Cour
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International
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Court

Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan

PROLEGOMENA

1. A fundamental pillar of the rule of law, access to justice is effectively materialised as a right and a guarantee of proper administration of justice. It is internationally recognised in human rights law and domestically enacted under different constitutional laws. Coupled with the right to an effective remedy, the right of access to justice provides every person, without discrimination on any basis, the possibility to use legal tools and mechanisms to claim recognition and protection of any of his or her rights, including fundamental and human rights.[1] Justice does not differentiate on the basis of sex, gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[2]

2. The Rome Statute of the International Criminal Court (the 'Statute') provides substantive and procedural rights to persons whose human dignity is shattered by the commission of atrocious crimes. Victims can access the Court to seek effective redress through the effective remedies coined in the Statute, the Rules of Procedure and Evidence (the 'Rules') or the Regulations of the Court (the 'Regulations'), either expressly or otherwise available through statutory interpretation that must be consistent with internationally recognized human rights. From early stages of the investigation, victims can submit information, make representations, be notified of prosecutorial and judicial decisions, request judicial review and challenge such decisions in appeal, and *in fine* act as parties along with the Prosecutor.

3. To deny victims standing to appeal, as the majority did, necessarily contradicts the Statute and the internationally recognised human rights of access to justice and to have an effective remedy. This situation urges me to write this dissenting opinion.

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[1] 'Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. The Declaration of the High-level Meeting on the Rule of Law emphasizes the right of equal access to justice for all, including members of vulnerable groups, and reaffirmed the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all'. United Nations, Access to Justice and the Rule of Law.

[2] *See* article 21(3) of the Statute.

4. In writing this dissent, I hope to provide guidance and a prospective view for the future.[3] As has been the case with previous dissenting opinions regarding the role of victims at this Court at other stages in the proceedings,[4] this opinion might help future compositions of the Appeals Chamber to sustain an interpretation that is consistent with the internationally recognised human rights of victims to access to justice and to an effective remedy. To that end, victims should keep bringing their appeals to the Appeals Chamber under their internationally recognised human rights to do so. Even if ultimately dismissed by the majority, the appeals of the victims made the difference in the situation at hand.

I. INTRODUCTION

5. On 5 December 2019, the majority decided that 'the appeals brought by LRV 1, LRV 2 and LRV 3 are inadmissible and must be dismissed as such'.[5] The very same day, I dissented from the majority's decision to dismiss the victims' appeals and its practice of issuing an oral judgment. In contrast with that practice, I preliminarly wrote the reasons why I would have admitted the victims' appeals, but I noted that once the majority provided its full reasoning in writing, I would supplement my dissent.[6]

6. On 4 March 2020, the majority issued its written reasons finding that, in the circumstances of article 15, where victims may make representations, 'victims cannot be considered to be a "party" in terms of article 82(1) of the Statute to the proceedings resulting from a Prosecutor's request for authorisation to initiate an investigation

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[3] In the words of Justice Ginsburg, '[d]issents speak to a future age. It's not simply to say "my colleagues are wrong and I would do it this way", but the greatest dissents do become court opinions'. Ruth Bader Ginsburg Interview with Nina Totenberg of National Public Radio, Ruth Bader Ginsburg and Malvina Harlan, *Radio Broadcast*, 2 May 2002.

[4] *See Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for the 'Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)"', 31 July 2015, ICC-02/11-01/15-172, para. 16, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, ICC-01/04-01/06-824 (OA 7), pp. 55-57.

[5] *See* Transcript of hearing, 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 5-6.

[6] *See also* Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133.

under article 15'.[7] In its view, 'the term "party" in article 82(1), read in conjunction with the context of article 15, refers solely to the Prosecutor, and therefore only the Prosecutor is a potential appellant of a pre-trial chamber's decision under article 15(4) of the Statute'.[8] The majority considered that 'article 21(3) of the Statute does not lead to a different interpretation' that would give victims a right to appeal.[9]

7. I disagree in principle because, in my view, the Statute grants victims substantive and procedural rights that allow them to bring their appeals in the article 15 stage of the proceedings. The majority was right in finding that 'at the International Criminal Court and depending on the type of decision that is being appealed under article 82(1) of the Statute, the term ['either party'] may exclude, for instance, the defence from appealing certain decisions, while giving other participants the right to appeal'.[10] It rightly recalled that paragraphs 3 and 4 of article 15 'make it clear that it is the Prosecutor who has the power to seek authorisation to initiate an investigation before a pre-trial chamber' and that 'victims may make representations thereon'.[11] I, nonetheless, disagree with the majority's finding that '*[i]n these circumstances*, victims cannot be considered to be a "party" in terms of article 82(1) of the Statute to the proceedings resulting from a Prosecutor's request for authorisation to initiate an investigation under article 15'.[12]

8. The majority's finding is specific to circumstances where victims have made representations before the pre-trial chamber on the Prosecutor's request to initiate an investigation. The situation would have been different if the right of victims to make such representations had been denied or violated at this stage. In such circumstances, would victims have the right to appeal?

9. Other than that, I take issue with the majority's finding that 'the term "party" in article 82(1), read in conjunction with the context of article 15, refers solely to the Prosecutor, and therefore only the Prosecutor is a potential appellant of a pre-trial

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[7] Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 4 March 2020, ICC-02/17-137 (hereinafter: 'Majority's Reasons'), para. 21.
[8] Majority's Reasons, para. 21.
[9] Majority's Reasons, para. 22.
[10] Majority's Reasons, para. 15.
[11] Majority's Reasons, para. 20.
[12] Majority's Reasons, para. 21 (emphasis added).

chamber's decision under article 15(4) of the Statute'.[13] The majority seems to ignore that the term 'party' in article 82(1) is preceded by the word '[e]ither', which implies more than one party. Whereas the majority recognised that the defence is excluded 'from appealing certain decisions, while giving other participants the right to appeal',[14] then, in addition to the Prosecutor, who else, *if not the victims*, may appeal a decision under article 15(4) of the Statute?

10. As explained below in section II, a textual and contextual interpretation of article 82(1) shows that the majority's reading is not in keeping with the ordinary meaning of the provision and its interplay with other norms of the statutory framework. Victims fall within the expression '[e]ither party' of article 82(1) in the context of decisions issued under article 15(4) of the Statute. This is further supported by supplementary sources of law found in general principles of international law and those emerging from domestic jurisdictions, as explained in section IV.

11. Moreover, in contrast with the majority's finding that 'article 21(3) of the Statute does not lead to a different interpretation of article 82(1) of the Statute that would give victims a right to appeal the Impugned Decision',[15] section III(A) below refers to jurisprudence under which the majority's interpretation of article 82(1) is inconsistent with the human right to effective remedy. Furthermore, the majority only focused on the right to an effective remedy and did not address the right of access to justice. I further disagree with the majority's finding that 'the right to an effective remedy arises, in the first place, with regard to a State that has violated the human rights of an individual'.[16] Section III(B) further explains why this right, as any human right, creates obligations for State and non-State actors, including individuals and organisations of any type.

