PARTLY DISSENTING OPINION OF [REDACTED]

1. We regret that we are unable to join the majority of the Appeals Chamber in the judgment on the appeal against the "Decision [REDACTED]"[1] (hereinafter: "Impugned Decision"). For the reasons set out hereunder, we would have confirmed the decision of [REDACTED], which was based on the understanding that assets subject to a request for cooperation [REDACTED] under articles 57 (3) (e) and 93 (1) (k) of the Statute must be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court. We agree with the majority in relation to the classification of the judgment [REDACTED].

2. The issue for determination in the present appeal revolves around the interpretation of the phrase "proceeds, property and assets and instrumentalities of crimes" in article 93 (1) (k) of the Statute. In essence, the question is whether "property and assets" may be viewed as stand-alone provisions unrelated to the qualifier "of crimes" that follows.

3. In our view, despite the awkward construction of the phrase in terms of punctuation and the apparently unnecessary duplication of the conjunction "and", a plain reading shows that a link between all four objects and the crimes allegedly committed is required. In particular, we note there is no additional qualifier linking "property and assets" to the suspect or accused person. In our view, it goes beyond a plain reading of the provision to insert the qualifier "of the suspect or accused person" to the words "property and assets", which appear between the words "proceeds" and "instrumentalities", both of which are undeniably qualified by the words "of crimes". In the same vein, within the phrase 'proceeds, property and assets and instrumentalities of crimes', we find it difficult to understand how the first and fourth items (proceeds and instrumentalities) could be linked to the words 'of crimes' but the second and third items (property and assets) could somehow not be related to the same words 'of crimes'. This is against a plain reading of the text.

4. Article 93 (1) (k) of the Statute further specifies that the freezing of "proceeds, property and assets and instrumentalities of crimes" must be "for the purpose of eventual forfeiture". This proviso is mirrored in article 57 (3) (e) of the Statute, which authorises the Pre-Trial Chamber "to take protective measures for the purpose of

[1] [REDACTED].

forfeiture". Article 77 (2) (b) of the Statute defines forfeiture as a penalty that may be imposed following conviction in relation to "proceeds, property and assets *derived directly or indirectly from [the] crime*" (emphasis added).[2] In our reading of the legal texts, this confirms that the property and assets that may be frozen or seized under articles 57 (3) (e) and 93 (1) (k) of the Statute and ultimately forfeited must be linked to crimes.

5. Article 57 (3) (e) of the Statute further indicates that protective measures for the purpose of forfeiture may be sought "in particular for the ultimate benefit of victims". In our view, this is a relatively uncontroversial indication that the proceeds, property and assets that are forfeited may ultimately serve the purpose of benefitting victims. Pursuant to article 79 (2) of the Statute, the Court may order money and other property collected through, *inter alia*, forfeiture to be transferred to the Trust Fund, which, pursuant to article 79 (1) of the Statute, is established "for the benefit of victims".[3] In a similar vein, article 110 (4) (b) of the Statute, concerning the reduction of sentence, refers to the "locating of assets subject to orders of fine, *forfeiture* or reparations which may be used for the *benefit of victims*" (emphasis added).

6. We cannot subscribe to the view of the majority of the Appeals Chamber, based on its reading of rule 99 of the Rules of Procedure and Evidence, that reparations may be considered to be a different type of forfeiture. Forfeiture and reparations are autonomous concepts and the Statute clearly and consistently distinguishes between the penalty of forfeiture of proceeds, property and assets derived directly or indirectly from crime under article 77 (2) (b) of the Statute and reparations orders that may be made against convicted persons. The drafting history supports the view that the term "forfeiture" was chosen deliberately and shows that the term was used in a consistent

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[2] Rule 147 of the Rules of Procedure and Evidence provides in relevant part: "1. In accordance with article 76, paragraphs 2 and 3, and rules 63, sub-rule 1, and 143, at any hearing to consider an order of forfeiture, Chamber shall hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime. […] 3. The Prosecutor, the convicted person and any bona fide third party with an interest in the relevant proceeds, property or assets may submit evidence relevant to the issue. 4. After considering any evidence submitted, a Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets if it is satisfied that these have been derived directly or indirectly from the crime".

