Court has held that as part of an effective investigation authorities must take the ‘reasonable steps available to them to secure the evidence concerning the incident...where appropriate.’³¹ However, the Court has also acknowledged in the aftermath of mass violence, the passage of time can reduce the immediacy of the investigation, changing the nature of the procedural obligation to obtain and preserve evidence, but not the obligation to ensure an effective investigation.³²

10. The historical nature of international crimes in Afghanistan raises several difficulties for investigations, notably in the ability to gather and preserve evidence, including availability of witnesses. These challenges only grow more debilitating with time. In Northern Ireland the conflict left most of the murders unsolved and historic investigations of over 2,000 of them have been hampered by the passage of time, fading memories, destruction of evidence and the bombings of forensic labs and police stations where evidence was held.³³ However, this has not changed the obligation to investigate, it only limits the field of those cases that can be brought forward to trial with sufficient evidence. The European Court has held that as part of an effective investigation authorities must take the ‘reasonable steps available to them to secure the evidence concerning the incident...where appropriate.’³⁴ The passage of time and the OTP duty to investigate should be construed generously by a PTC

²⁹ OTP Strategic Plan, 2016-2018, 6 July 2015, sec. 24.

³⁰ *Vargas-Areco v. Paraguay*, Judgment 26 Sep 2006, sec. 77; *Pueblo Bello Massacre v Colombia*, Judgment 31 Jan 2006, para.143; ECtHR, *CAS and CS v Romania*, Application No 26692/05, Judgment 20 Mar 2012, para.74; *Alpar v. Turkey*, Application No 22643/07, Judgment 26 Jan 2016, para.46.

³¹ *Al-Skeini and Others v. the United Kingdom*, App. no. 55721/07, 7 July 2011, para.166.

³² *Nikolić v. Croatia*, (Application no. 5096/12), 1 June 2015, para.42; and *Treskavica v. Croatia* (Application no. 32036/13), 12 April 2016, para.62.

³³ Sir Hugh Orde, former Chief Constable of the Police Service of Northern Ireland, Longford Lecture, 2 December 2009, available at: www.longfordtrust.org/longford-lecture/past-lectures/lectures-archive/sir-hugh-orde-war-is-easy-peace-is-the-difficult-prize/ accessed 9 November 2019.

³⁴ *Al-Skeini and Others v. the United Kingdom*, App. no. 55721/07, 7 July 2011, para.166 [emphasis added].

and to request status information from the OTP so as to ensure their procedural fairness, rather than the PTC replacing the OTP's decision making without an opportunity to respond to evidence collection within a 'reasonable time'. In the face of a reluctant state unwilling to cooperate in providing evidence to the Court, this in of itself should be an issue of non-cooperation, not a factor of the 'interests of justice'.³⁵

Interests of Justice and Peace Processes

11. An expansive reading of the interests of justice provision may allow for considerations of alternative forms of justice or other non-strictly criminal justice or legal considerations, such as amnesties or other transitional justice mechanisms, that incentivise perpetrator cooperation in the interests of promoting – or not disrupting – a peace process.³⁶ The OTP states decisions not to investigate or prosecute on the basis of the 'interests of justice' would only be taken in 'exceptional circumstances' and can include considerations of 'crime prevention and security'. However, the interests of justice 'should not be conceived of so broadly as to embrace all issues related to peace and security'.³⁷

12. Similar arguments have been made with respect to amnesties, reduced sentences and pardons with regards to peace and stability. Limited or conditional amnesties remain useful in practice as a means to encourage cessation of violence, peace negotiations and achieving other goals for victims such as truth and reparation.³⁸ The OTP has recognised the value in reduced conditional sentences in achieving broader goals, such as alternative sanctions in Colombia.³⁹ There is an emerging body of scholarly evidence to indicate that amnesties may contribute to reducing violence and facilitating peace processes, through encouraging the participation of combatants in ceasefires, negotiations, disarmament and demobilisation processes, and alternative accountability processes.⁴⁰ Such efforts are an attempt to secure some accountability and acknowledgement of responsibility from those responsible, rather than their resistance and non-cooperation. The OTP has discretionary authority to weigh such considerations, and complement and defer to such local processes only where they are in fact

³⁵ *Situation in the Republic of Kenya*, Decision on the 'Victims' request for review of Prosecution's decision to cease active investigation', ICC-01/09-159, Pre-Trial Chamber II, 5 November 2015, paras.22, 25, 27.