12. In brief, section II below presents my interpretation of the article 82(1) right to appeal article 15(4) decisions, pursuant to the ordinary meaning of the expression '[e]ither party' of article 82(1) and a contextual interpretation of this provision. Section III shows that such interpretation is consistent with internationally recognised

[13] Majority's Reasons, para. 21.
[14] Majority's Reasons, para. 15.
[15] Majority's Reasons, para. 22.
[16] Majority's Reasons, para. 23.

human rights. Subsection A demonstrates that the internationally recognised human rights of access to justice and to an effective remedy require meaningful participation of victims in criminal investigations. Subsection B shows that every individual and every organ of society must promote respect for such human rights. Section IV addresses subsidiary sources of law under article 21(1) of the Statute, specifically, in subsection A, the international principle of *ubi jus ibi remedium* and, in subsection B, principles emerging from domestic jurisdictions, those that would normally exercise jurisdiction over the crimes and other jurisdictions. Section V lists the main conclusions of this opinion.

II. INTERPRETATION OF THE ARTICLE 82(1) RIGHT TO APPEAL ARTICLE 15(4) DECISIONS

13. Article 82(1) reads, in the parts relevant to the appeals before us:

> 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
> (a) A decision with respect to jurisdiction or admissibility;
> […]
> (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.

A. Ordinary meaning of article 82(1) of the Statute

14. Pursuant to the Vienna Convention on the Law of Treaties, a treaty provision must be interpreted according to its ordinary meaning, its object and purpose, and the context given by other relevant treaty provisions.[17] As per previous jurisprudence of the Appeals Chamber, 'treaty provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty'.[18]

15. Accordingly, the word 'either', in its ordinary meaning, refers to two or even more than two elements:

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[17] Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232.
[18] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-04/06-3121-Red, para. 277.

> Used before the first of two (or occasionally more) given alternatives (the other being introduced by 'or').[19]

16. 'Either' thus refers, at the very least, to more than one element. In this regard, contrary to the Prosecutor's argument[20] and the majority's interpretation,[21] '[e]ither party' refers to more than one party. It cannot be true, in the ordinary meaning of the words used in the provision, that the Prosecutor is the only one who can appeal the Impugned Decision under article 82(1). This is all the more inapposite in light of the fact that the Prosecutor sought and obtained leave to appeal the Impugned Decision under article 82(1)(d) of the Statute,[22] which falls under the '[e]ither party' umbrella in the *chapeau* of article 82(1).

17. While wrong in excluding the victims, as explained below, the majority rightly found that 'at the International Criminal Court and depending on the type of decision that is being appealed under article 82(1) of the Statute, the term ['[e]ither party'] may

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[19] Oxford English Dictionary (online edition). Although generally accepted in conversational English, there seems to be a preference not to use 'either' for more than two elements in formal speech. It is submitted that '[i]f the number of alternatives is extended to more than two, opinion is divided about the elegance and even the acceptability of the results; in general a greater tolerance is necessary in conversational English, but in formal English it is advisable to restrict either to contexts in which there are only two possibilities'. *See* Robert Allen (ed.), *Pocket Fowler's Modern English Usage*, (Oxford University Press, 2nd ed, 2008).

While it may well be for 'elegance' purposes, the formal use of 'either' does not seem to be consistent with the *ordinary* meaning of the same provision in other languages. Conversational speech is the source of the ordinary meaning of words. Furthermore, the version of article 82(1) in at least one language does not necessarily support the idea that the provision refers only to two parties. The Spanish version of this provision reads '*[c]ualquiera de las partes*', which may refer to *more* than two parties. For this type of apparent contradictions between versions of a treaty provision in two authentic languages, article 33(3) of the Vienna Convention on the Law of Treaties provides a solution. It indicates that the provisions in all authentic texts of a treaty are presumed to have the same meaning. *See* Article 33(3) of the Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980 ('The terms of the treaty are presumed to have the same meaning in each authentic text'.). This has been understood as an interpretative requirement that 'every effort should be made to find a common meaning for the texts before preferring one to another'. *See* United Nations, Yearbook of the International Law Commission, Volume II, 1966, A/CN.4/SER.A/1966/Add.1, p. 225, para. 7. Consistency between the authentic versions of English and Spanish would require that '[e]ither party' in article 82(1) refers to more than two parties.

[20] Transcript of hearing, 4 December 2019, ICC-02/17-T-001-ENG, p. 105, line 24 to p. 107, line 5.

[21] Majority's Reasons, para. 21 (noting that 'the term "party" in article 82(1), read in conjunction with the context of article 15, refers solely to the Prosecutor, and therefore only the Prosecutor is a potential appellant of a pre-trial chamber's decision under article 15(4) of the Statute'.).

[22] Pre-Trial Chamber II, Decision on the Prosecutor and Victims' Requests 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, 17 September 2019, ICC-02/17-62, p. 16. (hereinafter: 'Decision granting leave in part').

exclude, for instance, the defence from appealing certain decisions, while giving other participants the right to appeal'.[23]

B. Contextual interpretation

18. Having excluded the defence from the term '[e]ither party' of article 82(1), the two remaining relevant actors would be the victims and the concerned State(s). Read in context with other provisions, '[e]ither party' includes the Prosecutor and, at the very least, *the victims*, during the discrete stage where the Prosecutor *proprio motu* requests a decision from the pre-trial chamber authorising her under article 15(4) to initiate an investigation.

19. To make a contextual interpretation, the place of a word within a sentence, a sentence within a paragraph, a paragraph within an article and so forth defines the context in which a provision is to be interpreted.[24] That is the case for article 82(1) with respect to its sub-paragraphs and all further provisions with which it is related.

20. In particular, the victims brought the instant appeals under subparagraph (a) of article 82(1) and the formulation '[e]ither party' must be read within that specific subparagraph. The wording 'decision with respect to jurisdiction' must be understood, as Judge Eboe-Osuji noted, in light of the general linguistic usage of the term 'jurisdiction': it 'would encompass the critical question whether or not to commence an investigation, which would set in motion the course of administration of justice at the Court, as a matter of its mandate'.[25] Again supporting this view, authoritative commentary on article 82(1)(a) of the Statute provides that the decisions subject to appeal under this article 'would be primarily those under Part 2 of the Statute (articles

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[23] Majority's Reasons, para. 15.
[24] O. Dörr, 'Article 31. General rule of interpretation', in O. Dörr, et al (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521 at para. 45. ('The entire text of the treaty is to be taken into account as 'context', including title, preamble and annexes … and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure of scheme of the treaty'.).
[25] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, "Partly Dissenting Opinion of Judge Eboe-Osuji" to the 'Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros"', 2 September 2019, ICC-01/13-98-Anx, para. 19.

5-21)' and that '[o]ther decisions in that Part appealable under this provisions would include those under article 15 para. 4 and 19 para. 6'.[26]

21. In my view, subparagraph (a) includes decisions making determinations on the pre-conditions to the exercise of the Court's jurisdiction under article 12 and the exercise of the Court's jurisdiction under article 13 of the Statute. In particular, article 13(c) indicates that '[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: […] [t]he Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15'.

22. In this regard, article 15(3) is clear in making the victims pivotal actors, in addition to the Prosecutor, at this phase of the proceedings. It provides that

> [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 authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

23. Rule 50 of the Rules regulates the procedure for authorization of the commencement of an investigation. Subparagraphs (1), (3) and (5) include special provisions to exclusively notify the victims or their legal representatives about the Prosecutor's request for authorisation for the opening of an investigation and the pre-trial chamber's decision on such a request. These provisions are special because the ordinary notification under rule 92(1) does not apply to the article 15 stage,[27] and, more importantly, because the victims are the only other participants who must be notified under rule 50 of the Prosecutor's request under article 15(3), and the pre-trial chamber's decision under article 15(4) of the Statute.

