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**International  
Criminal  
Court**

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### APPEALS CHAMBER

**Before:** Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibnez Carranca  
Judge Solomy Balungi Bossa

### SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

**Public**

**Victims' response to the Prosecutor's "Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber's decision under article 15"**

**Source:** Legal Representatives of Victims

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

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## I. INTRODUCTION

1. This filing is submitted jointly by the respective Legal Representatives for Victims (“LRVs”) of victims r/60009/17, r/00751/18, r/00750/18, r/00749/18, r/00635/18, r/00636/18 and r/00638/18 (“Victims”).<sup>1</sup> It is filed pursuant to regulation 24(2) of the Regulations of the Court (“Regulations”) in response to the Prosecutor’s “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15” (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber) (“OTP Observations”). The LRVs request that the Appeals Chamber (“Chamber”) dismiss the OTP Observations, either *in limine*, or alternatively, on their merits and deny the relief sought therein.

## II. PROCEDURAL HISTORY

2. On 12 April 2019, Pre-Trial Chamber II rejected the Prosecutor’s request to open an investigation into the situation in Afghanistan (“Decision”)<sup>2</sup> and on 31 May 2019, Judge Mindua filed a concurring separate opinion.<sup>3</sup>

3. On 7 June 2019, pursuant to article 82(1)(d), the Prosecution filed its Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the

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<sup>1</sup> The seven Victims are represented by three separate legal teams: r/60009/17 by Nancy Hollander, Mikołaj Pietrzak and Ahmad Assed; r/00751/18 (Sharqawi Al Hajj) and r/00750/18 (Guled Hassan Duran) by Katherine Gallagher of the Center for Constitutional Rights; r/00749/18 (Mohammed Abdullah Saleh al-Asad) by Margaret Satterthwaite and Nikki Reisch of the Global Justice Clinic at New York University (NYU) School of Law\*; and r/00635/18, r/00636/18 and r/00638/18 by Tim Moloney QC and Megan Hirst, instructed by Reprieve. [\*Communications from clinics at NYU School of Law do not purport to present the school’s institutional views, if any.]

This filing has been agreed jointly by the LRVs, and the LRVs will continue to seek common positions to the extent possible in order to ensure expedition and efficiency in the proceedings. However they emphasize that the representation of these two groups of clients remains separate and does not imply collective representation, and therefore that joint filings cannot be guaranteed in every instance.

<sup>2</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019.

<sup>3</sup> Concurring and separate opinion of Judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr.

Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (“Prosecution’s Leave to Appeal”) before the Pre-Trial Chamber.<sup>4</sup>

4. On 10 June 2019, pursuant to article 82(1)(d), a further Request for Leave to Appeal was filed before the Pre-Trial Chamber by victims who had made representations to the Chamber under article 15(3) (“Victims’ Request for Leave”).<sup>5</sup>

5. On 10 June 2019, pursuant to article 82(1)(a), three notices of appeal were filed before the Appeals Chamber by victims who had made representations to the Pre-Trial Chamber under article 15(3) (including those who make the current submissions, and those who filed the Victims’ Request for Leave) (“Victims’ Notices of Appeal”).<sup>6</sup>

6. Also on 10 June 2019, a group of proposed *amicus curiae*<sup>7</sup> and the Office of Public Counsel for Victims (“OPCV”) requested leave from the Pre-Trial Chamber to engage in the proceedings.<sup>8</sup> On 12 June 2019, the Pre-Trial Chamber issued a decision in which it deemed that “receiving additional submissions may assist the Chamber in determining the Prosecutor’s Request” and ordered that any written submissions by the *amicus curiae* organisations and the OPCV be filed “no later than 12 July 2019.”<sup>9</sup>

7. On 12 June 2019, without specifying the legal basis for its submission, the Prosecution filed identical “observations” before the Pre-Trial Chamber and the Appeals Chamber regarding the filings which had been made by victims, proposed

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<sup>4</sup> ICC-02/17-34.

<sup>5</sup> Victims’ request for leave to appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,” ICC-02/17-37.

