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**No. ICC-02/17 OA OA2 OA3 OA4
Date: 4 March 2020**

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

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

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

The Office of the Prosecutor

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Ms Helen Brady

Legal Representatives of Victims

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Ms Nina H. B. Jørgensen
Mr Wayne Jordash
Mr Jay Alan Sekulow

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeals of individual victims and two organisations submitting representations on behalf of victims filed pursuant to article 82(1)(a) of the Statute, in the Situation in the Islamic Republic of Afghanistan, against the decision of Pre-Trial Chamber II entitled ‘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 12 April 2019 (ICC-02/17-33),

Hereby, gives its reasons for the oral decision, rendered on 5 December 2019 (ICC-02/17-T-002-ENG), on the admissibility of the victims’ appeals against Pre-Trial Chamber II’s decision rejecting the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan

I. PROCEDURAL HISTORY

1. On 20 November 2017, the Prosecutor submitted a request for authorisation of an investigation into crimes allegedly committed in the Islamic Republic of Afghanistan (hereinafter: ‘Afghanistan’) since 1 May 2003, as well as related crimes allegedly committed in Poland, Romania and Lithuania since 1 July 2002 (the ‘Request’).¹
2. On 12 April 2019, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) rendered its decision under article 15(4) of the Statute rejecting the Request (the ‘Impugned Decision’).²
3. On 10 June 2019, the legal representatives of 82 victims (hereinafter: ‘LRV 1’), six victims (hereinafter: ‘LRV 2’) and an individual victim (hereinafter: ‘LRV 3’) in the situation in Afghanistan filed notices of appeal against the Impugned Decision under article 82(1)(a) of the Statute (collectively, the ‘Notices of Appeal’).³

¹ [Request for authorisation of an investigation pursuant to article 15](#), 20 November 2017, ICC-02/17-7-Conf-Exp (public redacted version registered on the same day, ICC-02/17-7-Red), para. 1.

² [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, (the ‘Impugned Decision’) p. 32. *See also* ‘[Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua](#)’, 31 May 2019, ICC-02/17-33-Anx-Corr, annexed to the Impugned Decision.

³ [Victims’ Notice of Appeal of the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”](#), ICC-

4. On 12 June 2019, the Prosecutor filed observations in which she submits, *inter alia*, that the victims who submitted the Notices of Appeal are not ‘parties’ in terms of article 82(1) of the Statute and are therefore not entitled to file an appeal.⁴

5. On 27 September 2019, the Appeals Chamber issued an order scheduling a hearing for three days from 4 to 6 December 2019, and invited the victims, the Prosecutor, and the Office of Public Counsel for victims (the ‘OPCV’) to participate. Further, interested States, professors of criminal law and/or international law, as well as organisations with specific legal expertise in human rights were invited to express their interest in participating in this proceeding as *amici curiae*.⁵

6. On 30 September 2019, following an order by the Appeals Chamber,⁶ LRV 1 filed its updated appeal brief⁷ (hereinafter: ‘LRV 1 Appeal Brief’) and both LRV 2 and LRV 3 filed a joint appeal brief⁸ (hereinafter: ‘LRV 2 and LRV 3 Appeal Brief’). LRV 1 submits that the Statute (*i.e.*, articles 15(3) and 53(1)(c)) and the Rules of Procedure and Evidence (the ‘Rules’) (*i.e.*, rules 50, 93, 107-109) reflect the specific interests of victims in decisions concerning authorisation or denial of requests to

02/17-36 (the ‘LRV 1 Notice of Appeal’); [Victims’ Notice of Appeal of the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”](#) [sic], ICC-02/17-38 (the ‘LRV 2 Notice of Appeal’); [Notice 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” \(ICC-02/17-33\)](#), ICC-02/17-40; a corrected version was registered on 12 June 2019 (ICC-02/17-40-Corr) (the ‘LRV 3 Notice of Appeal’).

⁴ [Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 \(filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber\)](#), ICC-02/17-42 (‘Prosecutor’s Observations’), paras 12-26. LRV 2 and LRV 3 subsequently filed a joint response to rebut Prosecutor’s Observations ([Victims’ response to the Prosecutor’s “Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15”](#), dated 19 June 2019 and registered on 20 June 2019, ICC-02/17-50).

