

PARTIALLY DISSENTING OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

I. INTRODUCTION

1. On 12 April 2019, Pre-Trial Chamber II, which took over from Pre-Trial Chamber III, issued 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’ (‘Decision’),¹ rejecting the Prosecutor’s request. On 31 May 2019, I delivered my Concurring and Separate Opinion.² Following the Decision, the Prosecutor and some Legal Representatives of Victims (‘LRV’) requested leave to appeal it.³ The Chamber’s ‘Decision on the Prosecutor and 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’ (‘Decision on the Prosecutor and Victims’ Requests’) dismisses *in limine* the Victims’ Request; partially grants the Prosecutor’s Request, by granting leave to appeal the First and Second Issues; and rejects the Prosecutor’s Request with regard to the Third Issue.
2. While I agree with my learned colleagues regarding the Prosecutor’s Request, I respectfully disagree with their determination concerning the Victims’ Request for leave to appeal the Decision. In my humble view, at this stage of the proceedings victims do have standing to appeal. This is why I am first going to summarise the parties and participants’ submissions and, second, to express my determination both on the victims’ legal standing to appeal and on the appealable issues the LRV have raised.

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

A. Submissions of the Prosecutor

3. In her request, the Prosecutor seeks leave to appeal three issues,⁴ which relate to: (i) the Pre-Trial Chamber’s interpretation of articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice; (ii) the exercise of the Pre-Trial Chamber’s discretion under those provisions; and (iii) the Pre-Trial Chamber’s understanding of the scope of any investigation it may authorise, in light of article 15 and other material provisions of the Statute. For the Prosecutor, these are appealable issues within the

¹ ICC-02/17-33.

² Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, ICC-02/17-33-Anx-Corr.

³ ICC-02/17-34 (Prosecutor’s Request); ICC-02/17-37 (Victims’ Request).

⁴ Prosecutor’s Request, para. 3.

meaning of article 82(1)(d). These issues arise from the Decision and should be certified for appeal for the following reasons: (i) they significantly affect the fair and expeditious conduct of the proceedings, (ii) they also affect not only the outcome of any trial, but also the very possibility of a trial occurring; and (iii) an immediate resolution by the Appeals Chamber not only may, but, in these circumstances, will materially advance the proceedings.⁵

4. Following the Prosecutor's Request, various individuals and organisations also made submissions. There are five non-governmental organisations appearing as *amici curiae*; 82 individual victims and two 'organisations on behalf of a number of victims'; six individual victims, one individual victim as well as the Office of the Public Counsel for Victims ('OPCV').
5. Following the submissions made by the latter, the Prosecutor filed her observations in which she requests that the Pre-Trial Chamber receive pursuant to article 15(3) and/or 68(3) the material aspects of the interveners' submissions, and treat them in equality with any submission received from the five NGOs and the OPCV, but dismiss *in limine* any aspects of their submissions which incorrectly depend on the status as a 'party' to the proceedings for the purposes of article 82(1). Also, she requests that the Pre-Trial Chamber certify the three above-mentioned issues for appeal.⁶
6. Finally, in her 'Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims',⁷ the Prosecutor welcomes the active engagement of the *amici curiae* and participating victims.⁸ However, she is of the opinion that the issues raised by the *amici curiae* are encompassed by the three issues she has identified. That is why she requests the Pre-Trial Chamber to promptly certify for appeal the three issues she has already raised.⁹

B. Submissions of the LRV

1) *Legal Representatives of the First Group of Victims ('LRVI')*

⁵ Prosecutor's Request, para. 4.

⁶ ICC-02/17-42 (Prosecutor's Observations), para. 27.

⁷ ICC-02/17-60.

⁸ ICC-02/17-60, para. 3.

⁹ ICC-02/17-60, para. 32.

7. On 10 June 2019, the LRV1 submitted the Victims' Request.¹⁰ In their request, they sought leave to appeal the Decision. As preliminary matters, not only they argued that they filed the submissions on time, but they also affirmed that they do have standing to seek leave to appeal because they qualify as a 'party' to these proceedings.¹¹
8. The LRV1 proposed six appealable issues for certification: (i) whether the Pre-Trial Chamber has jurisdiction to review the Prosecutor's assessment of the 'interests of justice'; ii) whether the Pre-Trial Chamber may consider the extent of State cooperation in deciding whether to authorise an investigation; (iii) whether the Pre-Trial Chamber may deny a request for authorisation to investigate on the basis that the investigation is unfeasible; (iv) whether the Pre-Trial Chamber may restrict the scope of the investigation to incidents specifically mentioned in the Prosecution's request, as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it; (v) whether the Pre-Trial Chamber may deny a request for authorisation on the basis that it believes that the Prosecutor should allocate her resources to other more promising preliminary investigations; and (vi) whether for the Court to exercise jurisdiction over war crimes of torture, cruel treatment and inhumane treatment, it is necessary that the infliction of severe physical or mental pain took place at least in part on the territory of a State Party, and whether the victim must have been captured within the borders of the State in which the armed conflict is taking place.¹²
9. Thus, for the LRV1 these six issues are appealable issues arising from the Decision, significantly affecting the fair and expeditious conduct of the proceedings, or the outcome of the trial, and which immediate resolution by the Appeals Chamber may materially advance the proceedings. Therefore, the LRV1 request the Pre-Trial Chamber to certify these issues for appeal.¹³
- 2) *Legal Representatives of the Second Group of Victims ('LRV2')*
10. On 13 June 2019, the LRV2 submitted their 'Victims' response to the Requests for Leave to Appeal filed by the Prosecution and by other Victims'.¹⁴ In their submissions, the LRV2 analyse the three appealable issues proposed by the Prosecutor and the six

¹⁰ The request was submitted by the LRV for 82 victims from the situation in Afghanistan and two organisations that submitted article 15(3) representations for many victims.

