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THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Consolidated Prosecution Response to the Appeals Briefs of the Victims

Source: **Office of the Prosecutor**

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Introduction

1. As directed by the Appeals Chamber,[1] the Prosecution files this consolidated response to the brief filed by the legal representatives of victims led by Mr Gaynor ("LRV1"),[2] and the brief jointly filed by the legal representatives of victims led variously by Ms Gallagher, Ms Hirst, Ms Hollander, and Ms Satterthwaite ("LRV2").[3] This response supports the Prosecution's own appeal[4] against the decision by the Pre-Trial Chamber declining to authorise the investigation into the situation in Afghanistan requested by the Prosecutor under article 15(3) of the Rome Statute.[5]

2. On issues pertaining to the merits of the Decision, the positions of the Prosecution and the LRV1 and LRV2 are generally consistent and mutually supporting. The Prosecution and the LRV1 and LRV2 concur that the Pre-Trial Chamber erred in law and abused its discretion, and that the Decision should be reversed. The Prosecution warmly welcomes and supports the participation of the victims in these proceedings.

3. In this response, the Prosecution will not simply repeat all the substantive issues on which the Prosecution and the LRV1 and LRV2 agree. However, it has sought to assist the Appeals Chamber by briefly identifying and cross-referring between the key arguments which have been raised. In the interest of simplicity, the Prosecution has also sought to show that these arguments may be considered within the framework of the two grounds of appeal which it has advanced, rather than the six grounds of appeal proposed by the LRV1 or the four grounds of appeal proposed by the LRV2. Notwithstanding the different fashion in which the three briefs are organised, the essential content is very similar.

4. The Prosecution and the LRV1 and LRV2 do, however, differ on technical issues of appellate procedure which have arisen in these proceedings. As an officer of the Court, it is incumbent upon the Prosecution to address these differences of opinion and to set out its own view of the correct law. It does so in the following paragraphs.

5. The Prosecution emphasises that these technical matters neither affect the outcome of these appeal proceedings, nor the ability of the LRV1 and LRV2 to participate in these appeal

[1] ICC-02/17-54, para. 9.
[2] ICC-02/17-73-Corr ("LRV1 Brief"). The briefs are numbered according to the order in which they were filed in the record.
[3] ICC-02/17-75-Corr ("LRV2 Brief").
[4] ICC-02/17-74 ("Prosecution Appeal Brief").
[5] ICC-02/17-33 ("Decision").

proceedings. But it remains important for the wider operations of the Court to ensure the consistency, clarity, and practicality of its procedural rules, notwithstanding the concern which may be engendered by particular decisions. Consequently, it is that wider interest—which, in the long term, militates to the benefit of all constituents of the Court—to which the Prosecution draws the attention of the Appeals Chamber.

Submissions

6. As it has previously stated, the Prosecution agrees that the Statute promotes the right of victims to participate in the judicial proceedings of this Court by giving their views on substantive matters.[6] These particular appellate proceedings are a case in point. It is entirely appropriate that the Appeals Chamber has the opportunity to receive the views of the victims, and to issue its judgment with the benefit of their unique perspective. The Prosecution welcomes and supports the participation of the LRV1 and LRV2, as well as the participation of others including relevant *amici curiae* and the Office of Public Counsel for Victims.

7. But the importance of victim participation on substantive matters does not mean that victims must have the *procedural* rights and duties associated with being a "party" to the Court's proceedings, such as those held by the Prosecution. Expanding the definition of a "party" is not only unnecessary to give effect to the interests of the victims but is also inconsistent with the established practice of the Court, based on interpreting the Court's legal texts. In the interests of fairness and procedural economy, for most litigation before the Court, the drafters specifically sought to avoid a situation in which a multitude of actors could exercise procedural rights such as the right to appeal. Yet, if the LRV1 and LRV2 were correct in arguing that a "party" under article 82(1) must include victims—even if only for the purpose of decisions under article 15(4)—so may *other* actors (such as States, organisations, and other natural persons) advance the same arguments to obtain standing for themselves.

8. These concerns bite especially when uncertainty has also arisen as to the scope of article 82(1)(a) of the Statute, which enables a "party" to appeal directly to the Appeals Chamber with regard to decisions on matters of jurisdiction or admissibility. Unlike the procedure under article 82(1)(d), such appeals are not necessarily subject to judicial control by a Pre-Trial or a Trial Chamber, but instead seise the Appeals Chamber automatically.

[6] *See also* ICC-02/17-60 ("Prosecution Response to *Amici Curiae* before the Pre-Trial Chamber"), para. 18; ICC-02/17-42 ("Prosecution Observations on Diverging Proceedings"), paras. 6, 14-15.

9. The scope of article 82(1)(a) has already been tested—including by the Prosecution itself in a previous appeal. But for the purpose of both these proceedings and the recent *Comoros* situation, the Prosecution has accepted, as it must, the Appeals Chamber's holding that this procedural appellate avenue must be interpreted narrowly. While the Prosecution recognises the different perspectives on this question, it favours adhering to established precedent on this issue, in the interest of consistency, legal certainty, and judicial economy. Otherwise, as previous cases have illustrated, potential prejudice may well arise.

10. Moreover, a judgment which, in tandem, redefines both the meaning of "party" *and* expands the scope of article 82(1)(a) will not only greatly increase the potential for appellate litigation but may well encourage speculative appeals by a variety of actors, in a fashion which may be detrimental to the fair and expeditious functioning of the Court. Even if the Appeals Chamber were to favour an increased opportunity for appellate scrutiny, at the current time and in its current circumstances, the Prosecution respectfully submits that this may not be seen as desirable in the future. Once released, the genie may be very difficult to return to the bottle.

11. Nor, in any event, is it necessary in this appeal to enter into any of these procedural questions. These matters have only arisen because the LRV1 and the LRV2 sought—no doubt out of the best motives—to provide a 'safety net' for the Prosecution's own prompt and effective action in seeking leave to appeal the Decision under article 82(1)(d), rather than seeking to bring a direct appeal under article 82(1)(a) of the Statute. Yet leave was duly granted by the Pre-Trial Chamber. While the Appeals Chamber may wish to dispel the Pre-Trial Chamber's apparent hesitation concerning the application of article 82(1)(d) to decisions under article 15(4),[7] there can be no doubt that the Appeals Chamber is nonetheless validly seised of this appeal, and has the power to address all the issues for which leave was granted, including those issues which are inextricably linked thereto.[8] Accordingly, the question whether an appeal could also have been brought under article 82(1)(a), and whether the LRV1 and the LRV2 have standing to trigger such an appeal, remains peripheral to the current proceedings, strictly understood.

[7] ICC-02/17-62 ("Certification Decision"), para. 33. *See also* paras. 23-26.
[8] *See further below* para. 19.

I. WHETHER THE DECISION IS A RULING ON JURISDICTION IN THE MEANING OF ARTICLE 82(1)(A)

12. The LRV1 and the LRV2 have sought to appeal the Decision under article 82(1)(a) of the Statute, which provides that "[e]ither party may appeal […] [a] decision with respect to jurisdiction or admissibility". While the Prosecution shares their view that the Decision is erroneous, and submits that the Appeals Chamber is nonetheless competent to decide all aspects of this appeal based on the certification granted by the Pre-Trial Chamber under article 82(1)(d),[9] it disagrees that the Decision falls within the scope of article 82(1)(a). It does so based on the previous consistent jurisprudence of the Court, which should be maintained in the interest of judicial economy and procedural fairness, as well as legal certainty.

I.A. The Decision does not appear to be a ruling on jurisdiction in the manner previously required by the Appeals Chamber under article 82(1)(a)

13. The Prosecution agrees that there is no bar in principle to decisions under article 15(4) being appealed under article 82(1)(a), nor indeed is this procedural route to appeal confined to decisions under articles 18 or 19.[10] What matters is whether the operative part of the impugned decision constitutes a ruling on jurisdiction or admissibility.[11] As the Appeals Chamber most recently held, "[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)".[12]

14. The Prosecution and the legal representatives of victims disagree only on the question whether the Decision actually satisfies this requirement. LRV1 opines that it does, insofar as the "[t]he Decision completely deprives the Court of its mandate to *exercise* jurisdiction in Afghanistan" and "raises questions which pertain directly to jurisdiction".[13] For LRV2, the Decision "concerns whether, and to what extent (that is, within which scope), the Court may exercise jurisdiction over the situation pursuant to article 13", and "contains express jurisdictional findings that exclude certain categories of crimes, perpetrators, and victims from the jurisdiction of the Court".[14]

[9] *See further below* para. 19.
[10] *See* LRV1 Brief, paras. 89-90.
[11] *See* LRV1 Brief, paras. 91-93; LRV2 Brief, paras. 43-44.
[12] ICC-01/13-51 OA ("*Comoros* Admissibility Appeal Decision"), para. 44. *See also* paras. 42, 49-50.
[13] LRV1 Brief, para. 11. *See also* paras. 93-97.
[14] LRV2 Brief, paras. 45-46, 52.

15. Informed by the previous jurisprudence of this Court, however, the Prosecution has taken the view that the "*operative part*" of the Decision does not constitute a "*ruling*" on jurisdiction.[15] The Decision is a "ruling" that the Prosecution is not authorised to open an investigation into the situation under article 15, notwithstanding that the situation *is* within the Court's jurisdiction and *does* contain at least one admissible potential case, because the Pre-Trial Chamber did not consider such an investigation would be in the interests of justice. While the Decision has the undoubted *procedural effect* of preventing the immediate opening of an investigation, nothing in it definitively precludes any material allegation arising from the situation being brought before the Court, as a matter of law.

16. First, the Pre-Trial Chamber itself considered that "all the relevant requirements are met as regards both jurisdiction and admissibility".[16] Indeed, it largely concurred with the Prosecution's submissions concerning article 53(1)(a) and (b) of the Statute. While some aspects of the Pre-Trial Chamber's reasoning did otherwise touch on jurisdictional matters[17]—and these will be addressed on the merits of this appeal since they relate to the Pre-Trial Chamber's appreciation of the investigation whose feasibility it purported to assess[18]—none of them constituted the *ratio decidendi* of the Decision. In this sense, they cannot be considered to constitute the "operative part" of the Decision. To consider otherwise would be to suggest that any decision may be appealed under article 82(1)(a) simply because a chamber opined on a matter that could be said to be jurisdictional in nature, even if this was wholly irrelevant to the disposition of that chamber's decision. This cannot be correct.