24. Someone who is not notified cannot possibly be a party; that is, neither the defence nor a State that is not notified could appeal a decision that it knows nothing about. Therefore, if '[e]ither party' under article 82(1) of the Statute refers to at least

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[26] C. Staker, 'Article 82: Appeal against other decisions', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1477, mn. 7.

[27] Rule 92(1) of the Rules of Procedure and Evidence states that it does not apply to the proceedings provided in Part 2 of the Statute.

two parties, it has to be read, at the stage of authorization of the commencement of an investigation, as the Prosecutor and the victims.

25. Another article that allows victims a role as parties at the specific stage of article 15 is article 68(3) of the Statute. It provides that '[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'. Not opening an investigation for grave crimes that harmed the victims squarely affects victims' rights of access to justice, effective remedies, redress and all further rights that would unfold in an investigation, eventual prosecutions, convictions and awards for reparations. Given that the defence is not a party at the article 15 proceedings, the interests of the accused would not be prejudiced.

26. Read in context with other provisions, '[e]ither party' includes the Prosecutor and *the victims*, during the discrete stage where the Prosecutor *proprio motu* seeks a decision from the pre-trial chamber under article 15(4) of the Statute. This interpretation is consistent with the internationally recognised human rights of access to justice and to an effective remedy, as explained below.

III. THE ABOVE INTERPRETATION IS CONSISTENT WITH INTERNATIONALLY RECOGNISED HUMAN RIGHTS

27. The Statute is a treaty that grants this Court jurisdiction over atrocious crimes that entail serious violations of human rights. That is the *raison d'être* of article 21(3) of the Statute. It binds the Court to be consistent with all internationally recognised human rights in its interpretation and application of the law.

28. The interpretation presented above is supported and, as required by article 21(3) of the Statute, consistent with the internationally recognised human rights at stake in these appeals, namely, the human rights to access to justice and to prompt and effective remedies. *A contrario sensu*, the majority's interpretation that victims are not included within those who under article 82(1) can appeal a decision issued by a pre-trial chamber under article 15(4) of the Statute is inconsistent with the internationally recognised human rights to access to justice and to have prompt and

effective remedies. These rights grant victims standing to appeal a decision rejecting a request to open an investigation for crimes that victimised them.

29. At the outset, I highlight the majority's finding that '[t]he function of article 21(3) is to ensure that the Court's interpretation and application of the Statute do not violate any human right that is internationally recognised'.[28] In this respect, we, the Judges of this Court, must be aware that our interpretation and application of the Statute does not violate, but rather applies and interprets the law pursuant to our *obligation* to be consistent with, internationally recognised human rights. The onus is on the Judges to know what those rights are and to assess whether our interpretation of the Statute is consistent with, or otherwise violates, such rights.

30. I dissent from the majority's finding that 'article 21(3) of the Statute does not lead to a different interpretation of article 82(1) of the Statute that would give victims a right to appeal the Impugned Decision'.[29] Particularly, it noted that 'the right to an effective remedy arises, in the first place, with regard to a State that has violated the human rights of an individual'.[30]

31. The majority missed two points. First, the right to an effective remedy, coupled with the right of access to justice, requires meaningful participation of victims in criminal investigations. Second, even if the State where a human right violation arises is called to provide the right to an effective remedy, every organ in society must promote and respect human rights, including the right to an effective remedy. I must emphasise that the right and guarantee of access to justice is one that courts of justice *par excellence* are bound to provide and, particularly, in the crimes under the jurisdiction of this Court, it is precisely the ICC which has the onus to grant it.

[28] Majority's Reasons, para. 23.
[29] Majority's Reasons, para. 22.
[30] Majority's Reasons, para. 23.

A. Internationally recognised human rights of access to justice and to an effective remedy require meaningful participation of victims in criminal investigations

32. I highlight the majority's finding that '[s]everal international human rights instruments recognise the right to an effective remedy'.[31] However, I note that the majority did not engage in the argument that the victims' right to appeal emerges too from the human right to access to justice. I add, in particular, that the human rights to access to justice and to an effective remedy have been internationally recognised in different treaties at both universal and regional levels: article 2(3) of the International Covenant on Civil and Political Rights (the 'ICCPR') (effective remedy for persons whose rights are violated);[32] article 7(1) of the African Charter on Human and Peoples Rights (the 'ACHPR') (right to be heard and right to appeal against violations of his or her rights);[33] articles 8 and 25(1) of the American Convention of Human Rights (the 'ACHR') (right to simple, prompt and effective recourse);[34] articles 6 and 13 of the European Convention of Human Rights (the 'ECHR') (fair trial and effective remedy);[35] articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (complaint, redress, and fair and adequate compensation);[36] article 6 of the Racial Discrimination Convention (effective protection and remedies);[37] and article 2(c) of the Convention on the

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[31] Majority's Reasons, para. 23, n. 47, referring to United Nations, General Assembly, Universal Declaration of Human Rights, Resolution 217A (III), 10 December 1948, U.N. Doc A/810, article 8; United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1996, 999 United Nations Treaty Series (hereinafter: 'ICCPR'), article 2(3); Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series (hereinafter: 'ACHR'), article 25(1); Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 United Nations Treaty Series (hereinafter: 'ECHR'), article 13; African Union, African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaty Series 26363 (hereinafter: 'ACHPR'), article 7(1)(a). *See also* African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle C.

[32] ICCPR, article 2(3).

[33] ACHPR, article 7(1).

[34] ACHR, articles 8, 25(1).

[35] ECHR, articles 6, 13.

[36] United Nations, General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 United Nations Treaty Series, articles 13, 14.

[37] United Nations, General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations Treaty Series 660, article 6.

Elimination of All Forms of Discrimination Against Women (effective protection through competent national tribunals and other public institutions).[38]

1. Nature and scope of the right/guarantee of access to justice

33. Access to justice as a pillar that sustains the international rule of law has a twofold nature: (a) it is an international human right and, at the same time, (b) it is a guarantee for the proper administration of justice. As a human right, it is internationally recognised in different treaties.[39] Under the Universal Declaration of Human Rights, not only States but also individuals and organisations of any nature must promote respect for such rights.[40] The right of access to justice enables every human being, without discrimination of any kind, to access tribunals with a view to having his or her rights recognised and protected, and to have an effective remedy should they be violated. This right has its foundation on the human right and principle of equality and non-discrimination before the law.

34. As a guarantee for the administration of justice, access to justice implies a mechanism binding tribunals, whatever their nature or jurisdiction may be, to grant participation, in any proceedings and at any stage, to individuals who have suffered a violation of any of their rights, where these are subject to settlement. Such tribunals have the obligation to grant those individuals recourse in all stages of the proceedings. This is so as to fulfil the guarantee of the proper administration of justice, and the principle of equality of arms to all parties in judicial proceedings.