³⁶ Talita De Souza Dias, 'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court, (2017) 30 *Leiden Journal of International Law* 731, 732.

³⁷ ICC-OTP, Policy Paper on the Interests of Justice, September 2007, p8.

³⁸ See Louise Mallinder, Amnesties and Inclusive Political Settlements, Political Settlements Research Programme, (2018) available at www.politicalsettlements.org/wp-content/uploads/2018/12/2018_Mallinder_Amnesties-Report.pdf

³⁹ James Stewart, "The Role of the ICC in the Transitional Justice Process in Colombia", May 2018, para.146-147. Available at <https://www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf>

⁴⁰ See Louise Mallinder, Can Amnesties and International Justice be Reconciled, *International Journal of Transitional Justice*? 1 (2007) 208, p218-19. See Belfast Guidelines on Amnesty and Accountability, TJI 2013.

functioning and doing so in good faith through a credible process that promotes peace, acknowledgement of responsibility, truth recovery, and reparations to victims.

13. In a more normatively neutral sense, the OTP's function is to weigh *all* potential factors (including the strictly legal/procedural, such as the gravity and interests of victims set forth by the Statute, as well as those arguably non-legal, such as political, peace and security, state cooperation) – and to determine negatively where the balance of these factors weighs against proceeding – that is, to rebut the presumption to proceed.⁴¹ The Statute itself seems to allude to this in the language of Article 53(2)(c) that a prosecution is not in the interests of justice when ‘taking into account *all the circumstances*’ (emphasis added), including gravity, interests of victims, age of alleged perpetrators and their role in the alleged crimes.

THE INTERESTS AND ROLE OF VICTIMS IN INVESTIGATIONS

14. The interests of victims are a key consideration in the formulation of the interests of justice.⁴² However, the construction of the interests of justice in Article 53 on the initiation of an investigation or decision not to commence a prosecution would suggest it outweighs the interests of victims and the gravity of the crime.⁴³ As such the gravity of the crime and the interests of the victims are only factors in the calculation of the interests of justice.⁴⁴ That said the interests of victims could add a transparency function to opaque prosecutorial discretion or political interference.⁴⁵ Submissions from victims through the Registry have provided a complementary and broader picture of crimes provided by the Prosecutor, including victims' views on the interests of justice.⁴⁶

15. Victims have a very circumscribed role in investigations at the ICC.⁴⁷ While early decisions of the pre-trial chambers recognised the place of victims in investigations,⁴⁸ the Appeals Chamber later overturned these, distinguishing the investigation stage as not ‘judicial proceedings’ that victims can participate in.⁴⁹ Though more recently PTC-I has

⁴¹ Dias (2017) p737-39.

⁴² Article 53(1)(c) and (2)(c). See ICC-OTP (2007) *Policy Paper on the Interests of Justice*, p. 5; Dias (2017), p736; and Luke Moffett and Rachel Killean, HRC Response to the Office of the Prosecutor's Draft Policy Paper on Case Selection and Prioritisation. QUB Human Rights Centre (2016).

⁴³ Drazan Dukic, Transitional Justice and the International Criminal Court – in “the interests of justice”? *International Review of the Red Cross*, 89 (897) (2007), 691-718, p. 697.

⁴⁴ Dias (2017) p737.

⁴⁵ Dukic (2007) p717.

⁴⁶ ICC-01/19-27, 14 November 2019, paras.19, 38-39.

⁴⁷ Under the Statute only on the grounds of Articles 15(3) and 19(3) can they submit representations or observations.