⁵ [Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters](#), 27 September 2019, ICC-02/17-72-Corr, paras. 3-6. After having received 15 expressions of interests to participate as *amici curiae*, the Appeals Chamber, on 24 October 2019, rendered a decision inviting *amici curiae* to either file written submissions or indicate that they will attend the oral hearing, and granted the victims of cross-border aerial bombardment and the Office of Public Counsel for the defence their respective requests to submit observations ([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, paras. 2, 4, 5, 7 and 8). Following this decision, seven *amici curiae* indicated their intention to make oral submissions at the hearing, and eight *amici curiae* submitted their written submissions.

⁶ [Order suspending the time limit for the filing of an appeal brief and on related matters](#), 24 June 2019, ICC-02/17-54, pp. 3 and 4).

⁷ [Updated Victims’ Appeal Brief](#), original version filed on 30 September 2019 and corrigendum registered on 2 October 2019, ICC-02/17-73-Corr.

⁸ [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”](#), original version filed on 30 September 2019 and corrigendum registered on 1 October 2019, ICC-02/17-75-Corr.

initiate an investigation.⁹ In their view, principles of international law and internationally recognized human rights favour recognition of victims' standing to appeal a decision which denies a request to initiate an investigation into an entire situation.¹⁰ They submit further that the interests of victims are distinct from those of the Prosecutor and that, specifically in this case, not all their grounds of appeal are covered by the Prosecutor's appeal.¹¹ LRV 1 contends that their appeal does not infringe upon the rights of other parties.¹²

7. LRV 2 and LRV 3, submit that article 15 of the Statute explicitly provides a role for victims to participate in the preliminary stage, without any need for them to be granted status as victims.¹³ In their view, the use of the singular, general and undefined term 'party' in article 82(1) indicates an intent to encompass a broader category of persons with interests in particular proceedings, in contrast to other provisions which identify specific persons with standing to bring an appeal.¹⁴ LRV 2 and LRV 3 further contend that the Prosecutor's role in article 15 proceedings does not foreclose victims' standing to bring an appeal and that recognising their standing to appeal the Impugned Decision would not 'unduly broaden' the appeals framework.¹⁵ LRV 2 and LRV 3 also argue that applicable human rights standards compel recognition of victims' standing to appeal the Impugned Decision.¹⁶

8. On 22 October 2019, the Prosecutor filed her response to the victims' appeal briefs.¹⁷ She argued that 'the internationally recognised right to a remedy is opposable to national jurisdictions, rather than the Court, which is merely one means by which States give effect to their obligations in this respect'.¹⁸ In the Prosecutor's view, to give full effect to the mandate under article 21(3) of the Statute, human rights that correspond to the States' positive duties towards their own citizens, have 'to be

⁹ [LRV 1 Appeal Brief](#), paras. 55-58.

¹⁰ [LRV 1 Appeal Brief](#), paras. 61-67.

¹¹ [LRV 1 Appeal Brief](#), paras. 78-82.

¹² [LRV 1 Appeal Brief](#), paras. 83-87.

¹³ [LRV 2 and LRV 3 Appeal Brief](#), paras 10, 13, 18.

¹⁴ [LRV 2 and LRV 3 Appeal Brief](#), paras 24-26, 30.

¹⁵ [LRV 2 and LRV 3 Appeal Brief](#), paras 31-37.

¹⁶ [LRV 2 and LRV 3 Appeal Brief](#), paras 38-41.

¹⁷ [Consolidated Prosecution Response to the Appeals Briefs of the Victims](#), ICC-02/17-92 ('Prosecutor's Response').

¹⁸ [Prosecutor's Response](#), para. 48.

adjusted to the particular structure of the Court'.¹⁹ She considered that the right to an effective remedy 'has to be adjusted to the particular structure of the Statute and to the existent provisions of the Statute, including Article 68(3), including Article 19(3) [and] including Article 15' in which context, she submitted, that right is respected.²⁰

9. On 22 October 2019, the following documents were also filed with the Court: (i) OPCV's submissions on the appeals,²¹ and (ii) LRV 2 and LRV 3's joint response to the Prosecutor's Appeal Brief.²² On 14 or 15 November 2019, the victims of cross-border aerial bombardment,²³ the Office of Public Counsel for the defence (the 'OPCD'),²⁴ and eight *amici curiae*²⁵ filed their respective submissions on the appeals. On 2 December 2019, the Government of Afghanistan filed written submissions.²⁶

10. From 4 to 6 December 2019, the Appeals Chamber held a hearing²⁷ to hear *inter alia* submissions on the issue of the standing of victims to bring an appeal under

¹⁹ [Transcript of hearing](#), 4 December 2019, ICC-02/17-T-001-ENG, p. 112, lines 3-5.