17. Second, the effect of the Pre-Trial Chamber's consideration of the interests of justice, under article 53(1)(c), was to return the situation to the Prosecutor for her further action, including under article 15(5) of the Statute (permitting the Prosecutor to present a subsequent request to open an investigation based on new facts or evidence). In this regard, the scenario appears to be analogous to the *Comoros* situation, in which the Appeals Chamber ruled that the residual discretion afforded to the Prosecutor under article 53(3)(a) and rule 108(3) *precluded* the admissibility of her appeal under article 82(1)(a).[19] The provisional nature of

[15] *Cf.* LRV2 Brief, paras. 47-51, 53-54.
[16] Decision, para. 96.
[17] *But see* ICC-01/04-02/06-1225 OA2 ("*Ntaganda* First Jurisdiction Appeal Decision"), para. 39 (considering, in the context of article 19, that "challenges[] which would, if successful, *eliminate the legal basis* for a charge on the facts alleged […] may be considered to be jurisdictional challenges", emphasis added).
[18] *See e.g. below* paras. 19, 68-74.
[19] *See Comoros* Admissibility Appeal Decision, paras. 50-51 ("The Impugned Decision is a request to the Prosecutor to reconsider her decision not to initiate an investigation—and, as set out more fully below, the

the Pre-Trial Chamber's conclusion, subject to the further discretion of the Prosecutor in renewing her application under article 15(5), was emphasised by its remark in the Disposition that "an investigation into the situation in Afghanistan *at this stage* would not serve the interests of justice".[20]

18. Moreover, while the Prosecution considers the Decision to have been erroneous in its approach and in its reasoning—which is why it sought leave to appeal under article 82(1)(d)—it does not understand the Decision to have barred any of the material allegations from being pursued further at the Court. For example, if it were to be accepted for the sake of argument that the Pre-Trial Chamber could properly reject an article 15(3) application because it considered the proposed investigation not to be feasible, the Prosecutor could in principle still have renewed her same application to the Pre-Trial Chamber supplemented with further information—notwithstanding the difficulties otherwise identified by the Prosecution in attempting to forecast matters such as State cooperation.[21] By contrast, if the Pre-Trial Chamber had ruled certain matters to be out of the Court's jurisdiction, then it would manifestly not be proper for the Prosecutor to return to that same chamber, with those same matters.

19. The Prosecution stresses in this context that its view on article 82(1)(a) is, moreover, premised on and informed by its view that those aspects of the Pre-Trial Chamber's reasoning which touch on matters of jurisdiction are "inextricably linked" to the second issue certified for appeal by the Pre-Trial Chamber (whether the Pre-Trial Chamber abused its discretion in assessing the interests of justice).[22] The LRV1 are incorrect to the extent they appear to assume otherwise.[23] Consequently, while the Prosecution shares the view expressed by the LRV1 and the LRV2 that the Pre-Trial's reasoning was erroneous on these matters, this does not prevent it from maintaining its view of the applicable procedural law. In short, there is no conceivable prejudice to the interests of the victims in this situation by adhering to the

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ultimate decision as to whether to do so is for her. While the Impugned Decision might conceivably have an effect on the admissibility of potential cases arising out of the situation […] the Impugned Decision is not by its nature a decision determining admissibility"). *See also* paras. 53, 56, 59-60, 66.

[20] Decision, Disposition (emphasis added).

[21] *See e.g.* Prosecution Appeal Brief, paras. 126-128.

[22] *See* Prosecution Appeal Brief, para. 10.

[23] *Contra* LRV1 Brief, paras. 82, 144, 165. *See also below* para. 54.

established law, whether on the scope of article 82(1)(a) or the potential for victims who have made representations under article 15(3) to have standing under article 82(1).[24]

I.B. Judicial economy and procedural fairness favour consistent interpretation of article 82(1)(a)

20. The Prosecution notes the view recently expressed by Judge Eboe-Osuji that, "whenever the decision of the Pre-Trial Chamber […] has, as its outcome, an equal potential than not that the Court may not 'exercise jurisdiction' […] it should then be beyond dispute that such a decision of the Pre-Trial Chamber is a 'decision with respect to jurisdiction', within the meaning of article 82(1)(a)."[25] In his view, "by general linguistic usage, the term 'jurisdiction' would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court".[26] While the Prosecution has reached a different understanding, in light of the previous jurisprudence of the Court, it certainly agrees with Judge Eboe-Osuji that it is the objective nature of the decision which is pertinent, and not its subjective characterisation by the chamber in question.[27]

21. In this context, and notwithstanding its foregoing submissions, the Prosecution recognises that there remains room for some academic debate about the proper scope of article 82(1)(a) of the Statute. Indeed, the Prosecution itself formerly took a broader view of such questions, until it was guided by the Appeals Chamber and relevant Pre-Trial Chambers to adopt a narrower position.[28]

22. However, broader concerns—including judicial economy and procedural fairness—now favour maintaining a consistent interpretation of article 82(1)(a). Consequently, since the Appeals Chamber has previously interpreted this provision relatively narrowly, and to favour article 82(1)(d) instead as the appropriate procedural avenue for decisions which do not rule on jurisdiction or admissibility in the strict sense, the Prosecution submits that it is

[24] *See below* paras. 28-55.
[25] ICC-01/13-98-Anx OA2 ("*Comoros* Appeal Judgment, Opinion of Judge Eboe-Osuji"), para. 16.
[26] *Comoros* Appeal Judgment, Opinion of Judge Eboe-Osuji, para. 19.
[27] *Comoros* Appeal Judgment, Opinion of Judge Eboe-Osuji, para. 18.
[28] *See e.g. Comoros* Admissibility Appeal Decision, paras. 50-51; ICC-01/13-68 ("*Comoros* Second Reconsideration Request"), paras. 84 (observing that "article 82(1)(d) [was] the correct basis to proceed if [the Prosecution] had wished to challenge the standards applied by the Pre-Trial Chamber" in its decision under article 53(3)(a)), 94 (suggesting that, by "elect[ing] not to seek leave to appeal the 16 July 2015 Decision under article 82(1)(d)", but instead proceeding unsuccessfully under article 82(1)(a), "[t]he 16 July 2015 Decision has thus acquired the authority of a final decision"), 108.

appropriate to maintain this position, unless there is a serious risk of injustice.[29] Indeed, a contrary approach—in which the meaning of article 82(1)(a) is interpreted with varying degrees of latitude in light of the circumstances of the situation—itself risks injustice. This is because it may directly affect the procedural decisions made by the parties to litigation before the Court, or otherwise encourage the simultaneous pursuit of multiple procedural avenues by litigants (for example, under both article 82(1)(a) and 82(1)(d)), which is detrimental to judicial economy.

23. In this context, the Prosecution also notes that, in its Certification Decision, before granting the Prosecution leave to appeal the Decision, the Pre-Trial Chamber expressed some concern that decisions under article 15(4) may not be amenable to appeal, with leave, under article 82(1)(d).[30] The Prosecution respectfully submits that this concern was erroneous, and would benefit from corrective guidance by the Appeals Chamber. Self-evidently, if the Pre-Trial Chamber is right that decisions under article 15(4) may not in principle be amenable to appeal under article 82(1)(d), then the Prosecution would be required to modify its position concerning the breadth of article 82(1)(a)—but, for the following reasons, the Prosecution does not consider this to be the case. To the contrary, as in these very proceedings, article 82(1)(d) appears to be wholly suitable.

24. Unlike other procedural avenues to appeal, article 82(1)(d) does not enable recourse to the Appeals Chamber based on the *type* of judicial decision but rather based on the procedural *significance* of a decision, as assessed objectively by the chamber which made it. Accordingly, it is immaterial at what stage the decision is issued.[31] Nor can it be reasonably suggested that the Prosecutor at least is not a "party" to her own application under article 15(3), such that she has standing under article 82(1)(d) to seek leave to appeal a decision under article 15(4).[32] The fact that proceedings may be *ex parte* does not mean that a judicial decision may not have a profound impact, requiring appellate review.[33] Indeed, the possibility for the Prosecutor to renew her application under article 15(5) offers no sufficient redress, if the Pre-Trial Chamber has in its decision under article 15(4) made clear that it simply will not

[29] *See also e.g.* ICC-02/11-01/15-172 OA ("*Gbagbo* Victims Participation Appeal Decision"), para. 14 ("in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions").
[30] Certification Decision, paras. 28-33.
[31] *Contra* Certification Decision, para. 29.
[32] *Contra* Certification Decision, para. 31.
[33] *Contra* Certification Decision, para. 30. *Cf. Comoros* Appeal Judgment, Opinion of Judge Eboe-Osuji, para. 13.

authorise an investigation, and its position is based on apparent errors of law.[34] It is in the nature of article 15 proceedings that many important issues—such as those which have arisen in this appeal, under article 53(1)(c)—may only arise in this procedural context. Therefore any suggestion that issues arising from such decisions may not be certified for appeal would mean that such issues may never be subject to appellate review if they do not constitute rulings on jurisdiction or admissibility (in the strict sense). This cannot be correct.

25. Contrary to the Pre-Trial Chamber's inclination—which, in any event, did not preclude the Pre-Trial Chamber from granting leave to appeal the Decision—the Prosecution submits that the Appeals Chamber should endorse article 82(1)(d) as an appropriate means of ensuring appellate scrutiny of decisions under article 15(4), alongside article 82(1)(a) as it has been previously consistently understood. This procedural mechanism ensures a degree of judicial control, such that peripheral matters in this context are not referred to the Appeals Chamber, yet there remains a 'safety net' which is appropriate in light of the weighty significance of a negative decision under article 15(4).

26. Indeed, it may be the case that issues arising from a decision *declining* to authorise an investigation will satisfy the criteria of article 82(1)(d) almost as a matter of course, given the obvious impact on the outcome of the proceedings of the Court and the value of timely intervention by the Appeals Chamber.

27. By contrast, to consider that article 15(4) decisions may only be appealed under article 82(1)(a)—and therefore to suggest that they are *always* appealable as of right under article 82(1)(a), insofar as they *always* determine how the Court will proceed to exercise its jurisdiction—may open the door to potentially unrestricted appellate re-litigation of article 15(4) decisions, with no routine threshold of judicial control such as that required by article 82(1)(d). This could hinder the fair and expeditious conduct of the proceedings, especially where article 15(4) decisions are resolved positively. In such circumstances, numerous alternative means of recourse become available at the proper time and in due course, including but not limited to challenges under articles 18 or 19.

[34] *Contra* Certification Decision, para. 32.

II. VICTIMS ARE PARTICIPANTS, BUT DO NOT HAVE STANDING TO BRING APPEALS UNDER ARTICLE 82(1)

28. Further or alternatively, even if the Decision may be considered to fall within the scope of article 82(1)(a) of the Statute,[35] the LRV1 and the LRV2 may not be considered as "parties" to the proceedings before the Pre-Trial Chamber, such that they have standing to file a notice of appeal with the Appeals Chamber. The Prosecution stresses that this distinction is merely a technical one in the present circumstances, where the Appeals Chamber is in any event properly seised of the appeal (because the Prosecution is also an appellant) and the LRV1 and the LRV2 may be afforded the full rights of participation—which the Prosecution welcomes and supports, especially in this situation. But the procedural issue at stake is also important for the more general operations of the Court, and so deserves attention.