<sup>6</sup> Victims’ Notice of Appeal of the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,” ICC02/17-38, 10 June 2019; Victims’ Notice of Appeal of the “Decision Pursuant o Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,” ICC-02/07-36, 10 June 2019; Corrected version of the Notice of appeal against the “Decision Pursuant to Article 15 of the Rome Statue on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”(ICC-02/17-33), ICC-02/17-40-Corr, 12 June 2019.

<sup>7</sup> Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan, ICC-02/07-35.

<sup>8</sup> Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, ICC-02/07-39.

<sup>9</sup> ICC-02/17-43.

*amicus curiae*, and the OPCV on 10 June 2019.<sup>10</sup> Through the “observations,” the Prosecution seeks *inter alia* that Victims’ Notices of Appeal be dismissed “without prejudice.”

8. On 13 June 2019, LRVs filed “Victims’ response to the Requests for Leave to Appeal filed by the Prosecution and by other victims,” before Pre-Trial Chamber II.<sup>11</sup>

### III. SUBMISSIONS

9. The LRVs submit that the OTP Observations raise several issues which are of concern to the Victims and warrant a response. Furthermore the LRVs submit that the matters addressed in the OTP Observations are of crucial importance, not only to the present proceedings but also to a fundamental aspect of the Court’s legal framework. Accordingly, LRVs submit this response to the OTP Observations pursuant to regulations 24(2) and 34(b) of the Regulations.

10. The LRVs request that the Chamber dismiss the OTP Observations, either *in limine*, or alternatively on their merits and deny the relief requested therein.<sup>12</sup>

#### ***Preliminary Matter: No basis exists for the OTP Observations before the Appeals Chamber***

11. At the outset, the LRVs note that the Prosecution has failed to identify any legal basis for its Observations. It has not identified the filing as a response, nor could it be considered one. Chapter 3, Section 4 of the Regulations governs interlocutory appeals. Regulation 64 of the Regulations does not provide for responses to *notices of appeal* filed under article 82(1)(a) of the Statute; rather, any response by the Prosecution should be filed to the Victims’ *appeal briefs*, within 21 days of the filing of

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<sup>10</sup> Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber), ICC-02/17-41 and ICC-02/17-42, 12 June 2019.

<sup>11</sup> ICC-02/17-45.

<sup>12</sup> To the extent that the OTP Observations opine that “the Court should act to give effect to the *core* interest at the heart of the various interventions, which is for the victims and their advocates to have an opportunity with the *substance* of the Decision,” OTP Observations, para 7 (emphasis in the original), the LRVs concur, and consider such interests are best served by way of a direct appeal of a ruling that divested the Court of jurisdiction for crimes committed against the Victims pursuant to article 82(1)(a).

such briefs, as provided for in regulation 64(4). Nor could the OTP Observations be considered a response within the meaning of regulation 24(1); not only is this “general provision” inapplicable due to the more specific provision governing interlocutory appeals (Regulation 64),<sup>13</sup> it also goes beyond the issues raised in the Victims’ Notices of Appeal, and engages with documents that were filed before the Pre-Trial Chamber.<sup>14</sup>

12. Accordingly, in these circumstances, the LRVs submit that the OTP Observations have been filed without a legal basis at the present stage of the appeal proceedings, and should be dismissed *in limine*.

*In any event, the relief sought by the Prosecution should be rejected on the merits*

13. In the OTP Observations, the Prosecution requests that the Chamber “dismiss without prejudice” the Victims’ Notices of Appeal. Should the Chamber not dismiss the OTP’s Observations *in limine*, the relief requested by the Prosecution should be denied. The Chamber should proceed to receive the Victims’ Appeals Brief in accordance with regulation 64(2), on 24 June 2019, or as otherwise directed for the filing of victims’ merits briefs.

14. A number of the issues raised in the OTP Observations were dealt with in the Victims’ Notices of Appeal. The points made there will not be repeated. However, in the event that the Chamber considers the OTP Observations on their merits, it should also have before it the following additional considerations.