¹¹ ICC-02/17-37, paras 13-42.

¹² ICC-02/17-37, paras 47-73.

¹³ ICC-02/17-37, para. 75.

¹⁴ ICC-02/17-45. These are seven victims represented by four separate legal teams.

issues identified by the LRV1. The LRV2 conclude that the issues proposed in the Prosecutor's Request correspond with one another and concern the same fundamental questions which arose from the Decision.¹⁵

11. However, the LRV2 submit that two specific issues fall within the scope of the issues already identified by the Prosecution and in the Victims' Request, but require separate elucidation in order to ensure that they are sufficiently addressed on appeal.¹⁶ The first separate issue asks, in the event that a Pre-Trial Chamber does have the power to review the Prosecutor's determination in respect of article 53 (1) (c), what is the standard of review to be applied by the Pre-Trial Chamber in that process.¹⁷ The second issue relates to whether the Chamber's decision is flawed by procedural error because it turned on issues on which the Prosecution and participating victims had not been given a chance to be heard.¹⁸
12. For the LRV2, even though the two separate issues are implicit in the questions raised both by the Prosecutor and the LRV1, they should be reformulated as separate issues, so that they will be properly addressed by the Appeals Chamber. In conclusion, the LRV2 support the Prosecutor's and the Victims' Requests, but they request the Pre-Trial Chamber to reformulate the issues certified for appeal so as to articulate on separate issues the two additional issues.¹⁹

3) *Reprieve/Foundation for Fundamental Rights Pakistan*

13. On 13 June 2019, Reprieve/Foundation for Fundamental Rights Pakistan filed its 'Response to Office of the Prosecutor's '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"'.²⁰ These submissions were filed on behalf of 'Cross-border Victims', who respond to the second and third issues raised in the Prosecutor's Request. For them, with regard to the scope of the investigation, the Prosecutor's request fails to make reference to the relevance of victim representations in delineating the scope of an investigation. With regard to the interests of justice, the 'Cross-border Victims' submit that the Pre-Trial Chamber erred in law in exercising its

¹⁵ ICC-02/17-45, para. 10.

¹⁶ ICC-02/17-45, para. 12.

¹⁷ ICC-02/17-45, para. 13.

¹⁸ ICC-02/17-45, para. 16.

¹⁹ ICC-02/17-45, para. 26.

²⁰ ICC-02/17-44. These submissions are made by Mr Steven Powles on behalf of a group of victims ('the Cross-border Victims'), located in Pakistan.

discretion under article 15, because it failed to give due consideration to the Cross-border Victims' submissions.²¹

14. Apart from stating their legal standing as participants to file their response in accordance with regulation 65(3) of the regulations of the Court, the 'Cross-border Victims' invite the Chamber to request the Prosecutor to provide further information clarifying her position with regard to alleged crimes reported by the 'Cross-border Victims'.²² Further or alternatively, the latter invite the Chamber to make findings as to the scope of the Court's jurisdiction in the event the Prosecutor has erred in law in forming the view that the crimes alleged by the 'Cross-border Victims' fall outside the scope of the Court's jurisdiction, precluding her from investigating the evidence provided by the 'Cross-border Victims'.²³

4) *Office of Public Counsel for Victims*

15. On 12 July 2017, the OPCV filed its 'Submissions in the general interest of the Victims on the Prosecution's 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-02/17-34)'.²⁴ In its submissions, the OPCV affirms that the victims of crimes allegedly committed in Afghanistan have a personal interest in fair and expeditious proceedings, to obtain justice and to uncover the truth about the events they suffered from.²⁵
16. For the OPCV, the ICC is a 'victim-centred Court' and its application and interpretation of victims' rights 'must be consistent with internationally recognised human rights'.²⁶ That is why the OPCV posits that it is in the interest of the victims that the Prosecution's Request for leave to appeal the Decision be granted. In the opinion of the OPCV, the three issues raised by the Prosecutor trigger questions of importance for the victims and they should be certified for appeal as they fulfil the requirements of article 82(1)(d).²⁷ I agree with this as I am going to explain in my determination.

²¹ ICC-02/17-44, para. 6.

²² ICC-02/17-44, para. 41.

²³ ICC-02/17-44, para. 41.

²⁴ ICC-02/17-59.

²⁵ ICC-02/17-59, para. 1.

²⁶ ICC-02/17-59, para. 2.

²⁷ ICC-02/17-59, paras 7 and 55.

