Cour
Pénale
Internationale

International
Criminal
Court

Original: English | No. ICC-02/17 OA OA2 OA3 OA4
Date: 5 December 2019

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public document

Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal

Opinion to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Legal Representatives of Victims
Mr Fergal Gaynor
Ms Nada Kiswanson van Hooydonk

Ms Katherine Gallagher
Ms Margaret Satterthwaite
Ms Nikki Reisch
Mr Tim Moloney
Ms Megan Hirst
Ms Nancy Hollander
Mr Mikołaj Pietrzak

Mr Steven Powles
Mr Conor McCarthy

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keita

Amici Curiae
Ms Spojmie Nasiri
Mr Luke Moffett
Mr David J. Scheffer
Ms Jennifer Trahan
Ms Hannah R. Garry
Mr Göran Sluiter
Mr Kai Ambos
Mr Dimitris Christopoulos
Ms Lucy Claridge
Mr Gabor Rona
Mr Steven Kay
Mr Paweł Wiliński
Ms Nina H. B. Jørgensen
Mr Wayne Jordash
Mr Jay Alan Sekulow

States Representatives
Competent authorities of the Islamic Republic of Afghanistan

Registrar
Mr Peter Lewis

Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal (Preliminary reasons)

1. For the reasons stated below, I respectfully dissent from the majority's oral ruling denying victims' standing to appeal.[1] First, I disagree with the form of the ruling issued orally by majority, as if victims' standing were a sudden or minor issue open to oral resolution during the conduct of a hearing, instead of through a fully reasoned judgment. The majority disposed of the victims' appeals orally without stating all the reasons for doing so, contrary to article 83(4) of the Statute.

2. Second, I disagree with the position taken by the majority regarding the standing of victims to bring an appeal and its scarce reasoning to support it. In my view, there are clear norms in the Statute that should be interpreted and applied contextually in the present case in light of the Statute's objects and purpose in a way that grants victims standing – in accordance with article 21(3) – in a decision rejecting a request for authorisation to investigate. The Statute is centred on the victims and many of the provisions under its statutory framework state that they have a central role, in particular, at the initial article 15 stage. Additionally, victims have internationally recognised human rights to access to justice and to obtain effective remedies, which at the initial phase emerging from a request for investigation translates into their standing to appeal a decision foreclosing such an investigation.

3. Reasons have to be given in full for purposes of transparency and accountability, so that we the Judges are accountable before the parties and the international community for our decisions. Transparency and accountability are pillars of the rule of law, which safeguards the fairness of proceedings. In writing the reasons for my dissent, I am not writing simply to say that the majority was wrong. I am writing for the future.[2] As has been the case with previous dissenting opinions

---

[1] *Situation in the Islamic Republic of Afghanistan*, 'Transcript of 5 December 2019', ICC-02/17 (hereinafter 'Transcript of 5 December 2019'), pp. 2-6.

[2] 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.

regarding the role of victims at this Court at other stages in the proceedings,[3] 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 that end, victims should keep bringing their appeals to the Appeals Chamber under their human rights to do so.

4. I am thus obliged to express my dissent against the practice of issuing an oral judgment without full reasoning, especially when it disposes of the appellants' standing and their grounds of appeal. In the interests of transparency and accountability, I express below the reasons why I would grant victims standing to bring their appeals in the case at hand. This document, however, contains my first reaction to the sudden ruling orally made by the majority regarding the standing of the victims to appeal. Once the majority discloses all their reasons, I will present my views in response to the arguments they present.

I. DISAGREEMENT WITH THE FORM OF THE MAJORITY'S DECISION

5. A ruling on the standing of victims is not a minor decision. Denying standing causes, in practice, a dismissal of the victims' ten grounds of appeal 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'[4] (the 'Impugned Decision'). The first group of victims' legal representatives ('LRV1') submitted six grounds of appeal and the second group ('LRV2'), jointly with the third ('LRV3'), submitted four grounds of appeal.[5] These victims have come before us as

---

[3] *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.

[4] Pre- Trial Chamber II, Situation in the Islamic Republic of Afghanistan, "Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the Situation in the Islamic Republic of Afghanistan", 12 April 2019, ICC-02/17-33.

[5] *See* LRV1, 'Corrigendum of Updated Victims' Appeal Brief', ICC-02/17-73-Corr, paras 106-116 (on their first ground of appeal), 117-132 (on their second ground of appeal), 133-143 (on their third ground of appeal), 144-167 (on their fourth ground of appeal), 168-171 (on their fifth ground of appeal), 172-185 (on their sixth ground of appeal); 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 Republic of Afghanistan" of 30 September 2019, ICC-

appellants and thus the Appeals Chamber had the obligation to issue a fully reasoned judgment regarding their standing and grounds of appeal, especially after having summoned them to hear their arguments.

6. As a clear example of the procedural duty to issue a fully reasoned judgment, Pre-Trial Chamber II (the 'Pre-Trial Chamber') provided reasons in writing as soon as it decided to deny the victims' request for leave to appeal the Impugned Decision under article 82(1)(d) of the Statute.[6] Those reasons not only allowed Judge Kesia-Mbe Mindua to issue his dissenting opinion,[7] but, most importantly, the reasons along with his opinion made the Pre-Trial Chamber accountable before the Prosecutor, the victims and the international community.

