



**Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the
‘Decision on the Registry’s transmission of applications for victim
participation in the proceedings’, whereby the majority declined to
consider the applications**

KEY FINDINGS

1. Victims have the right to participate in all stages of the proceedings. The Statute makes this possible under article 68(3) of the Statute, which is consistent with the internationally recognised human right of access to justice and the proper administration of justice.
2. According to the Statute, the Judges of this Court are obligated to decide matters brought before them. To decline to do so does not contribute to legal certainty.
3. Victims’ applications to participate in any stage of the proceedings raise a legal question that the Judges have the obligation to resolve. Deferring the matter to other Judges to eventually decide it at an uncertain future time is inconsistent with the Judges’ mandate under the Statute and the proper administration of justice.

I. INTRODUCTION

4. The majority ‘decline[d] to consider’ the applications of 50 individuals who wish to participate in this case as victims (the ‘Additional Applications’), ‘without prejudice to the matter being considered by a trial chamber, within its discretion, in any future proceedings’.¹ It instructed the Registrar to transmit the Additional Applications to a trial chamber ‘[s]hould trial proceedings be restarted or resumed’.² For the reasons that follow, I am unable to concur with the majority.

¹ Decision on the Registry’s transmission of applications for victim participation in the proceedings, 25 March 2020 (hereinafter: ‘Majority’s Decision’), p. 3.

² Majority’s Decision, p. 3.

5. According to the majority, ‘in principle, only victims who participated in the trial proceedings may participate in the ensuing appeal proceedings’.³ The majority considered that, ‘in the case at hand, it would not be appropriate to assess the Additional Applications, at this stage of the proceedings, with a view to potentially allowing victims, who did not participate at trial, to participate in the current appeal proceedings’. It noted, *inter alia*, that the ‘Additional Applications were submitted to the Registry during the trial phase, after the expiry of the deadline set’ by Trial Chamber I⁴ (the ‘Trial Chamber’), and ‘no reasons were provided as to why the applicants could not submit their applications within the set deadline, nor as to why these applications should be considered at this stage’.⁵

6. The majority made its decision despite a series of omissions by the Registrar that seriously affected the victims’ right of access to justice. The Registrar, on his own motion, decided not to transmit the Additional Applications to the Trial Chamber for a ruling on their admissibility. Rather he retained them for around two years, without enquiring of the applicants why they submitted their applications after the trial had started and whether they wanted them considered in an eventual appeal – that is, without asking the applicants for the reasons the majority says were not provided.⁶ Similar omissions by the Registrar led the Appeals Chamber to allow victims’ participation in the *Lubanga* appeal proceedings.⁷

7. Additionally, I note that the majority’s decision was made without previously informing and hearing from the applicants of the Additional Applications. This is inconsistent with the applicants’ substantive and procedural rights, under both the Statute and their internationally recognised human right of access to justice. This is further inconsistent with the proper administration of justice.

³ Majority’s Decision, para. 11. *See also* para. 14.

⁴ Majority’s Decision, para. 14.

⁵ Majority’s Decision, para. 14.

⁶ Majority’s Decision, para. 14 (‘The Appeals Chamber further notes that no reasons were provided as to why the applicants could not submit their applications within the set deadline, nor as to why these applications should be considered at this stage.’).

⁷ *See The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues](#), 6 May 2013, ICC-01/04-01/06-3026 (hereinafter: *Lubanga* Decision on the Registrar’s Request relating to Applications for Participation in the Appeal Proceedings), paras 1-5.

8. In my view, the majority's decision amounts to a denial of justice, which could lead to another injustice to applicants who seek recognition as victims of atrocious crimes. I must thus dissent from a decision that declines to entertain the Additional Applications, blaming the victims for not providing reasons they were not asked, nor had an obligation, to provide at the appellate stage, and leaving them in legal limbo, instead of resolving the matter at once and acknowledging that the deficiencies came from the Registrar as of 2017.