III. MY DETERMINATION

17. I especially note articles 15(1), (2), (3), and (4); 19(3); 21(3); 36(3)(b); 53(1)(c); 54(1); 57; 68(3); 75; 79; 81; 82(1)(d); 82(4); 83; and 84 of the Rome Statute. I also particularly note rules 50; 59; 85; 103(1), (2) and (3); 107; 110 and 155 of the Rules of Procedure and Evidence. Finally, I mainly refer to regulation 65(3) of the Regulations of the Court. My opinion is that, at this stage of the proceedings, victims should be recognised as ‘party’ and their independent right to appeal acknowledged by the Court.

A. Victims’ legal standing to appeal

1) *Victims as ‘party’*

a. **What is a ‘party’?**

18. Generally speaking, a party is ‘one (as a person, group, or entity) constituting alone or with others one of the sides of a proceeding, transaction, or agreement’.²⁸ In other words, it is ‘one so involved in the prosecution or defence of a judicial or quasi-judicial proceeding as to be bound or substantially affected by the decision or judgment therein’.²⁹ Hence, ‘a party is a person or group of persons that compose a single entity which can be identified as one for the purpose of law. Parties include: plaintiff (person filing suit), defendant (person sued or charged with a crime), petitioner (files a petition asking a court ruling), respondent (usually in opposition to a petitioner or an appeal), cross-complainant (a defendant who sues someone else in the same lawsuit), or cross-defendant (a person sued by a cross-complainant)’.³⁰ Consequently, a person who only appears in the case as a witness is not considered a party.³¹ Thus, the term ‘party’ in a judicial process can cover various actors or participants, because in fact a party is someone named in a legal matter and who has a direct interest in its outcome of it.³²

19. The Rome Statute does not give any definition of the term ‘party’. The same is true of the Elements of Crimes and of the Rules of Procedure and Evidence, which do not give a definition either. Nevertheless, these legal instruments make extensive use of this term without defining it. In order to define or understand the term ‘party’, I am going to

²⁸ See Merriam-Webster Legal Dictionary (<https://www.merriam-webster.com/dictionary/party#legalDictionary>).

²⁹ *Idem*.

³⁰ See the Legal Dictionary at <https://legal-dictionary.thefreedictionary.com/party>.

³¹ Wikipedia at [https://en.wikipedia.org/wiki/Party_\(law\)](https://en.wikipedia.org/wiki/Party_(law)).

³² See Federal Bar Association, Legal Definitions, at <https://www.fedbar.org/For-the-media/Legal-Definitions.aspx>.

recourse to the means of interpretation recommended by articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties since the Rome Statute is nothing else than a treaty.

20. In this regard, in accordance with article 31(1) of the Vienna Convention, I understand this term in its usual and ordinary meaning, in good faith, taking into account the object and the whole purpose of the Rome Statute, which is the fight against impunity, with a special attention to the rights of victims and the atrocities they have suffered. Only if this means of interpretation does not sufficiently help, I may recourse to the preparatory works (*travaux préparatoires*) of the drafters of the Statute, as a supplementary means provided for in article 32 of the Vienna Convention, when the term ‘party’ remains still ambiguous or obscure. Hence, in general, in my view, the meaning of ‘party’ depends on the circumstances. Sometimes ‘party’ means either the prosecutor or the defence, and sometimes, it means simply any ‘participant’ who has a personal interest in the judicial process,³³ like the victims.

b. Could victims be a ‘party’?

21. First of all, what is a victim within the meaning of the legal texts governing the ICC? The Rome Statute does not provide us with a definition of ‘victim’. However, rule 85 of the Rules of Procedure and Evidence defines this term, which encompasses both natural and legal persons; additionally, victims may be direct or indirect. Victims are different in quality and quantity in the course of the Court proceedings. If during preliminary examinations the victims of a situation may be just considered as ‘potential’ and are large in number, at the end and after a conviction has been entered victims will be only those who have suffered harm linked to the charges retained against the convicted person. Intermediary situations or status are naturally obvious.
22. Hence, we can say that at the investigation stage there will be a first group of victims, the ‘victims of the situation’; at the second stage, the group will be narrowed down to those who claim to be ‘victims of the facts’ charged against the suspect of the crimes submitted by the Prosecutor for trial; finally, a third group, the ‘victims of the convicted person’, will be those who can establish that they have suffered harm caused by the

³³ See e.g. article 82(1) of the Statute.

facts for which the accused was convicted.³⁴ All those victims exist and have personal interests to protect.

23. It is clear that the victims are a party, for example, during the reparations procedure, when they face the convicted person in the absence of the Prosecutor.³⁵ Article 75 of the Statute requires the ICC to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. Hence, victims, other interested persons and even States become parties despite or in the absence of the Prosecutor.
24. Indeed, during the reparations procedure, the victims' interests are more than ever at stake when the Prosecutor is absent. Pursuant to article 68(3) of the Statute:

'[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence'.