7. Denying victims' standing to appeal under article 82(1)(a) of the Statute and, accordingly, their grounds of appeal requires the issuance of a judgment in the terms of article 83(4) of the Statute:

> The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.[8]

8. Furthermore, there is no provision in the Statute allowing for a judgment to be made orally and without complete reasoning. On the contrary, the above-quoted

---

02/17-75', 01 October 2019, ICC-02/17-75-Corr, paras 55-69 (on their first ground of appeal), 70-99 (on their second ground of appeal), 100-121 (on their third ground of appeal), 122-145 (on their fourth ground of appeal).

[6] 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 (hereinafter: 'Decision granting leave in part'), p. 16. In denying the victims' request, the Pre-Trial Chamber interpreted the wording '[e]ither party' of article 82(1) as excluding the stage that follows a request by the Prosecutor under article 15 of the Statute. It limited such wording to the Prosecutor and the defence, especially when persons who claim to be victims have not obtained such status. It first considered that the drafters' choice of the wording '[e]ither party' in article 82(1) 'might be read as signalling the intent to restrict the scope of application of this provision to a procedural context where judicial criminal proceedings have already been started and are at hand, excluding any and all stages which are preliminary to it'. Decision granting leave in part, para. 30.

[7] *See* 'Partially Dissenting Opinion of Judge Antione Kesia-Mbe Mindua', 17 September 2019, ICC-02/17-62-Anx.

[8] For trial chambers, article 74(5) provides: 'The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court'.

article is a special provision requiring the Appeals Chamber to provide the full reasoning on which it bases its judgments. I especially disagree with making an appeal judgment orally rejecting the victims' legal standing in the present proceedings regarding the admissibility of their appeals and effectively dismissing their grounds of appeal, despite the written and oral arguments that all appellants and *amici curiae* have made. Legal standing in this concrete appellate procedure, where a request for authorisation to investigate crimes against the victims, including torture and violations to their life and integrity, was rejected, means that the only avenue to obtain justice, remedy and redress is their right to appeal. The rights to access to justice and to obtain effective remedies are rights inherent to the victims as human beings. The Court would not be creating such rights but simply acknowledging their existence.

9. In light of the foregoing, it is my view that the judgment denying standing to the victims, and the consequent rejection of their ten grounds of appeal, had to be in writing and fully reasoned.

II. DISAGREEMENT WITH THE SUBSTANCE OF THE MAJORITY'S DECISION

A. The majority's oral judgment

10. In the judgment read in open court, the majority indicated that 'who qualifies as a "party" in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal' and that 'the meaning of the term "either party" thus depends on the procedural context'. It recalled that the Impugned Decision was issued under article 15(4) of the Statute 'in response to a request by the Prosecutor seeking authorisation of an investigation *proprio motu*'. It went on to concede that '[v]ictims may participate in the proceedings before the pre-trial chamber, pursuant to article 15(3) of the Statute', but noted that they 'do not have the right to trigger proceedings under article 15 – this right is reserved for the Prosecutor'. It went on to say that no internationally recognised human right recognises a different interpretation.[9]

[9] 'Transcript of 5 December 2019', pp. 2-6.

11. The majority considered that '[i]n th[o]se circumstances, it cannot be sustained that the term "party" in article 82(1) of the Statute, in appeals against a decision of a pre-trial chamber under article 15(4) of the Statute, includes victims who have made representations under article 15(3)'.

12. I am of the view that 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. Otherwise, in addition to the Prosecutor, who, *if not the victims*, is the other party in the '[e]ither party' formulation of article 82(1), at the proceedings emerging from a prosecutorial request under article 15(3), leading to a decision of a pre-trial chamber under article 15(4) of the Statute?

B. Interpretation of the right to appeal under the Statute

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.

1. 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 statutory provisions.[10] In the words 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'.[11]

15. The word 'either' refers to two or even more than two elements:

---

[10] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[11] *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'.[12]

16. 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'.[13]

17. While it may well be for 'elegance' purposes,[14] 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.

18. 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.[15] 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'.[16] 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.

19. Be that as it may, one thing is true. 'Either' refers to more than one element. In this regard, contrary to the Prosecutor's oral argument,[17] '[e]ither party' refers to more than one party. It cannot be true, in the ordinary meaning of the words used in the

---

[12] Oxford English Dictionary (online edition).
[13] *See* Pocket Fowler's Modern English Usage. Ed. Robert Allen. Oxford University Press, 2008.
[14] Pocket Fowler's Modern English Usage. Ed. Robert Allen. Oxford University Press, 2008.
[15] 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'.).
[16] United Nations, 'Yearbook of the International Law Commission', Volume II, 1966, A/CN.4/SER.A/1966/Add.1, p. 225, para. 7.
[17] *Situation in the Islamic Republic of Afghanistan*, 'Transcript of 4 December 2019', 4 December 2019, ICC-02/17, pp. 126-127.