29. While various actors may claim an interest in the Court's proceedings, and may consequently be entitled to make submissions in those proceedings as participants, this does not confer upon them the status as a party under article 82(1) of the Statute, or the procedural rights of "parties" to the proceedings such as those possessed by the Prosecutor. To conclude otherwise would open the door to a significantly more cumbersome judicial process which, rather than working in the interest of victims, may tend to frustrate those interests since it could equally be employed by a variety of external actors. This is especially so with regard to proceedings under article 15(3) and (4), which the practice of the Court to date suggests will be most frequently resolved in *favour* of investigation, and thus which will be more likely to be challenged by actors other than the victims.

II.A. The Statute provides for the participatory rights of victims

30. It appears, rightly, to be accepted by all participants in these proceedings that the question of standing and the meaning of "party" under article 82(1) must be resolved by interpreting the Court's legal texts according to the principles of the Vienna Convention.[36] While this means taking account of provisions such as article 68 and rule 86, as relevant context, it does not mean that article 82(1) must be interpreted in light of a subjective view of "the central role afforded to the victims".[37] Rather, it must be interpreted to give effect to the

[35] *But see above* paras. 12-27.
[36] LRV1 Brief, para. 47. While this is not directly acknowledged by the LRV2, their interpretive approach seems to be consistent with this principle: *see e.g.* LRV2 Brief, paras. 24-37.
[37] *Contra* LRV1 Brief, para. 87.

intention of the drafters, who balanced the importance of ensuring justice for the victims with procedures necessary to ensure the effective functioning of the Court.[38]

31. The LRV1 and LRV2 seem to confuse the importance of the meaningful participation of victims in the proceedings at this Court—with which the Prosecution agrees[39]—with the need for victims to have procedural rights as a "party" to the litigation.[40] One does not follow from the other, nor is their conclusion supported by the authority presented by the LRV1.[41] To the contrary, as the Court has "conclusively establishe[d]",[42] the unique and valuable role played by the victims within the architecture of the Statute does not, except where expressly provided,[43] "equate them […] to parties to the proceedings".[44] Certainly, it need not, and does not, permit or require them to act as a second prosecutor.[45]

32. Rather, as the Appeals Chamber has recalled, "victims are […] participants who, under article 68(3) of the Statute, may present their views and concerns where their personal

[38] *See also* ICC-01/04-01/06-925 OA8 ("*Lubanga* Victim Participation Appeal Decision"), Separate Opinion of Judge Pikis, paras. 11-12 (recalling that "[t]he right of victims to participate enunciated by article 68(3) has no immediate parallel to or association with the participation of victims in criminal proceedings in either the common law […] or the Romano-Germanic system of justice", and recalling instead that the Statute must be autonomously interpreted according to the principles of the Vienna Convention on the Law of Treaties).
[39] *See above* paras. 2, 6, 28.
[40] *See e.g.* LRV1 Brief, paras. 80 (quoting Pre-Trial Chamber I's observation that "the Statute grants victims an independent voice and role in proceedings before the Court": ICC-01/04-101-tEN-Corr ("*DRC* Investigation Participation Decision"), para. 51), 85 (quoting the Appeals Chamber's observation that "victims are not precluded from seeking participation in any judicial proceedings: ICC-01/04-556 OA5 OA6 ("*DRC* Investigation Participation Appeal Judgment"), para. 56) to support their claim of standing to "seek appeal of a decision"); LRV2 Brief, paras. 1 (calling for victims to be provided "with the explicit right […] to meaningfully participate in and contribute to the article 15 process"), 6 (suggesting that victims should be considered "a 'party' for the purposes of lodging an appeal" against an article 15(4) decision on the basis of "victims' participatory rights at this initial stage of proceedings"). *See also* LRV2 Brief, p. 17 (sub-title reading: "Victims' participatory role in an article 15 process implies their status as 'parties' for the purposes of article 82(1) of the Statute").
[41] *See* LRV1 Brief, paras. 80, 85. Specifically, the quoted passage of the *DRC* Investigation Participation Decision was made in the context of recognising victim *participation*, and in the same paragraph also expressly acknowledged that the "roles" of participating victims and prosecutors are "clearly different": *DRC* Investigation Participation Decision, para. 51. Likewise, while the Appeals Chamber did indeed endorse the right of victims to seek *participation* in any judicial proceedings, it did so in the context of its statement in the previous paragraph that even participating victims are "not […] parties to the proceedings": *DRC* Investigation Participation Appeal Judgment, paras. 55-56. *See further below* para. 32.
[42] *DRC* Investigation Participation Appeal Judgment, para. 55.
[43] *See below* para. 36 (concerning article 82(4) of the Statute).
[44] *DRC* Investigation Participation Appeal Judgment, para. 55.
[45] *See e.g. Gbagbo* Victims Participation Appeal Decision, paras. 18-19 (reasoning that, "for appeals arising under article 82(1)(b) and (d) of the Statute, victims who have participated in the proceedings giving rise to the particular appeal need not seek the prior authorization of the Appeals Chamber to file a response to the document in support of the appeal"—but that, "any participation of victims that would exceed the filing of a response to the document in support of the appeal […] would require prior authorization by the Appeals Chamber"). In the context of appeals under article 82(1)(a), *see also* ICC-02/11-01/11-236 OA2 ("*Gbagbo* Jurisdiction Observations Appeal Decision"), para. 3 ("victims who made observations according to article 19(3) of the Statute and rule 59(3) […] in the proceedings before the Pre-Trial or Trial Chamber may submit observations before the Appeals Chamber"). In the context of appeals under article 81(1)(a) of the Statute, *see also* ICC-01/04-02/12-30 A ("*Ngudjolo* Victims Participation Appeal Decision"), para. 3.

interests are affected."[46] This means that their observations "must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings".[47] It does not permit them, for example, to define the *scope* of the issues arising in the appeal, which is reserved for the appellant as a party. To put it another way, proceedings in which victims may participate, such as those under article 68(3), "must be distinguished from […] proceedings which the victims may initiate themselves under statutory provisions",[48] under articles 75 or 82(4) of the Statute. Likewise, Judge Pikis observed:

> Participation is confined to the expression of the victims' 'views and concerns'. It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their 'views and concerns'. The term 'views' in the context of article 68(3) of the Statute signifies 'opinion', in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68(3) of the Statute the word 'opinion' is used. '[C]oncerns' signify matters of interest to a person; matters that preoccupy him/her. 'Préoccupations' is precisely the word used in the French text of the Statute.[49]

33. The principles at stake are no different in the context of article 15 proceedings than at other stages of this Court's process.[50] While article 68(3) refers to the Court's consideration of the victims' "views and concerns", this is not materially different from the concept of "representations" in article 15(3) or indeed of "observations" in article 19(3).[51] Certainly, to any extent there is a distinction in these terms, article 15(3) does not grant victims any greater degree of participation than article 68(3), and therefore does not encompass standing to appeal.

34. For these reasons, the Prosecution concurs with the majority of the Pre-Trial Chamber, which held that "whenever the drafters' intention was to vest victims with a right of appeal,

[46] ICC-01/04-01/06-2953 A A2 A4 OA21 ("*Lubanga* Reparations Admissibility Appeal Decision"), para. 67.
[47] *See e.g.* ICC-01/04-01/06-2205 OA15 OA16 ("*Lubanga* Regulation 55 Appeal Judgment"), para. 34; ICC-01/04-503 OA4 OA5 OA6 ("*DRC* Victim Participation Appeal Decision"), para. 101.
[48] *DRC* Investigation Participation Appeal Judgment, para. 50.
[49] *Lubanga* Victim Participation Appeal Decision, Separate Opinion of Judge Pikis, para. 15.
[50] Certification Decision, para. 22. *See further below* paras. 41-49.
[51] *See also* *Lubanga* Victim Participation Appeal Decision, Separate Opinion of Judge Pikis, para. 8 (in the context of discussing article 68(3), drawing a parallel between articles 15(3) and 19(3); ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), paras. 10-11 (adopting a "combined reading" of articles 15(3) and 68(3), for the purpose of article 68(3)).

they did explicitly provide for it",[52] and that "once the absence of a provision explicitly vesting victims with a right to appeal were no longer to be considered an obstacle for such right to exist, one may submit that there is no statutory basis or good reason to limit this approach".[53] In the particular context of article 15 proceedings, moreover, it is the Prosecutor who "is meant to act as the driving engine" and who is vested with "exclusive responsibility".[54] By recognising that other entities may be considered a "party" to these proceedings, without any form of judicial control, there is a risk that a variety of external actors might seek to "overcom[e] and nullify[] the Prosecution's determinations—and, indeed, those of the Pre-Trial Chamber—"despite […] not being privy to the information available".[55]

35. The LRV1 and LRV2 are incorrect to suggest that the ordinary meaning of the term "party"—at least in the context of the Statute—not only encompasses "one of the sides of a proceeding" but also anyone "who has an interest in the outcome" or who "has interests in a particular proceeding", and therefore that this term includes victims.[56] This is not, for example, the understanding of a number of other significant international criminal jurisdictions, which understand the term "party" to mean only the Prosecution or the Defence.[57] Within the unique framework of this Court, the approach of the LRV1 and LRV2 also overlooks the distinction between "parties" and "participants"—a distinction which reflects a division between those entities which are vested with core procedural functions in the proceedings before the Court (including the right of procedural initiative, standing to appeal, and so on) and those entities which have an interest in the Court's proceedings, and so are permitted to make submissions, but do not have the full status of a party.[58] Victims, as the Appeals Chamber has held, are "participants" in this latter sense.[59] The LRV1 and the LRV2 purport to accept this distinction for the purpose of other judicial proceedings before the Court, yet overlook it for the purpose of proceedings under article 15.

[52] Certification Decision, para. 23.
[53] Certification Decision, para. 22.
[54] Certification Decision, para. 24.
[55] Certification Decision, para. 24.
[56] *Contra* LRV1 Brief, para. 48; LRV2 Brief, para. 24.
[57] *See e.g.* ICTY Rules, rule 2 ("[t]he Prosecutor and the Defence"); ICTR Rules, rule 2 ("[t]he Prosecutor or the accused"); SCSL Rules, rule 2 ("[t]he Prosecutor or the Defence"); STL Rules, rule 2 ("[t]he Prosecutor or the Defence"); RSCSL Rules, rule 2 ("[t]he Prosecutor or the Defence"); IRMCT Rules, rule 2 ("[t]he Prosecutor or the Defence"); KSC Rules, rule 2 ("[t]he Specialist Prosecutor or the Defence").
[58] *See above* paras. 31-32.
[59] *See Gbagbo* Victims Participation Appeal Decision, para. 16.