25. This general provision of the Rome Statute is the main article of this founding legal instrument that organises victims' participation in the proceedings before the Court.³⁶ That is in conformity with the idea of victim-oriented justice which is at the heart of the ICC system. Indeed, the ICC is responsive to the needs of victims and reaches a fair balance in assessing the differing interests before it.³⁷ Actually, victim participation at the ICC has two faces: participation in the proceedings itself enshrined in article 68 of

³⁴ See Vega González, Paulina, 'The role of victims in International Criminal Court proceedings: their rights and the first rulings of the Court', in: *Revista Internacional de Direitos Humanos*, vol. 3, no 5, Sao Paulo, Dec. 2006, pp. 10, at 3.

³⁵ For example article 82(4) of the Statute considers victims as parties and allows them to appeal a reparation order issued under article 75.

³⁶ See Mégret, Frédéric, 'Victims before the International Criminal Court: a New Model of Criminal Justice?', *Victims of Crime Research Digest*, N.5, Government of Canada, Department of Justice, February 2017 at <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victimrds-rrs/p.6.html>.

³⁷ See Moffet, Luke, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', *Criminal Law Forum*, 26(2), 255-269 at p. 20, at <https://doi.org/10.1007/s10609-015-9256-1>.

the Statute, and participation in reparations proceedings pursuant to article 75 of the Statute.³⁸

26. In reality, through this main provision that is article 68(3), the Statute organises the participatory rights of the victims by leaving their implementation in the hands of judges.³⁹ In accordance with the general principle of law, a legal *lacuna* or an imprecise provision of law needs to be completed or clarified by the jurisprudence.⁴⁰ A human rights and criminal justice approach within the narrower field of international criminal justice provides a useful method with which to examine the participatory rights of victims in international criminal proceedings.⁴¹ However, in designing the ICC victim participation scheme, the drafters carefully considered the likely impact of the scheme on the fair and expeditious conduct of the Court's investigations and trials. On the whole, the drafters largely left it to the Court to balance the concerns of efficiency and fairness against the restorative purpose underlying the victim participation scheme.⁴²
27. In this regard, judges must act in line with the Rome Statute, which is a victim-centred international legal instrument. In sum, we find ourselves in a situation of 'what is not prohibited is allowed'. Every judge must decide having in mind the purpose of the Statute. For me, it is clear that my determination on this point is guided by the victim-centred approach of the Statute. In the silence of the Rome Statute, I have to decide in order to ensure a broader participation of victims in the judicial proceedings and, of course, in a manner which should not jeopardise the statutory rights of the accused. In so doing, I am not in whatsoever way interfering with the legislative powers of the States Parties. On the contrary, I am giving full effect to the relevant provisions and the purpose of the Statute. It is the judges' duty to decide upon modalities of victims' participation.⁴³
28. Hence, on a number of occasions, the ICC has already recognised that the procedural participatory rights are not limited to the prosecution and the defence, but also include

³⁸ See McAsey, Bridie, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness', *Australian International Law Journal*, 5, (2011) 18, pp. 105-125, at 108.

³⁹ See Ferstman, Carla, 'The Participation of Victims in International Criminal Court Proceedings; A Review of the Practice and Consideration of Options for the Future', Redress, Redress Trust, London, 2012, pp. 63, at 41.

⁴⁰ See McAsey, Bridie, *op. cit.*, at 121.

⁴¹ McGonigle Leyh, Brianne, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review*, 12 (2012), pp. 375-408, at 377.

⁴² See SáCouto, Susana and Cleary, Katherine, 'Victim Participation Before the International Criminal Court', War Crimes Research Office, Washington College of Law, Washington, November 2007, p. 76, at p. 3.

⁴³ See McGonigle Leyh, Brianne, *idem*, p. 394.

the ‘respect for the procedural rights of victims’.⁴⁴ Nowadays, the jurisprudence of the Court shows that victims are full parties during the reparations proceedings; they have all the procedural rights, including the right to appeal.⁴⁵ Is it the same during the pre-trial phase and, specifically, before that the authorisation of an investigation is granted by the Pre-Trial Chamber?

2) *Victims during the pre-trial phase*

29. Before the authorisation of an investigation by the Pre-Trial Chamber, victims of a situation have a certain role assigned to them by the Rome Statute. But can we affirm that they also have the right to appeal?

a. Role of the victims during pre-trial proceedings

30. The Rome Statute is clear: if the ICC Prosecutor may receive communications from anybody, including victims, to open a preliminary examination,⁴⁶ he or she is the only one to request the Pre-Trial Chamber to grant the authorisation to open an investigation.⁴⁷ According to article 15(3):

‘[I]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence’.

31. Therefore, if during preliminary examinations victims do not have any role before a Pre-Trial Chamber, the situation is completely different as soon as the Prosecutor has made a request for an authorisation to investigate. From that moment, victims of a situation have a statutory right to make representations before the Pre-Trial Chamber and their views must be taken into account in accordance with rule 50 of the Rules of Procedure and Evidence.

⁴⁴ Situation in DRC, Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6, ICC-01/04-135, 31 March 2006, para. 38.

⁴⁵ See Al Mahdi Case, Judgment on the appeal of the victims against ‘Reparations Order’, ICC-01/12-01/15A, 8 March 2018, para. 9.

⁴⁶ Rome Statute, article 15(1) and (2).

⁴⁷ Rome Statute, article 15(3).