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 under article 82(1)(d) of the Statute,[18] which falls under the '[e]ither party' umbrella in the *chapeau* of article 82(1).

20. One may wonder whether it is correct to say that '[e]ither party' means either the Prosecutor or the defence.[19] However, this has already been rejected by the Appeals Chamber seized of these appeals, which includes the majority. When rejecting the request of the Office of Public Counsel for the defence ('OPCD') to participate in these appeals under regulation 77(4) of the Regulations of the Court and to have access to the confidential case file, the Appeals Chamber recently decided that the article 15 'proceedings are conducted on an *ex parte* basis'.[20] It indicated that 'the Appeals Chamber is not persuaded that the rights of the defence could be prejudiced by the issues under appeal'.[21] It went on to allow the OPCD to participate rather as *amicus curiae*,[22] and accordingly denied its request for access to the confidential case file.[23] The Appeals Chamber cannot thus sustain – as the Pre-Trial Chamber did[24] – that '[e]ither party' means the Prosecutor and the defence.

21. 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 seeks a decision from the pre-trial chamber under article 15(4) of the Statute.

---

[18] Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, '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').

[19] *See e.g.* '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 (hereinafter: 'Decision granting leave in part'), para. 30.

[20] Trial Chamber I, 'Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims', 24 October 2019, ICC-02/17-97, (hereinafter: 'Decision on the participation of OPCD et al.'), para. 48.

[21] Decision on the participation of OPCD et al., para. 48.

[22] *See* Decision on the participation of OPCD et al., para. 48.

[23] *See* Decision on the participation of OPCD et al., para. 50.

[24] Decision granting leave in part, para. 30.

2. *Contextual interpretation*

22. 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.[25] That is the case for article 82(1) with respect to its sub-paragraphs and all further provisions with which it is related.

23. In particular, the victims brought the instant appeals under subparagraph (a) of article 82(1) and we must read the formulation '[e]ither party' 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'.[26] 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 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'.[27]

24. 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'.

---

[25] 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'.).

[26] *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.

[27] 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.

25. 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.

26. 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,[28] and, more importantly, because the victims are the only other participants that 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.

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

28. 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 to 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

---

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

is not a party at the article 15 proceedings, the interests of the accused would not be prejudiced. The diverging views of the Prosecutor and the victims, as is the case in the instant appeals, makes it appropriate for the victims to participate as parties.

3. Interpretation consistent with internationally recognised human rights

29. 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*, an interpretation holding that victims are not included within those who can appeal a decision issued by a pre-trial chamber under article 15(4) of the Statute would be 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.

30. The majority did 'not consider that internationally recognised human rights mandate a different interpretation of article 82(1) of the Statute'. It based that opinion on its consideration that '[t]he right to an effective remedy arises, in the first place, with regard to a State that has violated the human rights of an individual' and that such right 'cannot be a basis for finding that, before this Court, victims have procedural rights that go beyond those set out in the Court's legal framework'.[29]

31. The majority's understanding comes from a reading that renders article 21(3) of the Statute redundant and, all the more, moot. A reading of article 21(3) of the Statute in the context of the other subparagraphs of article 21 shows that subparagraph (3) is of mandatory and unqualified application by this Court. While emerging from victims' inherent conditions as human beings, human rights are recognised in treaties that bind States. If one were to apply to every human right the majority's view that the right to effective remedy is only enforceable upon the State which breaches a human right, such a view would empty article 21(3) of its effect, since the Court is obviously not a State.

[29] 'Transcript of 5 December 2019', p. 5.

(a) Article 21 of the Statute

32. Article 21(1) of the Statute clearly proposes a hierarchy on the sources of law that Judges of this Court are bound to apply: firstly, (a) the Statute, the Elements of Crimes and the Rules of Procedure and Evidence ('Rules'); secondly, (b) applicable treaties and principles of international law; and thirdly, (c) general principles of law that are not inconsistent with the Statute, international law and internationally recognised norms and standards.

33. Article 21(2), however, is separate from the hierarchy proposed in article 21(1) of the Statute. It simply indicates that Judges have discretion to apply the interpretation of principles and rules made in previous decisions of this Court. Article 21(2) is not another step in the hierarchy following article 21(1)(c). It is a discrete provision. Its effect is that Judges retain discretion to apply interpretations made in previous decisions regarding the law in all levels of article 21(1).

34. In contrast, Article 21(3) applies to *all* levels of the hierarchy under article 21(1) of the Statute. The application and interpretation of the law in such levels '***must*** be consistent with internationally recognized human rights […]' (emphasis added). This is a mandatory provision. In contrast with subparagraph (2), which uses the word 'may' indicating discretion, subparagraph (3) uses the word 'must'. This imposes an obligation upon Judges to be aware of all internationally recognised human rights, and to apply and interpret the law in all levels of article 21(1) consistently with such rights. In effect, the interpretation and application of the Statute and other binding sources of law cannot be inconsistent with such rights, in the same way that the legislation and decrees of a country cannot contradict the fundamental rights in its constitution.

