

Prosecutorial Discretion and Victims' Rights at the International Criminal Court: Demarcating the Battle Lines¹

Many victims were killed, and in fact one of us had to carry the head of her dead husband from Nakuru so that she could bury it. Her husband was killed during PEV. Do you know how traumatizing that is? Another lady's husband was killed in their house. These women are suffering and their only hope was the ICC. You are now informing us that the case has been terminated, do you want us to kill ourselves also? (*Halafu unatuambia case imeisha, unataka hata sisi tujiue?*)

...

Will the Court at least allow us to give our opinions in regards to this termination? There is so much we have to tell the Court and we feel they should listen to our grievances.²

I. Introduction

The independence of the Prosecutor was one of the most contentious issues to be canvassed at the Rome Conference, leading up to the adoption of the International Criminal Court Statute.³ Some States were worried about the prospect of an overly strong, independent prosecutor, and felt the need to put in place a series of checks and balances to avoid what might be perceived as the overzealousness of prosecutorial action. Other States, many civil society representatives and some academics were concerned that putting in place too many checks would turn the Court into a political instrument which would act and react in accordance with political as opposed to legal objectives, and would become a disservice to the overall aim of ending impunity.

The ICC Statute produced an inevitable balance – the independence of the Prosecutor is preserved, subject to a number of legal (as opposed to political) checks and balances. This has allowed the Prosecutor to engage in a number of sensitive preliminary examinations, investigations and prosecutions. But the practice of the Court has revealed another challenge; one which was perhaps less anticipated. This is the converse problem of (real or perceived) lack of zeal. What sway, if any, should there be to press what some might perceive to be a 'reluctant' prosecutor to take on more? What role for victims affected by the crimes under the jurisdiction of the Court, their lawyers and the many civil society groups that are working with them?

Article 54(1) of the Statute requires the Prosecutor to 'establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility', and 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.' Yet, how to measure 'effectiveness' is not clearly set out in the Statute, and even if it was clear, or indeed if the well-defined principle of

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² Situation in the Republic of Kenya, 'Victims' request for review of Prosecution's decision to cease active investigation' ICC-01/09-154, 3 August 2015, Annex 1: 'Victims' Views and Concerns', which is described as an illustrative set of views and concerns expressed by 93 Victims communicated in person to the Legal Representative for Victims during meetings with 702 Victims held in Kenya during the period 25 May to 17 June 2015.

³ Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) AJIL 2, 8; William Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP, 2011) 176-182

effectiveness under human rights law was applied,⁴ there is no real procedure under the ICC Statute to ensure this happens.

The context of course is complicated. The Office of the Prosecutor (OTP) does not have the resources to prosecute all the individuals involved in the perpetration of massive crimes, nor is it capable of simultaneously investigating each and every crime falling within the ICC's jurisdiction. The Prosecutor has limited personnel and budgetary capacity. Security and lack of cooperation constraints have impeded some investigations, which has led to evidential weaknesses in several cases brought to the Court. Clearly there is little room for the Prosecutor to manoeuvre. But at the same time, if there is a Prosecutor and a Court in place, and there are States Parties that have acceded to the ICC Statute and thus agreed to be bound by the ICC system, there is – and indeed there should be – a certain expectation that when the Court has jurisdiction, the Prosecutor will duly investigate and lodge prosecutions in relation to crimes coming within that jurisdiction, at least the 'worst' ones.

The Preamble of the ICC Statute emphasises that 'the most serious crimes of concern to the international community as a whole must not go unpunished...' and that the overriding purpose of the ICC's establishment is to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.' Indeed, at least for 'the most serious crimes', the Prosecutor is duty-bound to analyse the information received on potential crimes in order to determine whether there was a reasonable basis on whether to proceed with an investigation.⁵

In domestic law, there are rules and standards that apply. In some countries, there will be guidelines about how a Prosecutor exercises discretion, and victims can complain when these aren't followed. In other countries, there is a prosecutorial obligation to institute proceedings when the evidence is sufficient.⁶ Under international human rights law, there is an obligation on States to investigate and prosecute the most serious human rights abuses which constitute crimes under international law⁷ and victims are recognised to have a variety of procedural rights in the process.⁸

Arguably, there is no reason why this duty of States to investigate and prosecute crimes under international law is not reflected even in some modified way in the ICC Prosecutor's duties and responsibilities, as some form of presumption,⁹ or serving as 'a factor for consideration in the exercise of discretion.'¹⁰ After all, it is many of these same crimes under international law over which the ICC has jurisdiction, when States Parties fail to proceed genuinely with investigations or prosecutions. The ICC system as a whole is designed to avoid impunity and ensuring a modicum of action by the Prosecutor in furtherance of this aim, seems wholly appropriate and necessary. But, the inability for the Prosecutor to pursue *all* cases which fall within its mandate, given the sheer volume of grave situations and cases arguably necessitates a different kind of approach.

⁴ Human rights law makes clear that investigations must be effective in practice as well as in law, and must not be unjustifiably hindered by the acts or the omissions of the State. Authorities must always make a serious attempt to find out what happened. This includes 'the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure'. [*Aksoy v. Turkey* (1997) 23 E.H.R.R. 553, para. 98]

⁵ Article 53(1)(a) of the ICC Statute

⁶ REDRESS and Institute for Security Studies, *Victim Participation in Criminal Law Proceedings - Survey of Domestic Practice for Application to International Crimes Prosecutions*, August 2015, available at: <http://www.redress.org/downloads/publications/1508Victim%20Rights%20Report.pdf>

⁷ This obligation is reflected in a range of treaties and conventions, including the Genocide Convention, the Geneva Conventions 1949 (grave breaches provisions), the UN Convention Against Torture, the Convention Against Enforced Disappearances, and has been reflected in numerous judicial decisions.