²⁰ [Transcript of hearing](#), 4 December 2019, ICC-02/17-T-001-ENG, p. 112, lines 8-10.

²¹ [OPCV Consolidated Submissions pursuant to the "Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters" \(No. ICC-02/17-72-Corr\)](#), ICC-02/17-93.

²² [Victims' Joint Response and Request for Reply](#), ICC-02/17-94.

²³ [Submissions On Behalf Of Victims Of Cross Border Aerial Bombardment](#), 15 November 2019, ICC-02/17-116.

²⁴ [Observations of the OPCD on the Appeals Against ICC-02/17-33](#), 15 November 2019, ICC-02/17-110.

²⁵ These *amici curiae* are those that chose to file written submissions instead of participating in the hearing. [Written Submissions in the Proceedings Relating to the Appeals Filed 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' Issued on 12 April 2019 \(ICC-02/17-33\) and Pursuant to 'Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims' Issued on 14 October 2019 \(ICC-02/17-97\)](#), 14 November 2019, ICC-02/17-108; [Observations by Professor Jennifer Trahan as amicus curiae on the appeal of Pre-Trial Chamber II's '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 12 April 2019](#), 15 November 2019, ICC-02/17-109; [Observations of Professor Gabor Rona on the Pre-Trial Chamber's Conclusion that Events Beyond the Territory of Afghanistan Lack Sufficient Nexus to the Armed Conflict There for Purposes of Application of Rome Statute War Crimes](#), 14 November 2019, ICC-02/17-111; [Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence](#), 15 November 2019, ICC-02/17-112; [Amicus Curiae Observations on behalf of Former International Chief Prosecutors David M. Crane, Benjamin B. Ferencz, Richard J. Goldstone, Carla del Ponte and Stephen J. Rapp](#), 15 November 2019, ICC-02/17-113; [Amicus Curiae Observations](#), 15 November 2019, ICC-02/17-114; [Observations by Queen's University Belfast Human Rights Centre as amicus curiae on the appeal of Pre-Trial Chamber II's '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 12 April 2019](#), 15 November 2019, ICC-02/17-115; [Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter](#), 15 November 2019, ICC-02/17-117.

²⁶ [Written Submissions of the Government of the Islamic Republic of Afghanistan](#), 2 December 2019, ICC-02/17-130.

²⁷ [Decision on the conduct of the hearing before the Appeals Chamber](#), 22 November 2019, ICC-02/17-118. The schedule of the hearing was subsequently revised per the following two decisions: [Decision](#)

article 82(1)(a) of the Statute.²⁸ On 5 December 2019, the Appeals Chamber rendered, by majority, Judge Ibáñez Carranza dissenting, an oral decision in which it found the appeals brought by LRV 1, LRV 2 and LRV 3 to be inadmissible.²⁹

II. REASONS

11. On 5 December 2019, the Appeals Chamber decided, by majority, Judge Ibáñez Carranza dissenting, that ‘the appeals brought by LRV 1, LRV 2 and LRV 3 are inadmissible and must be dismissed as such’.³⁰ While the Appeals Chamber noted that the full reasoning for its decision would follow, it provided a summary of its reasons.

12. In its summary, the Appeals Chamber noted 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’³¹ and that ‘the meaning of the term “either party” [in article 82(1) of the Statute] thus depends on the procedural context’.³² 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*’.³³ It considered that ‘[v]ictims may participate in the proceedings before the pre-trial chamber, pursuant to article 15(3) of the Statute’,³⁴ but noted that they ‘do not have the right to trigger proceedings under article 15’ as ‘this right is reserved for the Prosecutor’.³⁵ Finally, the Appeals Chamber found that there was no internationally recognised human right that would grant the victims the right to appeal the Impugned Decision.³⁶ The full reasoning of the Appeals Chamber’s decision is set out below.

[on request for extension of time](#), 26 November 2019, ICC-02/17-121; [Decision on ‘Urgent Request Regarding Conduct of Proceedings’ and revised schedule for the hearing on 4 December 2019](#), 2 December 2019, ICC-02/17-129.

²⁸ [Transcript of hearing](#), 4 December 2019, ICC-02/17-T-001-ENG.