9. I therefore ought to express my disagreement with the majority's decision to decline to consider, on the basis of formalities and regardless of the Registrar's inaction, 50 victims' applications. This is against the applicable law of the Court, including the internationally recognised human rights of victims. Furthermore, this raises a moral concern. The Registrar received the Additional Applications in 2017, while the trial was ongoing, but decided not to transmit them to the Trial Chamber, rather retaining them for about two years, under the pretext that the applicants had allegedly missed a deadline, instead of deferring such a decision to the Trial Chamber.

10. The lack of due diligence of the Registrar in 2017 cannot be ignored and victims cannot be blamed instead, especially considering that the law of this Court allows victims to participate even only at the appellate stage, and its jurisprudence accounts for previous cases where the Registrar was admonished for not transmitting victims' applications in a timely manner. It runs counter to the Statute and internationally recognised human rights of access to justice and effective remedy to obstruct the participation of victims without due regard to the bureaucratic failures of the Registrar since 2017. A deadline imposed to participate at trial cannot be extended to other stages, and a decision whether or not the deadline was met with or without justifications cannot be made by the Registrar.

11. In short, victims have substantive and procedural rights, as per the Statute and international human rights law, to participate in appeals proceedings. In addition to our powers to entertain appeals, Judges of the Appeals Chamber enjoy, under article 83(1) of the Statute, the same powers of a trial chamber. There is no obstacle preventing the Appeals Chamber from entertaining the requests made by the applicants in the Additional Applications, and thus potentially granting them access to justice in any of the forms of participation provided in the Statute. Declining to make a decision as to the status of these applicants and making them wait for an uncertain,

unforeseeable future, depending on the outcome of this appeal and the discretion of a trial chamber to eventually consider the matter if trial is restarted or resumed, amounts to an abstention that is inconsistent with the functions of Judges. The abstention is especially serious coming from the Appeals Chamber, a chamber of last resort at this Court. Judges have to resolve, rather than postpone, matters brought before them. Otherwise, an abstention could amount to a denial of justice.

12. As explained below, the applicable law of this Court, and the facts and concrete circumstances of this matter support my view that not entertaining the Additional Applications could result in potential injustice. It is, in my view, clear how this situation could have been fixed: the applicants should have been heard and, if recognised as victims, they should have been allowed to participate during the appellate proceedings, in accordance with the Statute's provisions allowing victims to participate at any stages of the proceedings before this Court.

13. In the sections below, I will present the facts, circumstances, applicable law and reasons that sustain my view. Section II will present the procedural history regarding the Additional Applications. Section III will lay down the issue at stake and Section IV will list the concrete circumstances from which the issue at stake arises. Section V will elaborate on the reasons why, in my view, the Appeals Chamber should have considered the Additional Applications and granted those applicants recognised as victims authorization to participate in this appeal. Section VI will summarise the conclusions of this dissenting opinion.

II. PROCEDURAL HISTORY

14. Prior to the commencement of the trial of Mr Gbagbo and Mr Blé Goudé, the Trial Chamber set a deadline for submission of applications to the Registry and for the transmission of applications to the Trial Chamber.⁸ It decided that 'all victim applications, in order to be assessed for participation at trial, shall be received by the Registry by no later than 70 days prior to trial' and ordered 'the Registry to transmit

⁸ '[Decision on victim participation](#)', 6 March 2015, ICC-02/11-01/11-800 (the 'Trial Chamber's Decision on Victim Participation'), para. 51.

copies of the complete and relevant victim applications received, to the Chamber [...] by no later than 60 days prior to trial’.⁹

15. The trial of Mr Gbagbo and Mr Blé Goudé commenced on 28 January 2016.¹⁰ Between 26 May and 24 November 2017,¹¹ the Registrar received the Additional Applications from 50 individuals wishing to participate as victims in the proceedings in respect of Mr Gbagbo and Mr Blé Goudé.¹²

16. To the best of my knowledge, between 24 November 2017 and 15 January 2019, the Registrar did not take any action to transmit the Additional Applications to the Trial Chamber.

