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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

**Amicus Curiae Observations on behalf of Former International Chief Prosecutors
David M. Crane, Benjamin B. Ferencz, Richard J. Goldstone, Carla del Ponte and
Stephen J. Rapp**

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I. INTRODUCTION

1. This *amicus curiae* brief on behalf of Professor David M. Crane, Mr. Benjamin B. Ferencz, Mr. Richard J. Goldstone, Ms. Carla del Ponte and Mr. Stephen J. Rapp is filed pursuant to Rule 103 of the Rules of Procedure and Evidence and the ‘Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims’ issued by the Appeals Chamber on 24 October 2019.¹

2. The amici are former chief prosecutors of ad hoc international criminal tribunals who do not currently serve in any position at a court or investigative body in any State or multilateral organisation.² Their combined experience includes the Subsequent Proceedings at Nuremberg,³ the International Criminal Tribunal for the former Yugoslavia (ICTY),⁴ the International Criminal Tribunal for Rwanda (ICTR)⁵ and the Special Court for Sierra Leone (SCSL).⁶ Through their work in initiating, managing and overseeing complex criminal investigations in a range of country situations, and addressing alleged criminal conduct occurring at different historical junctures, the amici have helped to shape and develop international principles governing prosecutorial independence and the exercise of prosecutorial discretion.

3. The amici have familiarised themselves with the appeal briefs and responses in the present appeals against the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of

¹ Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims, ICC-02/17-97 OA OA2 OA3 OA4, 24 October 2019.

² Their biographies are attached as Annex A to the ‘Application on behalf of former International Chief Prosecutors to File Observations as Amicus Curiae in Appeal against Decision on the Authorisation of an Investigation’, ICC-02/17-89, 15 October 2019.

³ Benjamin Ferencz was Chief Prosecutor for the United States in The Einsatzgruppen Case (1947-1948).

⁴ Richard Goldstone from South Africa was the first ICTY Chief Prosecutor from 1994 to 1996. Carla del Ponte from Switzerland served as ICTY Chief Prosecutor from 1999 to 2007.

⁵ Richard Goldstone served as ICTR Chief Prosecutor in combination with his position at the ICTY, as did Carla del Ponte until the two roles were separated in 2003. Stephen Rapp from the United States was Chief of Prosecutions at the ICTR from 2005 to 2007.

⁶ David Crane from the United States was the first SCSL Chief Prosecutor from 2002 to 2005. Stephen Rapp served as SCSL Chief Prosecutor from 2007 to 2009.

Afghanistan’ issued by Pre-Trial Chamber II on 12 April 2019 (‘Impugned Decision’).⁷ Their observations focus on the issue of prosecutorial independence as it pertains to ‘the merits of the appeals’.⁸

II. THE INSTITUTIONAL AND FUNCTIONAL INDEPENDENCE OF THE PROSECUTOR

4. The amici submit that the appeals raise the issue of the proper calibration of the distinct prosecutorial and adjudicatory functions of the Office of the Prosecutor (OTP) and the Pre-Trial Chamber (Chamber) respectively. The experience of the ad hoc tribunals demonstrates that the greater the degree of political controversy, which is a common feature of investigations into genocide, crimes against humanity and war crimes potentially involving military and political leaders, the greater the need for independence of international prosecutors.⁹ In meeting the challenges of perceived judicial encroachment on prosecutorial independence at the ad hoc tribunals through, for example, completion strategies and mechanisms to expedite proceedings,¹⁰ the amici ‘realised the importance of a chief prosecutor having complete independence’.¹¹

5. The institutional independence of the OTP is governed and protected by the legal instruments that provide the constitutional framework for the International Criminal Court (ICC). According to Article 42 of the Rome Statute: ‘The Office of the

⁷ 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-02/17-33, 12 April 2019; Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019; Corrigendum of Updated Victims’ Appeal Brief, ICC-02/17-73-Corr, 2 October 2019; Corrigendum of Victims’ Joint Appeal Brief against 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” of 30 September 2019, ICC-02/17-75, ICC-02/17-75-Corr, 1 October 2019; Consolidated Prosecution Response to the Appeals Briefs of the Victims, ICC-02/17-92, 22 October 2019; Victims’ Joint Response and Request for Reply, ICC-02/17-94, 22 October 2019.

⁸ Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, ICC-02/17-72-Corr, 27 September 2019, para. 3.