⁸ Many of these are set out in REDRESS and Institute for Security Studies, *Victim Participation in Criminal Law Proceedings - Survey of Domestic Practice for Application to International Crimes Prosecutions* (above n. 6).

⁹ See, OTP, 'Policy Paper on the Interests of Justice' September 2007, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> 3, which refers to 'the presumption in favour of investigation or prosecution'. Elsewhere the Prosecutor has recognised that 'If the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation.' [OTP, 'Policy Paper on Preliminary Examinations' November 2013, 2, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20202013.pdf]

¹⁰ Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 EJIL 481, 490.

As many have argued,¹¹ it is vital for the Prosecutor to have a clear and objective policy from which it faithfully takes its decisions. This will enhance transparency and accountability when the Prosecutor inevitably chooses to take on one case over another and will help to clarify to all who look to the ICC as the appropriate venue to pursue international crimes prosecutions, the types of cases which will engender the attention of the Prosecutor. Judicial review of discretion is a further means by which transparency can be assured. As indicated by Nsereko, there is ‘a need to put in place mechanisms and practices to minimize error or to check abuse. This is the more necessary because, ... a wrong decision by the prosecutor, particularly to prosecute or not to prosecute, has the potential to erode public confidence in his or her office and in the administration of justice. Enhancing transparency and accountability in the prosecutor’s decision-making process is a major way of minimizing and checking abuse.’¹² Judicial review would be consistent with certain domestic jurisdictions, and could provide ‘a means by which persons affected by a case, particularly victims, can seek redress against decisions by the prosecutor’.¹³

But to date, there is no such framework. The Prosecutor has carefully guarded its independence and thus far has only introduced very generalised policy frameworks which provide little guidance to observers and the Pre-Trial Chamber has so far been extremely deferential to the Prosecutor’s exercise of discretion. Victims and others concerned by certain actions or non-actions of the Prosecution have had little occasion to express those concerns, despite the ICC’s celebrated victim participation framework.

It is this gap between the expectations of justice and what happens in practice which is the background to this article, and in particular, what can be done and by whom to press the Prosecution to act when it is reluctant to do so. I argue that the relevant Pre-Trial Chamber should be prepared to provide *real* oversight over the exercise of prosecutorial discretion; undue deference to the Prosecutor will not always be helpful to the attainment of justice for the worst crimes, nor to the eradication of impunity. I also argue that victims whose interests are affected should be accorded greater access to the Court to express their concerns, and that these views should necessarily be taken into greater account in decisions whether to proceed with an investigation or prosecution. At present, victims’ procedural rights in this area are rigorously curtailed. As will be described, part of the considerations which must be taken into account when deciding not to proceed with an investigation or prosecution involves an assessment of ‘the interests of justice’ and the ‘interests of victims’. In order to make these assessments, I argue that victims’ unfiltered voices should be heard by the Court.

II. The Statutory Framework

The ICC Statute provides different approaches to how an investigation and prosecution can be commenced or closed down, depending on how the matter has come before the Court in the first place. In accordance with Article 13 of the Statute, a matter can come before the Court in three principle ways: i) the Prosecutor can initiate a preliminary examination on her own initiative

¹¹ See, e.g., Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC’, 15 April 2003, 3, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor, ICC-OTP 2003, who stressed the importance of such a policy ‘to avoid fuelling any already existing perceptions of the ICC as a political court, to minimise any accusations of bias, and to increase transparency and boost the credibility of the Court as a strictly judicial institution, it is necessary to identify[ing] the guiding principles underpinning the exercise of prosecutorial discretion and to identify criteria which can be applied in each instance in order to determine whether the condition of Article 53(1) have been fulfilled.’ See also, Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 Am. J. Int’l L. 510, 535-50; James A. Goldston, ‘More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court’ (2010) 8 Journal of International Criminal Justice 383, 403-5

¹² Daniel Nsereko, ‘Prosecutorial discretion before national courts and international tribunals’, Guest lecture series of the Office of the Prosecutor (2004), 16.

¹³ Matthew Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’, (2004) 2 J Intl Crim J 71, 86.

acting upon her *proprio motu* powers; ii) a State Party may refer a matter to the Prosecutor; or iii) the UN Security Council may refer a matter.

When the Prosecutor is acting on her *proprio motu* powers and has commenced a preliminary examination on that basis, if she thereafter determines that there is a 'reasonable basis' to proceed with an investigation she is then required to obtain authorisation from the Pre-Trial Chamber in accordance with Article 15(3) of the Statute. In contrast, when a situation has been triggered as a result of a State Party or Security Council referral, there is no need to obtain advance authorization from the Pre-Trial Chamber to open an investigation.