- (i) The OTP misconstrues the relationship between victim standing provisions and article 82(1)

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<sup>13</sup> The appropriate analysis is similar to that recently employed by the Presidency when it determined that regulation 24 does not apply to the procedure governing a request for the disqualification of a judge, which is addressed specifically under rule 34. *Prosecutor v Thomas Lubanga Dyilo*, “Decision on ‘Requete de la Defense aux fins de solliciter l’autorisation de déposer une réplique a la Reponse de M. le Juge Marc Perrin de Brichambaut notifiée le 20 mai 2019’, dated 23 May 2019,” ICC-01/04-01/06-3456, 11 June 2019, para.10.

<sup>14</sup> The LRVs should not, however, be precluded from relying on regulation 24(2) by virtue of the fact that the OTP Observations are filed invalidly without legal basis. If that were the case no party would ever be in a position to argue before the Court that a document must be dismissed *in limine* for lack of legal basis.

15. At paragraph 14 the Prosecution expresses the view that:

*victims and other associated entities can and must have a voice in these proceedings—but considers that this opportunity is already expressly provided in the Court’s legal texts through the modalities of victim participation encompassed in articles 15(3) and/or 68(3) of the Statute, or otherwise as an amicus curiae under rule 103.*

16. Similarly, at paragraph 27 the Prosecution’s prayer for relief requests that the “Pre-Trial Chamber should, receive pursuant to article 15(3) and/or 68(3) the material aspects of interveners’ submissions, and treat them in equality with any submissions received from the Five NGOs and the OPCV” (emphasis added).

17. These statements fail to recognize the unique role, rights, and standing of victims in proceedings before this Court, which cannot be conflated with the posture of *amicus curiae*. The latter individuals or organizations are admitted to proceedings to which they are otherwise unconnected on a discretionary basis because of the particular information or expertise they have which may assist the Chamber in resolution of particular issues or cases.<sup>15</sup> In contrast, victims were given a special and far more central role by the Court’s founders. Article 68(3) makes clear that this role is not derived from victims’ ability to assist the Court with information or expertise: rather, it stems from the fact that the victims’ *personal interests* are affected by the proceedings.<sup>16</sup> Indeed, article 15(3) permits victims to make representations without

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<sup>15</sup> *Situation in the Republic of Kenya*, Decision on Application for Leave to Submit Amicus Curiae Observations, ICC-01/09-35, 18 January 2011, para 6; *Prosecutor v Laurent Gbagbo*, Decision on the “Application by Redress Trust for Leave to Submit Observations to Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence,” ICC-02/11-01/11-50, 8 March 2012, paras 5-7; Decision on the “Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules),” ICC-RoC46(3)-01/18-17, 14 June 2018, para 9; *Prosecutor v Lubanga*, Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, ICC-01/04-01/06-1175, 18 February 2008, para 7; *Prosecutor v Gaddafi & Al Senussi*, Decision on the “Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence,” ICC-01/11-01/11-153, 18 May 2012, paras 4-6 (in which a specific distinction is drawn between the role of *amicus curiae* versus that of victims).

<sup>16</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision on victims’ participation, ICC-01/04-01/06-1119, 18 January 2008, paras 96-101; Judgment on the appeals of The Prosecutor and The Defence against Trial

any preconditions. With all due respect and appreciation for the important role of *amici* before this Court, comparing this role to that of *amicus curiae* and using the term “intervenors”<sup>17</sup> so as to bracket together all of those who may appear before the Court other than the Prosecution and Defence ignores and diminishes victims’ special role in the Court’s framework.

18. More fundamentally, the Prosecution misconstrues the relationship between article 68(3) and article 82(1). The Prosecution appears to argue that victims cannot have standing under article 82(1), because this would require a separate basis of standing to that set out in article 68(3). However article 68(3) is a generalised basis for standing in all stages of ICC proceedings. It does not purport to identify the particular stages of proceedings in which victims can be heard, or which procedural steps can be taken by them. To the contrary, article 68(3) is explicitly broad in enabling victims to participate in “stages of proceedings determined to be appropriate by the Court.” This *includes appeal proceedings* under article 82(1). This position is strengthened in the present instance where the appeal arises out of proceedings in which victims had specific standing under article 15(3).