[3] We also note rule 221 (2) of the Rules of Procedure and Evidence, which provides that "when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims".

sense throughout the Statute.[4] There is, therefore, no basis to interpret forfeiture under articles 57 (3) (e) and 93 (1) (k) of the Statute as having a broader meaning going beyond the definition of forfeiture explicitly set out in article 77 (2) (b) of the Statute.

7. It may, moreover, be noted that the Statute and the Rules of Procedure and Evidence create a distinction regarding the *timing of measures* that may be taken for the purpose of giving effect to (i) the penalty of forfeiture, which, according to articles 57 (3) (e) and 93 (1) (k) of the Statute, may be requested by the Pre-Trial Chamber when a warrant of arrest or summons to appear has been issued, and (ii) an order for reparations, which, according to article 75 (4) of the Statute, may be issued by the Trial Chamber following conviction only. Although assets that are forfeited may ultimately be applied for the purpose of reparations, a clear distinction is created regarding the timing of measures in relation to assets that are derived directly or indirectly from crime and other assets of the suspect or accused person.

8. Rule 99 of the Rules of Procedure and Evidence confirms this distinction by providing that "[t]he Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested". There is nothing in the wording of rule 99 of the Rules of Procedure and Evidence that alters the express wording of the Statute that measures can be taken by the Pre-Trial Chamber pursuant to article 57 (3) (e) at the pre-trial stage of proceedings, whereas

[4] A note contained in a transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee regarding the intended meaning of "forfeiture" indicated: "The Committee of the Whole informs the Drafting Committee that the term "forfeiture" is to be translated as follows throughout part 7: French: *confiscation*; Spanish: *decomiso*; and Arabic: [...] The Committee of the Whole draws the attention of the Drafting Committee to the need to consider article 75 [Penalties] in conjunction with article 99, Enforcement of fines and forfeiture measures. The Committee of the Whole draws the attention of the Drafting Committee to the need to ensure consistency in the use of terms in article 79 [(Trust Fund)] and article 73, Reparations to victims" (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on Penalties*, 7 July 1998, A/Conf.183/13 (Vol.III) incorporating, A/CONF.183/C.1/WGP/L.14, pp. 317-318). It is also of particular relevance that, when introducing the report of the Working Group on Penalties to the Committee of the Whole, the Chairman of that working group stated that it had been agreed that "the term "forfeiture" should be used in a consistent manner throughout the Statute" (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Committee of the Whole, 24th Meeting*, 6 July 1998, A/CONF.183/13 (Vol.II) incorporating A/CONF.183/C.1/SR.24, p. 267).

measures pursuant to article 75 (4) can only be sought after a person is convicted of a crime within the jurisdiction of the Court.

9. Finally, we consider that the drafting history supports the conclusion that the drafters did not intend to allow for protective measures to be taken by the Pre-Trial Chamber in respect of all of the property of an accused person for the ultimate purpose of providing compensation to victims. It may be noted that the original precursor to article 57 (3) (e) of the Statute contained just such a proposal – that the Court should be empowered to order the provisional seizure of "all or part of the property" of the accused person to compensate specific victims who had come forward.[5] This provision remained largely unchanged up until the Rome Conference,[6] where it became the subject of much discussion and underwent a significant redraft.[7]

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[5] The relevant part of the September 1996 proposal for article 27 (Commencement of prosecution) was as follows: "Anyone who has personally suffered direct injury caused by a crime submitted to the Court may inform the Registrar of the Court in writing of the acts having caused injury to him and the nature and amount of the losses which he has sustained. […] 3. When it confirms the indictment in its entirety or in part, the Preliminary Investigations Chamber may order the provisional seizure of all or part of the property of the person committed for trial, if it believes that such a measure is necessary to compensate the victims who have come forward in accordance with paragraph 1 of this article. In that event, the Preliminary Investigations Chamber shall ask the Prosecutor to secure the cooperation of the States in whose territory the provisionally seized property is situated requesting them, inter alia, to freeze assets and to appoint official receivers" (footnotes omitted) (Fifty-first Session of the United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Compilation of Proposals*, 13 September 1996, A/51/22[VOL.II](SUPP), pp. 123-124).

[6] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 14 April 1998, A/CONF.183/13 (Vol. III) incorporating A/CONF.183/2/Add.1, p. 47, Article 58, subparagraph 9: "Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained. When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States".