²⁹ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 2, line 19 to p. 5, line 4. Judge Ibáñez Carranza’s dissenting opinion was filed later on the same day that the oral decision was rendered ([Dissenting opinion to the majority’s oral ruling of 5 December 2019 denying victims’ standing to appeal](#), 5 December 2019, ICC-02/17-133).

³⁰ See [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 5-6. 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.

³¹ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 18-20.

³² [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 20-21

³³ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 22-24

³⁴ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, line 25, to p. 4, line 1.

³⁵ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 4, lines 2-3.

³⁶ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 4, lines 11-12.

13. LRV 1, LRV 2 and LRV 3 brought their appeals against the Impugned Decision under article 82(1)(a) of the Statute. The question as to whether they were entitled to do so³⁷ is to be resolved by reference to the *chapeau* of Article 82(1) of the Statute, and, more specifically, the provision that ‘[e]ither party’ may appeal certain decisions.³⁸ Article 82(1) of the Statute reads as follows:

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;
- (b) A decision granting or denying release of the person being investigated or prosecuted;
- (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
- (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.

14. As found by the Appeals Chamber, ‘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’; ‘the meaning of the term “either party” thus depends on the procedural context’.³⁹

15. In the context of criminal proceedings, ‘either party’ refers, in the first place, to the prosecution and the defence – the two principal participants to such proceedings. Nevertheless, 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 may exclude, for instance, the defence from appealing certain decisions, while giving other participants the right to appeal.

16. That the term ‘either party’ must be interpreted in light of the procedural context, in particular the decision that is the subject of the appeal, is expressly

³⁷ The Appeals Chamber notes that it has not determined whether the Impugned Decision is indeed one that may be appealed under article 82(1)(a) of the Statute, as that question was not relevant to its resolution of the admissibility of the appeals at hand.

³⁸ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 15-17.

³⁹ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 18-21.

reflected in several provisions of the Statute, which indicate that certain types of decisions may not necessarily be appealed by both the Prosecutor and the defence. Notably, article 18(4) of the Statute provides that, with respect to preliminary rulings regarding admissibility, '[t]he State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82'. This means that the State concerned must be included within the meaning of 'either party' for appeals against preliminary admissibility rulings pursuant to article 82(1)(a) of the Statute. The defence, in contrast, has no express right to appeal such decisions.

17. Similarly, article 19(2) to (5) of the Statute provides for States, accused persons or suspects and the Prosecutor to challenge or seek rulings on jurisdiction and admissibility. Article 19(6) of the Statute provides, in its third sentence, that '[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82'. Based on a contextual interpretation of article 19(6), it is clear that all those who may challenge the Court's jurisdiction or the admissibility of a case under article 19(2) or seek a ruling thereon under article 19(3) of the Statute also have the right to appeal the resulting decisions, including States.⁴⁰

18. Conversely, understanding the term 'either party' in the *chapeau* of article 82(1) in conjunction with the context of the decision subject to appeal indicates that only the Prosecutor may bring an appeal under article 82(1)(c) of the Statute against decisions of a pre-trial chamber under article 56(3) of the Statute to act on its own initiative. Article 56(3)(a) of the Statute permits the pre-trial chamber, on its own initiative, to take measures under that article to preserve evidence. In such circumstances, there is only one 'party' to the particular decision, namely the Prosecutor, a fact further confirmed by article 56(3)(b) of the Statute, which provides for an appeal of such decisions by the Prosecutor, but does not refer to any other party.

⁴⁰ The Appeals Chamber has for example ruled on the appeal filed by the Republic of Kenya against a decision issued by the Pre-Trial Chamber as a result of the State's challenge under article 19(2) of the Statute. See Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute"](#), 3 August 2011, ICC-01/09-02/11-274.

19. Turning to the right to appeal the Impugned Decision, the Appeals Chamber notes 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*’.⁴¹ Accordingly, the question of who has the right to appeal the Impugned Decision under article 82(1) must be determined within the context of article 15 of the Statute.