19. The point may be demonstrated by analogy: Articles 64 and 69 of the Statute refer to procedures at trial in relation to evidence, including the production of evidence as well as challenges and determinations regarding the admissibility of evidence. Neither provision makes explicit reference to victims (or to “participants” or “intervenors”). Indeed both use the term “parties.” Nonetheless, numerous chambers of this Court have permitted participating victims to lead evidence<sup>18</sup> and to

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Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, paras 97-99; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010, paras 44-52; 58-60; *Prosecutor v Bosco Ntaganda*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, 15 January 2014, paras 81-84.

<sup>17</sup> The term is used throughout the OTP Observations to refer to the victim groups who have made filings in these proceedings – see especially OTP Observations, para 2.

<sup>18</sup> *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para 94; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2288, 16 July 2010, paras 37, 110–115;



challenge the admissibility of evidence,<sup>19</sup> pursuant to their general standing under article 68(3). These proceedings relating to evidence at trial are a “stage of the proceedings” in which it is appropriate for victims to be heard, as set out in article 68(3). The Appeals Chamber has held that “these provisions must be seen in the light of the provisions on victims’ participation, in particular article 68(3) of the Statute and rules 89 and 91 of the Rules.”<sup>20</sup>

(ii) Victims have standing on questions of substance and procedure alike

20. At paragraph 15 the OTP Observations suggest that victims may participate “on matters of substance” but not on “matters of procedure.” The LRVs disagree with the implicit characterisation by the Prosecution of their appeal of a denial of a request to investigate as “procedural.” However, in any event, the LRVs are not aware of any decision of this Court which prevents victims from participating in respect to procedural questions. To the contrary, it is commonplace for victims to be heard on questions of procedure.

21. The rationale behind this accepted practice is also a matter of common sense: procedural matters have a fundamental bearing on victims’ interests, including on victims’ ability to be heard on substantive matters. The OTP’s proposed distinction between “substantive” and “procedural” matters is artificial. The present instance is a clear example of this. Victims have a demonstrable personal interest in appealing by making “substantive” submissions on the errors in the Decision. However doing so raises “procedural” issues, most notably whether the Appeals Chamber may be

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*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, ICC-01/04-01/07-2517-tENG, 9 November 2010, para 32; *Prosecutor v Jean Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012, para 18.

<sup>19</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision on victims’ participation, ICC-01/04-01/06-1999, 18 January 2008, para.109; *Prosecutor v Thomas Lubanga Dyilo*, Judgement on the Appeals of the Prosecution and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para.101; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010, para.104.

<sup>20</sup> *Prosecutor v Thomas Lubanga Dyilo*, Judgement on the Appeals of the Prosecution and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para.101.

seized directly on the basis that this is an appeal with respect to jurisdiction. The Chamber's determination of procedural questions relating to appeal proceedings will have an impact on the substantive scope of appeal proceedings, in terms of the issues for appeal, and the extent to which victims can address issues which are of concern to them but which have not been raised by the Prosecution, as further elaborated below in paragraphs 31-35.

(iii) Victims' standing should not be denied for reasons of purported judicial economy and consistency

22. Also at paragraph 15, the OTP Observations argue that allowing victims the possibility to appeal would risk "delay, inefficiency, and inconsistency." In a similar vein, in paragraphs 6 and 8, the OTP Observations complain about "rival submissions" and "procedural competition" being introduced by the victims' filings, and refers in paragraph 13 to "ensuring legal certainty and judicial economy" and "streamlined procedure."

23. The claim that allowing victims to appeal may cause unacceptable delay and inefficiency rings particularly hollow in this situation given the Prosecution's 11 year delay in initiating the article 15 process. It moreover ignores that the victims are the persons – the party – with the greatest interest in seeing these proceedings advanced expeditiously<sup>21</sup> – a process that, regrettably, was already delayed by the seven week gap between the issuance of the initial decision and the separate concurring opinion.<sup>22</sup> Indeed multiple factors have contributed to the sizeable delays in the proceedings to date, but victims' participation is not one of them. The LRVs are making every effort to advance the proceedings in the most expeditious manner possible, including by submitting filings as quickly as possible, and by filing jointly.