35. By indicating that the internationally recognised human right to effective remedy is enforceable upon the violating State and not the Court, and that such right cannot be the basis for the right to appeal at this Court, the majority misreads article 21(3). The argument that says that international human rights law is only binding upon States is not new. International human rights treaties bind States and, under some circumstances, States must ensure that private actors comply with such

treaties.[30] Under the Universal Declaration of Human Rights, every individual and organ of society have the duty to promote and respect human rights.

36. Article 21(3) does not add any qualification requiring that internationally recognised human rights are those that would be only or specifically enforceable upon the Court. Article 21(3) is an express provision showing the consent of the States parties to bind the Court, an international organisation, to be consistent in its interpretation and application of the Statute with internationally recognised human rights. The Court could not endorse a discriminatory definition of gender under the pretext that the human rights treaties are not binding upon the Court. As internationally recognised human rights evolve in real time, article 21(3) imposes an obligation upon us, the Judges of this Court, to keep the text of the Statute up to date with our times. Article 21(3) makes the Statute a living instrument. That is the principle of evolving interpretation.[31]

37. In particular, the right to effective remedy in cases involving allegations of torture requires an investigation,[32] and participation of the victims.[33] International human rights courts have interpreted and developed the understanding of the right to effective remedy and the prohibition of torture according to applicable human rights treaties. 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 Statute pursuant to our *obligation* to be consistent with internationally recognised human rights. The onus is on us to know what those rights are and to assess whether our interpretation of the Statute is consistent with, or otherwise violates, such rights. Let us then accept the possibility that some of these rights are at stake in these appeals.

---

[30] *See* United Nations, Human Rights Committee, General Comment No. 31 (2004) on (Article 2) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8. *See also* Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001).

[31] *See e.g. 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.

[32] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485; Denis Vasilyev v Russia, Application No. 32704/04, 17 December 2009, para. 157.

[33] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485.

38. I recall that crimes under this Court's jurisdiction amount to gross violations of core human rights that are internationally recognised. The onus is on us Judges to know which rights are affected and to ensure that our interpretation and application of the Statute is consistent with such rights, under the mandate of its article 21(3). It is not optional to do so.

(b) Internationally recognised human rights and standards at stake in these appeals

39. 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 ('ICCPR') (effective remedy for persons whose rights are violated);[34] article 7(1) of the African Charter on Human and Peoples Rights ('ACHPR') (right to be heard and right to appeal against violations of his or her rights);[35] articles 8 and 25(1) of the American Convention of Human Rights ('ACHR') (right to simple, prompt and effective recourse);[36] articles 6 and 13 of the European Convention of Human Rights ('ECHR') (fair trial and effective remedy);[37] 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);[38] article 6 of the Racial Discrimination Convention (effective protection and remedies);[39] and article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (effective protection through competent national tribunals and other public institutions).[40] In interpreting these rights, different commissions and courts charged with their application have elaborated on the implications of such rights.

---

[34] United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1996, 999 United Nations Treaty Series (hereinafter: 'ICCPR'), article 2(3).
[35] African Union, African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaty Series 26363 (hereinafter: 'ACHPR'), article 7(1).
[36] Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series (hereinafter: 'ACHR'), articles 8, 25(1).
[37] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 United Nations Treaty Series (hereinafter 'ECHR'), articles 6, 13.
[38] 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.
[39] 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.
[40] 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).

40. 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 ('ACHPR') has provided for the victims' right to '*locus standi*'. The ACHPR 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'.[41]

41. The ACHPR 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'.[42] For the ACHPR, 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'.[43]

42. The European Court of Human Rights ('ECtHR') has recognised the rights of victims to participate in proceedings to the extent required to safeguard the victims' legitimate interests in several cases as follows. In *Al Nashiri v Poland*, the applicant is Abd al-Rahim Hussayn Muhamad al Nashiri,[44] one of the current appellants represented by LRV3.[45] The case before the ECtHR concerned the detention of the applicant, a Saudi Arabian national, at Guantanamo Bay following detention and torture at secret Polish sites under the CIA's authority. 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 the States' 'duty

---

[41] African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', Principle E.
[42] African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', Principle C.
[43] African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', Principle C.
[44] ECtHR, *Al Nashiri v Poland*, 'Judgment', 24 July 2014, Application No. 28761/11, para. 1.
[45] *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 Republic of Afghanistan" of 30 September 2019, ICC-02/17-75', 01 October 2019, ICC-02/17-75-Corr, para. 1.

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'.[46] 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'.[47] It did not go on to specify how victims should participate, but left this question open.

43. The ECtHR iterated in *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*[48] 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'.[49] 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'[50] (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 place greater requirements on the right to remedy.[51] The remedy must be '"effective" in practice as well as in law'.[52]

44. In *Rosendo Cantu v. Mexico*, the Inter-American Court of Human Rights ('IACtHR') highlighted the victim's right to participate in criminal proceedings in exercising their right to truth and access to justice:

---

[46] ECtHR, Al Nashiri v Poland, 'Judgment', 24 July 2014, Application No. 28761/11, para. 485.
[47] ECtHR, Al Nashiri v Poland, 'Judgment', 24 July 2014, Application No. 28761/11, para. 486.
[48] 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.
[49] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, 'Judgment', 17 July 2014, Application No. 47848/08, para. 149.
[50] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, 'Judgment', 17 July 2014, Application No. 47848/08, para. 132.
[51] ECtHR, Centre for Legal Resources on behalf of Valentin Campeanu v. Romania, 'Judgment', 17 July 2014, Application No. 47848/08, para. 148.
[52] ECtHR, Centre for *Legal Resources on behalf of Valentin Campeanu v. Romania*, 'Judgment', 17 July 2014, Application No. 47848/08, para. 148.