[7] On 4 July 1998, the Working Group on Procedural Matters submitted a proposal for article 57 (3) (e) of the Statute, which provided as follows:
Article 57 bis
Functions and powers of the Pre-Trial Chamber
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
[…]
(e) Having regard to the strength of the evidence, seek the cooperation of States pursuant to article 90 for the purpose of taking protective measures, strictly necessary to preserve the possibility for the Court to order *reparations* to, or in respect of, victims, in accordance with article 73 (emphasis added).
A footnote to the proposed article 57 (3) (e) indicated:
In deciding whether to grant protective measures, the Court will have to take into account the interests and rights of the (unconvicted) person(s) in respect of whose property protective measures are sought. The view was expressed that the proposed text did not provide a clear threshold in relation to these measures. The close connection between this proposal and article 73 was also pointed out (United

In the final draft proposal for article 57 *bis*, on 9 July 1998, any reference to "reparations" was removed and the Pre-Trial Chamber's authority to request protective measures was limited to those that are taken "for the purpose of forfeiture".[8]

10. The question of whether the Court should be empowered to order protective measures arose again during the negotiations of the Rules of Procedure and Evidence when the French delegation proposed a rule to allow the Presidency to order the "provisional attachment of any property, asset or money" and seek the cooperation of states pursuant to part 9 of the Statute once an order under article 75 was made.[9] The proposal however was not adopted.[10]

11. In our view, it is clear from the foregoing that proposals allowing for protective measures to be taken in respect of all of the property of an accused person, irrespective of any link to crime, for the ultimate purpose of providing compensation to victims were explicitly rejected by the States Parties during the drafting of the Statute and the Rules of Procedure and Evidence.

Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, *Working paper: new draft proposal for articles 57 and 57bis*, A/CONF.183/13 (Vol. III) incorporating A/CONF.183/C.1/WGPM/L38/REV.1, pp. 275-276).

[8] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, *Working paper on article 57 bis*, 9 July 1998, A/CONF.183/13 (Vol. III) incorporating A/CONF.183/C.1/WGPM/L.64, p. 277: "Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (*l*), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims".

[9] The proposal contained in Rule 10.29 was as follows: "For the enforcement of decisions taken by the Court pursuant to article 75, the Presidency may, at the request of the victims or their legal representatives or at the request of the Prosecutor, order the provisional attachment of any property, asset or money, and request, where necessary, the cooperation of any State in accordance with part 9 of the Statute, when such measures were not requested previously by the Court". An explanatory note to the proposal stated: "This rule seems to be necessary in situations where the chamber which took the decision to order reparations in accordance with article 75 did not order provisional measures because no property had been located at the time of the decision. The aim is to prevent the sentenced person from organizing the 'disappearance' of his or her property at this stage" (Preparatory Commission for the International Criminal Court, *Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement*, 18 November 1999, PCNICC/1999/WGRPE(10)/DP.1, p. 11).

[10] According to one commentator, this was due to a denial on the part of many delegations that any obligation existed for states to adopt protective measures for reparations purposes: "[The French proposal] did not gain much support and in the course of the debate it emerged that many delegations denied the existence of an obligation for State Parties to cooperate with the ICC for the purpose of adopting protective measures in the field of reparation". (A. Cassese, et. al. (eds), The Rome Statute of the International Criminal Court: A Commentary, Volume II, (Oxford University Press, 2002) p. 1834).

12. We fully endorse the view of the majority of the Appeals Chamber that reparations are an important feature of the Statute and acknowledge that the result of the majority's interpretation is that the Court will be well-placed to ensure that the resources of suspects or accused persons will ultimately be available for any awards of reparations. However, in our view, the majority's interpretation of articles 57 (3) (e) and 93 (1) (k) of the Statute overreaches the plain meaning of those provisions. We consider that the Statute and the Rules of Procedure and Evidence endow [REDACTED] authority to freeze only property and assets linked to the crimes alleged prior to conviction. If this is not considered to be a desirable outcome, we believe that this could only be changed by means of an amendment to the Statute.

Done in both English and French, the English version being authoritative.

Judge [REDACTED] **Judge [REDACTED]**

Dated this [REDACTED]

At The Hague, The Netherlands