

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/17**
Date: **29 November 2019**

THE APPEALS CHAMBER

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Victims' Response to the Observations of the OPCD

Source: **Legal Representatives of Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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I. INTRODUCTION

1. The legal representatives of 82 Afghan victims ('Victims') and two organisations submit this response to the observations made by the Office of Public Counsel for the Defence ('OPCD')¹ in accordance with the Appeals Chamber's 'Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims' ('Decision on Participation').² The OPCD filed observations in the capacity as *amicus curiae*, pursuant to Rule 103 of the Rules of Procedure and Evidence ('Rules').³

2. The OPCD takes the position that Pre-Trial Chamber II correctly considered a) the time elapsed between the alleged crimes and the Prosecutor's request for authorisation; b) the scarcity of cooperation; and c) the likelihood that relevant evidence and potential suspects might still be available and within reach, in its decision refusing authorization to investigate in the situation in Afghanistan.⁴ The OPCD argues that these factors 'go to the heart of the interests of justice; namely whether the circumstances would allow a defendant to receive a fair trial.'⁵

3. The Victims submit that fair trial rights are not engaged at the authorisation stage, that the Pre-Trial Chamber did not adequately take into account the gravity of the crimes and the interests of victims as provided for in Article 53(1)(c) of the Rome Statute ('Statute'). And, in any event, that the OPCD observations are based on the false premise that the Pre-Trial Chamber may carry out an interests of justice assessment when the Prosecutor has decided to initiate an investigation.

¹ OPCD, 'Observations of the OPCD on the Appeals Against ICC-02/17-33' ('OPCD observations'), ICC-02/17, 15 November 2019.

² Appeals Chamber, 'Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims', ICC-02/17 OA OA2 OA3 OA4, 24 October 2019.

³ Decision on Participation, para. 50.

⁴ Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' ('Impugned Decision'), ICC-02/17, 12 April 2019.

⁵ OPCD observations, para. 22.

II. SUBMISSIONS

4. Fair trial rights are not triggered at the preliminary examination stage, nor at the authorization of investigation stage. The Appeals Chamber confirmed in its Decision on Participation that ‘the issues arising in these appeals concern the very preliminary question as to whether an investigation should be authorised under article 15 of the Statute and what factors should be taken into account for this decision’ and that ‘such proceedings are conducted on an *ex parte* basis, without the participation of suspects.’⁶ Logically, in the absence of suspects or accused, fair trial rights are not engaged at the pre-authorisation stage.

5. This is supported by the scope of the application of fair trial rights in the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights, the European Convention on Human Rights, and the Inter-American Convention on Human Rights. All these human rights instruments provide that fair trial rights are generally triggered at the time that criminal charges are made.⁷ The *Panovits v. Cyprus* case referred to by the OPCD confirms that fair trial rights are not considered in the abstract but that they are activated when an individual is suspected or accused of an offence.⁸

6. In any event, the Prosecutor has an exclusive right to decide whether to open an investigation under Article 15 of the Statute.⁹ The factors discussed by the OPCD – passage of time; feasibility of investigations; cooperation by States – are factors which fall within the discretion of the Prosecutor to assess, at the appropriate time during the investigation, when it is in full possession of all relevant facts. They are not factors that may be validly used by the Pre-

⁶ Decision on Participation, para. 48.

⁷ Article 14(2) of the [International Covenant on Civil and Political Rights](#) provides that ‘Everyone *charged with a criminal offence* shall have the right to be presumed innocent until proven guilty according to law’ [emphasis added] while Article 14(3) of the same instrument adds that ‘In the determination of *any criminal charge* against him, everyone shall be entitled to [...] minimum guarantees’ [emphasis added]. Similarly, Article 10 of the [Universal Declaration of Human Rights](#) states that ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of *any criminal charge* against him’ [emphasis added]. And Article 6 of the [European Convention on Human Rights](#) also provides that ‘in the determination of his civil rights and obligations or of *any criminal charge* against him’ [emphasis added]. Similarly, Article 8 of the [American Convention on Human Rights](#) states that ‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any *accusation of a criminal nature* made against him[...]’.

⁸ European Court of Human Rights (‘ECtHR’), [Case of Panovits v. Cyprus](#), 11 December 2008; *see also* [Case of Engel and Others v. Netherlands](#), 8 June 1976; ECtHR, [Case of Blokhin v. Russia](#), 23 March 2016.

⁹ Victims, ‘Corrigendum of Updated Victims’ Appeal Brief’ (‘Victims Appeal Brief’), ICC-02/17 OA OA2 OA3 OA4, 2 October 2019, para. 84.

Trial Chamber to deny authorization of an investigation requested by the Prosecutor. As the Victims have submitted before the Appeals Chamber, the Pre-Trial Chamber acted *ultra vires* when it carried out an interests of justice assessment after the Prosecutor had decided to open an investigation.¹⁰

7. The OPCD's arguments concerning the practice in Germany and the United Kingdom support the view that it is for the Prosecutor, and not the Pre-Trial Chamber, to decide whether the interests of justice weigh against the opening of any investigation.

8. The OPCD argues that Germany and the United Kingdom 'have equivalent preliminary examination phases for their proceedings on international crimes.'¹¹ In both countries, it is for the prosecutor or the police to decide whether to investigate, not for a court. As the OPCD acknowledges, in Germany it is the "Federal Prosecutor General", and not a court, that has the discretion to decide to proceed with an investigation.¹² In the United Kingdom, as the OPCD acknowledges, it is the police, and again not a court, that has to make an informed decision whether to conduct an investigation.¹³

9. The OPCD also submits that Pre-Trial Chamber II did not fail to take into account the 'relevant factors of gravity and victims.'¹⁴ The Pre-Trial Chamber, however, failed to give adequate weight to these factors. It merely *noted* that it must determine, taking into account the gravity of the crime and the interests of victims, if there are nonetheless reasons to believe that an investigation would not be in the interests of justice.¹⁵ Pre-Trial Chamber II mentioned the 'interests of victims' once in the Impugned Decision and gave no indication that it had properly appreciated the fact that the vast majority of victims want an investigation to be opened. The Pre-Trial Chamber failed to give adequate weight to their interests, and to the gravity of the crimes committed against them.

10. The OPCD argues that there is 'credible academic support for the Pre-Trial Chamber's decision to give greater weight to the lack of cooperation above other relevant factors in favour of an investigation.'¹⁶ However, there is no basis in law to support such an assertion. Article 53(1)(c)

¹⁰ Victims Appeal Brief, paras. 106-116.

¹¹ OPCD observations paras. 33-35.

¹² OPCD observations, para. 34.

¹³ OPCD observations, para. 35.

¹⁴ OPCD observations paras. 67-68.

¹⁵ Impugned Decision para. 87.

¹⁶ OPCD observation, para. 68.

of the Statute makes it unequivocally clear that reasons not to initiate an investigation must be *substantial*. And while Article 53(1)(c) refers to the gravity of crimes and the interests of victims, there is no mention of non-cooperation as a factor to be considered as part of an interests of justice assessment.¹⁷

11. The Pre-Trial Chamber's failure to appreciate that cooperation obligations are only triggered on commencement of investigation, its assumption that relevant States Parties will fail to fulfil their cooperation obligations after the investigation has commenced, and its failure to address the process for remedying state non-cooperation set out in Article 87(7) of the Statute, render its analysis of state cooperation speculative, defeatist and erroneous.

Respectfully submitted,



Fergal Gaynor



Nada Kiswanson van Hooydonk

Dated this 29th day of November 2019

In The Hague, and Vence, France

¹⁷ Victims Appeal Brief, para. 115, and paras. 117-132.