17. On 15 January 2019, the Trial Chamber issued, by majority, Judge Herrera Carbuccion dissenting, an oral decision on the no-case-to-answer motions raised by Mr Gbagbo and Mr Blé Goudé, acquitting them of all charges.¹³ Six months later, on 16 July 2019, the Trial Chamber issued its written reasoning,¹⁴ which included the ‘Opinion of Judge Cuno Tarfusser’,¹⁵ the ‘Reasons of Judge Geoffrey Henderson’¹⁶ and Judge Herrera Carbuccion’s ‘Dissenting Opinion’.¹⁷

18. On 8 November 2019, the Registrar transmitted to the Appeals Chamber the Additional Applications. The Registrar states that the Additional Applications ‘were not transmitted for the Trial Chamber’s consideration as they had been received after

⁹ [Trial Chamber’s Decision on Victim Participation](#), p. 24.

¹⁰ See [Transcript of 28 January 2019](#), ICC-02/11-01/15-T-9-ENG, p. 4, line 1.

¹¹ See [‘Transmission of Applications for Victim Participation in Appeal Proceedings and Related Report’](#), 8 November 2019, ICC-02/11-01/15-1284 (the ‘Registry’s Transmission’), footnote 8.

¹² See [Registry’s Transmission](#), para. 8.

¹³ [ICC-02/11-01/15-T-232-Eng](#), p. 1, line 15 to p. 5, line 7.

¹⁴ [Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittalment portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion](#), ICC-02/11-01/15-1263.

¹⁵ [Opinion of Judge Cuno Tarfusser](#), ICC-02/11-01/15-1263-AnxA.

¹⁶ [Reasons of Judge Geoffrey Henderson](#), ICC-02/11-01/15-1263-Conf-AnxB. A public redacted version was registered the same day (ICC-02/11-01/15-1263-AnxB-Red).

¹⁷ [Dissenting Opinion](#), ICC-02/11-01/15-1263-Conf-AnxC. A public redacted version was registered the same day (ICC-02/11-01/15-1263-AnxC-Red).

the expiration of the 60-day deadline prior to the start of trial'.¹⁸ The Registrar assessed and found the Additional Applications 'complete and linked to the case'.¹⁹

19. On 18 and 20 November 2019, Mr Gbagbo and Mr Blé Goudé filed observations arguing that the Appeals Chamber should not consider the Additional Applications since they were filed well after the deadline set by the Trial Chamber.²⁰ Mr Gbagbo argued, *inter alia*, that: (i) the deadline set by the Trial Chamber is still applicable; (ii) as the Registry had not considered it appropriate to transmit the applications to the Trial Chamber because the deadline had expired, the same considerations should apply at this stage; (iii) the present situation is different from the one in the *Lubanga* case; and (iv) the current appeal is not in relation to a final judgment but to a 'no case to answer' decision, which technically is part of trial proceedings; this, in his view, further confirms that the Trial Chamber's deadline is still applicable.²¹ Mr Blé Goudé submitted that the Additional Applications, having been received after the Trial Chamber's deadline, 'should not be considered by the Chamber as doing so would directly contravene Trial Chamber I's ruling'.²² He argued that '[t]here are no particular circumstances at this stage of the no case to answer proceedings justifying the Chamber to depart from the yet applicable Trial Chamber's decision'.²³

III. ISSUE AT STAKE

20. The Appeals Chamber had to consider the Additional Applications and decide whether or not to grant participation, as victims, to the applicants at the current stage of the proceedings, in the context of the Prosecutor's appeal against the acquittal of Mr Gbagbo and Mr Blé Goudé.²⁴

¹⁸ [Registry's Transmission](#), para. 8.