However, the Prosecutor may thereafter determine that she does not wish to proceed with an investigation or a later prosecution. This might be because of the Prosecutor's belief that there is no discernable admissible crime, that the matter would be inadmissible due to reasons of complementarity, and/or because the identified crimes are not sufficiently serious to warrant the commencement of an investigation.¹⁴ If the Prosecutor decides not to proceed, the Statute sets out a number of factors to be taken into account, and affords rights to certain parties. First, the Prosecutor is obligated to inform the relevant Chamber of this decision. The Prosecutor is also required to inform those who provided the office with information,¹⁵ and particularly victims.¹⁶

If the matter was initiated by a State Party or a UN Security Council referral, then those bodies have the right to seek review of the Prosecutor's decision not to proceed, before the Pre-Trial Chamber. Victims affected by the Prosecutor's decision have no comparable rights, though they may be accorded the right to participate in review proceedings initiated by others. The Pre-Trial Chamber can request the Prosecutor to reconsider her decision not to proceed, but ultimately the discretion lies with the Prosecutor to determine what cases to pursue.

The Prosecutor may also take the decision not to proceed on the basis of the 'interests of justice'. The Statute provides that when the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and would be admissible, she can nevertheless decide not to proceed when, 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'¹⁷ Similarly, Article 53(2) addresses the ability of the prosecutor to forego a prosecution. It indicates that, upon investigation, the Prosecutor may conclude that there is not a sufficient basis to proceed because it 'is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime.'

If either of those determinations is made, the Prosecutor must notify the Pre-Trial Chamber to that effect with reasons for her determination. The Pre-Trial Chamber can review the Prosecutor's decision on the 'interests of justice' of its own motion.¹⁸ Upon that review, should the Pre-Trial Chamber disagree with the Prosecutor's assessment, it can order the Prosecutor to proceed with the investigation or prosecution. The powers of the Pre-Trial Chamber are greater in such contexts. If the Pre-Trial Chamber decides to review the Prosecutor's decision then it will only be effective if confirmed by the Chamber. The Rules of Procedure and Evidence make clear that when the Pre-Trial Chamber does not confirm the Prosecutor's decision not to proceed, 'he or she *shall* proceed with the investigation or prosecution' (emphasis added).¹⁹

The Prosecutor can also itself reconsider a decision not to investigate or prosecute, on the basis of new facts or information, regardless of whether a request to do so has emanated from the Pre-Trial

¹⁴ Article 17(1) and 53 of the ICC Statute.

¹⁵ Art 15(6) of the ICC Statute; Rule 49 of the Rules of Procedure and Evidence.

¹⁶ Rule 92(2) of the Rules of Procedure and Evidence.

¹⁷ Art 53(1)(c) of the ICC Statute.

¹⁸ Art. 53(3)(b) of the ICC Statute.

¹⁹ Rule 110(2) of the Rules of Procedure and Evidence.

Chamber. As such, it is always possible for victims' groups, civil society organisations, States Parties and others to supply additional facts and evidence to the Prosecutor to encourage her to revisit an earlier negative decision.

III. Prosecutorial Discretion and the Development of Guidelines

In light of extensive powers of the Prosecutor to decide which situations and cases to pursue, and which charges (if any) to proffer, there have been calls on the Prosecutor to develop guidelines on the exercise of its discretion.²⁰ Thus, the Office of the Prosecutor has released a series of policy papers which, while falling short of formal guidelines, help to clarify how the Prosecutor understands its discretion and purports to exercise it. The Office's approach to discretion can be further understood through its submissions and pleadings in cases before the Court. As will be described, the various statements of principle are broadly framed, leaving quite a lot of room for manoeuvre. Furthermore, there is little ability to hold the Prosecutor to these statements of principle. Indeed, some commentators have argued that they have been only selectively applied by the Prosecutor if at all, Schabas going so far as to refer to the Prosecutor's 'interpretive deviations' which he says may have the result of 'distorting the proper role of the ICC in the campaign against impunity and the protection of human rights.'²¹

The Prosecutor's statements of policy which have included considerations of prosecutorial discretion have naturally evolved over time. The first of these was released in 2003: 'Paper on some policy issues before the Office of the Prosecutor'.²² In this paper, the Prosecutor makes clear that given its limited resources, it will focus on initiating 'prosecutions of the leaders who bear most responsibility for the crimes.'²³ In the Annex to the Paper, it is made clear that the Prosecutor will 'set priorities, taking into account the limits and requirements set out in the Statute, the general policy of the Office and all other relevant circumstances, including the feasibility of conducting an effective investigation in a particular territory.'²⁴

In later papers, the Prosecutor has clarified that its 'policy of focused investigations and prosecutions' 'means it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges during the course of an investigation. Part of the analysis to determine whether there is a reasonable basis to proceed concerns the gravity of the crimes,²⁵ which the Prosecutor has assessed to include 'the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation,²⁶ having regard to both quantitative and qualitative considerations.'²⁷ A limited number of incidents will be selected in order to allow the Office to carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization.'²⁸

In its 2012-2015 strategic plan, the approach was changed. Prosecutor Ocampo's policy of focused investigations and prosecutions has shifted under Bensouda to 'open-ended, in-depth investigations', 'towards a "building upwards" strategy where culpability of the most responsible persons could not be

²⁰ See, above n. 11.

²¹ William Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 J Intl Crim J 731, 760-61.

²² OTP, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, available at: http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

²³ Ibid, 3.

²⁴ OTP, 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', September 2003, available at: http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

²⁵ Art 17 (1)(d) of the ICC Statute.

²⁶ OTP, 'Policy Paper on Preliminary Examinations' November 2013, above n. 9, 3. See also, Regulation 29(2) of the Regulations of the Office of the Prosecutor.

²⁷ Ibid, 'Policy Paper on Preliminary Examinations' 15.