36. The LRV1 also suggest that, if "the drafters of the Statute intended for *only* [the] Prosecution and [the] Defence to appeal decisions under Article 82(1) then they would have expressly provided for it, as they did under Article 81."[60] However, this overlooks that a close reading of the Statute *does* evince that the entities which may be considered to be "parties" for the purpose of article 82(1) were limited. This follows not only from the use of the term "either" (which has a binary connotation), but also the position of article 82(1) in following from article 81 which provides only for appeals filed either by the "Prosecutor" or the "convicted person" (*i.e.*, the Defence). By contrast, the provision which does exceptionally permit victims standing to appeal—article 82(4)—is subsequent to the reference to "[e]ither party" in article 82(1) and so does not modify the signifiicance of the term "either". Moreover, by clearly confining the scope of appeals by victims to one procedural circumstance ("against the order for reparations"), article 82(4) was clearly intended by the drafters not only to be *lex specialis* to both articles 81 and 82 of the Statute but to be exhaustive. Thus, it is not in contention that, while the Rome negotiations saw "[d]ivergent views on the question of who is a 'party'",[61] including with regard to victims,[62] the drafters ultimately declined to grant standing to appeal for victims who participated in the Court's proceedings.[63] Instead, there was only consensus in granting such standing when victims are a claimant for reparations under articles 75 and 82(4).[64]

37. This logic is inverted by the LRV2, who suggest that "article 82(1) […] is unusual in using a generic term to encompass persons with appeal rights" and that there is no fixed

[60] LRV1 Brief, para. 45.
[61] H. Brady, 'Appeal,' in R. Lee *et al* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001) ("Brady"), p. 593 ("For some delegations, such as France, the term 'party' includes everyone who participates in the proceedings. For others, such as Canada, Australia, South Africa, Spain, and Austria, the term's meaning is to be derived from its context, and in general refers to the principal protagonist/s and antagonist/s in the proceedings"). While Ms Brady is currently a member of the Office of the Prosecutor, this commentary was published in 2001, prior to her employment at the Court and based on her participation as a State representative to the Rome Conference and Preparatory Commission in the drafting of the Statute and the Rules of Procedure and Evidence.
[62] Brady, p. 595 ("Some delegations, most notably France, thought that 'victim-participants', whether participating through a legal representative or otherwise, were a 'party'. Many others, including Spain, Austria, South Africa, Canada and Australia, opined that while the Court might allow victims to participate in proceedings, either in person or through a legal representative by way of the scheme in Rule 89-91, this did not necessarily accord them 'party' status in the proceedings").
[63] Brady, p. 595 ("'Victim-participants' or their legal representatives who participate in proceedings through the regime in Rules 89-91 do not have appeal rights in the Statute or the Rules").
[64] Brady, p. 595 ("Under article 75, victims have a right to seek reparations. As a claimant for reparations, such victims are clearly 'parties' and have an explicit right under article 82, paragraph 4 to appeal an order for reparations"). *See also* *Lubanga* Reparations Admissibility Appeal Decision, para. 67 ("under article 82(4) of the Statute, victims are entitled to bring an appeal" and "are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants").

meaning at all for the term "party".[65] Instead, they suggest that "[t]he concept of 'party' must be assessed on a case by case basis, taking into account the context of the decision in question and the interests of persons affected".[66] Yet such a conclusion is not sustainable. Not only is it unsatisfactory to suggest that "party" (which usually has a narrow connotation) in fact means "any person with a sufficient interest" (a broad category), but it would have been illogical for the drafters to create such a procedure without an explicit regime for judicial control in order to adjudicate *which* persons do indeed have a sufficient interest. When the drafters wished to create such a system, they did so, as in rule 103. Accordingly, since the interpretation urged by the LRV2 would be fundamentally inconsistent with the Court's procedural economy (and would encourage external actors to engage in speculative litigation), it may not be considered the correct meaning of the term "party". In the Prosecution's submission, the term "party" in article 82(1) must at least have an objective meaning, which may be applied and relied upon consistently, even if only for the purpose of article 82.[67]

38. In this regard, the LRV2 also seem to misapprehend the Pre-Trial Chamber in the Certification Decision, when it distinguished provisions in which "standing to appeal is specifically granted" to entities "who are not initiators of the specific legal procedures in question", or at least have the power to initiate such procedures. This was relevant in attempting to define what a "party" *is*, not to suggest that all rights of appeal are limited to parties.[68] Simply put, the Statute regulates standing to appeal in two ways. First, it makes general provision for those procedural actors who are integral to the conduct of the proceedings before the Court ("parties"). Second, it makes additional, specific provision for other actors who are recognised to have an interest in the proceedings before the Court, such as States with regard to measures under article 57(3)(d) or victims under article 82(4) in relation to decisions on reparations. The existence of this latter category does not, however, greatly illuminate the content of the former—beyond the obvious point that, when the drafters considered that entities other than the "parties" (narrowly defined) required standing to appeal, this was granted expressly.

39. The LRV1 are not assisted by the practice of the Court in permitting States—and still exceptionally, for limited purposes—to be considered "parties" to proceedings for the

[65] LRV2 Brief, paras. 25-28.
[66] LRV2 Brief, para. 28.
[67] *See also below* para. 40.
[68] LRV2 Brief, para. 32.

purpose of article 82(1).[69] In *Bashir*, Jordan was recognised to have standing to appeal under article 82(1)(d) when the lawfulness of its own conduct was the very object of proceedings before the Court under article 87(7) of the Statute (leading to its referral, initially, to the Assembly of States Parties and the Security Council).[70] The decision in *S. Gbagbo* recognised that Côte d'Ivoire had standing to appeal in circumstances when it was already and expressly recognised by the Statute, under article 19(2)(b), to have standing to bring the challenge to admissibility which led to the impugned decision in the first place.[71] This was consistent, for example, with the principle established in article 18(4) of the Statute. As such, these precedents show only that States may be recognised to have sufficient interest in certain proceedings (both in nature and degree) to justify regarding them as a "party"—but only where this is also consistent with the broader procedural scheme of the Statute.[72] In contrast, the position of victims is materially different, insofar as the Statute not only provides them with their own bespoke participatory regime (which applies at all relevant stages of proceedings) but also expressly regulates their right to appeal in article 82(4) (thus, by implication, excluding their resort to any right of appeal under article 82(1) and (2)).

40. The LRV1 overstate the "manifestly absurd or unreasonable" consequences that they consider would follow from the established law that the victims are not a "party" in the meaning of article 82(1) of the Statute.[73] First, and in contradiction to the LRV2's approach,[74] this assumes that the term "party" must necessarily have the same meaning in every provision

[69] *Cf.* LRV1 Brief, para. 49. *See also* LRV2 Brief, paras. 28-29 (suggesting that the practice of the Court illustrates that the term "party" has been "understood to encompass all those whose legal interests are affected by a decision").
[70] *See* ICC-02/05-01/09-397 OA2 ("*Bashir* Referral Appeal Judgment"), paras. 14, 17, 212-213, 215-216. *Cf.* LRV1 Brief, para. 50. The LRV2's reference to the decision recognising Mr Mangenda's standing to appeal matters under article 85 of the Statute—again subject to judicial control, under article 82(1)(d)—is also consistent with this principle, insofar as Mr Mangenda's rights under the Statute were the very object of the proceedings in question: *cf.* LRV2 Brief, para. 28 (citing ICC-01/05-01/13-1893 ("*Mangenda* Compensation Certification Decision"); ICC-01/05-01/13-1964 OA13 ("*Mangenda* Compensation Appeal Judgment")).
[71] *See* ICC-02/11-01/12-75-Red ("*S. Gbagbo* Admissibility Appeal Judgment"), paras. 7, 15. *Cf.* LRV1 Brief, para. 51.
[72] *See also* Brady, pp. 594 ("There is little doubt that a State which raised a challenge or question on jurisdiction or admissibility, or which is directly involved in the Court's ruling on the issue, is a 'party', and as such may bring an appeal against the decision with respect to admissibility or jurisdiction under article 82, paragraph 1(a). In addition, a State affected by the Pre-Trial Chamber's decision under article 57, paragraph 3(d) has the right to bring an appeal under article 82, paragraph 2"), 596 (recalling that victims and witnesses may be the subject of protective measures and that "it would seem reasonable that the victim or witness who brought the motion for the protective or special order, or who is directly affected by the decision, is a 'party' to the proceedings which determined the issue, and as such may bring an appeal" under article 82(1)(d) of the Statute, but observing even so that "in view of the multitude of victims and the potential number of protective and special orders, the Court will need to inject a good dose of pragmatism into its approach to granting leave so as not to endlessly tie up the resources of the Appeals Chamber").
[73] *Contra* LRV1 Brief, para. 54.
[74] LRV2 Brief, para. 28. *See above* para. 37.

of the Statute. While this is indeed normally an appropriate starting point, it need not necessarily be the case.[75] Second, the examples provided by the LRV1 generally relate to the possibility for legal representatives of victims to present evidence during trial.[76] But they overlook that, in this respect also, the practice of the Court does not consider that victims have the same procedural rights in presenting evidence as the Prosecution and the Defence[77]—the "parties" to the trial.[78]

II.B. The Prosecutor is the only party to pre-investigative proceedings

41. Nor does the Prosecution see any basis to draw a special distinction for the purpose of article 15 proceedings.[79] Nothing in article 82(1)—or, specifically, article 82(1)(a)—offers any support for the view that its interpretation may vary according to the stage of proceedings. Quite to the contrary, it is expressed in absolute terms. While the Prosecution is sympathetic to the victims' concerns in this appeal, it is not clear that a negative decision under article 15(4) goes more directly to "the core of their interests" than, for example, other procedural decisions including those under articles 53, 58, 61, and 74 of the Statute.[80]

42. The practice of the Special Tribunal for Lebanon ("STL") cited by the LRV1 shows nothing to the contrary, insofar as "exceptionally" and "in strictly confined circumstances" it allowed victims "a narrow right" to appeal a decision relating to the grant of protective measures for those same victims—and this highly circumscribed finding was itself only reached by a slender 3-2 majority.[81] Materially, even that majority further agreed that "there

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[75] *See* R. Gardiner, *Treaty Interpretation*, 2nd Ed. (Oxford: OUP, 2015), p. 209.
[76] LRV1 Brief, para. 54.
[77] *See e.g.* ICC-01/04-01/07-2288 OA11 ("*Katanga* Modalities Appeal Judgment"), paras. 47-48 ("the Trial Chamber, in determining whether to exercise its authority under article 69(3) of the Statute to request victims to submit evidence, and if the requirements of article 68(3) are fulfilled, does so with the understanding that 'the right to lead evidence pertaining to the guilt or innocence of the accused […] lies primarily with the parties'. […] The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68(3) of the Statute […] Secondly, when requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69(3)").
[78] *See above* paras. 31-32, 35.
[79] *Contra* LRV1 Brief, para. 40; LRV2 Brief, para. 7 (suggesting that, notwithstanding the standing of victims "to lodge an appeal at other stages of proceedings", the Appeals Chamber may consider they have standing to appeal against decisions under article 15(4) of the Statute).
[80] *Contra* LRV1 Brief, para. 52.
[81] *Cf.* LRV1 Brief, para. 53 (citing STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representatives of Victims against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("*Ayyash* Victim Protective Measures Appeal Judgment"), para. 10). *See also* para. 87. *See further* *Ayyash* Victim Protective Measures Appeal Judgment, Partly Dissenting Opinion of Judges Riachy and Nsereko, *especially* paras. 13 (referring to "general principles of criminal law and international human rights law, which recognize a right of appeal of an accused person but do [not] confer a comparable right on victims when they do

can be no right of appeal if it was the express intention of the drafters to exclude it".[82] It also expressly distinguished its interpretation of the STL Statute from the law applicable at this Court.[83]

43. Nor does the fact that article 82(1) refers to "[e]ither party" mean that there must necessarily be more than one party in all procedures to which this provision applies. Consequently, there is no proper basis to conclude that, in *ex parte* proceedings to which the Defence is not a party, some other entity (such as the victims) must be a party instead. Rather, *mutatis mutandis*, article 82(1) may apply simply to *one* party if the proceedings in question are *ex parte*.[84] In the context of article 15(4), therefore, it is immaterial that the interest of victims at this stage "is arguably greater than that of any other party outside the Prosecution".[85] While the Prosecution may agree with this view, this still does not mean that the procedural role of victim at this time is *analogous* with, or becomes akin to, that of the Prosecutor, such that they must be granted the procedural rights as an appellant which flow from that.