¹⁹ [Registry's Transmission](#), para. 8.

²⁰ See *Remarques de la Défense à la suite de la « Transmission of Applications for Victim Participation in Appeal Proceedings and Related Report »* (ICC-02/1101/15-1284) et demande de rejet de la requête présentée par la Greffe, ICC-02/11-01/15-1285-Conf, paras 10-17; Blé Goudé Defence Observations on the Registry's "Transmission of Applications for Victim Participation in Appeal Proceedings and Related Report" (ICC-02/11-01/15-1284), ICC-02/11-01/15-1286-Conf, para. 5.

²¹ Mr Gbagbo's Observations, paras 12-16.

²² Mr Blé Goudé's Observations, para. 5.

²³ Mr Blé Goudé's Observations, para. 5.

²⁴ See [Prosecution Notice of Appeal](#), 16 September 2019, ICC-02/11-01/15-1270. A corrigendum was filed the following day ([ICC-02/11-01/15-1270-Corr](#)). See also [Prosecution Document in Support of](#)

IV. CONCRETE CIRCUMSTANCES OF THIS CASE

21. The issue at stake rises from the following facts and omissions:

- i) The Additional Applications were submitted to the Registrar in 2017 while the trial was ongoing.
- ii) However, the Registrar, on his own motion, decided not to transmit the Additional Applications to the Trial Chamber for the latter to make a ruling on their admissibility and, potentially, their merits.
- iii) In the absence of a ruling, the Registrar retained the Additional Applications for about two years.
- iv) The Registrar does not appear to have informed the applicants about his decision not to transmit the Additional Applications to any chamber up to now nor does he appear to have consulted with the applicants regarding their views on the matter.

22. For the reasons that follow, I consider that the right of the applicants who filed the Additional Applications, to have their views considered by a chamber, cannot be breached under the pretext and allegation that they do not meet discretionary formalities imposed by the Trial Chamber, such as a deadline. This is especially the case when no judge made a decision on the question of whether the 50 applicants were time-barred from participating at trial or whether they would otherwise have a justification for their allegedly late filing.

V. REASONS

23. Under article 68(3) of the Statute, '[w]here the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at *stages* of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial' (emphasis added). The word 'shall' denotes an obligation to permit victims' participation and the word 'stages', in plural, indicates that victims' participation is not meant to be granted only at the trial stage.

[Appeal](#), 15 October 2019, ICC-02/11-01/15-1277-Conf (a public redacted version was registered on 17 October 2019, ICC-02/11-01/15-1277-Red).

24. Rule 89(1) of the Rules of Procedure and Evidence (the ‘Rules’) provides, in relevant part, that ‘[i]n order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the *relevant* Chamber’ (emphasis added). Notably, by saying ‘relevant Chamber’, the rule is not limiting transmission to the trial chamber.

25. Accordingly, regulation 86(3) of the Regulations of the Court (the ‘Regulations’) provides that:

[v]ictims applying for participation in the *trial and/or appeal* proceedings shall, ***to the extent possible***, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate [emphasis added].

26. This regulation provides for victims’ participation ‘in the trial and/or appeal proceedings’. The use of ‘and/or’ indicates that appeal proceedings constitute a distinct stage from trial proceedings. Nothing in this regulation bars victims from participating in the appellate stage.

27. Victims thus have a substantial and procedural right, and the Court has the obligation to allow them, to participate at any stage of the proceedings in a manner that is consistent with the rights of the accused and a fair and impartial trial. The Statute, Rules or Regulations do not prevent individuals who did not participate as victims in previous stages of the proceedings to participate during the appellate stage.