²⁸ OTP, 'Policy Paper on Victims' Participation' September 2010, 8, available at http://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf, referring to the Prosecutorial Strategy 2009-2012, paras. 18-20.

sufficiently proven from the outset....²⁹ This has been explained to entail first identifying ‘alleged crimes (or incidents) to be investigated within a wide range of incidents. Following this meticulous process, alleged perpetrators are identified based on the evidence collected. This approach implies the need to consider multiple alternative case hypotheses and to consistently and objectively test case theories against the evidence – incriminating and exonerating – and to support decision-making in relation to investigations and prosecutions.’³⁰

Prosecutor Bensouda’s office has indicated that it is developing a case selection and case prioritisation policy to clarify how it decides which cases to pursue within a situation opened for investigation, as well as how it proposes to end its involvement on a situation under investigation.³¹ This will hopefully help to further improve the transparency of decision-making.

IV. Practice before the Court

IV.1 Preliminary Examinations

The Prosecutor has received a vast number of communications since the office began to function. By the end of 2013, a total of 10,470 “communications” were received by the Office pursuant to article 15 of the Statute.³² However, the majority of communications do not even reach the preliminary examination stage; they are filtered out because they are considered to be manifestly outside the jurisdiction of the Court.

Neither the ICC Statute nor the Rules of Procedure and Evidence set a timeline for the Prosecutor to evaluate preliminary examinations. Rule 105 of the Rules of Procedure and Evidence refers to the need for the Prosecutor to ‘promptly’ inform the State(s) or the Security Council making a referral, or in the case of decisions taken ‘in the interests of justice’, the Pre-Trial Chamber, when it decides not to proceed with an investigation. However, the promptness which is required arguably could relate to the timeframe beginning from the moment *after* the Prosecutor takes the decision to when it notifies of that decision, and not to the timeframe *in which it takes the decision*.³³ Indeed, a number of preliminary examinations have languished for many years, without any final decision being taken by the Prosecutor.

The Central African Republic which had referred a matter to the Prosecutor, sought to speed up the decision-making process by filing an application with the Pre-Trial Chamber, requesting the Prosecutor to provide information on the alleged failure to decide, within a reasonable time, whether or not to initiate an investigation.³⁴ Citing a range of human rights standards concerning the need to proceed without unreasonable delay, the State noted the denial of justice for the victims and argued that the Prosecutor’s silence could be interpreted as an implicit refusal to open an investigation.³⁵ This application led the Pre-Trial Chamber to affirm that ‘the preliminary examination of a situation pursuant to article 53 (1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13 (a) and 14 of the Statute, regardless of its complexity.’³⁶ It then proceeded to request the Prosecutor, *inter alia*, ‘to provide the Chamber and the Government of the Central African Republic, no later than 15 December 2006, with a report containing information on the current status of the preliminary examination of the

²⁹ OTP, ‘OTP Strategic Plan 2016 – 2018’, 6 July 2015, para 13.

³⁰ *Ibid.*, para 34.

³¹ *Id.*, para 36.

³² Statistics are available on the website of the ICC, www.icc-cpi.int.

³³ This interpretation was put forward by the Prosecutor. See, OTP, ‘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, para. 10.

³⁴ Central African Republic, ‘Public Redacted Version of ICC-01/05-5-Conf - *Transmission Par Le Greffier d’une Requête aux Fins de Saisine de la Chambre Préliminaire de la Cour Pénale Internationale et Annexes Jointes*’, ICC-01/05-5-Anx1-Red, 27 September 2006.

³⁵ *Ibid.*

³⁶ Pre-Trial Chamber, ‘Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic’, Situation in the Central African Republic, ICC-01/05-6, 30 November 2006, p. 4.

CAR situation, including an estimate of when the preliminary examination of the CAR situation will be concluded and when a decision pursuant to article 53 (1) of the Statute will be taken.³⁷ The Prosecutor complied with the request ‘in the interests of transparency’, but disputed that it had any specific obligation of timeliness in which to carry out preliminary examinations.³⁸

Of those situations that have proceeded to preliminary examination, eight have been revealed publicly to have proceeded to full investigation.³⁹

There are only a few instances in which the Prosecutor has used its discretion not to proceed with an investigation. These are described below. Of these, there has been no instance in which the Prosecutor has taken a decision not to proceed solely on the basis of article 53, paragraph 1 (c) or 2 (c). As such the powers of the Pre-Trial Chamber to review the exercise of the Prosecutor’s discretion not to proceed have been circumscribed.⁴⁰ The Venezuela and Republic of Korea matters concerned communications submitted directly to the Prosecutor under the *proprio motu* powers. In each case, the Prosecutor when applying Article 15, declined to seek authorisation to commence an investigation because of the view that the available information did not provide a reasonable basis to believe that a crime under the jurisdiction of the Statute was committed,⁴¹ at least in part having to do with the insufficient scale of the events. In the case of Venezuela, some of the information provided was understood to be too generalised and incapable of verification and the Prosecutor was not convinced that several particular acts were committed as part of a widespread or systematic attack directed against any civilian population. With respect to the Republic of Korea, the rationale not to proceed appeared to be based on the difficulty to demonstrate that the anticipated civilian impact would have been clearly excessive in relation to the anticipated military advantage of the attack. With respect to Iraq which also concerned the Prosecutor’s *proprio motu* powers, the Prosecutor came to an initial decision not to proceed with an investigation. Even though the Prosecutor determined that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment, the view taken was that the required gravity threshold of the Rome Statute had not been met.⁴² In assessing gravity, the Office appears to have focused solely on a quantitative analysis.⁴³ It indicated that

The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.⁴⁴

³⁷ Ibid, p. 5.