⁹ See R. J. Goldstone, *For Humanity, Reflections of a War Crimes Investigator*, Yale University Press, 2000, p. 132.

¹⁰ See e.g. R. J. Goldstone, ‘A View from the Prosecution’, (2004) 2(2) *Journal of International Criminal Justice* 380, p. 381: ‘In the early days of the ICTY, the judges insisted on receiving regular reports from the Prosecutor on the policy with regard to and the progress of the investigations. This created tension and, at times, I became concerned that the independence guaranteed to me by the Security Council was being impugned.’

¹¹ R. J. Goldstone, ‘The International Criminal Tribunal for the former Yugoslavia and Rwanda’, in D. M. Crane, L. N. Sadat and M. P. Scharf (eds), *The Founders*, Cambridge University Press, 2018, p. 55.

Prosecutor shall act independently as a separate organ of the Court. [...] A member of the Office shall not seek or act on instructions from any external source.¹² Thus, as a *separate* organ of the court, the OTP is institutionally independent from other organs of the ICC and its members shall act independently of third parties, including governments.¹³ Article 42 mirrors provisions in the Statutes of the ICTY, ICTR and SCSL.¹⁴ An SCSL Trial Chamber described ‘autonomy and independence’ in the exercise of prosecutorial authority before international criminal tribunals as an ‘internationally accepted norm’.¹⁵ International criminal law and practice reveal a ‘developing principle of independence – prosecutors should not take instruction from outside sources with regard to particular cases’.¹⁶ One of the lessons to be learned from the ad hoc tribunals is ‘the complete and effective independence of the prosecutor’.¹⁷

6. Article 13(c) of the Rome Statute provides that the ICC may exercise its jurisdiction over a crime listed in Article 5 if: ‘The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.’ The ICC Prosecutor’s *proprio motu* power to select a situation to investigate was an actively debated issue during the negotiation of the Rome Statute.¹⁸ Acceptance of this

¹² The ICC’s Code of Conduct for the Office of the Prosecutor provides a detailed elaboration of Article 42 of the Rome Statute under the heading ‘Independence’, including a reminder to ‘remain unaffected by any individual or sectional interests and, in particular, by any pressure from any State, or any international, intergovernmental or non-governmental organisation or the media.’ Code of Conduct for the Office of the Prosecutor, 5 September 2013, Chapter 2, Section 2, para. 23(b).

¹³ See also ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 26: ‘Independence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation.’

¹⁴ ICTY Statute, Article 16(2); ICTR Statute, Article 15(2); SCSL Statute, Article 15.

¹⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay-Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, para. 22.

¹⁶ M. M. deGuzman and W. A. Schabas, ‘Initiation of Investigations and Selection of Cases’, in G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappala (eds), *International Criminal Procedure, Principles and Rules*, Oxford University Press, 2013, p. 133.

¹⁷ Goldstone, *For Humanity* (n. 9 above), p. 131.

¹⁸ Impugned Decision, para. 32. See also W. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 5th ed, 2017, p. 158: ‘The case for independent prosecutorial powers was immensely strengthened by the extremely positive model of responsible officials presented by Richard Goldstone and Louise Arbour, the prosecutors of the ad hoc tribunals who held office while the Rome Statute was being drafted.’

possibility in the carefully negotiated and adopted treaty was the ultimate form of recognition of the OTP as an independent organ of the ICC.

7. The OTP has functional independence in the sense of ‘freedom in decision making’¹⁹ to carry out its mandate, including by exercising prosecutorial discretion. In contrast to some domestic systems, ‘[p]rosecutorial discretion is [...] a necessary feature of the international criminal law system’.²⁰ Prosecutorial discretion is not unlimited,²¹ and its boundaries depend on the legal framework in which it is exercised. The exercise of prosecutorial discretion at the investigative stage ‘is subject to the principle of equality before the law and to [the] requirement of non-discrimination.’²² Equality and non-discrimination have been extrapolated from the ad hoc tribunal jurisprudence as important principles limiting discretion in selection decisions.²³

8. The amici submit that by making a positive determination of the interests of justice contrary to the ordinary meaning of the statutory provisions, and by substituting its own discretion for that of the OTP in its assessment, the Chamber encroached unreasonably on prosecutorial discretion and negatively affected the OTP’s ability to fulfil its mandate. In particular, the OTP is accountable to victims,²⁴ and 680 out of 699 victim applicants ‘welcomed the prospect of an investigation’.²⁵ The Chamber also failed to recognise that in a situation as complex as the one before it, ‘prosecutorial independence turns into something more than a simple attribute of the office; it becomes an essential component of the capacity of the whole judicial

¹⁹ *Nahimana, Barayagwiza and Ngeze v. The Prosecutor*, ICTR-99-52-A, Judgment (Appeals Chamber), 28 November 2007, para. 19.