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<sup>21</sup> Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18, 6 September 2018, para.88.

<sup>22</sup> The LRVs note that the Prosecution's chosen path for *potential* appeal will, in fact, lag behind the victims. The Pre-Trial Chamber's decision to set a deadline of 12 July 2019 for the filing of an amicus brief and OPCV submissions on the initial question of whether it should even grant leave to appeal demonstrates that it is the proceedings before the Pre-Trial Chamber that could cause delay and result in multiple rounds of briefing before the Appeals Chamber, in the event that the Pre-Trial Chamber does in fact grant the motions for leave to appeal – which is of course an open question.

To argue that the best way to ensure expeditious proceedings is to simply deny victims an opportunity to participate and be heard would defeat the very object of article 68(3) – and in this case, article 15(3) – and almost certainly have no overall impact on the pace of these proceedings, which have been consistently slowed by others.

24. The references to “inconsistency” and “procedural competition” are likewise perplexing complaints in the context of ICC proceedings. Such proceedings do not take the simplistic form that the OTP Observations seem to envisage, between a Prosecutor and a single defendant. This is particularly true in the context of preliminary examinations, when the only parties are the Prosecution and victims – with no defendant.<sup>23</sup> But more generally procedural steps before the Court may be permitted to be taken by multiple defendants, states parties, affected non-states parties,<sup>24</sup> represented witnesses, and others (for example, latterly, judges subject to recusal proceedings). This potentially multi-lateral nature of the proceedings depends not on a rigid interpretation of which individuals are expressly identified in the Statute, Rules, or Regulations in relation to a particular stage of proceedings, but rather on whose interests are affected by the proceedings.

25. In comparison to many other actors in the proceedings, victims have a far stronger reason to expect that they will be heard where their interests are affected: this is specifically established by article 68(3). (In the context of the present proceedings, standing under article 68(3) is further bolstered by the specific standing rights granted under article 15(3). The LRVs respectfully refer the Chamber to their arguments concerning article 15(3) in the Victims’ Notices of Appeal.) The drafters of the Statute, in creating that provision, already had in mind the challenges it may create in terms of the multilateral nature of proceedings, but did not opt to limit

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<sup>23</sup> See Victims’ Notice of Appeal, ICC-02/17-38, paras. 17-23, 28-30 (setting out the direct role of victims in the preliminary examination stage, and the rights set forth in the Statute and Rules to realize and protect their interests).

<sup>24</sup> See for example *Request Under Regulation 46(3) Of The Regulations Of The Court*, Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ICC-RoC46(3)-01/18-28, 21 June 2018.

victims' standing to certain procedural steps. Instead they took an expansive approach in terms of the proceedings to which article 68(3) applies (ie any "stages of the proceedings"), and limit victims' participation only by reference to (i) the requirement that victims' personal interests are affected; (ii) the extent to which the participation sought is consistent with fair trial rights; and (iii) judicial discretion regarding appropriateness. This third limitation enables a chamber in a given instance to avoid any difficulties arising out of victim participation by exercise of discretion *where appropriate*. It renders it unnecessary to achieve judicial economy by imposing a blanket prohibition on victims' involvement in a particular stage of proceedings (such as an appeal). Experience from the Special Tribunal for Lebanon, which has a victim participation scheme modelled directly on that of the ICC and has allowed victims to initiate interlocutory appeals,<sup>25</sup> shows no indication that the smooth running of proceedings is hampered as a result. Nor have the Extraordinary Chambers in the Courts of Cambodia faced such difficulties as a result of their Internal Rules granting specific interlocutory appeal rights to victims who participate as civil parties.<sup>26</sup>

26. Moreover, the LRVs cannot agree with the Prosecution's apparent view that judicial proceedings are inherently more effective when they involve fewer parties. At the article 15 stage (including appeals therefrom) there is a particular concern that the Prosecutor will have the sole voice in the proceedings. Such a situation would not assist the Court in its judicial decision-making. At this stage of proceedings then, far from risking inconsistency, the involvement of victims is even more vital, to ensure that the Court is apprised of the full range of views, including the views of those most affected by an article 15 decision. Indeed, it is for this reason that the drafters of the Statute specifically provide for victims to make representations directly to the Pre-Trial Chamber, pursuant to article 15(3). It is also possible to envisage circumstances in which victims are the *only* party wishing to appeal a decision (for

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<sup>25</sup> Special Tribunal for Lebanon, *Prosecutor v Ayyash et al.*, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, STL-11-01/PT/AC/AR126.3, 10 April 2013.