³⁸ OTP, ‘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, para. 11.

³⁹ In Uganda; the Democratic Republic of Congo; the Darfur Region of the Sudan, Central African Republic, Kenya, Libya, Côte d’Ivoire and Mali.

⁴⁰ As set out earlier, the Pre-trial Chamber can only review on its own motion the Prosecutor’s exercise of discretion not to proceed when a decision not to proceed is taken solely on the basis of article 53, paragraph 1 (c) or 2 (c). Beyond this, it is only when the Prosecutor’s initial examination was triggered by a State or Security Council referral, and those parties seek a review of the Prosecutor’s exercise of discretion not to proceed, that the Pre-Trial Chamber will be able to embark on a review.

⁴¹ OTP, ‘OTP response to communications received concerning Venezuela’, 9 February 2006; OTP, ‘Situation in the Republic of Korea: Article 5 Report’ 23 June 2014.

⁴² OTP, ‘OTP response to communications received concerning Iraq’, 9 February 2006.

⁴³ See Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (above n. 21) who criticises the Prosecutor’s approach to gravity.

⁴⁴ OTP, ‘OTP response to communications received concerning Iraq’, pp 8-9.

The preliminary examination concerning Iraq was later reopened after the receipt of additional information.⁴⁵ The Prosecutor also opened a preliminary examination concerning Palestine in response to a declaration from the Minister of Justice of the Government of Palestine accepting the exercise of jurisdiction by the Court for acts committed on the territory of Palestine since 1 July 2002. However, it decided not to proceed because Palestine was not recognized as a State at the time of the declaration.⁴⁶ The preliminary examination was later reopened as a result of the UN General Assembly having granted Palestine non-member observer status on 29 November 2012, and Palestine's 2 January 2015 accession to the ICC Statute.⁴⁷

None of the above matters resulted in debate before the Pre-Trial Chamber because of the inability for the individuals who referred the information to the Prosecutor (who were not States or the UN Security Council, but mainly private persons and civil society organisations and in one instance – an entity that had not yet been recognized as a State) to seek review.

IV.2 Pre-Trial Chamber Scrutiny: The Very Exceptional *Mavi Marmara* case

The only instance in which the Pre-Trial Chamber has had occasion to review the exercise of the Prosecutor's discretion not to initiate an investigation relates to the matter referred by the Union of the Comoros – concerning the *Mavi Marmara* flotilla, a vessel registered in the Comoros. The matter concerned the 31 May 2010 interception by Israeli Defense Forces of a humanitarian aid flotilla on route to the Gaza Strip, in which ten passengers were killed and more than 50 injured. A preliminary examination was opened on 14 May 2013, and on 6 November 2014, the Prosecutor publicised its decision not to start an investigation.⁴⁸ It indicated that even though there is a reasonable basis to believe that war crimes under the jurisdiction of the Court were committed, the *Mavi Marmara*, when Israeli Defense Forces intercepted the "Gaza Freedom Flotilla" on 31 May 2010; 'the potential case(s) likely arising from an investigation into this incident would not be of "sufficient gravity" to justify further action by the ICC.'⁴⁹ In coming to this conclusion on the insufficient gravity, the Office of the Prosecutor distinguished the case from *Abu Garda*, which also concerned a single attack involving a relatively small number of victims, on the basis that *Abu Garda* concerned the killing of peacekeepers,⁵⁰ thus placing the nature and the impact of the crimes in a different realm.

Counsel for Comoros appealed, in accordance with Article 53(3)(a) of the ICC Statute, which permits the Pre-Trial Chamber to request the Prosecutor to reconsider her decision not to open an investigation. It argued that the way in which the Prosecutor applied the gravity threshold was erroneous, as were her assessment of what evidence could be considered and her assessment of that evidence. Among other rationales, Counsel for Comoros also argued that the Pre-Trial Chamber should be guided by the need to counter impunity for the crimes which would otherwise go unpunished, and the deterrent effect of an ICC investigation, when deciding whether to intervene to request the Prosecutor to reconsider her decision.⁵¹ The Legal Representative for Victims made similar arguments.⁵² The Prosecution in its observations strongly encouraged the Pre-Trial Chamber

⁴⁵ OTP, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', 13 May 2014.

⁴⁶ OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine'', September 2014.

⁴⁷ OTP, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', ICC-OTP-20150116-PR1083, 16 January 2015.

⁴⁸ OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met"', 6 November 2014.

⁴⁹ *Ibid.*

⁵⁰ OTP, 'Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report', 6 November 2014, [http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf), pg 58, 59, para 145.