28. This interpretation is consistent with the internationally recognised human rights of access to justice and effective remedy, taking particularly into account the specific context of victim participation in criminal proceedings. The human rights of access to justice and effective remedy are recognised in different treaties at the international and regional level. The rights of access to justice and effective remedy are reflected in article 2(3) of the International Covenant on Civil and Political Rights; articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 6 of the Racial Discrimination Convention; article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women; articles 13 and 16(4) of the Convention on the Rights of Persons with Disabilities; articles 5(5) and 13 of the European Convention on Human Rights;

article 7(1)(a) of the African Charter on Human and Peoples' Rights, and article 25(1) of the American Convention on Human Rights.²⁵

29. The Inter-American Court of Human Rights (the 'IACtHR') has indicated that 'the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings'.²⁶ More specifically, it has noted that 'victim's participation in criminal proceedings is not limited to merely repairing the damage done but, is primarily designed to make effective [the victim's] rights to know the truth and obtain justice before the competent judicial authorities'.²⁷ The IACtHR has extensive jurisprudence noting that victims 'must have full access and the capacity to act, *at all stages and levels* of said investigations, in accordance with domestic laws and the provisions of the American Convention'.²⁸

²⁵ See United Nations, General Assembly, [International Covenant on Civil and Political Rights](#), 16 December 1966, 999 United Nations Treaty Series 14668, article 2(3); United Nations, General Assembly, [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 10 December 1984, Resolution 39/46, articles 13, 14; United Nations, General Assembly, [International Convention on the Elimination of All Forms of Racial Discrimination](#), 21 December 1965, Treaty Series 660, article 6; United Nations, General Assembly, [Convention on the Elimination of all Forms of Discrimination Against Women](#), 18 December 1979, Treaty Series 1249, article 2(c); United Nations, General Assembly, [Convention on the Rights of Persons with Disabilities](#), 24 January 2007, A/RES/61/106, articles 13, 16; Council of Europe, [Convention for the Protection of Human Rights and Fundamental Freedoms](#), 4 November 1950, 213 United Nations Treaty Series, articles 5, 13; African Union, [African Charter on Human and Peoples' Rights](#), 27 June 1981, 1520 United Nations Treaty Series 26363, 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; Organization of American States, [American Convention on Human Rights](#), 22 November 1969, 1144 United Nations Treaty Series, article 25(1).

²⁶ *The 'Street Children' (Villagran-Morales et al.) v. Guatemala*, [Judgment of November 19, 1999 \(Merits\)](#), Series C No. 63, para. 227. See also *Baldeón-García v. Perú*, Judgment (Merits, Reparations, and Costs), 6 April 2006, Series C. no. 147, para. 146 (noting that 'victims of human rights violations or their next of kin must enjoy ample possibilities of being heard and participating in the related proceedings, in order to clearly establish the facts and the punishment applicable to the perpetrators of those acts, and to seek an appropriate relief'); *Heliodoro Portugal v. Panama*, [Judgment \(Preliminary objections, Merits, Reparations and Costs\)](#), 12 August 2008, Series C. no. 186, para. 247 (noting that 'the State must ensure that Heliodoro Portugal's next of kin have full access and capacity to act at all stages and in all instances of the said investigations and proceedings, in accordance with domestic law and the provisions of the American Convention').

²⁷ *Rosendo Cantú et al. v. Mexico*, [Judgment of August 31, 2010 \(Preliminary Objections, Merits, Reparations and Costs\)](#), Series C. No. 216, para. 167

²⁸ IACtHR, *Juan Humberto Sánchez v. Honduras*, [Judgment \(Preliminary Objection, Merits, Reparations and Costs\)](#), 7 June 2003, Series C. no. 99, para. 186 (emphasis added). See also IACtHR, *Zambrano Vélez et al. v. Ecuador*, [Judgment \(Merits, Reparations and Costs\)](#), 4 July 2007, Series C. no. 166, para. 149 (noting that 'the State must ensure to the victims' family members full access and capacity to act in all stages and instances of the said investigations and proceedings, pursuant to the domestic laws and the provisions of the American Convention. The right to truth, which underlies the right of the victims or their family members to obtain from the competent organs of the State a