32. The investigation is a very important phase whereby the Prosecutor aims to establish truth and justice through the selection of charges and perpetrators for trial. Victims' participation is, here, a procedural right attaching to fundamental rights, such as the right to life.⁴⁸ But also, victims have a right to substantive justice, which encompasses the outcomes of judicial processes. For victims, substantive justice involves redressing the harm they have suffered and the causes of victimisation, and it corresponds with an effective remedy in human rights law, which has developed three rights for victims of gross violations: truth, justice, and reparations.⁴⁹ The Prosecutor is also obliged to consider and respect the interests of victims in investigations under article 53(1)(c) and 54(1)(b) of the Statute.⁵⁰ It should be recalled that the desire of the Rome Statute's drafters to serve victims' interests is further evidenced by the severance of provisions allowing for victim participation and those relating to reparations.⁵¹ However, victims before the ICC have no right to initiate criminal investigations.
33. The jurisprudence of the Court is rudimentary, inconsistent and confusing regarding the participation of the victims in the proceedings during the pre-trial process.⁵² In the situations in the Democratic Republic of the Congo (DRC)⁵³ and Uganda,⁵⁴ Pre-Trial Chambers I and II recognised the right for victims to participate in the investigation proceedings. The Appeals Chamber overturned these Pre-Trial Chambers' decisions later on. The Appeals Chamber found that the investigation is not a judicial proceeding in which victims can participate, but an 'inquiry conducted by the Prosecutor'.⁵⁵
34. In some subsequent decisions,⁵⁶ ICC judges acknowledged that during the pre-trial process, apart from the Prosecutor and in the absence of the defence (suspect and accused), there may be other 'parties', such as States. In these situations, these States were allowed to appeal. What about victims?

⁴⁸ See Moffet, Luke, *op. cit.*, p. 10.

⁴⁹ See Moffet, Luke, 'Realising Justice for Victims Before the International Criminal Court', *International Crimes Database Brief* 6, September 2014, 11 p., at p. 4.

⁵⁰ *Idem*, p. 11.

⁵¹ See SáCouto, Susana and Cleary, Katherine, *op. cit.*, at p. 17.

⁵² See Friman, Hakan, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?', *Leiden Journal of International Law*, 22, (2009), pp. 485-500, at 487.

⁵³ Situation in DRC, ICC-01/04-101.

⁵⁴ Situation in Uganda, ICC-02/04-101.

⁵⁵ Situation in DRC, ICC-01/04-556, para 45; Situation in the Republic of Kenya, ICC-01/09-24, para 9. See Moffet, Luke, *op. cit.*, p. 11.

⁵⁶ Pre-Trial Chamber II, 'Decision on Jordan's Request for Leave to Appeal', 21 February 2018, ICC-02/05-01/09; and Appeals Chamber, 'Judgment on the appeal of Côte d'Ivoire against the decision of the Pre-Trial Chamber of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11-01/12 A, 27 May 2015.

35. During the pre-trial proceedings, once the Prosecutor has requested an authorisation to investigate from the Pre-Trial Chamber, victims are those of the situation and that are invited by the Chamber to express their views and concerns. They have personal interests in the outcome of the process.⁵⁷ Their human rights to truth, justice and reparation are at stake.⁵⁸ Human rights as internationally and regionally recognised in various instruments, such as the ‘1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ and the ‘2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, should not be a mere slogan here.⁵⁹ Number of international and regional texts, both explicitly and implicitly, call for greater recognition of victims’ rights in the criminal process, and even go as far as to call for victims’ procedural rights in criminal proceedings.⁶⁰ The principles contained in relevant provisions, such as article 8 of the Universal Declaration of Human Rights and article 2(3) of the International Covenant on Civil and Political Rights, are well known and should be put in practice by the Court in accordance with article 21(3) of the Rome Statute.⁶¹
36. Moreover, decisions by the European Court of Human Rights and the Inter-American Court of Human Rights have given standing to victims in criminal proceedings and for compensation procedures. Even though there is not yet a clearly mentioned or designated suspect or accused at this early stage, the victims of the situation have a clear interest to see the authorisation for an investigation granted so that their rights to remedy could be effective. Therefore, they deserve to participate fully in the proceedings.
37. In my view, if these victims are ‘potential’, it is because the conviction has not been entered yet. But, that does not mean that these victims do not exist and their rights

⁵⁷ See De Hemptine, Jérôme, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’, *Journal of International Criminal Justice*, 8, (2010), pp. 165-179, at p. 172.

⁵⁸ See Bassiouni, Cherif, ‘International Recognition of Victims’ Rights’, *Human Rights Law Review*, 6, 2, (2006), pp. 203-279.

⁵⁹ See the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in Resolution 40/34 of 29 November 1985, A/RES/40/34 and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in Resolution 147, 21 March 2006, A/RES/60/147.

⁶⁰ See McGonigle Leyh, Brianne, *op. cit.*, p. 381.