⁵¹ Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom Of Cambodia, 'Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation' ICC-01/13-3-Red 29 January 2015, paras 58, 59

⁵² 'Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation' ICC-01/13-27-Red, 23 June 2015; 'Victim Observations pursuant to "Decision on Victims' Participation" of 24 April 2015', ICC-01/13-28-Red, 30 June 2015

to take a deferential approach in its assessment of the exercise by the Prosecutor of its discretion. It submitted that:

... although the Prosecution agrees that it must exercise its duties in a rational, fair, and reasonable way, the Pre-Trial Chamber should be reluctant to engage in its own comparisons of different situations before the Court in conducting any review. Likewise, the Pre-Trial Chamber should not interfere with the Prosecution's assessment merely on the basis that the Judges have a "responsibility for upholding the underlying core values and principles of the ICC", or to encourage deterrence. [footnotes omitted]⁵³

The Pre-Trial Chamber accepted many of the arguments put forward by Comoros and the legal representatives for victims and proceeded to request the Prosecutor to reconsider its decision not to initiate an investigation.⁵⁴

The Prosecutor has sought to appeal the Pre-Trial Chamber's decision,⁵⁵ though the formal basis for so doing has been strongly contested.⁵⁶ Its main arguments appear to be that the Pre-Trial Chamber exceeded its mandate under article 53(3) of the Statute, and the careful balance struck therein between prosecutorial independence and accountability.⁵⁷ Indeed, the Prosecution seems to argue that it was wrong for the Pre-Trial Chamber to embark on a review of the Prosecutor's assessment that certain facts did not meet the gravity threshold. It has argued that 'Article 53(1) of the Statute does not permit the initiation of an investigation if the Prosecutor determines there is no reasonable basis to proceed. In this assessment, the Prosecutor is best placed to make the necessary determinations in accordance with the Statute.'⁵⁸

In observations made by the Office of Public Counsel for Victims, it was explained that 'the filing of the Notice of Appeal has been perceived by the victims as a sign of unwillingness by the Prosecutor to listen to their concerns and to understand what really happened on board of the vessels.'⁵⁹ Another team of legal representatives for victims, expressed that victims were 'most disappointed' highlighting 'the Prosecution showing no enthusiasm and urgency to investigate these crimes.'⁶⁰ At the time of writing, this matter was still pending.

⁵³ OTP, 'Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute', Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, ICC-01/13-14-Red, 30 March 2015, para 15.

⁵⁴ 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC-01/13-34, 16 July 2015. Note however, the 'Partly Dissenting Opinion of Judge Péter Kovács', ICC-01/13-34-Anx-Corr, 16 July 2015.

⁵⁵ 'Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)', ICC-01/13-35 27 July 2015

⁵⁶ The Office of the Prosecutor has contended that the Pre-trial Chamber's request for it to reconsider its decision not to initiate an investigation, because it considers elements of the gravity of the crimes, is a 'decision on admissibility' which it argues enables it to be appealed. Counsel for Comoros as well as the legal representatives for victims, have contested this. See, e.g., 'Application by the Government of the Comoros to dismiss *in limine* the Prosecution "Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)"' ICC-01/13-39, 3 August 2015; 'Victims' observations on the admissibility of the Prosecution "Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)"', ICC-01/13-48, 19 August 2015

⁵⁷ 'Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)', ICC-01/13-35 27 July 2015, para. 17. A more detailed explanation of the Prosecutor's arguments appear in. OTP, 'Prosecution's Further Submissions concerning Admissibility', Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, ICC-01/13-47, 14 August 2015.

⁵⁸ 'Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)', ICC-01/13-35 27 July 2015, para. 21.

⁵⁹ Office of the Public Counsel for Victims, 'Victims' observations on the admissibility of the Prosecution "Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)"', Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, ICC-01/13-48, para 45.

⁶⁰ Legal Representatives for Victims, 'Observations of the Victims on the admissibility of the Prosecution's "Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)"', Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, ICC-01/13-50, 19 August 2015, para 3

IV.3 Avoiding Pre-Trial Chamber Scrutiny

Arguably, there have been at least two main avoidance techniques which have been employed by the Prosecution to avoid Pre-Trial Chamber scrutiny of prosecutorial discretion. The first concerns the practice of keeping examinations (and eventually investigations) open even though there does not appear to be an intention to proceed with an investigation or prosecution, without any formal decision being taken to close the investigation or prosecution and without ‘any indication of when, if ever, the investigation will resume.’⁶¹

As already indicated, the Central African Republic argued that the Prosecutor’s failure to progress the preliminary examination of the situation without undue delay amounted to an implicit decision not to proceed. The Pre-Trial Chamber never addressed this contention in its ruling, and indeed with some further delay, the Prosecutor eventually did proceed with a full-fledged investigation in that situation.⁶² However, the Pre-Trial Chamber underscored what it understood to be the Prosecutor’s obligation to proceed with timely preliminary examinations, regardless of their complexity. Arguably this same reasoning could apply to the need for the Prosecutor to carry out timely formal investigations.

This issue of suspending rather than closing matters, arguably to avoid scrutiny by the Pre-Trial Chamber, has arisen in relation to a number of situations under formal investigation. For instance, in the *Lubanga* case, the Prosecutor had indicated that, despite the narrow indictment relating to the recruitment and enlistment of child soldiers, he was continuing to investigate other potential crimes.⁶³ However, in June 2006, the OTP informed the Pre-Trial Chamber that it had *suspended* its investigation into other crimes because of security concerns, but this does not exclude that it may continue the investigation into further crimes allegedly committed by Lubanga after the close of the proceedings.⁶⁴ No new charges have subsequently been brought to the attention of the Pre-Trial Chamber, and there is no indication of ongoing investigations.⁶⁵

In the Kenya II situation, the Prosecutor wrote to the Legal Representative for Victims and explained that ‘it has concluded that, in the absence of genuine cooperation from the Government, there is no immediate prospect of strengthening the evidence’.⁶⁶ However, it refrained from formally closing the investigation and this statement of ‘suspension’ does not trigger the jurisdiction of the Court to inquire into those Prosecutorial actions (or non-actions). The Legal Representative for Victims in the Kenya II has put it thus:

The Prosecution cannot be permitted to immunize itself against judicial review by, in effect, deciding not to proceed *sine die* and then (a) denying that it has decided not to proceed; and (b) claiming that its decision not to proceed is not based on the interests of justice. Rather, the Statute’s drafters appear to have intended the Prosecution *either* to rigorously and actively investigate and prosecute the cases before it until the conclusion of the trial or appeal, as appropriate, *or* to make a determination not to proceed under article 53.⁶⁷

⁶¹ Republic of Kenya, ‘Victims’ request for review of Prosecution’s decision to cease active investigation’ ICC-01/09-154, 3 August 2015, para 30

⁶² OTP, ‘Prosecutor opens investigation in the Central African Republic’, ICC-OTP-20070522-220, 22 May 2007.