30. This substantial right, moreover, cannot be breached under the pretext of discretionary formalities imposed by the Trial Chamber, such as a deadline that cannot bind the Appeals Chamber, let alone the Registrar's omissions in transmitting the Additional Applications. The IACtHR has indicated that 'any domestic law or measure that imposes costs or *in any other way obstructs an individual's access to the courts*, and that is not warranted by what is reasonably needed for the administration of justice, should be considered contrary to Article 8(1) of the Convention' (emphasis added).²⁹

31. Furthermore, there are no 'convincing reasons'³⁰ to depart from the approach adopted by the Appeals Chamber in the *Lubanga* case.³¹ It is the only case in which

clarification over the violations and corresponding responsibilities, through the investigation and prosecution; and which, recognized and exercised in a particular situation, constitutes an important measure of reparation and gives rise to an adequate expectation of the victims, which the State must satisfy'); *Escué Zapata v. Colombia*, [Judgment \(Merits, Reparations and Costs\)](#), 4 July 2007, Series C. no. 165, para. 166 (observing that '[t]he State must ensure that the victim's relatives have full access and capacity to act in all the stages and instances of said investigations and proceedings, in accordance with the domestic law and the rules of the American Convention'); *Heliodoro Portugal v. Panama*, [Judgment \(Preliminary objections, Merits, Reparations and Costs\)](#), 12 August 2008, Series C. no. 186, para. 247 (noting that 'the State must ensure that Heliodoro Portugal's next of kin have full access and capacity to act at all stages and in all instances of the said investigations and proceedings, in accordance with domestic law and the provisions of the American Convention'); *Anzualdo Castro v. Peru*, [Judgment \(Preliminary Objection, Merits, Reparations and Costs\)](#), 22 September 2009, Series C. no. 202, para. 183 noting that 'during the investigation and prosecution, the State must ensure full access and procedural capacity of the victim's next-of-kin in all the stages of this investigation, in accordance with the domestic law and the rules of the American Convention'.).

²⁹ *Yvon Neptune v. Haiti*, [Judgment of May 6, 2008 \(Merits, Reparations and Costs\)](#), Series C No. 180, para. 82. See also *Cantos v. Argentina*, [Judgment of November 28, 2002 \(Merits, Reparations and Costs\)](#), Series C No. 97, para. 50.

³⁰ It is recalled that, if the Appeals Chamber wants to depart from its jurisprudence, there is relevant case law stating that it needs to give 'convincing reasons' justifying such a departure. See *Prosecutor v. Jean-Pierre Bemba Gombo*, [Reasons for the 'Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"'](#), 20 October 2009, ICC-01/05-01/08-566, para. 16. In an interlocutory appeal in the *Gbagbo and Blé Goudé* case, the Appeals Chamber held that 'absent "convincing reasons" it will not depart from its previous decisions' See [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. 14.

³¹ See [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#). See also [Decision on 32 applications to participate in the proceedings](#), 27 August 2013, ICC-01/04-01/06-3045-Red2 (hereinafter: '*Lubanga* Decision on 32 victims applications'), para. 13.

the Registrar transmitted new victims' applications to the Appeals Chamber,³² in the context of final appeals against decisions on conviction and sentence.³³

32. In the *Lubanga* case, the Registrar asked the Appeals Chamber for guidance on whether to submit before it 29 applications that had not been considered by the Pre-Trial or Trial Chamber and, additionally, three applications that had been rejected as incomplete by the Trial Chamber but subsequently completed by the applicants. The Registrar had previously noted to the Trial Chamber that he had received new applications. Given that the Trial Chamber was at the deliberations stage, it declined to consider the applications, but indicated that the applications should be provided in the event of sentencing and reparations stages. However, after the deliberations and the decision on conviction of Mr Lubanga, the Registrar did not submit the applications to the Trial Chamber.³⁴