> The Court emphasises 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**. This necessarily means that, at the domestic level, adequate and effective remedies must exist for a victim to be able to challenge the competence of the authorities who exercise jurisdiction over matters, when it is considered that they do not have jurisdiction.[53] [Emphasis added.]

45. In *Gonzales Medina and Family v. Dominican Republic*, the IACtHR found a violation to 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 should be access to justice, learning the truth of what happened, and the award of just reparation.[54]

46. Similarly, 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'[55] 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.'[56]

47. In 2006, drawing from prior international agreements, the UN adopted 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. The principles include three remedies for gross

[53] 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.
[54] 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.
[55] IACtHR, *Cantos v. Argentina*, 'Judgment of November 28, 2002 (Merits, Reparations, and Costs)', 28 November 2002, Series C, No. 97, para. 50; *see also* IACtHR, *Yvon Neptune v. Haiti*, 'Judgment of May 6, 2008 (Merits, Reparations and Costs)', 6 May 2008, Series C, No. 180, para. 82.
[56] IACtHR, Tiu Tojín v. Guatemala, 'Judgment of November 26, 2008 (Merits, Reparations, and Costs)', Series C, no. 190, para. 95, referring to *Cantos v. Argentina*, 'Judgment of November 28, 2002 (Merits, Reparations, and Costs)', 28 November 2002, Series C, No. 97, para. 50; *Yvon Neptune v. Haiti*, 'Judgment of May 6, 2008 (Merits, Reparations and Costs)', 6 May 2008, Series C, No. 180, para. 82.

violations of International Human Rights Law: '[e]qual and effective access to justice'; '[a]dequate, effective and prompt reparation for harm suffered'; and 'access to relevant information concerning violations and reparation mechanisms'.[57] According to these principles, 'a victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law'.[58]

48. Further, let us not forget the words of the eighth plenary session of the Rome Conference, that '[j]ustice for victims of gross violations of international humanitarian law and human rights could be achieved only when victims had access to justice in three areas: the right to know the truth, the right to a fair trial and the right to reparation'.[59]

49. The provisions of the Statute allowing for the participation of victims of crimes under the jurisdiction of the Court are an example of how the notion of access to justice has expanded in international criminal law.[60] This Court has developed the understanding of victims as participants to the proceedings, provided official protection to victims during the proceedings, and its Statute accords victims the explicit right to reparations derived directly from their victimizers.[61] In order for these victims' right to access to justice to be properly guaranteed, the proceedings must be capable of redressing the harm that was inflicted.[62]

50. The possibility of obtaining remedies is an important guarantee for victims of human rights violations during their participation in criminal proceedings. Refusing

---

[57] United Nations, General Assembly, 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 - Resolution 147, 21 March 2006, A/RES/60/147, para. 11.
[58] United Nations, General Assembly, 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 - Resolution 147, 21 March 2006, A/RES/60/147, para. 12.
[59] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8th plenary meeting, 18 June 1998, *in* Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Vol III, A/CONF.183/13 (Vol. II), 15 June – 17 July 1998, p. 120, para. 86.
[60] D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 17.
[61] *See* T.M. Funk and P. Massidda, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2015), p. 79.
[62] D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 17.

parties access to tribunals should be considered a primary example of the concept of denial of justice.[63] One of the most negative consequences of impunity is the fact that it leaves victims without a remedy. This calls into serious question the integrity of human rights guarantees and the rule of law.[64]

4. Conclusion

51. The Impugned Decision subject to appeal relates to paragraphs (3) and (4) of article 15 and therefore touches and concerns matters of jurisdiction under article 82(1)(a). By interpreting the wording 'either party' of article 82(1) as either the Prosecutor or the defence – excluding victims from those who can appeal a decision, specifically at the article 15 stage – the defence would be entitled to be the respondent of the appealing Prosecutor. However, if the majority were to follow that interpretation, it would – by following such an interpretation – contradict the recent decision of the Appeals Chamber that it 'is not persuaded that the rights of the defence could be prejudiced by the issues under appeal',[65] and that OPCD would participate as *amicus curiae*.[66]

52. If not the defence, 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 seeks a decision from the pre-trial chamber under article 15(4) of the Statute.