20. Article 15 of the Statute concerns the power to initiate investigations absent a referral by a State Party or the United Nations Security Council. Paragraphs 3 and 4 of article 15 regulate the procedure and criteria for the Prosecutor to initiate an investigation, and the pre-trial chamber’s role in that regard. The provisions make it clear that it is the Prosecutor who has the power to seek authorisation to initiate an investigation before a pre-trial chamber. In contrast, victims may make representations thereon.⁴² In this regard, the Appeals Chamber notes the Prosecutor’s oral argument that she is the only one who can trigger proceedings under article 15 of the Statute.⁴³ Indeed, nothing in article 15 of the Statute or the related Rules grants victims the power to request the pre-trial chamber to authorise the initiation of an investigation. Therefore, as found by the Appeals Chamber, ‘[v]ictims may participate in the proceedings before the pre-trial chamber, pursuant to article 15(3) of the Statute’, but they ‘do not have the right to trigger proceedings under article 15’ as this ‘right is reserved for the Prosecutor’.⁴⁴

⁴¹ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, lines 22-24.

⁴² The Appeals Chamber notes that in providing the procedural right for victims to make representations before the pre-trial chamber the drafters specifically limited the scope of that right. *See* JT. Holmes, ‘Jurisdiction and Admissibility’ in R. Lee (ed) *The ICC: Elements of Crimes and Rules of Procedure and Evidence* (2001) (‘Holmes’), p. 332-333: ‘There was broad support for the principle of victims having a role at this stage of the Court’s consideration of admissibility questions, because of the inclusion of provisions to that effect in articles 15 and 19 of the Statute. However, the degree and nature of that participation generated lengthy discussions. On the one hand, there were delegations that believed that victims should participate as full parties in proceedings at this stage, including the right to request a hearing, to receive communications from all parties, and to appeal a decision not to authorize an investigation. [emphasis added] [...] Other delegations believed that allowing this degree of participation was contrary to the intent of article 15, which was to ensure expeditious consideration of the Prosecutor’s request for authorization of an investigation. Moreover, some delegations argued that if victims were permitted to play an extensive role in article 15 proceedings, then for reasons of fairness and balance, States should be given equal rights and opportunities to make representations and participate in article 15 hearings. In the end, this argument was not pursued since it was acknowledged that the right of victims to make representations at this stage was set out in the Statute, whereas no such right existed for States’.

⁴³ [Transcript of hearing](#), 4 December 2019, ICC-02/17-T-001-ENG, p. 106, lines 10-25.

⁴⁴ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 3, line 25 to p. 4, line 3.

21. In 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. Thus, 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. Contrary to LRV 1’s argument, 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.⁴⁵ LRV 1 contends that, pursuant to article 21(3), an ‘[i]nterpretation of article 82(1) of the Statute in compliance with internationally recognized human rights standards requires inclusion of victims’ legal interests in the context of the Impugned Decision’.⁴⁶ LRV 1 makes this argument referring, in particular, to the right to an effective remedy in case of human rights violations. For the reasons that follow, the Appeals Chamber is not persuaded by this argument.

23. Article 21(3) provides, in its relevant part, that ‘[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’. The 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. As found by the Appeals Chamber, ‘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’.⁴⁷ In this regard, the Appeals Chamber notes that

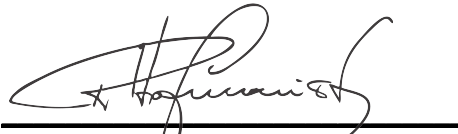
⁴⁵ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 4, lines 11-12.

⁴⁶ See [LRV 1 Appeal Brief](#), paras 38 *et seq.*

⁴⁷ [Transcript of hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 4, lines 12-16. Several international human rights instruments recognise the right to an effective remedy. See, 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 1966, 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’, Principle C. The Appeals Chamber notes 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. See, [European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European](#)

LRV 1 submits that States have the duty to provide remedies for human rights violations in their territory,⁴⁸ but fails to explain why the Court would have the same obligation with regard to alleged human rights violations by a State. The Appeals Chamber notes 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. Consequently, the Appeals Chamber does not consider that, by rejecting as inadmissible the victims' appeals, it is interpreting or applying the Statute inconsistently with their right to an effective remedy. The 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 have been heard by the Appeals Chamber as participants in the Prosecutor's appeal against the Impugned Decision.

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



Judge Piotr Hofmański
Presiding

Dated this 4th day of March 2020

At The Hague, The Netherlands

[Union and Commission of the European Communities, Judgment of the Court \(Grand Chamber\) of 3 September 2008](#), Document 62005CJ0402, paras 281-285, 299, 303-304, 306-308 and 326.

⁴⁸ See [LRV 1 Appeal Brief](#), paras. 67- 71. In this regard the Appeals Chamber notes 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. See 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, para. 15.