<sup>26</sup> ECCC Internal Rules, rule 74(4).

example where the Prosecutor opts not to appeal against an article 15 decision that limits the scope of an investigation in a manner prejudicial to some or all victims). The approach proposed in the OTP Observations would effectively render such a decision unreviewable and deny victims any opportunity to be heard on a matter fundamental to their interests.

27. Insofar as there is any basis in the Prosecution's fears that a multiplicity of actors can complicate proceedings, it is well within the procedural powers of a chamber to manage this challenge without imposing a blanket denial of standing rights.

(iv) Article 82(1) appeals are a stage of proceedings in which it is appropriate to hear from victims

28. At paragraph 18 the OTP Observations argue that:

*"there is simply no need in the present circumstances to stretch the definition of "party" in article 82(1), nor indeed any tension with article 21(3), because the statutory procedures of the Court remain available to accommodate the victims' interests and concerns."*

29. This assertion is predicated on errors of both law and fact. The position is wrong in law because it suggests that "necessity" is a requirement for victims' views and concerns to be heard under article 68(3) (and in this case, its related provision, article 15(3)). It is wrong in fact because it assumes that that denying victims the right to appeal in this instance would have no impact on their ability to advance those interests in the present proceedings.

30. Concerning the legal position: As set out above at paragraph 25, article 68(3) imposes only three limitations on the requirement that the Court "shall" hear victims' views and concerns. None of these makes reference to a requirement of necessity. The LRVs accept that under article 68(3), a Chamber maintains discretion as to whether or not victim participation is "appropriate" in a given instance. However they are aware of no decision of this Court which has to date limited such

participation to circumstances in which it is deemed “necessary” or where victims can demonstrate that such participation would affect the outcome of proceedings. Moreover, article 15(3) provides no such requirement for victims to make representations to the Pre-Trial Chamber, including on matters such as the scope of the investigation. Respectfully, to limit victim participation in this way would ignore its rationale, which is precisely to avoid the instrumentalization of victims in the proceedings by calling on them only when the Prosecution deems it to be required.<sup>27</sup>

31. Concerning the factual position: The Prosecution’s contention in this respect is inapposite in the present proceedings. Indeed, here it *is* clear that denying victims a role under article 82(1) *would* have a direct impact on the course of the proceedings. This is for at least two reasons:

32. First, the Prosecution’s chosen path of appeal is uncertain. If the Pre-Trial Chamber denies the Prosecution’s motion for leave – and the Victims’ Notices of Appeal have been dismissed – victims would be left with no remedy – and no justice.<sup>28</sup>

33. Secondly – and contrary to the view advocated in the OTP Observations – the Victims’ Notices of Appeal do not take an approach which is either equivalent to or fully subsumed by the Prosecution’s approach taken in the OTP Request for Leave to Appeal.<sup>29</sup> The Victims’ Notices of Appeal raise important questions which would not

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<sup>27</sup> This was a common criticism of the manner in which victims were deployed by the Prosecutor in the ICTY and ICTR, with French ICTY Judge Claude Jorda describing victims as being “reduced” to instrumentalised witnesses (Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1387, 1387–88 (Antonio Cassese et al. eds., 2002).

<sup>28</sup> The LRVs presume it is out of concern for this scenario that the Prosecution seeks dismissal of the notices of appeal “without prejudice” – however, the Prosecution’s effort to curtail victims’ appeal *is*, of course, prejudicial.