53. The right to prompt and effective remedies in cases involving allegations of torture, such as the situation of Afghanistan, requires an investigation,[67] and participation of the victims.[68] An interpretation excluding victims from those who can appeal a decision, specifically at the article 15 stage, would entail the re-victimisation of victims by denying their human rights to access to justice and to prompt and

---

[63] *See* D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 17.
[64] D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 61.
[65] Decision on the participation of OPCD et al., para. 48.
[66] *See* Decision on the participation of OPCD et al., para. 48.
[67] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485; Denis Vasilyev v Russia, Application No. 32704/04, 17 December 2009, para. 157.
[68] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485.

effective remedy. They were first victimised by the crimes, re-victimised by the Impugned Decision, and then again by the decision denying their leave to appeal. The majority has decided to endorse, without fully explained reasons, a view that could re-victimise the victims.

54. In the present appeals, where the Impugned Decision, if final, results in a denial of any investigation of the horrendous abuses suffered by the victims, as well as their rights under article 15(3), the right to prompt and effective remedy requires that the victims can appeal the Impugned Decision. Otherwise, if victims cannot reverse the Impugned Decision, and specifically the findings impugned under grounds that do not overlap with the Prosecutor's appeal, justice and all related rights would be denied.

C. Principles of law

55. 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 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.

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

56. According to this principle, '[w]here there is a right, there is a remedy'.[69] A commentator indicates that '[t]his maxim has long been part of common law legal systems and appears in Roman/Dutch law'.[70] Even if not written in a statute, 'courts

---

[69] 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.

[70] 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*

have an inherent power to devise the appropriate remedy to conclude cases that come within their jurisdiction'.[71]

57. The Judges of this Court can grant victims an avenue to appeal when the Statute has not expressly provided for it because of the Court's inherent power to grant remedies for rights that have been violated. In doing so, the Court would not be creating any right but simply acknowledging the right of victims to make representations under article 15(3) of the Statute and their recognised rights as humans to have access to justice and prompt and effective remedies. Such rights adhere to victims in their condition as humans. They are subjects and not simply objects of protection.

58. There is no dispute as to the right that victims have to make representations when the Prosecutor requests authorisation to open an investigation, pursuant to article 15(3) of the Statute and rule 50 of the Rules. The Court's inherent power would allow the Appeals Chamber, under the *ubi jus ibi remedium* principle, to give victims a remedy to fully enforce their rights to make representations under article 15(3) of the Statute. In particular, when a pre-trial chamber issues a decision against their representations, refusing to authorise an investigation for the crimes that victimised them, victims may appeal in order to fully exercise their rights. It would be counterproductive for victims to have the right to petition the Court, yet to have no right to appeal where that petition is not accepted. By logic, the right to petition in the present case encompasses the right to appeal when the petition is not accepted.

59. As indicated above, when applying this principle, as with any source of law under subparagraph (1) of article 21, the Judges of this Court need to be aware that this application is not inconsistent with the internationally recognised human rights at stake. The right to prompt and effective remedies in cases involving allegations of torture requires the opening of an investigation,[72] and victims' participation.[73] A

Materials (5th ed., 1994), p. 4; *Paxton's Case*, 1 Quincy 51, 57 (Mass. 1761) ('[T]he Law abhors Right without Remedy').

[71] D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed., 2015), p. 377.

[72] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485; *Denis Vasilyev v Russia*, Application No. 32704/04, 17 December 2009, para. 157.

[73] *See e.g.* Al Nashiri v Poland, Application No. 28761/11, 24 July 2014, para. 485.

consistent application of the *ubi jus ibi remedium* principle would thus support granting victims the right to appeal the Pre-Trial Chamber's decision not to open an investigation in the situation of Afghanistan.

2. *Principles emerging from domestic jurisdictions*

60. 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 by the Court 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**, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards' (emphasis added). In her request, the Prosecutor alleges that crimes were committed in Afghanistan, Lithuania, Poland and Romania.[74] As indicated below, from the criminal codes of procedure of these countries, it is possible to conclude that victims have standing to appeal. Moreover, the laws of other countries such as France, England and Wales also support that conclusion.

(a) States that would normally exercise jurisdiction over the crimes

(i) Afghanistan

61. Under Afghan criminal law, the victims and the Higher Saranwal (the entity with the highest prosecutorial power in the country), have standing to appeal a decision by the Primary Saranwal closing an investigation:

> At the conclusion of the investigations phase, if the Primary Saranwal deems that there is not grounded evidence dismisses the case. The victim or higher Saranwal can file a complaint to the Court against this decision within ten days. The Court, after having examined the case can confirm the decision of the Saranwal or vice versa request him to lodge the indictment.[75]

[74] *See* '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.
[75] Afghanistan Interim Criminal Procedure Code for Courts 2004, article 39.