33. In its decision on the applications, the Appeals Chamber noted that 'for reasons unknown to the Appeals Chamber, the Registrar did not re-submit the applications for the purposes of the sentencing proceedings, nor did the Trial Chamber rule on them' and that '[i]f the Trial Chamber had dealt with these applications, those applicants who would have been granted a right to participate in the trial proceedings would also have been granted the right to participate in the appeals proceedings from the start'.³⁵ It therefore considered that 'by no fault of the applicants, the applications were not transmitted to the relevant Chamber' and that, 'in this specific case, it is in the interests of the proper administration of justice that the Appeals Chamber considers the applications in the present proceedings'.³⁶ It urged 'both the Registrar and the

³² *I.e.*, applications submitted by new applicants who had not yet been given the status of victims, nor allowed to participate, during the pre-trial and/or trial proceedings.

³³ See [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#). See also [Lubanga Decision on 32 victims applications](#).

³⁴ See [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#), paras 1-2.

³⁵ [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#), para. 5.

³⁶ [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#), para. 5.

relevant Chambers to apply diligence in respect of ensuring that applications for participation are transmitted and considered properly and in a timely fashion'.³⁷

34. Having been informed by the Registry about a number of pending applications, the Appeals Chamber in *Lubanga* set a deadline for them to be transmitted to the Chamber.³⁸ It subsequently assessed the applications, which it stated 'were either submitted or completed with supplementary information during the trial phase of proceedings, yet, through no fault of the applicants, were never transmitted to the Trial Chamber'.³⁹ It stated that, under the circumstances, 'it would be in the interests of the proper administration of justice to conduct an assessment of the applications for participation during the appeal phase of the present proceedings'.⁴⁰ The Appeals Chamber granted the applicants the right to participate as victims and requested they file observations by a given date in the event that their views and concerns differed from those already filed by victims already participating in the case.⁴¹

35. In the present case, the Additional Applications were received by the Registrar in 2017 during trial proceedings and, by all means, before the appellate stage had started. It appears that the Registrar, in 2019, saw a need to transmit the Additional Applications during the appellate stage and to recommend ways forward.⁴² The Additional Applications were indeed transmitted to the Appeals Chamber on 8 November 2019, at the very early stage of the appeal proceedings. They were, therefore, filed and submitted in compliance with regulation 86(3) of the Regulations.

36. It is observed that the deadline imposed at trial would only apply for the purposes of trial proceedings and could not be imposed on the Appeals Chamber. Whether it is the appellate stage following a no-case-to-answer decision is irrelevant.⁴³ The phrase 'or appeal' in regulation 86(3) of the Regulations does not

³⁷ [Lubanga Decision on the Registrar's Request relating to Applications for Participation in the Appeal Proceedings](#), para. 5.

³⁸ [Lubanga Decision on 32 victims applications](#), paras 2-3.

³⁹ [Lubanga Decision on 32 victims applications](#), para. 13.

⁴⁰ [Lubanga Decision on 32 victims applications](#), para. 13.

⁴¹ [Lubanga Decision on 32 victims applications](#), para. 171.

⁴² See [Registry's Transmission](#), paras 8-11.

⁴³ For instance, the timelines to file the appeal and responses in the case at bar correspond to those granted in appeals against final, as opposed to interlocutory, decisions.

make any distinction as to the impugned decision: it may be the appeal stage in respect of any type of trial or pre-trial decision.

37. In brief, the Registrar in 2017, on its own motion, decided not to transmit the Additional Applications to the Trial Chamber at the time they were submitted so that the trial Judges could decide whether or not to consider them. The Registrar in 2019 decided to transmit the Additional Applications to the Appeals Chamber. At this point, no judge has even looked at the Additional Applications. Having been filed on time for the instant appeal, the Appeals Chamber has the obligation to process them.