⁶¹ The Universal Declaration of Human Rights adopted by the UN General Assembly in Resolution A/RES/217A on 10 December 1948 and the International Covenant on Civil and Political Rights adopted by the UN General Assembly in Resolution 2200A(XXI) on 16 December 1966.

should be ignored. On the contrary, they are present and active because they have personal interests: they have expressed their views and concerns and, consequently, they expect a positive outcome of the pre-trial proceedings, the only way for them to fulfil their procedural and substantive rights. Indeed, the victims' right to substantive justice implies redressing the harm they have suffered and addressing the cause of their victimisation.⁶² Thus, if the Pre-Trial Chamber rejects the Prosecutor's request, for these victims such a decision is, in reality, a final one, since it puts an end to the prospect of the investigation and the very possibility to have a trial and a possible conviction against the accused. As a result, there will be no remedy. In such circumstances, the appeal here is not a simple interlocutory appeal; it is in reality an appeal against a final decision.

38. The possibility for the Prosecutor to bring another request for an authorisation under article 15(5) of the Statute does not solve this matter linked to article 15(4). Since ICC Pre-Trial Chambers have considered States as 'parties' during the pre-trial proceedings and have granted them leave to appeal, why cannot they do the same for the victims?

b. Victims' right to appeal an article 15 decision

39. Could victims appeal an article 15 decision if a request for authorisation to investigate submitted by the Prosecutor has been rejected by the Pre-Trial Chamber? Thus far, there is no jurisprudence on such question at the ICC. The Rome Statute is silent about that⁶³. Appeals and revisions are dealt with in Part 8, articles 81 to 85. Article 82, which is entitled 'Appeal against other decisions', provides at paragraph 1(d):

'Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings' (Emphasis added).

⁶² See Wemmers, Jo-Anne, 'Victims' Need for Justice, Individual versus Collective Justice', in *Victimological Approaches to International Crimes: Africa*, Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer and Antony Pemberton (eds), Intersentia, Cambridge, Antwerp, Portland, 2011, pp. 145-152, at 148.

⁶³ In my humble view, this silence does not mean that the right to appeal is statutorily denied to victims. This legislative *lacuna* must be interpreted by the ICC judges in a creative way in accordance with the spirit and the purpose of the Rome Statute, which establishes a first ever victim-oriented international criminal justice institution.

40. Moreover, paragraph 2 of the same article recognises *expressis verbis* the right to appeal against a decision of the Pre-Trial Chamber under article 57, paragraph 3(d), in favour of the State concerned, with the leave of the Pre-Trial Chamber.
41. Furthermore, paragraph 4 reads:
- ‘A legal representative of the victims, the convicted person or a *bona fide* owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence’.
42. The spirit of article 82 shows clearly that the term ‘either party’ cannot mean only the prosecutor and the defence (suspect or accused). This expression encompasses various participants, including the victims. In my humble view, if the Statute does not clearly mention the victims as having a legal standing to appeal, it is simply an oversight or a legislative *lacuna* which must be supplemented by case law. This legal vacuum and the necessity of implementing the victims’ participatory rights in light of the preamble of the Rome Statute command to recognise the legal standing of the victims to appeal the Pre-Trial Chamber’s Decision. Doing differently would simply defeat the victim-centred vocation of the Rome Statute and would make victims’ participatory rights meaningless at this very preliminary stage.
43. It is quite clear that the ICC is still struggling with how best to accommodate victim participation in accordance with the relevant statutory provisions. Thus, while some judges focus on whether there is any express statutory support, others rather point out that a particular solution is not prevented by the Statute, that is, ‘what is not explicitly provided for is prohibited’ versus ‘what is not explicitly prohibited is allowed’.⁶⁴ This Court needs courageous judges to put in place this principal innovative feature of the ICC: the important place of the victims in the judicial criminal process.
44. During the article 15 proceedings, there is no defence yet, especially before the Pre-Trial Chamber’s authorisation. Could we then say that the only party is the Prosecutor? We know that once the Prosecutor has requested an authorisation, victims have been invited and allowed by the Pre-Trial Chamber to make submissions. Since that time, they are engaged in the judicial process and they have personal interests.⁶⁵ Indeed, the personal interests of the victims are affected at this stage in a general manner, if that

⁶⁴ See Friman, Hakan, *op. cit.*, at p. 499 and p. 500.

⁶⁵ Even though some may think that there are no ‘judicial proceedings’ yet at this stage.

participation enables them to clarify facts, punish those responsible for crimes and seek reparation for the harm suffered.⁶⁶ Because victims have the fundamental rights to truth, justice and reparations, they also have the right to participate in investigations.

45. As said above, this human right in favour of victims has been recognised by regional human rights courts.⁶⁷ It is obvious that Pre-Trial Chambers must apply fundamental human rights principles pursuant to article 21(3) of the Rome Statute, which provides:

‘The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’.

46. This requirement of the implementation of fundamental principles of human rights is also reflected in article 36(3)(b) of the Statute, which requires ICC judges to be qualified either in criminal law and procedure or in relevant areas of international law, such as international humanitarian and human rights law. The former are asked to put themselves in List A and the latter in List B. This shows the importance of human rights at the ICC.