44. The LRV1 acknowledge that their claim of standing under article 82(1)(a) "is based on their right to participate in matters relating to the authorisation of the investigation",[86] under article 15(3) and rule 50.[87] But this right is not absolute—as the Pre-Trial Chamber recognised in the *Burundi* situation, for the purpose of article 15(3), "the Pre-Trial Chamber may restrict victims' right of participation in certain situations in accordance with article

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not have the status of *partie civile*" and concluding that "generally under the [STL] Statute, only parties may bring an appeal" and that "[e]xceptions to this principle must be clearly articulated in the Rules and must be narrowly applied to the situation foreseen in that text"), 16 (observing that the "[STL] Statute contains a general presumption that non-parties are not permitted to lodge appeals, and the Rules contain no explicit provisions granting [victims] a right of appeal in relation to protective measures"), 19 (noting that the possibility for "victims to present their views and concerns at stages of *existing* proceedings before a Chamber […] does not include initiating new proceedings or […] mounting an appeal", emphasis supplied), 20 ("an appellant must always demonstrate that he or she has standing to appeal" and there is no "justifiable basis" for "adding 'fundamentally concerned interests' as a basis for the right to appeal").

[82] *Ayyash* Victim Protective Measures Appeal Judgment, para. 11. *See further above* paras. 36, 39 (concerning the intention of the drafters of the Rome Statute with regard to victims' standing for appeal).

[83] *Ayyash* Victim Protective Measures Appeal Judgment, para. 17 (recalling the "case-law of the International Criminal Court […] under which participating victims have not been permitted to initiate interlocutory appeals" but considering that the STL is "not bound by that jurisprudence" and that "there are a number of differences between the legal framework of the ICC and that of our Tribunal"). *But see also* Partly Dissenting Opinion of Judges Riachy and Nsereko, para. 11.

[84] *Contra* LRV1 Brief, paras. 40 (suggesting that "[i]t is erroneous to interpret the provision as referring to Prosecution and Defence, as there is no Defence at this stage"), 43 ("Therefore, the two parties recognised by the Statute and the Rules to participate in the authorisation of investigation process are the Prosecution and the victims"). *See also* para. 46.

[85] LRV2 Brief, para. 30.

[86] LRV1 Brief, para. 32.

[87] LRV1 Brief, para. 33. *See also* paras. 41-42.

68(1) of the Statute", for example if the Prosecution has determined under rule 50(1) that there is a relevant "danger to the integrity of the investigation or the life or well-being of victims and witnesses".[88] Likewise, as in this situation, the victims may potentially have access to some parts of an application under article 15(3)—and, indeed, the ensuing decision under article 15(4)—but not necessarily all of it. The possibility for such restrictions not only affects the extent in principle to which victims may consequently participate in any resulting appeal proceedings,[89] but also illustrates the difficulty in viewing article 15(3) as enabling victims to be a "party" to the proceedings for the purpose of article 82(1). Such status would be incompatible with the possibility for the Pre-Trial Chamber to restrict their opportunity to make representations, as recognised for example in *Burundi*.

45. Nor in any event does the exercise of the victims' right to make representations under article 15(3) mean that they have procedural rights comparable at that stage to those of the Prosecutor, as the LRV1 even concedes.[90] There is no inconsistency in recognising their "strong interest" in such matters—which led the drafters of the Statute to enable them to make representations to the Pre-Trial Chamber—but not conferring upon them the procedural rights of a "party", in particular, the right to appeal.[91] The LRV1 appear to wholly overlook that, while the victims were entitled to make representations for the purpose of article 15(4), the application was brought at the instance of the Prosecutor.[92] And, while the Prosecution agrees that the Decision is detrimental to the interests of victims, and shares their concerns in this regard, the Court has adequately protected their interests by the Prosecutor's own standing to appeal,[93] which she has exercised on this occasion.[94] While the LRV1 asserts that this is insufficient, they do not explain the basis for this conclusion.[95] The issues raised by the Prosecution and the LRV1 are essentially the same.

46. The LRV1 are not assisted in this respect by referring to other occasions on which victims may be permitted to make representations. For example, it is irrelevant that victims

[88] *See* *Burundi* Article 15 Decision, paras. 10-11. *See also* paras. 13-14, 18-19.
[89] By way of analogy, *see e.g.* ICC-01/04-169 OA ("*DRC* Warrant Appeal Judgment"), para. 30 (even if any right of participation is applicable on appeal, "it must of necessity be restricted in its enforcement due to the under seal and *ex parte*, Prosecutor only, nature of the proceedings").
[90] LRV1 Brief, para. 84. The LRV1 likewise does not claim any right to participate in the non-judicial proceedings associated with the conduct of an investigation: LRV1 Brief, para. 85. *See also* LRV2 Brief, paras. 11-12.
[91] *Cf.* LRV1 Brief, para. 56.
[92] *See* LRV1 Brief, para. 58.
[93] *See* LRV1 Brief, para. 58.
[94] *See above* para. 19.
[95] LRV1 Brief, para. 81.

were permitted to make legal submissions in proceedings brought by the Prosecutor under article 19(3) of the Statute—there is no basis to suggest that, in that context, the victims could have sought to appeal the Pre-Trial Chamber's decision under article 19(3).[96] It is irrelevant also that victims may always seek "*participation*" in any proceedings.[97] This merely illustrates that the Statute welcomes and benefits from the participation of victims on substantive matters *without* necessarily conferring on them the autonomous procedural rights (and duties) of parties to the litigation.

47. The LRV1's emphasis on the Prosecutor's duty to consider the "interests of victims" under article 53(1)(c) also undermines its view that the drafters of the Statute must therefore have intended to give victims standing to appeal.[98] To the contrary, if the Prosecutor were to make a negative determination about the interests of justice under article 53(1)(c), in a situation which had been referred to the Court, article 53(3)(b) makes clear that the *Pre-Trial Chamber* is entitled to intervene, but no right of standing is granted to the victims to challenge the Prosecutor's decision, notwithstanding their close interest in such matters. Likewise, while the Prosecutor is obliged under rule 92(2) to inform the victims of a decision not to investigate, the drafters expressly chose *not* to provide the victims with a remedy.[99] Only the Security Council or a State Party which referred the situation can request the Pre-Trial Chamber to review the Prosecutor's decision not to open a situation for investigation, with a view to requesting her to reconsider. Rather, by requiring the organs of the Court such as the Prosecutor and judicial Chambers to "take into account the needs of all victims", rule 86 illustrates that the drafters sought instead to make victims' concerns central to the Court's operation *without* making them a party,[100] given the procedural burden this might entail.

48. Finally, and contrary to the suggestion of the LRV1 and LRV2, it is not necessary to interpret the term "party" in article 82(1) to include victims, for the purpose of a decision under article 15(4), to ensure the Statute is consistent with "internationally recognized human rights", as required by article 21(3).[101] While it is true that the Statute is informed by internationally recognised human rights,[102] the LRV1 overlook that the Statute makes more

[96] *Contra* LRV1 Brief, para. 55 (referring to the *Bangladesh-Myanmar* proceedings). *See also* para. 56.
[97] *Contra* LRV1 Brief, para. 57. *See also* para. 85.
[98] *Contra* LRV1 Brief, para. 56.
[99] *Cf.* LRV1 Brief, para. 60. Rule 92, moreover, does not apply to proceedings under article 15 of the Statute: *see* rule 92(1); *DRC* Investigation Participation Appeal Judgment, para. 47.
[100] *Cf.* LRV1 Brief, para. 60.
[101] *Contra* LRV1 Brief, paras. 10, 61; LRV2 Brief, para. 38. *See also* Certification Decision, para. 25.
[102] LRV1 Brief, para. 63; LRV2 Brief, para. 38.

specific provision to give effect to these rights within the limits of the Court's mandate. In particular, the internationally recognised right to a remedy is opposable to *national* jurisdictions, rather than the Court, which is merely one means by which States give effect to their obligations in this respect.[103] In this context, the selective mandate of the Court—as illustrated by articles 15 and 53—demonstrates that it is not a forum in which the right of every victim in a situation can be vindicated.[104] States retain their primary obligation to afford an effective remedy for those matters which do not fall within the Court's mandate.[105] Nor does the right to an effective remedy mean that victims must have procedural standing to appeal every decision affecting their interests at this Court.[106] Rather, in such matters, the Prosecutor—who takes account of their interests under rule 86—acts on their behalf, and on behalf of the international community as a whole.

49. The LRV2's further suggestion that victims may require standing to appeal under article 82(1), in the context of article 15 proceedings, to ensure that the *Prosecutor* is accountable also seems misplaced. In these proceedings, the appeal at issue—for which the LRV2 seek standing—is not directed at the Prosecutor, but at a decision of a Pre-Trial Chamber *denying*

[103] *See e.g.* ICCPR, art. 2(3); UN Human Rights Committee, *General Comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15. *See also* ACHR, art. 25 (guaranteeing "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection" against violations of fundamental rights, but further specifying that States shall undertake this guarantee by means of "the competent authority provided for by the legal system *of the state*", emphasis added); ACHPR, art. 7(1) (guaranteeing "the right to an appeal to competent *national organs*" against violations of fundamental rights, emphasis added); ECHR, art. 13 (guaranteeing "an effective remedy before a *national authority*", emphasis added). *See also* D. Harris et al, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 3rd Ed. (Oxford: OUP, 2014), pp. 765 (citing *Kudla*, para. 152), 782; L. Burgorgue-Larsen and A. Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: OUP, 2011), pp. 681-683 (mns. 26.12-26.14: referring to the "enormous variety of *national* situations", emphasis added, relevant to article 25 of the ACHR), 700 (mn. 27.05: describing how the Inter-American Court has conceptualised a 'right to the truth' within the context of articles 8 and 25 of the ACHR); N. Roht-Arriaza, 'Principle 1: general obligation of States to take effective action to fight impunity,' in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity* (Oxford: OUP, 2018), pp. 48-50 (discussing the general obligations of States to take effective action to combat impunity); W. Schabas, 'Principle 20: jurisdiction of international and internationalized criminal tribunals,' in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity* (Oxford: OUP, 2018), p. 219 (observing that "[i]t remains the rule that States have primary responsibility to exercise jurisdiction over serious crimes under international law" and that international tribunals may exercise "concurrent jurisdiction" with States "[i]n accordance with the terms of their statutes"); D. Shelton, *Remedies in International Human Rights Law*, 3rd Ed. (Oxford: OUP, 2015), pp. 16-18, 58, 432 (describing this Court as "an additional forum for sanctioning the most egregious breaches of human rights law" but observing that "it does not eliminate the need for civil remedies to redress the harm caused to the victims", emphasis added). *See further* Statute, Preamble ("[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[e]mphasizing that the International Criminal Court […] shall be complementary to national criminal jurisdictions"). *See also* LRV2 Brief, para. 40 (recalling that "[t]he EU 'Victims' Directive' requires *EU jurisdictions* to implement the right to an effective remedy", emphasis added).