²⁰ deGuzman and Schabas, (n. 16 above), p. 165.

²¹ C. del Ponte, ‘Investigation and Prosecution of Large-scale Crimes at the International Level, The Experience of the ICTY’, (2006) 4 *Journal of International Criminal Justice*, 539, p. 542; Goldstone, *For Humanity* (n. 9 above), p. 132, noting that upholding the independence of prosecutors does not mean that they should not be held fully accountable for their actions, including through judicial review of the exercise of their discretion as provided within the relevant statutory framework.

²² *Prosecutor v. Mucić et al.* (Čelebići case), IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 605.

²³ deGuzman and Schabas, (n. 16 above), pp. 155-156 and 167.

²⁴ See e.g. Rome Statute, Article 54(1)(b).

²⁵ Impugned Decision, para. 87.

institution to fulfil its mandate'.²⁶ Instead, the Chamber presented its own view of the feasibility of an investigation in such a way as to undermine not only the OTP's ability to fulfil its mandate but also the entire project of international criminal justice.²⁷

III. THE CHAMBER'S POSITIVE DETERMINATION OF THE INTERESTS OF JUSTICE

9. The amici recognise that the Rome Statute creates a novel institutional and procedural framework and that the operational structure of the ICC differs from that of the ad hoc tribunals. At the ad hoc tribunals, the selection of a situation to be investigated is made at the political level by the United Nations (UN) and/or by an agreement with the affected State. At those tribunals the prosecutor has a broad 'discretion in relation to the initiation of investigations and in the preparation of indictments', having regard to the finite resources available to any prosecutor's office, whether domestic or international.²⁸ In accordance with Article 13 of the Rome Statute, the ICC's jurisdiction is triggered by a State party or UN Security Council referral, or by the Prosecutor acting *proprio motu*. In all these instances the Prosecutor retains the discretion to determine if there is a reasonable basis to proceed with an investigation, while in the latter instance authorisation to proceed must be sought from the Pre-Trial Chamber.²⁹

10. In the Impugned Decision, the Chamber explained that the statutory review mechanism when the Prosecutor acts *proprio motu* is designed 'to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundamentals'.³⁰ However, the Chamber failed to acknowledge a presumption of investigation where the requirements of jurisdiction and admissibility are met in accordance with Article 52(1)(a) and (b) of the Rome Statute.³¹ Contrary to the statutory framework, the

²⁶ L. Côté, 'Independence and Impartiality', in L. Reydam, J. Wouters and C. Ryngaert (eds), *International Prosecutors*, Oxford University Press, 2012, 319, p. 321.

²⁷ See also A. Mudukuti, 'From Immunities to the Afghanistan Decision – Talking International Criminal Justice with Stephen Rapp', *Opinio Juris* (online), 25 September 2019.

²⁸ Čelebići appeal, (n. 22 above), para. 602.

²⁹ See Rome Statute, Articles 13(c), 15(3) and 53(1).

³⁰ Impugned Decision, para. 32.

³¹ Prosecution Appeal Brief, ICC-02/17-74, paras 23-25.

Chamber added the requirement of a ‘positive determination to the effect that investigations would be in the interests of justice’³² with the aim of preventing the Court from ‘engaging in investigations which are likely to ultimately remain inconclusive’.³³

11. Applying the general rule of interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties, Articles 15(4) and 53(1)(c) of the Rome Statute preserve a prosecutorial discretion to determine that an investigation would *not* serve the interests of justice. Article 53(1)(c) mentions the gravity of the crime and the interests of victims as two factors the Prosecutor should take into account in the exercise of her discretion. The decision not to proceed with an investigation is subject to a discretionary review power of the Pre-Trial Chamber.³⁴ The statutory provisions do not introduce a positive obligation for the OTP to assess whether an investigation *is* in the interests of justice.³⁵

12. The amici submit that the appropriate degree of control over prosecutorial discretion is built into the relevant statutory provisions and that these provisions were misinterpreted by the Chamber. The Impugned Decision constitutes an erroneous attempt by the Chamber to extend its own discretionary powers, even going so far (by a Majority) as to set limits to any authorised investigation.³⁶ The Chamber’s approach potentially restricts the OTP’s ability to investigate independently on the basis of the principles of equality and non-discrimination and amounts to an unjustifiable assumption of discretionary powers by the Chamber vis-à-vis the OTP.