⁴⁸ *DRC*, Decision on the Applications for Participation in the Proceedings, ICC-01/04-101, 17 January 2006; *Uganda*, Decision on Victims' Applications for Participation, ICC-02/04-101, 10 August 2007, and *Darfur*, Decision on the Applications for Participation in the Proceedings, ICC-02/05-111-Corr, 14 December 2007.

⁴⁹ *DRC*, Judgment on victim participation in the investigation stage, ICC-01/04-556, 19 December 2008, para.45; and *Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, 3 November 2010, para.9.

recognised that allowing victims to participate in the investigation is at the Chamber's discretion in light of Article 68(3) and Rule 93.⁵⁰ Moreover PTC-I held that victims have a 'right to provide information to, receive information from and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage.'⁵¹ Despite the Appeals Chamber decision to exclude victim participation from investigations, it provides an exception to allow victims to participate in judicial proceedings 'affecting investigations', such as the appeal in this current impugned decision.⁵²

16. In order for the Court to understand the interests of victims they should be able to participate in judicial proceedings during the investigation, but to also provide information of relevance to the PTC attention. Regional human rights courts have recognised that victim participation in the investigation helps to ensure public transparency and effectiveness in finding the truth and identifying those responsible, given that victims are both key witnesses and stakeholders.⁵³ In addition, victims are entitled to have access to the investigation and case file, including witness statements, and to present their interests, as well as to have 'full access and the capacity to take part in all the stages of the investigation'.⁵⁴ It does not mean that every request by a victim has to be satisfied. For instance sensitive information does not have to be disclosed to victims during the investigation, rather the information should be sufficient for them to effectively participate in proceedings that affect their interests.⁵⁵

17. Victims do not speak with one voice. In countries with protracted conflicts, such as in Afghanistan, ascertaining who the victims and their legitimate representatives are can be fraught with competing claims and opinions. Certain victim groups may be politically co-opted to push the agenda of those responsible for violence by shifting the blame on others. Allowing such parties, whether victims or not, to exert undue pressure and influence or to frame the OTP's selection of cases and charges would clearly undermine the independence and impartiality of the Office. Instead we suggest dealing with such interests through victims'

⁵⁰ This is within the competence of Article 19(3). Bangladesh/Myanmar, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018, para.21.

⁵¹ *Palestine*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, 13 July 2018, para.10.

⁵² ICC-01/04-556, para.56.

⁵³ *Kaya v Turkey*, Application no. 22492/93, (ECtHR, 28 March 2000), paras.121–126; *McKerr v United Kingdom*, Application no. 28883/95, (ECtHR, 4 May 2001), para.115; *Mapiripán Massacre v Colombia*, Judgment on Merits, Reparations, and Costs, (IACtHR, 15 September 2005), para.116 and 119; *Al-Skeini v United Kingdom*, para.167.

⁵⁴ *Oğur v Turkey*, App No. 21594/93 (ECtHR, 20 May 1999), para.92; *Güleç, v Turkey*, App No. 21593/93 (ECtHR, 27 July 1998), para 82; and *McKerr v the United Kingdom*, App No. 28883/95 (ECtHR, 4 May 2001), para.148; *Gomes-Lund et al. (Guerrilha do Araguaia) v Brazil*, Judgment on Merits, Reparations and Costs, Series C No 219, (IACtHR, 24 November 2010), para.257.

⁵⁵ *Ramsahai and Others v The Netherlands*, Application no. 52391/99, (ECtHR, 15 May 2007), para.347-349. See Luke Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court, *Criminal Law Forum*, 26(2) (2015) 255-289, p273.

legal representatives, civil society actors or the OPCV to submit amici to the pre-trial chambers, as the best way to facilitate their participation in the investigation. In addition, care needs to be taken to ensure a representative sample of victims are able to participate in the investigation, not just urban, educated males who have better access to civil society or the internet to present their views or certain ethnic groups, which may require engagement for victims through the Registry, which already occurs under Article 15 investigations.⁵⁶