35. Due to this double dimension of access to justice, its scope is broad. This means that it includes *inter alia*:

a. A right to petition, act as a party and have access and participate in all stages of proceedings, including the right to appeal;

b. A right to have an impartial judge for the settlement of rights;

c. A right to obtain a fair ruling;

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[38] United Nations, General Assembly, article 2(c) of the Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, United Nations Treaty Series 1249, article 2(c).
[39] *See* ICCPR, articles 2(3), 14(1); ACHPR, article 7(1)., ACHR, article 8(1)); ECHR, article 6(1).
[40] *See* General Assembly, Universal Declaration of Human Rights, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71, Preamble.

d. A right to have proceedings under the principle of due process of law in all stages of proceedings, including the appellate stage;

e. A right to be notified and receive information;

f. A right to make submissions, motions, and recusals, present and challenge evidence, etc.

36. By giving victims the opportunity to be heard before a tribunal, their right of access to justice is not exhausted. It is just a *de minimis* expression of the right and a guarantee of the proper administration of justice.

37. The right and guarantee of access to justice for atrocious crimes is linked to the right to obtain an effective remedy for the victims of such atrocities. This is so in either national or international jurisdictions, and is of particular relevance in the case of crimes under the jurisdiction of the ICC.

38. Accordingly, giving victims the right and a guarantee of access to justice, along with the right to an effective remedy, entails that the victims can participate at all stages of judicial proceedings in order to seek recognition and protection of their rights. The scope of the right and guarantee of access to justice is expansive and includes the right of victims to bring appeals against decisions that pertain to their rights. Courts, like the ICC, have the onus to enable victims to access justice in this way.

2. Human rights principles and jurisprudence on the rights of access to justice and to an effective remedy

39. The majority rightly recognised that several international human rights instruments recognise the right to an effective remedy.[41] However, it failed to accept that such recognition requires a right to meaningful participation of victims in criminal investigations. Such a requirement, as described below, emerges from the

[41] Majority's Reasons, para. 23, referring to United Nations, General Assembly, Universal Declaration of Human Rights, Resolution 217A (III), 10 December 1948, U.N. Doc A/810, article 8; ICCPR, article 2(3); ACHR, article 25(1); ECHR, article 13; African Union, ACHPR, article 7(1)(a). *See also* African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle C.

principles and jurisprudence of different human rights bodies regarding the rights to an effective remedy and to access to justice.

40. Human rights bodies at regional and international levels have interpreted these rights under the applicable human rights treaties. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission of Human and Peoples' Rights (the 'African Commission') has provided for the victims' right to '*locus standi*'. The African Commission coined the principle that 'States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or nongovernmental organization is entitled to bring an issue before judicial bodies for determination'.[42]

41. The African Commission further provided for the right to an effective remedy. It noted that '[e]veryone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity'.[43] For the African Commission, the right to an effective remedy must include 'access to justice', 'reparation for the harm suffered' and 'access to the factual information concerning the violations'.[44]

42. The European Court of Human Rights ('ECtHR') has observed that the right to effective remedy in respect of violations to the rights to life and to not be subjected to torture requires an investigation[45] and participation of victims therein.[46] In *Al Nashiri v Poland*, the applicant was Abd al-Rahim Hussayn Muhamad al Nashiri,[47] one of the current appellants represented by LRV3.[48] The case before the ECtHR concerned the

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[42] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle E.
[43] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle C.
[44] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle C.
[45] *See e.g.* ECtHR, *Al Nashiri v Poland*, Judgment, 24 July 2014, Application No. 28761/1128761/11 (hereinafter: '*Al Nashiri* Judgment'), para. 485; *Denis Vasilyev v. Russia*, Judgment, 17 December 2009, Application No. 32704/04 (hereinafter: '*Denis Vasilyev v. Russia*'), para. 157.
[46] *See e.g. Al Nashiri* Judgment, para. 485.
[47] *Al Nashiri* Judgment, para. 1.
[48] *See* LRV2 and LRV3, Corrigendum of Victims' Joint Appeal Brief against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic

detention of the applicant, a Saudi Arabian national, at Guantanamo Bay following detention and torture at secret Polish sites under the authority of the United States Central Intelligence Agency (the 'CIA'). In order for the right to effective remedy not to be illusory, the ECtHR found that the prohibition of torture requires that investigations be capable of identifying those most responsible, and that victims be able to participate in such investigations. The ECtHR found that in cases alleging torture, the prohibition of torture, read in conjunction with States' 'duty to "secure to everyone within their jurisdiction the rights and freedoms defined in […] [the] Convention", requires by implication that there should be an effective official investigation'.[49] In light of this reading of the prohibition of torture, the ECtHR noted that 'the victim should be able to participate effectively in the investigation in one form or another'.[50] It did not go on to specify how victims should participate, but left this question open.

43. The ECtHR reiterated in *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*[51] that where non-derogable rights such as the right to life or freedom from torture are at stake, the right to effective remedy requires 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure'.[52] The ECtHR held that 'in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim'[53] (emphasis added). It recognised that the scope of the effective remedy 'varies depending on the nature of the applicant's complaint under the Convention', implying that gross violations of human rights will

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Republic of Afghanistan" of 30 September 2019, ICC-02/17-75, 01 October 2019, ICC-02/17-75-Corr, para. 1.

[49] *Al Nashiri* Judgment, para. 485.

[50] *Al Nashiri* Judgment, para. 486.

[51] The facts of the case related to Mr Campeanu, a Romanian man with severe learning difficulties who was HIV positive and lived for most of his life in the care of the State. He died in 2004, following alleged homicide by negligence, after which the State failed to carry out an autopsy as provided for by domestic law. Following the investigation, the prosecutor's office decided not to prosecute arguing that the treatment received had been appropriate and non-violent. ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, Judgment, 17 July 2014, Application No. 47848/08.

[52] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, Judgment, 17 July 2014, Application No. 47848/08, para. 149.

[53] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, Judgment, 17 July 2014, Application No. 47848/08, para. 132.

place greater requirements on the right to remedy.[54] The remedy must be '"effective" in practice as well as in law'.[55]

44. Importantly, the Inter-American Court of Human Rights (the 'IACtHR') has observed that victims have capacity to act in criminal investigations. It has extensive jurisprudence noting that victims 'must have full access and the *capacity to act*, at all stages and levels of said investigations, in accordance with domestic laws and the provisions of the American Convention'.[56]

45. In *Rosendo Cantu v. Mexico*, the IACtHR highlighted the victim's right to participate in criminal proceedings in exercising her right to truth and access to justice. It emphasised 'that the victim's participation in criminal proceedings is not limited to merely repairing the damage done but, is primarily designed to make effective her rights to know the truth and obtain justice before the competent judicial authorities'.[57]

46. In *Villagran-Morales et al. v. Guatemala*, the IACtHR noted that 'the victims of human rights violations or their next of kin should have substantial possibilities of