62. Similarly, while the Primary Saranwal and the sentenced person are the only parties who can appeal a trial judgment, the victims can file for recourse against the appeal judgment before the Supreme Court.[76]

(ii) Lithuania

63. Under the Code of Criminal Procedure, victims in Lithuania have rights during the investigation stage to present evidence, to make requests (including requests for collection of evidence), and to appeal against the actions of the police officer or public prosecutor which the victim believes has affected their rights or interests. The victims may appeal against the actions of a pre-trial investigation officer, prosecutor, pre-trial judge and court, as well as appeal against a court judgment or ruling.[77]

(iii) Poland

64. Victims in Poland 'may participate in the judicial proceedings as a party thereto, by assuming the role of subsidiary prosecutor, alongside the public prosecutor of instead of him'.[78] Under article 299 of the Polish Code of Criminal Procedure, the victim ('the injured') is a party to preparatory proceedings.[79] Pursuant to article 323, the injured party has a right to appeal if preparatory proceedings are discontinued.[80]

(iv) Romania

65. Having indicated in its article 30 that the Prosecutor, along with investigators and judges, is part of Romanian judicial bodies, article 32 of the Romanian Code of Criminal Procedure states that the parties to criminal procedures are 'the defendant, the civil party and the party with civil liability'.[81] Article 33 further indicates that '[t]he main subjects are the suspect and the victims' and that they 'have the same rights and obligations as the parties'.[82]

---

[76] Afghanistan Interim Criminal Procedure Code for Courts 2004, articles 63, 71.
[77] Article 28 of Lithuanian code of criminal procedure, article version effective from 1 March 2016, wording of act enters into force 1 September 2019.
[78] Article 53 of Polish code of criminal procedure, 6 June 1997. (hereinafter: 'Polish Code of Criminal Procedure').
[79] Article 299 of Polish Code of Criminal Procedure, 6 June 1997.
[80] Article 323 of Polish Code of Criminal Procedure, 6 June 1997.
[81] Romania, Arts 30, 32 of Romanian code of criminal procedure, Published in 15 July 2010, in force from 1 February 2014 (hereinafter: 'Romanian Code of Criminal Procedure').
[82] Article 33 of Romanian Code of Criminal Procedure.

(b) Other jurisdictions

66. In addition to the national laws of States that would normally exercise jurisdiction over the crimes in this case, regional law from the European Union and domestic legislation from both common and civil law traditions such as France, Germany and the United Kingdom support granting victims the right to appeal a decision that closes an investigation into the crimes that victimised such victims.

(i) European Union

67. Article 11 of European Union Directive 2012/29/EU indicates:

> **Rights in the event of a decision not to prosecute**
>
> 1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.[83]

68. Similarly, the 'Framework decision 2001/220 - 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings' indicates, in its article 3 that '[e]ach Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence'.[84]

(ii) France

69. A victim can lodge an appeal, as a civil party, by applying to the prosecutor general of the court of appeal in the jurisdiction where the court that dismissed the case is located. Article 186 of the French Code of Criminal Procedure states that

---

[83] 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).

[84] 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.

> The civil party may file an appeal against orders refusing the investigation, against discharge orders and against orders affecting his civil claims. However, in no case may he appeal against an order or the provisions of an order made in respect of the detention of the person under judicial examination or in respect of judicial supervision.
>
> The parties may also file an appeal against an order by which the judge has ruled upon his jurisdiction, either on his own motion, or upon an objection made to his jurisdiction.[85]

70. Victims have the right to put questions to the witnesses and the accused through the President of the Court, and additionally the right to make statements at the hearing and present evidence.[86]

(iii) Germany

71. The German Code of Criminal Procedure grants victims the right to inspect files, and the right to be heard by police, prosecutor or judge during the investigation stage. Acting as 'Private Accessory Prosecutor', victims have the right to appeal the public prosecutor's decision to terminate proceedings on account of the lack of sufficient suspicion of an offence, or file an application for a court decision, or conduct the proceedings as a private prosecutor. In this regard, Section 401 provides that '[t]he private accessory prosecutor may avail himself of an appellate remedy independently of the public prosecution office'.[87]

(iv) United Kingdom

72. The Crown Prosecution Service ('CPS') created the Victims' Right to Review Scheme ('VRR') in order to implement article 11 of the EU Victims Directive. It came into effect on 10 December 2013 and applies to all qualifying cases from 5 June

---

[85] France, Article 186 of Code of Criminal Procedure, amended by LOI no. 2015-993 of 17 August 2015, article 2, consolidated version as of December 1, 2019 (hereinafter: 'French Code of Criminal Procedure').

[86] French Code of Criminal Procedure, Article 120 (amended by LOI no. 2004-204, March 9 2004, article 95 JORF 10 March 2004, in force 1 October 2004), article 156 (amended by LOI no. 2004-204, 9 March 2004, article 196 JORF, 10 March 2004), article 312 (amended by LOI no.2000-516, 15 June 2000, article 36 JORF, 16 June 2000, in force 1 January 2001) article 442-1(LOI no. 2000-516, 15 June 2000, Article 39 JORF, 16 June 2000, in force 1 January 2001), article 662 (amended by LOI no.93-2, 4 January 1993, article 103 JORF, January 5 1993), article 665 (amended by LOI no.2016-731, 3 June 2016, article 98) amended by LOI no.2015-993 of 17 August 2015, article 2, consolidated version as of December 1, 2019.

[87] Germany, Section 400 and Section 401 of German Code of Criminal Procedure, published on 7 April 1987, amended by Article 3 of the Act of 23 April 2014.