⁶³ *Prosecutor v. Lubanga, Prosecutor’s Information on Further Investigation*, 28 June 2006, ICC-01/04-01/06-170, para. 2.

⁶⁴ *Ibid*, paras. 7, 9, 10.

⁶⁵ Discussed in Carla Ferstman, ‘Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility?’, (2012) 16(5) *Intl J Hum Rts* 796.

⁶⁶ This is referred to in Situation in the Republic of Kenya, ‘Victims’ request for review of Prosecution’s decision to cease active investigation’ ICC-01/09-154, 3 August 2015, para 4, referenced therein as ‘Confidential Annex 2: Letter from OTP to LRV of 2 April 2015, para. 20’.

⁶⁷ *Ibid*, para 142. This is further explained in Situation in the Republic of Kenya, ‘Victims’ response to Prosecution’s application to dismiss *in limine* the Victims’ request for review’, ICC-01/09-157, 15 September 2015.

As the Central African Republic has argued, in some circumstances, the Prosecution's lack of clear action can be interpreted constructively. The Kenya II legal representative for victims has made similar arguments:

... the Chamber has discretion to review the Decision under article 53(3)(b) and rule 110(2) of the Rules of Procedure and Evidence ('Rules'). The only valid statutory basis for the Decision is either article 53(1)(c) (that further investigation 'would not serve the interests of justice') or article 53(2)(c) (that further prosecution 'is not in the interests of justice'). That is, that the Prosecution *de facto* has decided not to proceed because it has concluded that further investigation or prosecution would be futile, and therefore would not be in the interests of justice.⁶⁸

Or, as the Kenya II LRV has argued, the Pre-Trial Chamber should, in the face of lack of clear standards in the statute, and in light of the Court's deterrent effect, cause there to be a judicial review as being the only thing 'consistent with internationally recognized human rights'.⁶⁹

Another approach has been to seek to insulate the Prosecution's decisions from review by specifying that, the assessment leading to the exercise of the prosecutor's decision not to proceed, was based on a variety of considerations, and not only or mainly those relating to the 'interests of justice'. As set out earlier, the Pre-Trial Chamber is only entitled to review on its own motion the exercise of the Prosecutor's discretion not to proceed, when the Prosecutor's decision is based *solely* on considerations relating to the 'interests of justice'.⁷⁰

Indeed, even though considerations as to gravity are part and parcel of the factors to be assessed for an 'interests of justice' based decision,⁷¹ the Prosecution has made clear in its decisions not to proceed with an investigation that it has considered gravity as part of the overall admissibility considerations under Article 17(1)(d). Yet as Ambos and Stegmiller have argued, there is a distinction between the gravity tests in Articles 17 and 53. The former is a minimum threshold consideration involving a legal determination of admissibility. The latter test introduces a discretionary element wherein a situation or case's relative gravity is assessed against other criterions when considering which matters to take forward. As they argue,

if gravity is used by the Prosecutor as a case selection and prioritization factor, it should be labelled accordingly, i.e., the OTP must reveal whether it uses gravity as a legal minimum threshold under article 17 (1) (d) ICC Statute or as a case selection criterion that involves discretionary considerations. If the latter is the case, as it appears from the strategy and policy papers, the OTP's gravity determination is a matter of article 53 (2) (c) ICC Statute, subject to judicial control under article 53 (3) ICC Statute. As a consequence, any decision not to prosecute individuals based on discretionary determination of gravity – no matter whether the pending situation was triggered *proprio motu*, through a State referral or a Security Council referral – could be reviewed by the Chambers (footnotes omitted)⁷²

⁶⁸ Situation in the Republic of Kenya, 'Victims' request for review of Prosecution's decision to cease active investigation' ICC-01/09-154, 3 August 2015, Para 10

⁶⁹ Situation in the Republic of Kenya, 'Victims' request for review of Prosecution's decision to cease active investigation' ICC-01/09-154, 3 August 2015, para 9, 40.

⁷⁰ Situation in the Republic of Kenya, 'Prosecution's application to dismiss *in limine* the Victims' request for review of Prosecution's decision to cease active investigation', ICC-01/09-156, 25 August 2015, paras. 4, 40.

⁷¹ Article 53(1)(c) and 53(2)(c) of the ICC Statute.