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[54] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, Judgment, 17 July 2014, Application No. 47848/08, para. 148.
[55] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, Judgment, 17 July 2014, Application No. 47848/08, para. 148.
[56] IACtHR, *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 7 June 2003, Series C. no. 99, para. 186 (emphasis added). *See also* IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment (Merits, Reparations and Costs), 4 July 2007, Series C. no. 166, para. 149 (noting that 'the State must ensure to the victims' family members full access and capacity to act in all stages and instances of the said investigations and proceedings, pursuant to the domestic laws and the provisions of the American Convention. The right to truth, which underlies the right of the victims or their family members to obtain from the competent organs of the State a clarification over the violations and corresponding responsibilities, through the investigation and prosecution; and which, recognized and exercised in a particular situation, constitutes an important measure of reparation and gives rise to an adequate expectation of the victims, which the State must satisfy'); *Escué Zapata v. Colombia*, Judgment (Merits, Reparations and Costs), 4 July 2007, Series C. no. 165, para. 166 (observing that '[t]he State must ensure that the victim's relatives have full access and capacity to act in all the stages and instances of said investigations and proceedings, in accordance with the domestic law and the rules of the American Convention'); *Heliodoro Portugal v. Panama*, Judgment (Preliminary objections, Merits, Reparations and Costs), 12 August 2008, Series C. no. 186, para. 247 (noting that 'the State must ensure that Heliodoro Portugal's next of kin have full access and capacity to act at all stages and in all instances of the said investigations and proceedings, in accordance with domestic law and the provisions of the American Convention'); *Anzualdo Castro v. Peru*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 22 September 2009, Series C. no. 202, para. 183 noting that 'during the investigation and prosecution, the State must ensure full access and procedural capacity of the victim's next-of-kin in all the stages of this investigation, in accordance with the domestic law and the rules of the American Convention'.).
[57] IACtHR, *Rosendo Cantu v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 31 August 2010, Series C. no. 216, para. 167. *See also* paras 175, 177.

being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation'.[58] In *Radilla-Pacheco v. Mexico*, it observed that 'victims can present arguments, receive information, provide evidence, make allegations, and, in synthesis, defend their interests' and that their 'participation shall seek a fair trial, the knowledge of the truth of what happened, and the granting of fair reparations'.[59] In *Baldeón-García v. Perú*, the IACtHR observed that 'victims of human rights violations or their next of kin must enjoy ample possibilities of being heard and participating in the related proceedings, in order to clearly establish the facts and the punishment applicable to the perpetrators of those acts, and to seek an appropriate relief'.[60]

47. Furthermore, the IACtHR has affirmed that 'States shall not obstruct persons who turn to judges or the courts in order to have their rights determined or protected'[61] and that '[a]ny regulation or practice of the domestic order that makes individual access to the courts difficult and is not justified by the reasonable needs of the administration of justice itself, shall be understood as contrary to the previously mentioned Article 8(1) of the Convention.'[62]

48. In *Gonzales Medina and Family v. Dominican Republic*, the IACtHR found a violation of the right to fair trial, and reiterated its prior jurisprudence relating to failure to comply with the victim's family's right to participate fully in the criminal investigation into the facts of the case:

> [T]he States have the obligation to guarantee the right of the victims or their family to take part in all stages of the respective proceedings, so that they can make proposals, receive information, provide evidence, formulate arguments and, in brief, assert their interests and rights. The purpose of this participation

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[58] IACtHR, *The 'Street Children' (Villagran-Morales et al.) v. Guatemala*, Judgment (Merits), 19 November 1999, Series C. no. 63, para. 227.
[59] IACtHR, *Radilla-Pacheco v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 23 November 2009, Series C. no. 209, para. 247.
[60] IACtHR, *Baldeón-García v. Perú*, Judgment (Merits, Reparations, and Costs), 6 April 2006, Series C. no. 147, para. 146.
[61] IACtHR, *Cantos v. Argentina*, Judgment (Merits, Reparations, and Costs), 28 November 2002, Series C, No. 97, para. 50; *see also* IACtHR, *Yvon Neptune v. Haiti*, Judgment (Merits, Reparations and Costs), 6 May 2008, Series C, No. 180, para. 82.
[62] IACtHR, Tiu Tojín v. Guatemala, Judgment (Merits, Reparations, and Costs), 26 November 2008, Series C, no. 190, para. 95, referring to *Cantos v. Argentina*, Judgment (Merits, Reparations, and Costs), 28 November 2002, Series C, No. 97, para. 50; *Yvon Neptune v. Haiti*, Judgment (Merits, Reparations and Costs), 6 May 2008, Series C, No. 180, para. 82.

should be access to justice, learning the truth of what happened, and the award of just reparation.[63]

49. In brief, while the majority recognised the existence of the right to an effective remedy, its interpretation that victims are not parties who have the right to appeal is inconsistent with the internationally recognised human rights to access to justice and to have an effective remedy. Human rights jurisprudence shows that the right to an effective remedy in cases involving allegations of torture requires the opening of an investigation and victims' participation therein. Moreover, the right to access to justice provides every person, without discrimination on any basis, the possibility to claim recognition for and protection of any fundamental and human rights.

50. There are substantive and procedural rights under the statutory framework and international human rights law and jurisprudence enabling victims to have the right to appeal decisions affecting their interests in criminal investigations. Given that, in the current situation, the Pre-Trial Chamber denied the Prosecutor's request for authorisation to initiate an investigation, the only effective remedy was the right to appeal the Impugned Decision. In the absence of any other recourse, the Appeals Chamber had the obligation to grant the right of victims to appeal, as an expression of their rights of access to justice and an effective remedy.

B. Every individual and every organ of society must promote respect for human rights

51. The majority, focusing only on the right to an effective remedy, thereby ignoring the broad scope of the right and guarantee of access to justice, observed that 'the right to an effective remedy arises, in the first place, with regard to a State that has violated the human rights of an individual'.[64] It also noted in a footnote that 'a right to an effective remedy can arise if it is an international organisation that has committed the violation or has a process by which rights have been restricted'.[65] Then again, having noted that LRV 1 had submitted that States have the duty to provide

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[63] IACtHR, *Gonzalez Medina and Family v. Dominican Republic*, Judgment (Preliminary objections, merits, reparations and costs), February 27 2012, Series C. no.240, para 251. *See also* para 263.
[64] Majority's Reasons, para. 23.
[65] Majority's Reasons, para. 23, n. 47, referring to European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the Court, 3 September 2008, Document 62005CJ0402 (hereinafter: '*Kadi et al.*'), paras 281-285, 299, 303-304, 306-308 and 326.

remedies for human rights violations in their territory,[66] it insisted that 'it is for *the States* to establish appropriate judicial and administrative mechanisms under domestic law to address claims regarding human rights violations'.[67] It then noted that LRV 1 'fail[ed] to explain why the Court would have the same obligation with regard to alleged human rights violations by a State' and that 'there is no allegation in the instant case that the Court is responsible for any of the alleged violations of human rights from which the right to an effective remedy could follow'.[68]

52. The majority's view thus appears to be that the right to an effective remedy primarily emerges as a State's obligation when the State is responsible for a human right violation, and that it eventually creates an obligation for an international organisation only if the organisation has violated a human right. The majority is of the view, however, that no such obligation would arise for an international organisation such as the Court when it was a State, rather than the international organisation itself, the one that caused the human rights violation for which the obligation to provide an effective remedy arises.

53. The majority relies on its reading of General Comment No. 31 to construct that 'the Human Rights Committee has emphasised that it is for *the States* to establish appropriate judicial and administrative mechanisms under domestic law to address claims regarding human rights violations'.[69] However, a more comprehensive reading of General Comment No. 31 provides a better understanding of the Human Rights Committee's reasoning and, in my view, shows that the majority overemphasised the States' obligation to provide effective remedies.