2013. The VRR was developed following guidance issued by the Court of Appeal in *R v. Killick*.

73. *Killick* indicated that '[a]s a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance'.[88] The Court clearly concluded that victims have the right to seek review of a CPS decision not to prosecute, victims should not have to seek recourse in judicial review, and clearer procedure and guidance was necessary.[89]

74. The right to request a review arises when the CPS:

> (i) makes the decision not to bring proceedings (i.e. at the pre-charge stage);
> (ii) discontinues (or withdraws in the Magistrates' Court) all charges involving the victim, thereby entirely ending all proceedings relating to them;
> (iii) offers no evidence in all proceedings relating to the victim; or
> (iv) asks the court to leave all charges in the proceedings to 'lie on file'.[90]

75. Upon requesting a review, the CPS first seeks to resolve the request through a 'local resolution' process, which involves the assignment of a new prosecutor to review the case and 'look again at the decision and to establish whether it was correct'.[91] Where the victim's dissatisfaction has not been resolved locally, the 'independent review' process begins. This review comprises 'a reconsideration of the evidence and the public interest i.e. the new reviewing prosecutor will approach the case afresh to determine whether the original decision was right or wrong'.[92] It should be noted that '[f]ollowing the conclusion of the VRR process, there is no scope for any further review by the CPS and accordingly, if the victim remains dissatisfied with the decision, and/or wishes to challenge it further, then the victim should apply to the High Court for a judicial review'.[93]

---

[88] United Kingdom, Court of Appeal, *R v. Killick*, 29 June 2011, [2011] EWCA crim 1608, p. 133.
[89] Crown Prosecution Service, 'Victims' Right to Review Guidance issued by the Director of Public Prosecutions', revised July 2016, (hereinafter 'CPS Guidance'). Crown Prosecution Service, 'Victims' Right to Review Guidance issued by the Director of Public Prosecutions', revised July 2016, ('CPS Guidance').
[90] CPS Guidance, para. 9.
[91] CPS Guidance, paras 22-29.
[92] CPS Guidance, para. 31.
[93] CPS Guidance, para. 49.

76. In another relevant case, *R v. Quillan and others*, it was held that '[a]s the decision not to appeal is a decision which is final for the complainant or alleged victim, the prosecutor should consult and must be afforded a proper opportunity of doing so'.[94]

3. Conclusion

77. Both international and national law support victims' standing to appeal a decision that closes an investigation into the crimes that victimised them. The Court's inherent power would allow its chambers, under the *ubi jus ibi remedium* principle, to give the victims a remedy to fully enforce their rights to make representations under article 15(3) of the Statute. In particular, when a pre-trial chamber issues a decision against their representations, they may appeal in order to fully exercise their rights.

78. Moreover, victims' standing is supported by the national laws of States that would normally exercise jurisdiction over the crimes in this case, such as Afghanistan, Lithuania, Poland and Romania. Moreover, regional law from the European Union and domestic legislation from both common and civil law traditions such as France, Germany and the United Kingdom support granting victims the right to appeal a decision that closes an investigation into the crimes that victimised such victims.

III. FINAL CONCLUSIONS

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

i. Denying victims' standing to appeal and, accordingly, their grounds of appeal requires the issuance of a written judgment in the terms of article 83(4) of the Statute.

ii. A contextual interpretation of articles 82(1)(a), 13(c), 15(3) and (4), 68(3), and rule 50 of the Rules made in light of the Statute's object and purpose, and article 21(3), allows this Court to put victims on equal footing with

[94] United Kingdom, Court of Appeal, *R v. Quillan and Others*, 25 March 2015, [2015] EWCA crim 538.

the Prosecutor to appeal a decision issued under article 15(4) against their interests.

iii. In the present appeals, effective remedy means the right of victims to bring an appeal against a decision that closes an investigation of grave crimes that harmed the victims' human rights.

iv. In the case at hand, an interpretation acknowledging that victims are included within those who can appeal a decision closing an investigation would be consistent with the internationally recognised human rights of access to justice and to a prompt and effective remedy, particularly in cases involving torture. Granting victims standing to appeal such a decision in this case would not unduly expand standing in other types of proceedings. The Court would not be creating any right, but it would be following its duty to acknowledge the internationally recognised human rights that adhere to victims in their condition as human beings. Victims are subjects, and not simply objects, of protection.

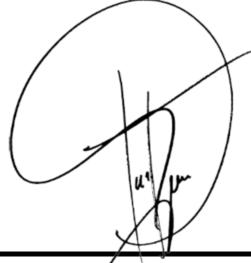
v. In addition, the Court's inherent power would allow the Appeals Chamber, under the *ubi jus ibi remedium* principle, to give victims a remedy to fully enforce their rights to make representations under article 15(3) of the Statute. In particular, when a pre-trial chamber issues a decision against their representations, refusing to authorise an investigation for the crimes that victimised them, victims may appeal in order to fully exercise their rights.

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. The appeals presented by victims are the only avenue available to them to exercise their internationally recognised human rights of access to justice and effective remedies. Their standing to bring appeals directly before the

Appeals Chamber is the only guarantee that the crimes that victimised them will not remain in impunity.

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



Judge Luz del Carmen Ibáñez Carranza

Dated this 5th day of December 2019

At The Hague, The Netherlands