[104] *Cf.* LRV1 Brief, para. 64. *See also* paras. 65-75. *Cf.* LRV2 Brief, para. 30.

[105] *Contra* LRV2 Brief, para. 77 ("a decision by the Prosecutor not to even open an investigation permits complete impunity in the entire situation").

[106] *Contra* LRV2 Brief, para. 39.

the Prosecutor's *own* application under article 15(3).[107] In such a context, the Prosecutor not only sought to take action, but did so on her own initiative. It is hard to imagine how, in this scenario, victims could require further accountability from the Prosecutor. It is notable that the drafters did not even grant standing to appeal for any State affected by a *positive* article 15(4) decision—where the issue of prosecutorial accountability might in principle be said to more closely engaged.[108] Rather, the drafters recognised that the Prosecutor's exercise of her statutory independence in these matters is best assured by the high qualifications on her post, and the checks and balances in the Statute, and not by the introduction of further legal procedures at this very early stage of proceedings. The Appeals Chamber should be cautious to adopt any interpretation that may affect the delicate balance reached by the drafters in articles 15, 53, and 82.

II.C. Expansion of standing to appeal, with no judicial control, is likely to impede the fair and expeditious conduct of proceedings

50. The LRV2 suggest that there should be no concern "that recognising victims' standing to appeal would open the floodgates, […] both as a matter of theory and—based on experience in similar jurisdictions—as a matter of practice."[109] Respectfully, the Prosecution disagrees. To the contrary, it is difficult to see how the principle claimed by the LRV1 and LRV2 could be appropriately limited. Likewise, while it may be true that expanding the scope of standing to appeal may not infringe upon the rights of third parties as such, or of the Prosecutor, this does not mean that it is procedurally desirable or consistent with the framework of the Statute.[110]

51. First, while the Prosecution acknowledges the LRV2's view that "victims' interests will be substantially less significant" in the course of "interlocutory proceedings before the Court" other than those under article 15(4), such that they would not possess standing to appeal, it is not clear that this is so.[111] Nor are the LRV2 in this situation in a position to foreclose a more assertive stance by other victims in other cases and situations. As a consequence, it is impossible to claim that granting standing to the victims under article 82(1)(a) for the purpose of an article 15(4) decision would not entail a much broader principle.

[107] *Contra* LRV2 Brief, para. 33.
[108] States are, however, given limited recourse under articles 18 and 19 of the Statute: *see e.g.* Statute, arts. 18(2), 18(4), 18(7), 19(2).
[109] LRV2 Brief, para. 34.
[110] *Cf.* LRV1 Brief, para. 83. *See also* paras. 84-86.
[111] *Contra* LRV2 Brief, para. 36. *See above* para. 41, 45.

52. Second, and as already noted, a case-sensitive assessment of "whose legal interests are directly affected by the decision in question"—the test suggested by the LRV2 to determine who is a "party" for the purpose of article 82(1)—is itself likely to trigger speculative litigation as various potential entities will be able to make colourable, even if not ultimately persuasive, arguments that they constitute such a person. Contrary to the LRV2's apparent assumption,[112] the principle that they espouse would not be confined only to victims, but might also potentially include (for example) States Parties to the Statute, States which are not Parties to the Statute, inter-governmental organisations, NGOs, witnesses, and so on. In this regard, the Prosecution recalls the caution expressed by a bench of the ICTY Appeals Chamber when considering questions of standing:

> If this view of the matter appears overly legalistic, any other ruling would open up the Tribunal's appeals procedures to non-parties—witnesses, counsel, *amicus curiae*, even members of the public who might nurse a grievance against a Decision of the Trial Chamber. This could not be. The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties.[113]

53. Third, the practice of the STL and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") does not assist in the present regard.[114] As previously noted, the grant of standing to appeal for victims at the STL was in any event extremely limited.[115] Yet even if it was not, the material circumstances of those tribunals are very different from those of this Court, especially with regard to the basis of their jurisdiction and their ability to trigger 'new' investigations.

54. The proceedings in this case also illustrate the difficulties inherent in any expansion of standing to appeal. As the LRV1's submissions illustrate, they sought to 'second-guess' the Prosecution's understanding of the applicable legal and procedural regime—resulting in a process which has been rendered unnecessarily complex, while ultimately placing the resulting appeal on no sounder a procedural footing.[116] Indeed, as the Prosecution has already

[112] *See* LRV2 Brief, paras. 34-37 (referring only to victims).
[113] ICTY, *Prosecutor v. Tadić*, IT-94-1-T, In the Case of Dragan Opačić: Decision on Application for Leave to Appeal, 3 June 1997, para. 6.
[114] *Contra* LRV2 Brief, para. 37.
[115] *See above* para. 42. *See also* LRV2 Brief, para. 37 (noting that "in practice" even this has been "rarely exercised").
[116] *Contra* LRV1 Brief, para. 82.

advised,[117] the LRV1 are incorrect to assert that their appeal "encompasses critically important issues that are not appealable by the Prosecution".[118]

55. Furthermore, while the Prosecution notes the submission of the LRV1 and LRV2 that *any* person qualifying as a victim in the meaning of article 15(3) has the full participatory rights of victims as provided in the Statute,[119] this could potentially include thousands—even millions—of individuals, with no judicial control over their intervention. Within the context of article 15(3), the Court has developed procedures to accommodate the reception of such submissions in large numbers. Yet if each of those individuals was also vested with standing to appeal, including under article 82(1)(a) where there is no mechanism of judicial control,[120] this could lead to a significant volume of additional litigation.

III. THE DECISION IS ERRONEOUS AND SHOULD BE REVERSED

56. Notwithstanding their technical differences on matters of appellate procedure, the Prosecution and the LRV1 and the LRV2 concur that the Decision is erroneous and should be reversed. Not only did the Pre-Trial Chamber err in law, by misinterpreting the assessment that it was obliged to carry out under articles 15(4) and 53(1)(c) of the Statute, but it also abused its discretion in attempting to carry out that assessment. Specifically, the Pre-Trial Chamber: erred in procedure by failing to seek additional information when required; misdirected itself as to the law concerning the scope of an authorised investigation and the jurisdiction of the Court; misappreciated relevant considerations; and, took into account irrelevant considerations. All these errors materially affected the Decision.

III.A. The Pre-Trial Chamber erred in law by seeking to make a positive determination of the interests of justice (Prosecution's First Ground of Appeal)

57. In its First Ground of Appeal, the Prosecution submitted that the Pre-Trial Chamber erred in concluding that it was permitted or required to condition the authorisation of an

[117] ICC-02/17-63 ("Prosecution Notice of Joined Proceedings"), para. 5 ("the issues previously identified by the Legal Representatives either fall within the issues certified for appeal by the Pre-Trial Chamber, or are 'inextricably linked' to them, and so may be heard in that context"). *See also* ICC-02/17-68 ("Page Limit Decision"), para. 10.
[118] *Contra* LRV1 Brief, para. 82. *See also* paras. 144, 165. *See further above* para. 19.
[119] LRV1 Brief, paras. 34-38; LRV2 Brief, paras. 13-23.
[120] *See also* *Ayyash* Victim Protective Measures Appeal Judgment, para. 10 (expressly conditioning the "narrow right" it recognised for victims to appeal matters relating to their own protective measures on "obtaining certification" from the first instance chamber). On the limited nature of this decision, *see further above* para. 42. Regarding the importance of judicial control for the purpose of this Court, *see also above* fn. 72.

investigation on its own *positive* determination that this would be in the interests of justice.[121] This argument thus coincides substantially with the First Ground of Appeal of the LRV1, and the First and Second (in part) Grounds of Appeal of the LRV2.

58. Specifically, the Prosecution and the LRV1 and LRV2 agree that the Pre-Trial Chamber erred in law in interpreting articles 15(4) and 53(1)(c), and that the Pre-Trial Chamber was not permitted to conduct its own (positive) assessment of the interests of justice.[122] Indeed, in determining that such an assessment was required, the Pre-Trial Chamber not only departed from the consistent practice of the Court but also failed to engage in any thorough process of statutory interpretation.[123]

59. However, according to the LRV1 and the LRV2, "[t]he Chamber can review, or carry out [an assessment under article 53(1)(c)] only where the Prosecution decides *not* to investigate or prosecute".[124] This is based on their view that the Pre-Trial Chamber's power of judicial review of determinations under article 53(1)(c) is "expressly limited" by article 53(3).[125]

60. The Prosecution finds some merit in the 'bright line' position adopted by the LRV1 and LRV2 in this regard. Nonetheless, out of an abundance of caution and mindful of the practice of other Pre-Trial Chambers under article 15(4),[126] the Prosecution recognised in its Appeal Brief that article 15(4) of the Statute might indeed be plausibly interpreted to permit the Pre-Trial Chamber to determine whether it concurs with the Prosecutor's assessment under article 53(1)(c)—*but provided* that, in considering this question, it does not exceed the scope of the Prosecutor's assessment and the 'negative' nature of the test established under the Statute, as the Pre-Trial Chamber did in the Decision.[127] As such, even if the Pre-Trial Chamber was entitled to consider whether it concurred with the Prosecutor that there were not substantial reasons to believe that an investigation would not serve the interests of justice, it remains the case that the Pre-Trial Chamber erred in the *way* it understood and carried out this

[121] *See* Prosecution Appeal Brief, paras. 12-59.
[122] *See e.g.* LRV2 Brief, para. 83.
[123] LRV1 Brief, paras. 110-112. *See also* LRV2 Brief, paras. 56-69.
[124] LRV1 Brief, para. 7 (emphasis supplied); LRV2 Brief, para. 55. *See also* LRV1 Brief, paras. 99-100, 109; LRV2 Brief, paras. 59-69.
[125] LRV1 Brief, para. 107; LRV2 Brief, paras. 55 (especially fn. 84, citing article 53(3)), 59, 61. *See further* LRV1 Brief, para. 108.
[126] In this regard, the LRV2 perhaps misinterprets the significance of the remark by the *Kenya* Pre-Trial Chamber that review of the Prosecutor's assessment under article 53(1)(c), in the circumstances of that situation, was "unwarranted": LRV2 Brief, para. 56. *See* Prosecution Appeal Brief, paras. 35 (fn. 57), 39-40.
[127] *See e.g.* Prosecution Appeal Brief, paras. 26-40, 47, 67, 128.

assessment. The Prosecution understands the LRV1 and the LRV2 also to allow for this position, in the alternative.