A right for victims to appeal

18. The right for victims of serious crimes to appeal is an important function of the administration of justice and accountability of such processes in themselves.⁵⁷ The ECCC permits civil parties to appeal in specific circumstances including refusing requests for investigative action.⁵⁸ The ICC only allows victims to have a right of appeal for reparation decisions,⁵⁹ with other decisions at the chamber's discretion. The Chamber has an obligation to notify victims of a decision not to investigate or prosecute, but there is no explicit procedure for them to review such a decision.⁶⁰

19. We are not suggesting that victims have a stand-alone right to appeal, but the commencement of proceedings provide a unique period on the commencement and progress to a case that may be worthwhile to incorporate a right to request a review where a decision has been made to not prosecute or to commence an investigation, such as Article 53(3)(b). A right to review a decision to not commence an investigation or prosecute a suspect where there is sufficient evidence can ensure greater transparency in prosecutorial decision-making by allowing them to be impartially examined by an independent party.⁶¹ The English Court of Appeal has held that the failure to allow victims to review a decision not to prosecute is 'disproportionate', where there are not court proceedings given the gravity of the consequences, as 'a decision not to prosecute is in reality a final decision for a victim'.⁶² This does not mean that victims have an unlimited right to appeal or review, but decisions not to investigate or prosecute should be done in consultation with victims to allow them to make an 'informed decision',⁶³ provided with reasons (and apology where appropriate),⁶⁴

⁵⁶ 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, para.211; and *Bangladesh/Myanmar*, Public redacted version of "Registry's Request for Extension of Notice Period and Submissions on the Article 15(3) Process", 26 June 2019, ICC-01/19-3, para.21.

⁵⁷ Rule 55(10), ECCC Internal Rules; STL Rule 87(D), limited to the appeals stage.

⁵⁸ Rule 74(10), ECCC Internal Rules.

⁵⁹ Article 82(4), Rome Statute.

⁶⁰ Rule 92(2), RPE.

⁶¹ Article 11, EU Directive 2012/29/EU Establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012.

⁶² *R v Killick* [2011] EWCA Crim 1609, para.48.

⁶³ *R v Quillan and others* [2015] EWCA Crim 538 para.34. See also Article 6(1)(a), EU Directive 2012/29/EU.

conducted in a ‘careful and thorough’ way,⁶⁵ and that such reviews should be prompt in particular for historic prosecutions.⁶⁶

20. There are key junctures that for the purposes of transparency and confidence in the procedure and decision making of the Court merit an opportunity for victims to appeal a decision outside of reparations proceedings. Decisions not to commence an investigation being made by the Chambers should allow victims’ standing to request a review in order to ensure an inclusive decision-making process that will impact those most affected by international crimes. The victims who would have standing to request the PTC to conduct a review must be able to demonstrate a *prima facie* personal interest in the crimes within the preliminary examination or situation, are brought in good faith and not vexatious claims. This may ultimately limit it to a singular opportunity for victims, whether represented by civil society organisations, lawyers or the OPCV appropriate to their context and capacity, provided there has been sufficient time to respond to such a call by the pre-trial chamber.

CONCLUSION

21. The International Criminal Court sits in a unique position to adjudicate on international crimes around the world, but its reach should not exceed its grasp. This decision offers the Appeals Chamber to clarify the interests of justice, the interests of victims therein, their scope for appeals and importantly the scope of powers between the OTP and pre-trial chambers in the commencement of investigations. We intimately appreciate the difficulties of carrying out investigations in ongoing protracted conflicts for historic crimes and limited resources, but these issues in themselves should not inhibit the Court trying to strive and seek justice, and importantly not to yield in the face of impunity.



Signed by Luke Moffett,
Director of the Queen’s University Belfast Human Rights Centre

15 November 2019.

Belfast.

⁶⁴ *R (AC) v DPP* [2018] EWCA Civ 2092, para.43.

⁶⁵ *R(L) v DPP* [2013] EWHC 1752, para.10.

⁶⁶ See *Re Marie Louise Thompson* [2004] NIQB 62; *Re Julie Doherty* [2004] NIQB 78; and *Re McCabe* [2010] NIQB 58.