IV. THE CHAMBER’S ASSESSMENT OF THE INTERESTS OF JUSTICE

13. The amici submit that the Chamber’s assessment of the interests of justice represents an extreme example of intrusion by the judiciary into the discretionary

³² Impugned Decision, para. 35.

³³ Impugned Decision, para. 33.

³⁴ Rome Statute, Article 53(3)(b).

³⁵ This point is argued comprehensively in the Prosecution Appeal Brief, ICC-02/17-74, paras 12-57, and the Victims Appeals, ICC-02/17-73-Corr, paras 107-112, and ICC-02/17-75-Corr, paras 55-69.

³⁶ See Prosecution Appeal Brief, ICC-02/17-74, paras 73-93.

domain of the Prosecutor thereby significantly undermining prosecutorial independence. The ICTY Appeals Chamber has commented that: ‘The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly.’³⁷ In the Impugned Decision, the Chamber failed to afford the OTP such a presumption and abused its own authority by purporting to exercise those functions itself. This is despite the Chamber’s own observation that the pre-investigative stage ‘remains under the exclusive responsibility of the Prosecution until a request under article 15 is filed.’³⁸

14. The Chamber regarded the interests of justice as a ‘factor potentially *precluding* the exercise of the prosecutorial discretion’.³⁹ However, it failed to acknowledge that an assessment as to whether the interests of justice favoured a decision not to proceed with an investigation lay first and foremost within the discretion of the OTP. The Chamber defined the phrase loosely by reference to the ‘overarching objectives underlying the Statute’, namely, ‘the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities’.⁴⁰ The amici submit that these are all considerations to be weighed in the balance as part of an exercise of discretion properly made by the independent organ in possession of all the facts at the pre-investigative stage, namely the OTP. As the OTP had indicated that it had not identified any reason that would make an investigation contrary to the interests of justice,⁴¹ the Chamber usurped the role of the OTP and engaged in a speculative exercise of its own discretion.

15. The Chamber concluded that an investigation would not be in the interests of justice on the basis of its consideration of three factors: the time that had elapsed since the commission of some of the alleged criminal conduct; the difficulty of ensuring state

³⁷ Čelebići appeal, (n. 22 above), para. 611.

³⁸ Impugned Decision, para. 36.

³⁹ Impugned Decision, para. 89 (emphasis added).

⁴⁰ Ibid.

⁴¹ Impugned Decision, para. 87.

cooperation; and the availability of relevant evidence and potential suspects.⁴² The Chamber's assessment afforded too much weight to expediency and insufficient weight to the objectives of combating impunity and atrocity prevention. Having noted that torture, for example, is 'radically banned' under international law,⁴³ the Chamber failed to give due consideration to the gravity of the alleged conduct. Similarly, the prevention of future crimes is seen as 'the fundamental objective of the criminal justice system at both the national and international levels.'⁴⁴ In this respect, the amici submit that the Impugned Decision has a damaging impact on the credibility and effectiveness of warnings by the ICC Prosecutor during ongoing atrocities to powerful parties that they may face justice. If the Impugned Decision stands, it could substantially weaken an important tool of atrocity prevention.

16. By placing undue emphasis on expediency at the pre-investigative stage and making prematurely defeatist and speculative remarks about the likelihood of achieving State cooperation,⁴⁵ the Impugned Decision undermines the goal of combating impunity. The message that affected States and individuals may benefit from failing to cooperate and hold out until the threat of an investigation has passed directly contradicts the experience of the ad hoc tribunals, where eventually justice caught up with suspects such as Charles Taylor and Radovan Karadžić.⁴⁶ The amici note in this context the recent establishment of ad hoc investigative mechanisms at the international level that are focused on the preservation of evidence and documentation

⁴² As a further illustration of the Chamber overreaching in the exercise of its own discretion, account was taken of extraneous factors that were exclusively within the competence of the OTP, such as the management of its budget. See Article 42(2) of the Rome Statute and Prosecution Appeal Brief, ICC-02/17-74, paras 141-149.