61. Precisely because a chamber "cannot review the absence of a finding",[128] the Prosecution submits that the Pre-Trial Chamber must, under articles 15(4) and 53(1)(c), confine itself to determining whether it concurs with the Prosecutor on either one of two matters. First, that there is no specific circumstance which sufficiently raises concern that opening an investigation would not serve the interests of justice; or second, whether it concurs with the Prosecutor's assessment of how such a factor is weighed against other relevant factors such as the gravity of the identified crime(s) and the interests of the victims.[129] The LRV2 appear to share this view.[130] This is the only way to give effect to the 'negative' nature of the article 53(1)(c) assessment—which follows from the presumption of investigation for situations meeting the requirements of articles 53(1)(a) and (b)—which appears to be commonly agreed in these proceedings.[131]

62. As explained in the Prosecution's Appeal Brief, the Prosecution agrees that the Pre-Trial Chamber should have been guided primarily by the representations of victims in determining whether it concurs with the Prosecutor's determination that there is no substantial reason to believe the requested investigation would not serve the interests of justice.[132] The Prosecution also agrees that, in circumstances where the Pre-Trial Chamber considers that such a reason may exist, it should seek further information from the Prosecutor as to her assessment of the relevant factors.[133]

III.B. The Pre-Trial Chamber abused its discretion in assessing the interests of justice (Prosecution's Second Ground of Appeal)

63. In its Second Ground of Appeal, even if the Pre-Trial Chamber was correct to find that it was allowed to condition its article 15(4) decision on the basis of its own positive assessment of the interests of justice, the Prosecution submitted that the Pre-Trial Chamber

[128] LRV2 Brief, para. 58.
[129] *See* Prosecution Appeal Brief, para. 37.
[130] LRV2 Brief, para. 79 ("Even if […] a pre-trial chamber is permitted to address the 'interests of justice' requirement as part of an article 15 process, its examination is limited to reviewing the Prosecutor's discretionary determination—not substituting its own discretion for that of the Prosecutor"). *See also* paras. 80-82.
[131] *See e.g.* LRV2 Brief, para. 68 (referring to "the presumption—implicit in the Statute and consistent with its object and purpose—that investigations of criminal conduct subject to the Court's jurisdiction and admissibility requirements will be in the interests of justice"). *See also* para. 78.
[132] *See* Prosecution Appeal Brief, paras. 18, 37 (second bullet point), 41, 59. *See also* LRV1 Brief, paras. 112, 115; LRV2 Brief, para. 12.
[133] LRV1 Brief, paras. 113-114.

abused its discretion in conducting such an assessment. This overlaps with and complements the Second to Sixth Grounds of Appeal of LRV1, and the Second to Fourth Grounds of Appeal of LRV2. In particular, the Pre-Trial Chamber failed to seek additional information from the Prosecutor, failed to properly appreciate the three factors that it principally identified (and the broader legal framework relevant to those factors), and took into account legally irrelevant considerations.

64. The Prosecution also notes in this context that the LRV1 and the LRV2 do not have access to the confidential and *ex parte* annexes to the Prosecutor's Request under article 15(3), which contain some information identifying certain individuals, and to which passing reference was made in the Prosecution Appeal Brief. As such, to any extent that in these proceedings the LRV1 and the LRV2 may choose to address the experiences of identified individuals, this would be done without knowledge of whether or not these individuals may already be referred to in the Request. This state of affairs does not prejudice the conduct of these proceedings since, in any event, the Prosecution considers as a matter of law that the incidents identified in the Request are merely *examples* for the purpose of proceedings under articles 15(3) and 15(4), and that the scope of any authorised investigation is not limited to these examples.[134]

III.B.1. The Pre-Trial Chamber failed to seek additional information from the Prosecutor (Second Ground of Appeal of LRV2, in part)

65. The Prosecution agrees with the LRV2 that the Pre-Trial Chamber erred by failing to seek additional information from the Prosecutor when it identified concerns with respect to the Prosecutor's analysis under article 53(1)(c).[135] While not enumerated as a sub-ground of appeal in its own right, the LRV1 Brief also submits that the Pre-Trial Chamber committed a procedural error "by not giving the Prosecutor and victims an opportunity to be heard on 'the interests of justice'".[136]

66. The Prosecution also notes the submission of the LRV2 that the Pre-Trial Chamber failed sufficiently "to take account of the views of victims that were before it", insofar as they suggest that "the Pre-Trial Chamber *wholly ignored* the victims' representations".[137] While

[134] *See below* para. 68-69, 71.
[135] LRV2 Brief, paras. 91, 96. *See further* Prosecution Appeal Brief, paras. 37 (second bullet point), 63-68, 128, 136.
[136] LRV1 Brief, para. 9. *See also* paras. 101, 113, 115, 138.
[137] LRV2 Brief, paras. 91, 93 (emphasis supplied). *See further* paras. 95-99. *But see also* para. 92 (acknowledging that "a chamber cannot be required to *agree with* or *adopt* victims' views").

the Prosecution takes no position on this particular claim, it does recall its submission that the Pre-Trial Chamber's declared aspiration to serve the interests of the victims was not apparently matched either by its reasoning or the conclusions that it ultimately reached.[138]

67. That said, the Prosecution does not agree with the LRV2's criticism of the Pre-Trial Chamber's remark concerning the evidentiary basis for its article 15(4) decision,[139] insofar as the Prosecution understands this to have correctly reflected the legal requirement that the Pre-Trial Chamber and the Prosecutor must *concur* with regard to the authorisation of an investigation.[140]

III.B.1. The Pre-Trial Chamber erred in law by imposing an arbitrary limit on the scope of any authorised investigation (Fourth Ground of Appeal of LRV1; Third Ground of Appeal of LRV2)

68. The Prosecution agrees with the LRV1 and the LRV2 that the Pre-Trial Chamber, by majority, erred in appreciating the potential scope of the authorised investigation, by limiting it to those incidents identified in the Prosecutor's request under article 15(3) and incidents "closely linked" to them, and that this raises an important issue of principle.[141] This materially affected the Pre-Trial Chamber's assessment of the interests of justice, insofar as it informed the various factors which it sought to take into account.[142] But, more broadly, the LRV2 are also correct to point out that excluding the possibility that an investigation authorised under article 15(4) may encompass crimes committed after the date of the request under article 15(3) limits the deterrent value of the Court's engagement with a situation, and thus impedes one of "the fundamental objectives of the Court".[143]

69. As the Prosecution has already explained, the scope of an investigation is delimited by suitable geographic, temporal, and other material parameters, which are reasonably derived

[138] *See e.g.* Prosecution Appeal Brief, paras. 157-166 (arguing that the Pre-Trial Chamber failed to properly identify and give sufficient weight to the interests of the victims in its assessment of the interests of justice).
[139] LRV2 Brief, para. 95 (submitting that the Pre-Trial Chamber dismissed " victim representations wholesale by insisting that its determination under article 15(4) must be made 'on the *exclusive* basis of information *made available by the Prosecutor*'", emphasis supplied).
[140] *See e.g.* Prosecution Appeal Brief, paras. 36, 38. *See further* ICC-02/11-15-Corr ("*Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández"), paras. 16 ("By virtue of the limited purpose of the procedure under Article 15 of the Statute […], as well as the distinct mandates and competences of the Chamber and the Prosecutor respectively, the examination to be undertaken by the Chamber, in exercising its supervisory role, is solely a review of the request and material presented by the Prosecutor"), 18, 21, 27-28.
[141] LRV1 Brief, paras. 145-150; LRV2 Brief, paras. 100-101.
[142] *See e.g.* Prosecution Appeal Brief, para. 76.
[143] LRV2 Brief, para. 112. *See also* paras. 111, 113.

from the circumstances suggested by the available information.[144] It is not confined to the specific incidents identified for the purpose of article 53(1). In this regard, the Prosecution agrees with the LRV1 and LRV2 that key considerations supporting this understanding include the distinction between "situations" and individual cases[145]—which is significant in light of the distinct competences of the Prosecutor and the Pre-Trial Chamber[146]—as well as the Prosecutor's duty of objective investigation under article 54(1),[147] and the obvious practical difficulties that arise in limiting the scope of an investigation to matters which can be established to the article 53(1) standard of proof *without* investigation.[148] The Prosecution also agrees that the Decision represents a marked departure from the consistent practice of the Court.[149]

70. The Prosecution notes the LRV2's further concern that the Pre-Trial Chamber may also have been inclined to "exclude[]crimes which are sufficiently linked to the situation in Afghanistan and which appear to fall clearly within the jurisdiction of the Court, whether classified as war crimes or crimes against humanity."[150] In particular, the LRV2 appear to suggest that the Pre-Trial Chamber excluded the possibility that certain allegations might constitute crimes against humanity,[151] or be attributable to perpetrators other than those provisionally identified for the purpose of article 53(1).[152]

71. The Prosecution does not share the LRV2's interpretation of the Decision in this regard, given the position that it had itself taken in its Request, for the limited purpose of articles 15(3) and 53(1).[153] Notwithstanding the Decision, however, the Prosecution also emphasises its own view that the specific conduct identified for the purpose of article 15(3) does not limit the scope of the subsequent investigation, or the legal characterisation of any offences established by that investigation, provided the offences in question are sufficiently linked to

[144] Prosecution Appeal Brief, para. 77.
[145] LRV1 Brief, paras. 153. *See further* Prosecution Appeal Brief, paras. 78, 83.
[146] *See further* Prosecution Appeal Brief, para. 84. *See also* LRV1 Brief, para. 163; LRV2 Brief, paras. 114-115.
[147] LRV1 Brief, para. 155. *See further* Prosecution Appeal Brief, para. 86.
[148] LRV1 Brief, paras. 160-162; LRV2 Brief, paras. 103-108, 110. *See further* Prosecution Appeal Brief, para. 87.
[149] LRV1 Brief, paras. 154, 157-159; LRV2 Brief, paras. 101-102, 112. *See further* Prosecution Appeal Brief, paras. 88-89.
[150] LRV2 Brief, para. 117. The LRV2 recognise that the Decision does not in fact contain such a finding, but suggest that such an approach would be a "clear likelihood" if the matter were remanded back to the Pre-Trial Chamber. Applying the law correctly, however, as explained herein and further in the Prosecution Appeal Brief, the Pre-Trial Chamber would have no power at this stage to exclude any legal characterisation which might subsequently be proposed by the Prosecution as a possible charge on the basis of her investigation.
[151] LRV2 Brief, paras. 118-119. *See also* paras. 126 (fn. 180), 128.
[152] LRV2 Brief, paras. 118, 120.
[153] *See e.g.* ICC-02/17-7-Red ("Request"), paras. 187-188, 221, 260. *See also above* para. 67.

the parameters of the investigation as authorised.[154] This also appears to be the submission of the LRV1 and the LRV2. Accordingly, provided the Appeals Chamber upholds this broader legal principle, any question whether conduct falling within the parameters of the investigation might also be subject to *additional* legal characterisations is premature, and should not be addressed at the present time.