47. I am convinced that the fundamental human rights of victims to truth, justice and remedy should be respected by this Court, whose primary purpose is being victim-oriented, which must not be a mere slogan. At the difference of the *ad hoc* international tribunals,⁶⁸ victims at the ICC must play a more proactive role.⁶⁹ Even though at the pre-trial stage, before the authorisation for investigating has been granted, there is no suspect or accused yet, victims do exist because international crimes have been committed and the Prosecutor is seeking permission to investigate. Those victims considered as ‘potential’ in the Pre-Trial Chamber’s Decision⁷⁰ have, however, personal interests to protect at this very early stage of the proceedings – which I consider as judicial – especially since they have been already admitted by the Pre-Trial Chamber to

⁶⁶ See McKay, Fiona, ‘Victim Participation in Proceedings before the International criminal Court’, *Human Rights Brief*, Vol 15, Issue 3, 2008, 2-5, at 2.

⁶⁷ See e.g. *Kaya v. Turkey*, App no.22535/93 (ECtHR, 28 March 2000), para 121-126.

⁶⁸ Pursuant to the Statute of both ICTY and ICTR, victims play no role apart from being witnesses, and there are no reparations proceedings in their favour.

⁶⁹ See Bassiouni, Cherif, ‘International Recognition of Victims’ Rights’, *op. cit.*, p. 230.

⁷⁰ Decision, paras 19-20.

make their representations, immediately after the Prosecutor's Request for an authorisation to investigate.⁷¹

48. Therefore, in the present exceptional circumstances where an entire investigation has been denied, I agree with the LRV1 that:

“[j]ust as States have interests which should be respected in exceptional circumstances by providing an avenue to appeal under 82(1), even when that provision does not expressly so provide, victims should also be permitted to appeal a decision that goes to the core of their interests”.⁷²

49. As a result, even though article 82(1) does not *expressis verbis* provide a right to appeal in favour of victims or potential victims of a situation, this provision, however, read together with article 53 and in combination with rules 50, 68 and 107 to 110, shows the centrality of victims' interests at the pre-authorisation stage. Therefore, victims should be granted leave to appeal the Pre-Trial Chamber's Decision.
50. One may ask what would happen if, after a denial by the Pre-Trial Chamber of the authorisation to investigate requested by the Prosecutor, the latter renounces to such a leave to appeal, while the victims or potential victims of the situation do not. It is clear in my mind that the triggering power of an investigation is the Prosecutor who acts as an impartial agent of justice.⁷³ Before his or her request for authorisation to investigate, the Pre-Trial Chamber has no powers on the situation and the potential victims are just dormant. However, as soon as the Prosecutor has requested the authorisation, the proceedings go under the authority of the Pre-Trial Chamber, which must take into account the views and needs of the victims who, now, officially exist.
51. I have no problem to imagine that in a given situation where the Prosecutor does not request leave to appeal a Pre-Trial Chamber's decision denying an authorisation to investigate, the victims of such a situation could request and be granted leave to appeal, and then obtain a positive decision from the Appeals Chamber, ordering the Pre-Trial Chamber to reconsider its refusal or ordering the Prosecutor to investigate. In my humble opinion, this is not interference with the independence of the Prosecutor, since

⁷¹ For the Appeals Chamber, the process during the investigations in the framework of articles 54(1)(c) and 55 are indeed considered as 'judicial proceedings'; see Situation in the Democratic Republic of the Congo, ICC-01/04, paras 11 and 12.

⁷² Victims' Request, para. 25.

⁷³ See De Hemptine, Jérôme, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon', *op. cit.*, at 173.

he or she is the only one who first triggered article 15 proceedings.⁷⁴ As a result, victims will be able to raise the issues they deem appealable.

B. Victims' proposed issues for certification for appeal

52. At the outset, I would like to acknowledge the valuable submissions made by different *amici curiae* organisations.⁷⁵ It is needless to say that they are very useful and that I have taken them into account in my reflections. These submissions were mainly made in support of the victim-applicants and the Prosecutor's Request. Overall, they acknowledge that the Prosecution and the victim-applicants collectively request that the Chamber certify eleven issues for appeal, falling into six thematic categories.⁷⁶ In her 'Consolidated response to submissions by *amici curiae*, under rule 103(2), and reply to the response of certain participating victims', filed on 19 July 2019,⁷⁷ the Prosecutor welcomes the involvement of the *amici curiae* and participating victims.⁷⁸
53. However, the Prosecutor suggests that the six issues raised by them are already taken into account by her submissions and, therefore, the Pre-Trial Chamber is requested, for the purposes of judicial economy, only to certify the three issued proposed by her.⁷⁹ On this point, the Prosecutor is generally supported by the OPCV.⁸⁰ But, with regard to the victims' legal standing to request certification of issues and leave to appeal under article

⁷⁴ That is why an appeal by the victims is not against the Prosecutor, as stated in the majority Decision, para. 24.