54. General Comment No. 31 noted the States' obligation to provide domestic remedies because it was referring to the wording of a treaty that binds States.[70]

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[66] Majority's Reasons, para. 23, referring to LRV 1 Appeal Brief, paras. 67- 71.
[67] Majority's Reasons, para. 23, n. 48, referring to UN Human Rights Committee, *General Comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 (hereinafter: 'General Comment No. 31'), para. 15 (emphasis added).
[68] Majority's Reasons, para. 23.
[69] Majority's Reasons, para. 23, n. 48, referring to General Comment No. 31, para. 15 (emphasis added).
[70] The Human Rights Committee noted from the outset that the obligations under article 2(1) of the ICCPR, 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized', 'are binding on States Parties and don not, as such, have direct horizontal effect as a

However, it does not say that international organisations such as international tribunals would have no obligation to provide effective remedies, promote respect for the right to effective remedy or, more broadly, any human right. In contrast, General Comment No. 31 provides circumstances where the obligation of article 2 of the ICCPR binds States in relation to the acts of non-State actors, such as private individuals and entities,[71] and even peacekeeping missions.[72]

55. The Human Rights Committee reminded States of the relationship between those obligations under article 2(1) and the need to provide an effective remedy under article 2(3) of the ICCPR.[73] It is in this context that the Human Rights Committee 'attache[d] importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law'.[74] It said this as an implication of article 2(1) of the ICCPR and, nonetheless, it did not say that States are the only ones to provide effective remedies under the broader framework of international law.

56. The view that international law is *only* binding upon States appears anachronistic and has been superseded. Publicists at the beginning of the last century wrote that '[s]ubjects of international law are nations, and those political societies called states'[75] and that 'the Law of Nations is a law for international conduct of States, and not of their citizens'.[76] However, I find that this view is at odds with the

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matter of international law'. *See* General Comment No. 31, para. 8.

[71] It notes that '[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'. *See* General Comment No. 31, para. 8.

[72] It notes that the obligations under article 2(1) of the ICCPR also applies with respect to the rights of those under the power or effective control of 'forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'. *See* General Comment No. 31, para. 10.

[73] *See* General Comment No. 31, para. 8 (noting that 'States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3'). *See also* para. 15 (observing that '[a]rticle 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights'.).

[74] It notes that ''. *See* General Comment No. 31, para. 15.

[75] C. Phillipson, *Wheaton's Elements of International Law* (5th ed., 1916) p. 32.

[76] L. Oppenheim, *International Law: A Treatise*, (Arnold McNair ed., 4th ed. 1928) pp. 20-21, para. 13.

evolution of international law *in toto* and particularly with the principle of evolutive interpretation[77] and the *pro homine* principle[78] under international human rights law.

57. The idea that States are the only subjects of international law has evolved after World War II. International law has followed a tendency towards binding not only States, but also non-state actors, including individuals and organisations.[79] This evolution is a recognition of a *jus natural* approach that regards human rights as self-evident; they are intrinsic to every person simply by virtue of being human.[80] Human rights are to be perceived as equal, inalienable and universal,[81] rather than contingent on legal provisions.

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[77] The principle of evolving interpretation is based on the understanding that 'treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions'. IACtHR, *Atala Riffo and daughters v. Chile*, Judgment (Merits, Reparations, and Costs), 24 February 2012, Series C No. 239 (hereinafter: '*Atala Riffo and daughters v. Chile*'), para. 83; *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, Series C No. 134, para. 106; *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), 17 June 2005, Series C No. 125, para. 125; ECtHR, Grand Chamber, *Demir and Baykara v. Turkey*, Judgment, 12 November 2008, Application No. 34503/97, para. 68. *See also The Prosecutor v. Thomas Lubanga Dyilo*, 'Separate Opinion of Judge Luz del Carmen Ibáñez Carranza', 16 September 2019, ICC-01/04-01/06-3466-AnxII, para. 70.

[78] In the framework of the ICCPR, members of the Human Rights Committee have noted that the interpretation of a treaty 'should be performed on the basis of the *pro persona* principle', which 'creates greater safeguards for the rights of victims of human rights violations and sends a signal to States regarding their future conduct'. *See* United Nations, Human Rights Committee, *José Alejandro Campos Cifuentes v. Chile*, Individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting), 28 July 2009, CCPR/C/96/D/1536/2006, para. 11. The IACtHR has required that its applicable law 'be interpreted in favour of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system' based on the *pro homine* principle. *See* IACtHR, *In the matter of Viviana Gallardo et al*, Advisory Opinion, 15 July 1981, Series A No. 101, para. 16. *See also Atala Riffo and daughters v. Chile*, para. 84 *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, Series C No. 134, para. 106; *Ricardo Canese v. Paraguay*, Judgment (Merits, Reparations, and Costs), 31 August 2004, Series C No. 111, para. 181. *See also The Prosecutor v. Thomas Lubanga Dyilo*, 'Separate Opinion of Judge Luz del Carmen Ibáñez Carranza', 16 September 2019, ICC-01/04-01/06-3466-AnxII, para. 64-68.

[79] According to H. Steiner et al., '[o]ne of the most dramatic developments within international human rights law over the past decade or more has been the growing importance of a range of non- state actors. The centrality of the state is one of the defining features of international law and the human rights system builds upon this by seeking to bind states through a network of treaty obligations to which, in the vast majority of cases, only states can become parties. Non-state actors are thus, by definition, placed at the margins of the resulting legal regime. The problem is that actors such as transnational corporations, civil society groups, international organizations and armed opposition groups, to name just the most prominent among a wide range of potentially important non-state actors, have all assumed major roles in relation to the enjoyment of human rights, especially in recent years.' H. Steiner, P. Alston, R. Goodman, International Human Rights in Context. Law, Politics, Morals (Oxford University Press, 3rd ed., 2008), p. 1385.

[80] J. Griffin, (eds.) *On human rights*, (Oxford University Press, 2008), p. 2.

[81] J. Donnelly, 'The relative universality of human rights', 29 *Human rights quarterly* (2007), p. 281, at pp. 282-283. (hereinafter: 'Donnelly').

58. Legalistic approaches often question whether the application of human rights is reserved to the realm of State liability. For the wronged communities, this discussion is pointless. In reality, the agony of victims is not different whether the abuses amount to grave violations of human rights or international crimes. It is merely a semantic distinction. That is the banality of semantics.

59. Regardless, every individual and every organ of society must promote respect for human rights. On December 9, 1948, the General Assembly adopted the Universal Declaration of Human Rights, proclaiming obligations for every individual and organ of society:

> The General Assembly,
>
> Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, ***shall*** strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction[82] (emphasis added).

60. Although in the context of individual criminal liability, the bench in *United States of America v. Friedrich Flick, et al.*, held in 1947 that "[i]t cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals".[83] Referring to the argument that 'international law is a matter wholly outside the work, interest, and knowledge of private individuals', the bench found that such a 'distinction is unsound'.[84] It held that '[i]nternational law, as such, binds every citizen just as does ordinary municipal law'.[85]

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[82] *See* General Assembly, Universal Declaration of Human Rights, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 Preamble.
[83] United Nations War Crimes Commission, *Case No. 48 (The Flick Trial: Trial of Friedrich Flick and Five Others)*, 20 April-22December, 1947, CC2.csv:994 (hereinafter: '*Flick case*'), p. 18.
[84] *Flick case*, p. 18.
[85] *Flick case*, p. 18.