III.B.2. The Pre-Trial Chamber erred in law and fact when assessing conduct with a nexus to the armed conflict (Sixth Ground of Appeal of LRV1; Fourth Ground of Appeal of LRV2)

72. The Prosecution agrees with the LRV1 and the LRV2 that the Pre-Trial Chamber erroneously conflated its analysis of jurisdiction *ratione loci* with considerations related to jurisdiction *ratione materiae* (concerning the scope of application of the law of non-international armed conflict, and the nexus requirement).[155] In this respect, the Prosecution agrees that there was no basis to doubt that the victims of the identified crimes in this situation fell, materially, under the protection of common article 3.[156] It likewise agrees that the Pre-Trial Chamber's emphasis on the location in which alleged victims were captured was misplaced,[157] and unsupported by the established nexus test.[158] Again, the Pre-Trial Chamber's errors materially affected the Decision insofar as the Pre-Trial Chamber would otherwise have recognised that the parameters of any investigation are broader than it appreciated, affecting its analysis of those factors it took into account in assessing the interests of justice.[159]

73. In this context, the LRV1 also seem to argue that the Court may exercise jurisdiction over a person who, by their conduct in the territory of a State Party, is an accessory to a crime which is perpetrated by another person who is *not* in the territory of a State Party.[160] For its part, the Prosecution had noted in its Request under article 15(3) that "a suspect is not required to be physically present in the territory of a State Party when a crime is committed for the Court to be able to exercise jurisdiction over his or her conduct" as long as "the

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[154] *See e.g.* Prosecution Appeal Brief, paras. 88, 92; M. Cross, 'The standard of proof in preliminary examinations,' in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2* (Brussels: TOAEP, 2018), pp. 247-250. *See also* LRV2 Brief, para. 121.
[155] LRV1 Brief, para. 172; LRV2 Brief, paras. 122, 124, 127.
[156] LRV1 Brief, paras. 181-182; LRV2 Brief, paras. 135-138. *See further* Prosecution Appeal Brief, paras. 100-104.
[157] LRV1 Brief, paras. 177, 179-180; LRV2 Brief, paras. 128-129, 132, 134. *See further* Prosecution Appeal Brief, paras. 99, 105-109.
[158] LRV1 Brief, para. 178; LRV2 Brief, para. 131. *See further* Prosecution Appeal Brief, para. 98.
[159] *See e.g.* Prosecution Appeal Brief, paras. 94, 110.
[160] LRV1 Brief, para. 176; *see also* paras. 172-175.

underlying conduct which is imputed to the suspect occurs within the Court's jurisdiction".[161] Yet such questions do not appear to have been addressed directly in the Decision, and consequently there is no clear basis to suggest that they materially affected the Pre-Trial Chamber's reasoning. For this reason, the Prosecution does not consider it necessary for the Appeals Chamber to rule on this issue in the context of the current appeal proceedings. This also favours the principle of judicial economy, insofar as the Court should rule on such questions if and when it is in a position to do so within a concrete factual framework requiring its intervention.

74. Likewise, it is not clear to the Prosecution that the Decision necessarily ruled *adversely*, as the LRV2 claim, on the question whether the Court may have "jurisdiction *ratione loci* under article 12(2) over torture committed against individuals captured *in* Afghanistan when their subsequent abuse *continued* on the territory of a non-State party".[162] Rather, the Prosecution understands the Pre-Trial Chamber to have made a general remark—*obiter dicta*—concerning its view of jurisdiction *ratione loci* in circumstances where the conduct occasioning an article 5 crime "were to occur *entirely* on the territory of a non-State Party".[163] But, in the same paragraph, the Pre-Trial Chamber acknowledged—correctly[164]—that "it is necessary that the alleged conduct […] takes place at least in part in the territory of a State Party".[165] To the extent that the LRV2 seek to raise any broader question about the jurisdiction *ratione loci* of this Court, this does not seem to arise from the Decision and therefore cannot be said to have materially affected its reasoning.[166] Again, in the Prosecution's submission, such questions should be left until it is necessary for the Court to rule upon them.

III.B.3. The Pre-Trial Chamber erred in assessing those factors it took into account in assessing the interests of justice (Second and Third Grounds of Appeal of LRV1, and Second Ground of Appeal of LRV2, in part)

75. In carrying out its own assessment of the interests of justice—which was neither permitted or required by articles 15(4) and 53(1)(c), as previously set out—the Pre-Trial

[161] Request, para. 47.
[162] *Cf.* LRV2 Brief, para. 139 (emphasis added).
[163] Decision, para. 54 (emphasis added)
[164] *See e.g.* ICC-RoC46(3)-01/18-37 ("*Bangladesh* Article 19(3) Decision"), paras. 64, 72. *See also* LRV2 Brief, para. 140; Decision, para. 50.
[165] Decision, para. 54.
[166] *See* Prosecution Appeal Brief, para. 97 (noting that, "for the 23 incidents to which the Pre-Trial Chamber referred, […] all the relevant conduct"—for the purpose of the analysis under article 53(1)—"is alleged to have occurred on the territory of Afghanistan, Lithuania, Poland, or Romania (all States Parties to the Statute)").

Chamber stated that it took particular account of three factors: the time elapsed between the time of the identified crimes and the Request,[167] the prospects for State cooperation,[168] and the prospects for securing relevant evidence and suspects.[169] As the Prosecution has explained in its Appeal Brief, the Pre-Trial Chamber erred and abused its discretion in considering each of these factors,[170] materially affecting the Decision.[171] The Pre-Trial Chamber also failed to give weight, or sufficient weight, to other relevant factors: the gravity of the identified crimes and the interests of the victims.[172] The LRV1 and LRV2 likewise raise some of the same concerns.

76. In particular, the Prosecution agrees with the LRV1 that the Pre-Trial Chamber's view of the limited prospects for State cooperation rested on an uncertain factual basis, and failed to take into account the legal obligations of States Parties to the Statute.[173] Such an approach may indeed risk being "perceived as a reward for non-cooperation by States under the Court's scrutiny."[174] The Prosecution does not, however, agree that the Pre-Trial Chamber should have heard from relevant States Parties; rather, it is simply to be presumed that they will comply with those binding international obligations which they have freely undertaken.[175]

77. The Prosecution understands that the LRV1 may also suggest more broadly that the feasibility of an investigation may never be taken into account in assessing the interests of justice.[176] The Prosecution considers instead that it was erroneous in this situation for the Pre-Trial Chamber to have determined that an investigation could *only* be authorised if the Pre-Trial Chamber considered that an adequate *ex ante* showing was made of the prospects for securing prosecutions and/or convictions, within the context of proceedings under article 15. In any event, the Prosecution agrees that the Pre-Trial Chamber was unreasonable in minimising the prospects for securing relevant evidence and suspects, especially on the basis

[167] *See* Prosecution Appeal Brief, para. 111.
[168] *See* Prosecution Appeal Brief, para. 123.
[169] *See* Prosecution Appeal Brief, para. 130.
[170] *See* Prosecution Appeal Brief, paras. 112-122 (passage of time), 124-129 (State cooperation), 131-137 (securing evidence and suspects).
[171] *See* Prosecution Appeal Brief, para. 138.
[172] *See* Prosecution Appeal Brief, paras. 150, 151-156 (gravity), 157-166 (interests of victims).
[173] *See* LRV1 Brief, paras. 118-121, 123-124, 126-129; LRV2 Brief, paras. 88-89.
[174] LRV1 Brief, para. 105. *See also* LRV1 Brief, para. 131; LRV2 Brief, paras. 84, 86-87.
[175] *Contra* LRV1 Brief, para. 122. *But see* para. 125 ("Whether […] States Parties do comply with their obligations under Part 9 […] is not for the Chamber to prejudge").
[176] LRV1 Brief, paras. 133-135, 142-143.

of its apparent misapprehensions concerning the passage of time since the material allegations and the significance of this consideration.[177]

78. The Prosecution likewise agrees with the LRV1 and the LRV2 that Pre-Trial Chamber failed to give sufficient weight to the gravity of the crimes and the interests of the victims.[178]

III.B.4. The allocation of the Prosecutor's resources is a matter for her independent and exclusive assessment and determination (Fifth Ground of Appeal of LRV1 and Second Ground of Appeal of LRV2, in part)

79. Finally, the Prosecution agrees with the LRV1 and the LRV2 that, since the allocation of the Prosecutor's resources is a matter within her own exclusive competence, this could not properly be taken into account by the Pre-Trial Chamber in the Decision.[179]

Conclusion

80. For all the reasons above, the Appeals Chamber should receive the LRV1 Brief and the LRV2 Brief as victims' representations for the purpose of determining the Prosecution's appeal brought under article 82(1)(d). On the basis of all those submissions, it should reverse the Decision, as unanimously requested.[180]

81. Consequently, and as set out in the Prosecution Appeal Brief, the Appeals Chamber should enter its own finding under article 83(2) to confirm the Prosecutor's determination that there are no substantial reasons to believe that an investigation of this situation would not serve the interests of justice. On this basis, it should authorise an investigation, as required by article 15(4) of the Statute, or otherwise remand the matter back to the Pre-Trial Chamber with a direction for it to promptly authorise an investigation.

82. Having granted this relief, the Appeals Chamber should maintain the established law of this Court and confirm that the LRV1 Brief and the LRV2 Brief may not be considered as appeals brought before it by a "party" against a "decision with respect to jurisdiction or admissibility", under article 82(1)(a) of the Statute. Consequently, it should (in this respect only) decline to receive the LRV1 Brief and the LRV2 Brief, and confirm that the proceedings insofar as brought under article 82(1)(a) are inadmissible. If thought necessary,

[177] LRV1 Brief, paras. 136-140, 143. *See further* Prosecution Appeal Brief, paras. 131-137.
[178] LRV1 Brief, para. 116; LRV2 Brief, para. 77. *See further* Prosecution Appeal Brief, paras. 150, 151-156 (gravity), 157-166 (interests of victims).
[179] LRV1 Brief, paras. 168-171; LRV2 Brief, paras. 85, 87, 90. *See further* Prosecution Appeal Brief, paras. 141-149.
[180] *See* Prosecution Appeal Brief, paras. 11, 168; LRV1 Brief, para. 14; LRV2 Brief, paras. 4, 69, 146.

the Appeals Chamber could also provide guidance to Pre-Trial Chambers about the applicability of article 82(1)(d) to a decision under article 15(4) which denies an application by the Prosecutor under article 15(3) of the Statute.

Fatou Bensouda, Prosecutor

Dated this 22nd day of October 2019

At The Hague, The Netherlands