<sup>29</sup> It should not be assumed that victims’ interests are always reflected in the position of the Prosecution. Indeed, as already stated by the jurisprudence of this Court:

*the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as “either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.*

arise in an appeal pursuant to the Prosecution's Request for Leave to Appeal. Crucially for the Victims who make these submissions, the OTP Request for Leave to Appeal does not encompass the Decision's denial of jurisdiction over certain crimes identified in the OTP's article 15 request. Those limitations are set out most expressly in paragraphs 51-56 of the Decision, but are also implied in paragraph 64, which appears to limit jurisdiction in respect of war crimes to "the Taliban and other anti-governmental armed groups." In this regard, the LRVs do not agree with the Prosecution "that no binding determination (in the sense of an article 82(1)(a) 'ruling') has been made restricting the scope of the Court's jurisdiction or the admissibility of potential cases arising from the situation."<sup>30</sup> The Decision includes specific findings that exclude victims and/or crimes suffered by victims – including those represented by the LRVs – from the jurisdictional scope (*ratione materiae*, *ratione loci*, and arguably, temporal) of an investigation by the Prosecution.

34. Additionally, the Victims' Appeal Briefs will set forth for the Chamber why the scope of article 82(1)(a) includes review of decisions on *substantive* jurisdiction *strictu sensu* (subject-matter, personal, territorial and temporal jurisdiction), but also decisions which present a bar to the *exercise of jurisdiction*. It is the Victims' position that these two concepts are inseparable and must both fall within article 82(1)(a). However if the scope of an eventual appeal is defined solely by the OTP's Request for Leave to Appeal, the proper understanding of "with respect to jurisdiction" will not be resolved.

35. Moreover, it is possible that the Pre-Trial Chamber will grant leave on a more limited basis than that requested by the Prosecution, if at all. Should that arise, having dismissed the Victims' Notices of Appeal would lead to a clearly more limited appeal than that which could proceed on the basis of the Victim's Notices of Appeal

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*Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Cor, 17 January 2006, para. 51; referring to European Court of Human Rights, *Berger v. France*, Judgment, 3 Dec. 2002, Application No. 48221/99, para. 38; and to European Court of Human Rights, Grand Chamber, *Perez v. France*, "Judgment," 12 Feb. 2004, Application No. 47287/99, para. 68.

<sup>30</sup> OTP Observations, para. 24.

and pursuant to the interpretation of article 82(1)(a) which the Victims propose – and could exclude certain victims, including those represented by the LRVs.

36. The Victims must be able to pursue an appeal of the Decision which divests the Court of jurisdiction (in this case both substantive jurisdiction and the exercise thereof) over the crimes to which they were subjected. Under Article 15(3) of the Statute, victims have been granted “an independent, direct avenue to make representations before a Pre-Trial Chamber seized of a request for authorization of an investigation.”<sup>31</sup> Accordingly, the victims’ appeals should be decided on their own merits.

#### IV. CONCLUSION

37. The OTP Observations are based on long-standing misconceptions regarding the role of victims in ICC proceedings. It is disconcerting that while the Prosecutor, rightly, makes public statements expressing her concern for victims and the commitment of her Office to taking a "victim-responsive approach" in its work,<sup>32</sup> the Prosecution continues to seek to limit victims’ voices in ICC proceedings. The Victims implore the Prosecution to reflect on and modify this approach, especially in this case where victims’ very access to justice is at stake.

38. The manner in which the Chamber resolves the present issue will have significant implications for the framework of the Court, both in terms of the availability of meaningful participation for victims and in respect of broader questions which include the relationship between substantive and procedural jurisdiction, and the scope of article 82(1)(a). It may also determine the Chamber’s ability to review the issues raised by the OTP Request for Leave to Appeal, in the event that some or all of those issues are not certified, and the Victims’ Notices of Appeal. The Chamber has the power to correct serious errors by the Pre-Trial Chamber, which acted *ultra vires* in relying on the "interests of justice" to improperly

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<sup>31</sup> See Pre-Trial Chamber III, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,” ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para 9.

<sup>32</sup> Office of the Prosecutor, Strategic Plan 2016-2018, 16 November 2015, paras 37 and 49.