⁷⁵ On 10 June 2019, an '*Amicus Curiae* Submission on Behalf of Human Rights Organisations in Afghanistan' was filed by the Afghanistan Human Rights and Democracy Organization, Afghanistan Human Rights Organization, Afghanistan Forensic Science Organization, Feminine Solidarity for Justice Organization, and Afghan Victims' Families Association (ICC-02/17-35). On 14 June 2019, a 'Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' was filed by Armanshahr/Open Asia, International Federation for Human Rights (FIDH), and Afghanistan-Transitional Justice Coordination Group (TJCG). On 11 July 2019, an '*Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' was filed by 17 human rights and civil society organisations based in Afghanistan. They are: 1. Afghan Capacity Building Organisation; 2. Afghanistan Forensic Science Organisation; 3. Afghanistan Human Rights and Democracy Organisation; 4. Afghan Human Rights Organisation; 5. Afghanistan Organisation for Research and Advocacy; 6. Afghanistan Reconstruction and Civil Society Organisation; 7. Afghan Victims' Families Association; 8. Afghan women and Educational and Vocational Service Organisation; 9. Citizen Organisation; 10. Darnika Development and Services Organisation; 11. Feminine Solidarity for Justice Organisation; 12. Mubtaker Women's Social Organisation (Anjuman e Eshtimae Zanan e Mubtaker); 13. Nawid Naw Council (Council for New-Good Tidings); 14. Noor (Light); 15. Women's capacity Building and Development Organisation; 16. Women for Justice Organisation Afghanistan; and 17. Women Participation Promotion Organisation.

⁷⁶ ICC-02/17-57, para. 17.

⁷⁷ ICC-02/17-60.

⁷⁸ ICC-02/17-60, para. 3.

⁷⁹ ICC-02/17-60, para. 4, 8 and 10.

⁸⁰ ICC-02/17-59, paras 7 and 55.

- 82, advocated especially in the second *amicus curiae*'s submissions,⁸¹ the Prosecutor asserts her opposition.⁸²
54. First of all, I would like to say that the eleven issues recalled by the *Amici Curiae* Organisations⁸³ in the name of the Prosecutor and the victim-applicants fall, as acknowledged by these organisations themselves, into the above-mentioned six thematic categories.⁸⁴ In my view, these categories correspond to those recognised by LRV1. If summarised, these categories reflect the three issues raised by the Prosecutor⁸⁵ and supported by the OPCV.⁸⁶
55. The LRV2 also conclude that the issues identified by the Prosecutor and by the LRV1 correspond with one another and concern the same fundamental questions.⁸⁷ However, the LRV2 submit that two specific issues are encompassed by the scope of the issues already identified by the Prosecutor and by the LRV1, but which require separate elucidation in order to ensure that they are sufficiently addressed on appeal.⁸⁸
56. I am of the opinion that these two issues related to the powers and the standard of review of the Pre-Trial Chamber, and the necessity for the victims to be heard, are implicit in the questions raised both by the Prosecutor and the LRV1, as recognised by the LRV1 themselves.⁸⁹ That is why, in my view, the victims and, in any event, the 'Cross-border Victims', as recognised by the Prosecutor, are not, in fact, prejudiced in any way by the contents of the Prosecutor's Request to the Pre-Trial Chamber under article 15(3).⁹⁰
57. Moreover, I agree with the Prosecutor that the interests of the participating victims are safeguarded because she has already triggered proceedings under article 82(1)(d), and participating victims have taken this opportunity to express their views before the Chamber.⁹¹ Furthermore, with regard to the scope of the article 15 procedure, by

⁸¹ ICC-02/17-58, para. 82

⁸² ICC-02/17-60, para. 32.

⁸³ Five Human Rights Organisations: The Afghanistan Human Rights and Democracy Organisation, Afghanistan Human Rights Organisation, Afghanistan Forensic Science Organisation, Feminine Solidarity for Justice Organisation, and Afghan Victims' Families Association.

⁸⁴ ICC-02/17-57, para. 17.

⁸⁵ ICC-02/17-34.

⁸⁶ ICC-02/17-43 and ICC-02/17-59.

⁸⁷ ICC-02/17-37, para. 10.

⁸⁸ ICC-02/17-37, para. 12.

⁸⁹ ICC-02/17-37, para. 26.

⁹⁰ ICC-02/17-60, para. 24.

⁹¹ *Idem*.

seeking leave to appeal on the third issue, the Prosecutor has already acted to confirm her understanding of the law as potentially allowing all well-founded allegations to be included in any investigation. Thus, the interests of the ‘Cross-border Victims’ are protected.⁹² In light of this explanation and for the sake of judicial economy, I cannot agree more with the Prosecutor. That is why I also summarise all proposed issues and will consider only the three issues identified by the Prosecutor.

58. With regard to these issues, as already said, I fully share the opinion of my learned colleagues. Thus, I am also satisfied that the First and Second Issues amount to appealable issues within the meaning and for the purposes of article 82(1)(d) of the Statute. However, I do not believe that the Third Issue qualifies as an appealable issue. It is rather an abstract legal question and, as such, unsuitable to grant an application under article 82(1)(d) of the Statute.

IV. CONCLUSION

59. ‘Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’ and ‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’, the State Parties have agreed to set up the Court, which applies the Statute.⁹³ It is in such a spirit that I have analysed the submissions of all parties and participants.

60. While I fully support the Chamber’s decision with regard to the Prosecutor’s Request for leave to appeal, I nevertheless equally support the Victims’ Request as explained above.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Dated this 17 September 2019

At The Hague, The Netherlands

⁹² ICC-02/17-60, para. 27.

⁹³ Rome Statute, preamble.