⁷² Kai Ambos and Ignaz Stegmiller, 'Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?', (2012) 58(4) *Crime, Law and Social Change* 391, 399

IV.4 Clamping Down on Victim Participation in the Pre-Trial Phase: Impact on the Impact of Justice

Victims have a primary interest in ensuring that the Prosecutor undertakes full investigations that correspond with the nature, scale and gravity of the crimes. They can advocate for the Prosecution to responsibly implement its policy statements, and further encourage the Office to pursue lines of enquiry that relate to the most significant patterns of victimisation, which reflect both the magnitude of victimisation as well as their central characteristics, including the impact on particular categories of victims, such as women, children and other vulnerable groups. However, victims' role during the investigation of a situation is extremely limited. The Appeals Chamber has held that victims cannot proceed *generally* during the investigation of a situation; they can participate in proceedings affecting investigations, provided that their personal interests are affected by the issues arising for resolution.⁷³ They have no standing before the Court to oblige the Prosecutor to pursue certain leads or to develop certain lines of prosecutorial enquiry, nor an ability to appeal a decision not to pursue certain lines of enquiry.

In principle, victims with participatory rights in a particular case or situation could raise an issue concerning the exercise of the Prosecutor's discretion not to proceed with an investigation or prosecution with the Pre-Trial Chamber. Indeed, as already described, the legal representative for victims recently did so in the Kenya II situation, though this invocation of the Pre-Trial Chamber was strongly contested by the Prosecution⁷⁴ and at the time of writing, the Pre-Trial Chamber has yet to respond to the filing.⁷⁵ The Prosecution was most concerned by the prospect that victims could trigger an 'interests of justice' review; 'participants should not be permitted to circumvent the rules on standing by asserting a general right to request a Chamber to take action *proprio motu*. This would generally allow victims an open-ended right to make legal submissions on any topic in the absence of a judicial proceeding, provided those submissions are couched as a request for a Chamber to intervene.'⁷⁶ But, the Chamber should not have its hands tied by a formulaic adherence to rules which were intended to be interpreted flexibly. After all, the purpose of victim participation is to enable victims' views and concerns to be heard.

However, in most other cases when victims' interests have been affected by the exercise of the Prosecution's discretion, this has been as a result of the failure of the Prosecution to seek authorization to commence an investigation (which engenders no procedural rights for victims whatsoever), or when the Prosecutor decides to proceed with charges which exclude the nature of particular victims' suffering. In the latter example, only those 'participating' victims who fit within the existing situation or charges will be eligible for participatory rights, and it will naturally be those which fall outwith the charges that would have the strongest interest to encourage the Pre-Trial Chamber to carry out a review.⁷⁷ This is a significant cap on victim participation, if the only victims who may participate are those which fit within the frame of the Prosecutor's situation or case.

In its 2013 Policy Paper on Preliminary Examinations, the Prosecution makes clear that when considering the 'interests of justice' which statutorily obliges it to take into account victims' interests, 'the Office will consider, in particular, the interests of victims, including the views expressed by the

⁷³ *Situation in Democratic Republic of the Congo*, 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007', ICC-01/04-556, 19 December 2008, paras. 45, 56, 58

⁷⁴ *Situation in the Republic of Kenya*, 'Prosecution's application to dismiss *in limine* the Victims' request for review of Prosecution's decision to cease active investigation', ICC-01/09-156, 25 August 2015, paras. 19-26.

⁷⁵ *Situation in the Republic of Kenya*, 'Prosecution's application to dismiss *in limine* the Victims' request for review of Prosecution's decision to cease active investigation', ICC-01/09-156, 25 August 2015, paras. 23.

⁷⁷ See, *Situation in The Democratic Republic of the Congo* (ICC), Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding 'Prosecutor's Information on further Investigation', ICC-01/04-399, 26 September 2007; *Situation in The Democratic Republic of the Congo* (ICC), Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, ICC-01/04-373, 17 August 2007, para. 5. Both discussed in, Ferstman, Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility?' (n. 62) 799-801

victims themselves as well as by trusted representatives and other relevant actors such as community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations.⁷⁸ Yet it is not clear what weight the Prosecutor will give to victims' expressed interests or precisely how it would seek to engage with them. Enabling victims to engage directly with the Pre-Trial Chamber so that their views and concerns can be independently known would seem to be a crucial way in which to safeguard their interests before the Court.

V. Conclusions

There are obvious challenges for the ICC to fulfil its mission to end impunity for the worst possible crimes and the Prosecution bears the main brunt of these challenges. Faced with massive criminality in most parts of the world, security constraints, minimal budgets and a lack of cooperation from many States, it is no wonder that the Office simply wants to get on with its work with the minimum amount of distractions and to the best of its ability. Its' job is difficult enough without the distractions of needing to explain and account for its decisions, and on occasion, to have these reviewed by the Pre-Trial Chamber.

For the most part, the Pre-Trial Chamber has given extreme deference to the Prosecutor and has deflected most of the relatively few attempts made by victims and others to review the exercise of the Prosecutor's discretion. Victims can and have been side-lined from those issues that most concern them during the investigation stage. The Prosecutor's choice of which situations to investigate and which charges to proffer directly impacts on whether and how their victimisation will be acknowledged and perceived, whether it will be recognised in their communities that they suffered a particular harm at the hands of a specific perpetrator and whether they will be eligible to participate and claim reparations.

Stronger safeguards should be in place to ensure that prosecutorial discretion is exercised in accordance with the overarching goals of the Rome Statute. As McDonald and Haveman have underscored, there is a need to make what are largely subjective criteria, more objective.⁷⁹ This is not a limitation on prosecutorial independence; it is simply recognition that no power should be unchecked.

⁷⁸ OTP, 'Policy Paper on Preliminary Examinations', November 2013, para. 68.

⁷⁹ Avril McDonald and Roelof Haveman, 'Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC', 15 April 2003, 3-4.