61. To date, there is an emerging consensus on the obligations of non-State actors under international law.[86] As for corporations, in 2002, the United Nations Commission on Human Rights drafted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[87] These norms acknowledge that, besides States, 'transnational corporations and other business enterprises, […] are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments',[88] that they '*have, inter alia, human rights obligations and responsibilities*',[89] and that '[t]ransnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization'.[90] In 2011, the UN Special Representative on Human Rights and Transnational Corporations and other Business Enterprises proposed the UN Guiding Principles on Business and Human Rights.[91] In September 2013, during the twenty-fourth session of the UN Human Rights Council, Ecuador presented a proposal for the 'elaboration of an international legally binding

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[86] In the *Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, the Special Tribunal for Lebanon held, in the context of contempt proceedings, that the word 'person' in its statute included both natural and legal persons, and that there was an emerging international consensus on the role of corporations under international law. It based these conclusions, *inter alia*, on various international instruments holding that transnational corporations have duties to respect human rights and State practice providing for liability of corporations at a domestic level. *See Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 Oct. 2014, STL-14-05/PT/AP/AR126.1, paras 33-74.

[87] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., August 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2.

[88] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., August 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, p. 2 (including, *inter alia*, 'the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; […] the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; […] the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms'.).

[89] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., August 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, p. 3. (Emphasis added.)

[90] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., August 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, p. 3.

[91] UN General Assembly, *Report of the Special Rapporteur of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Right. Implementing the United Nations "Protect, Respect and Remedy" Framework*, March 21, 2011, U.N. Doc. A/HRC/17/31.

instrument on transnational corporations and other business enterprises with respect to human rights'.[92] In June 2014, the Human Rights Council created and tasked the Open Ended Intergovernmental Working Group to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[93]

62. As for international organisations, the case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* at the European Court of Justice (the 'ECJ') is illustrative of the extent to which international organisations are bound to respect human rights. Mr Kadi and Al Barakaat International Foundation sough annulment of two regulations through which the European Council (the 'EC') implemented Regulation 1333(2000) of the United Nations Security Council (the 'UNSC'). One of the EC regulations ordered the freezing of assets of individuals listed in one of its annexes in accordance with the list by a sanctions committee of the UNSC ('Annex I'). The other two EC regulations included Mr Kadi and Al Barakaat in Annex I. The ECJ found that Mr Kadi's and Al Barakaat's rights of defence, especially the right to be heard and effective judicial protection, and Mr Kadi's right to property had been violated. It thus granted Mr Kadi's and Al Barakaat's actions for annulment.[94]

63. To reach this outcome, the ECJ considered that 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures'.[95] It observed that

> the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming

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[92] Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26 June 2014A/HRC Res. 26/9, para. 9. *See also* United Nations General Assembly, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, June 24, 2014, A/HRC/26/L.22/Rev.1; United Nations General Assembly, *Human rights and transnational corporations and other business enterprises*, June 23, 2014, A/HRC/26/L.1.
[93] UN General Assembly, Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 14 July 2014, A/HRC/RES.26/9, para. 1.
[94] *See*, *Kadi et al.*, paras 15-33, 353, 371-372.
[95] *Kadi et al.*, para. 326.

> an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[96]

64. The majority thus was correct when it said that 'a right to an effective remedy can arise if it is an international organisation that has committed the violation or has a process by which rights have been restricted'.[97] Nevertheless, by requiring a violation of this Court as a condition for it to have an obligation to provide an effective remedy to victims,[98] the majority failed to appreciate that international organisations could have such an obligation even when they are not directly responsible for the human rights violation that causes the need for an effective remedy. Certainly, international organisations could potentially be complicit in human rights violations by other international organisations or States. Precisely the situation in *Kadi et al.* shows that the EC could be responsible for human rights violations through the implementation of resolutions issued by the UNSC sanctioning individuals listed by a UNSC sanctions committee.

65. This is also applicable to international organisations such as international tribunals. Particularly in the case of the ICC, different actors could potentially be complicit with human rights violations attributable to States if any such actors fails to comply with their corresponding obligations under the Statute.

66. In addition, I highlight that the human right and guarantee of access to justice, for which the courts must provide, could be directly violated whenever the Court denies this right with no legal justification. The majority indicated that LRV 1 'fail[ed] to explain why the Court would have the same obligation [to provide remedies] with regard to alleged human rights violations by a State'.[99] However, this has no relevance for the right and guarantee of access to justice. Being both a right

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[96] *See*, *Kadi et al.*, para. 326. *See also* paras 281-285, 299, 303-304, 306-308.
[97] Majority's Reasons, para. 23, n. 47, referring *Kadi et al.*, paras 281-285, 299, 303-304, 306-308 and 326.
[98] Majority's Reasons, para. 23 (noting that 'LRV 1 submits that States have the duty to provide remedies for human rights violations in their territory, but fails to explain why the Court would have the same obligation with regard to alleged human rights violations by a State' and that 'there is no allegation in the instant case that the Court is responsible for any of the alleged violations of human rights from which the right to an effective remedy could follow').
[99] Majority's Reasons, para. 23 (emphasis added).

and a guarantee, access to justice does not require victims to demonstrate that the Court has violated their rights; particularly, as this is not the case in this appeal.

67. I highlight that the majority, making its conclusion case-specific, found 'no allegation *in the instant case* that the Court is responsible for any of the alleged violations of human rights from which the right to an effective remedy could follow'.[100] It noted that '[t]he victims have had the opportunity to effectively access this Court and participate in various proceedings relating to the Prosecutor's Request; they were heard by the Pre-Trial Chamber and they are being heard by the Appeals Chamber as participants in the Prosecutor's appeal against the Impugned Decision'.[101] I disagree with those observations because simply being heard does not satisfy the right of access to justice. It is just a minimum expression of this right and the corresponding human right to an effective remedy. As noted above, only being heard by the Court does not grant victims the status of 'party' and thus prevents them from exercising all the relevant rights derived from such status.

68. The current situation is fortunately one where the Prosecutor obtained leave from the Pre-Trial Chamber to appeal its Impugned Decision and the victims filed their appeals before the Appeals Chamber. Had the Prosecutor not obtained leave to appeal, the position of the victims would have been different, and the only avenue for this Court to respect their right to an effective remedy would have been for the Appeals Chamber to admit their appeals.

IV. SUBSIDIARY SOURCES OF LAW UNDER ARTICLE 21(1) OF THE STATUTE

69. If the provisions of the Statute and the Rules were not sufficient to answer the question of whether the victims have standing to appeal a decision issued by a pre-trial chamber under article 15(4), subparagraph (b) of article 21(1) allows the Court to apply principles of international law. Alternatively, subparagraph (c) permits drawing general principles of law from domestic jurisdictions as long as such principles are not inconsistent with the Statute, international law and internationally recognised

[100] Majority's Reasons, para. 23 (emphasis added).
[101] Majority's Reasons, para. 23.

norms and standards. They must also be consistent with internationally recognised human rights under article 21(3), and in particular, those at stake in these appeals.