⁴³ Impugned Decision, para. 85, presumably referring to the number of international and domestic legal provisions prohibiting torture and the status of the prohibition as *jus cogens*.

⁴⁴ H. Correll, 'Introduction' in Crane et al., *The Founders*, (n. 11 above), p. 11.

⁴⁵ See also Prosecution Appeal Brief, ICC-02/17-74, para. 126, noting that the cooperation obligations of States under the Rome Statute come into operation after an investigation has been opened. Neither the Rome Statute nor the ICC Rules of Procedure and Evidence specify a time limit for preliminary examinations. See I. Stegmüller, 'Article 15', in M. Klamberg (ed), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 183.

⁴⁶ Further examples are provided by internationalised tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Extraordinary African Chambers.

precisely because political realities mean that there is often a considerable time gap between the commencement of investigations and criminal trials. Additionally, key documentary evidence may only come to light many years after the commission of the alleged offences.⁴⁷

17. The Chamber failed to offer the parties an opportunity to be heard contrary to established international principles and thus purported to review an exercise of discretion without any knowledge of the OTP's reasoning. ICTY jurisprudence has affirmed a principle that 'the parties to a case have a right to be heard before a decision is made which can affect their rights'.⁴⁸ Stated differently, the fact that judges may have the power to decide a matter *proprio motu* 'does not relieve [them] of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.'⁴⁹ This is a matter of basic fairness. Moreover, hearing the parties' views can assist the judges in making the correct decision.⁵⁰ The failure to allow the Prosecutor to be heard in this instance clearly impacted on her rights as the Chamber had no input on the assessment of the single criterion – the interests of justice – that led to the authorisation to open an investigation being denied.

V. CONCLUSION

18. In his opening statement in the *Einsatzgruppen* case, Benjamin Ferencz presented a 'plea of humanity to law.'⁵¹ The experience of the ad hoc tribunals set the foundation for the establishment and early progress of the ICC, based on the principle

⁴⁷ The *Slobodan Milošević* case demonstrates that international prosecutors are not dependent on State cooperation to carry out their investigative responsibilities. Although political opinion shifted with the Kosovo war and relevant evidence was subsequently handed over to the ICTY, the decision to indict Milošević on 22 May 1999 'rested solely with the Prosecutor'. L. Côté, 'The Independence of International Prosecutors, Where Law Meets Realpolitik', in F. Lafontaine and F. Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, Intersentia, 2019, 253-275, p. 272.

⁴⁸ *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR15bis, Decision on Appeal against Decision on Continuation of Proceedings, 6 June 2014, para. 51.

⁴⁹ *Prosecutor v. Goran Jelisić*, IT-95-10-A, Judgment (Appeals Chamber), 5 July 2001, para. 27.

⁵⁰ *Ibid.*

⁵¹ *The Einsatzgruppen Case*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. 4, Nuernberg, October 1946-April 1949, Opening Statement of the Prosecution (Mr. Ferencz), p. 30.

of a strong and independent prosecutor. The Impugned Decision strays from this principle. It curtails prosecutorial discretion unreasonably and undermines prosecutorial independence in a manner that backtracks on the developments in international criminal justice since Nuremberg. Furthermore, it tends to create a misleading impression that international prosecutors may be incapable of investigating thoroughly and expeditiously in precisely the type of transitional and evolving context in which they are mandated to act. By failing to show deference to the party in possession of the facts and interfering unreasonably in the fulfilment of the mandate of the Prosecutor, the Chamber also undermined the capacity of the ICC as a whole to achieve its objectives. The Preamble to the Rome Statute expresses the determination to establish an 'independent permanent' Court. The amici submit that the current appeals provide a critical moment for the Appeals Chamber to reaffirm the principle of prosecutorial independence and instil confidence in the ICC process by authorising an investigation into the situation in Afghanistan.

19. Stephen Rapp and Nina Jørgensen plan to be in The Hague on the dates of the hearing and request permission to be present in the courtroom so as to be available to provide any clarifications to these observations as might assist the Appeals Chamber.

The amici curiae thank the Appeals Chamber for the opportunity to make these written observations.

Respectfully submitted on behalf of Professor David M. Crane, Mr. Benjamin B. Ferencz, Mr. Richard J. Goldstone, Ms. Carla del Ponte and Mr. Stephen J. Rapp.



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Dated this fifteenth day of November 2019
At Southampton, UK.