A. The international principle of *ubi jus ibi remedium*

70. Should there be no clear right under the Statute, article 21(1)(b) thereof allows application of general principles of law. According to the principle *ubi jus ibi remedium*, '[w]here there is a right, there is a remedy'.[102] Shelton indicates that '[t]his maxim has long been part of common law legal systems and appears in Roman/Dutch law'.[103]

71. It is important to note that the application of this principle, as with any source of law under subparagraph (1) of article 21, is consistent with internationally recognised human rights.

72. In the case at hand, the right to prompt and effective remedies in cases involving allegations of torture requires the opening of an investigation[104] and victims' participation therein.[105] Application of this principle would therefore militate in favour of granting victims the right to appeal the Pre-Trial Chamber's decision not to open an investigation.

73. In my view, it follows that not only is there a right of participation for victims at various stages of the proceedings, provided by article 68(3) of the Statute, as expressed above, but in addition, by the terms of the principle *ubi jus ibi remedium*,

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[102] Black's Law Dictionary (10th ed., 2014), p. 1965. *See also* Oxford Dictionary of Law (7th ed., 2009) ('Wherever […] a right exists there is also a remedy.'):

> The principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss. Further, where one's right is denied the law affords the remedy of an action for its enforcement. This right to a remedy therefore includes more than is usually meant in English law by the term "remedy", as it includes a right of action. Wherever, therefore, a right exists there is also a remedy. Ashby v White (1703) 14 St Tr 695, 92 ER 126 (or rather the classic judgment of Lord Chief Justice Holt in that case) is usually cited to exemplify the maxim. This principle, which has at all times been considered so valuable, gave occasion to the first invention of that form of action called an action on the case. Such actions played a major part in the development of the law of tort.

[103] D. Shelton), *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 377, *referring to* R.N. Leavell *et al.*, *Equitable Remedies, Restitution and Damages, Cases and Materials* (5th ed., 1994) ('Shelton'), p. 4. *See also* Shelton, p. 377 (In this regard, Shelton observes that 'courts have an inherent power to devise the appropriate remedy to conclude cases that come within their jurisdiction'.). *See also Paxton's Case*, 1 Quincy 51, 57 (Mass. 1761) ('[T]he Law abhors Right without Remedy').

[104] *See e.g.* *Al Nashiri* Judgment, para. 485; *Denis Vasilyev v. Russia*, para. 157.

[105] *See e.g.* *Al Nashiri* Judgment, para. 485.

victims must be granted a remedy to give effect to their right. In these circumstances, the victims must have standing to appeal.

74. It is undisputed that victims have the right to make representations pursuant to article 15(3) of the Statute and rule 50 of the Rules. It follows, as a logical consequence, that when a pre-trial chamber issues a decision that is contrary to the interests of the victims, such as, refusing to authorise an investigation, it would be a breach of the victims' right to make representations, and at the same time, not being recognised as parties, they would be denied a right of appeal when their representations are disregarded.

B. Principles emerging from domestic jurisdictions

75. Subparagraph (c) of article 21(1) of the Statute indicates that when failing to apply the sources of law under subparagraphs (a) and (b), the Court shall apply 'general principles of law derived […] from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime […]'.

76. LRV 2 and LRV 3 argued that regional and domestic jurisdictions provide the victims' rights to challenge prosecutorial decisions.[106] The majority did not address nor engage with those arguments. However, in my preliminary reasons dissenting from the majority's decision to deny victims standing to appeal, I observed that the Prosecutor alleged that crimes were committed in Afghanistan, Lithuania, Poland and Romania.[107] From my examination of the laws of these countries,[108] one may conclude, as argued by LRV 2 and LRV 3, that it is possible for victims to challenge or appeal a decision that closes an investigation into the crimes.[109] This also appears

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[106] *See* Corrigendum of Victims' Joint Appeal Brief against 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" of 30 September 2019, ICC-02/17-75, 01 October 2019, ICC-02/17-75-Corr, paras 55-69, paras 40-41.

[107] *See* Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, para. 60, referring to Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red, paras 43-49.

[108] *See* Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, para. 60-65.

[109] Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, paras 60-65, referring to Afghanistan Interim Criminal Procedure Code for Courts 2004, article 39, 63, 71; Lithuanian Code of Criminal

to be supported by regional law from the European Union[110] and domestic legislation from both civil and common law traditions, such as France[111] and the United Kingdom.[112]

77. Thus, in my view, the Statute, internationally recognised human rights law, principles of international law, such as the *ubi jus ibi remedium* principle, and national laws support the right of victims to appeal a decision that closes an investigation into the crimes that victimised them. In particular, when a pre-trial chamber issues a decision to the detriment of the interest of victims, as in this case, the interests of victims must be protected by affording them a right of appeal of such a decision.

V. CONCLUSIONS

78. In light of the foregoing, the following conclusions can be made:

i. Victims have substantive and procedural rights under the Statute to participate in all stages of the proceedings, including the appellate stage. A contextual interpretation of article 82(1) in light of the Statute's object and purpose, articles 13(c), 15(3) and (4), 68(3), and rule 50 of the Rules, allows this Court to put victims on an equal footing with the Prosecutor to appeal a decision that seriously affects their interests.

ii. Under international human rights law, access to justice is an expression of the principles of equality and non-discrimination before the law. Access to justice is

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Procedure, article version effective from 1 March 2016, wording of act enters into force 1 September 2019, article 28; Polish Code of Criminal Procedure, 6 June 1997, articles 53, 299, 323; Romanian Code Of Criminal Procedure, Published in 15 July 2010, in force from 1 February 2014, articles 30, 32.

[110] Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, paras 67-68, referring to European Parliament, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 25 October 2012, 2012/29/EU, article 11(1). *See also* European Union, Framework decision 2001/220 - 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 15 March 2001, article 3.

[111] Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, paras 69-70, referring to French Code of Criminal Procedure, article 186.

[112] Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133, paras 72-76, referring to Court of Appeal, *R v. Killick*, 29 June 2011, [2011] EWCA crim 1608, p. 133. *See also* Crown Prosecution Service, Victims' Right to Review Guidance issued by the Director of Public Prosecutions, revised July 2016, paras 9, 22-29.

not only a fundamental human right but also a guarantee of proper administration of justice.

iii. In the present appeal, under international human rights law, the right of access to justice, linked to the right to an effective remedy, means that victims can bring an appeal against a decision that denies an investigation into crimes that violated the victims' human rights, particularly in cases involving torture.

iv. Granting victims standing to appeal such a decision in this case is not unduly expanding the scope of their participation in other types of proceedings. The Court would not be creating any right, but it would be following its duty to acknowledge the victims' internationally recognised human rights.

v. Application of the *ubi jus ibi remedium* principle gives victims an effective remedy before this Court, in particular, when a pre-trial chamber issues a decision to the detriment of their interests. This remedy, in the circumstances, must be a right of appeal.

vi. Victims' standing is supported by the national laws of States that would normally exercise jurisdiction over the crimes in this situation and domestic legislation from both common and civil law traditions.

vii. Not only States, but also individuals and organisations, are bound to promote and respect human rights. The courts and especially ICC have a duty to provide the right and a guarantee of access to justice. In the instant case, and at this stage of proceedings, no concerned State has been, or is, able to provide access to justice for the victims, thus denying them an effective remedy. Therefore, the ICC, and particularly the Appeals Chamber in this instance, is required by law to provide this remedy.

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

Judge Luz del Carmen Ibáñez Carranza

Dated this 5th day of March 2020

At The Hague, The Netherlands