38. Thus, in light of article 68(3) of the Statute, rule 89(1) of the Rules, regulation 86(3) of the Regulations, the internationally recognised human rights of access to justice and to an effective remedy, and, in addition, previous jurisprudence of the Appeals Chamber in *Lubanga*, I consider that victims who did not participate in the trial stage, due to bureaucratic failures which prevented them from obtaining a ruling on their applications and the possibility to eventually obtain leave to appeal such a ruling, should participate in this appeal. It was not their fault that the Registrar failed to transmit the applications to the Trial Chamber or that he did not ask them to provide reasons for submitting their applications after the trial had started. However, when the Registrar in 2019 transmitted the Additional Applications to the Appeals Chamber, it should have processed them to guarantee the applicants' rights and provide a remedy for the Registrar's delay, with a view of granting the applicants participation in the appeal proceedings. Yet, the majority decided to decline from considering the Additional Applications. Deciding not to resolve a matter brought before the judges could be inconsistent with the principles of fairness and proper administration of justice. The majority has left the applicants in legal limbo, far from obtaining any legal certainty.

39. As it was done in *Lubanga*, I consider that in the case at hand, the Appeals Chamber should have then requested and received observations from the parties, allowing in particular Mr Gbagbo and Mr Blé Goudé to provide observations on the merits of the Additional Applications. To that end, the Appeals Chamber should have

considered that the victims who are currently participating are represented by the principal counsel of the OPCV,⁴⁴ and that the Registrar recommended that the victims who filed the Additional Applications, if authorised to participate, could be represented by the OPCV under rule 90(2) of the Rules.⁴⁵ It should have also recalled that Mr Gbagbo's and Mr Blé Goudé's responses to the Prosecutor's appeal brief were filed on 6 March 2020,⁴⁶ and that the victims shall file their observations within 30 days thereafter.⁴⁷ With that, the Appeals Chamber should have acted without further delay and directed the Registrar to transmit (i) confidential unredacted versions of the Additional Applications to the Prosecutor, and (ii) confidential redacted versions of the Additional Applications to Mr Gbagbo and Mr Blé Goudé, in order for them to submit observations thereon. With this information, the Appeals Chamber would have already been in a position to evaluate whether to grant the applicants status as victims and allow them to participate in this appeal.

40. Alternatively, the Appeals Chamber could have at least secured minimum safeguards for the rights of the victims, by directing the Registrar to transmit the Additional Applications to the OPCV for it to take them into account under its general mandate to represent *all* victims under regulation 81(4)(c) of the Regulations.

41. Regulation 81(4)(c) of the Regulations states:

The tasks of the Office of Public Counsel for victims shall include:

[...]

(c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' applications to participate in the

⁴⁴ [Directions on the conduct of the proceedings](#), 3 September 2015, ICC-02/11-01/15-205, paras 67-69, and p. 24.

⁴⁵ Under this rule, '[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular group of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives'.

⁴⁶ See [Réponse de la Défense de Laurent Gbagbo au « Mémoire d'appel de l'Accusation » \(ICC-02/11-01/15-1277-Conf-tFRA\) déposé le 15 octobre 2019](#), 6 March 2020, ICC-02/11-01/15-1314-Red; [Defence Response to the 'Prosecution Document in Support of Appeal'](#), 6 March 2020, ICC-02/11-01/15-1315-Red. See also [Decision on Mr Gbagbo's request for extension of time to file a response to the Prosecutor's appeal brief](#), 6 February 2020, ICC-02/11-01/15-1304, p. 3.

⁴⁷ The Appeals Chamber has decided that '[t]he legal representative of victims may file consolidated observations, to the responses of both Mr Gbagbo and Mr Blé Goudé, within 30 days of notification of both responses to the Prosecutor's appeal brief' and that '[t]hese observations shall not exceed 60 pages'. [Decision on victim participation](#), 26 November 2019, ICC-02/11-01/15-1290, p. 3.

proceedings, *when applications pursuant to rule 89 are pending*, or when a legal representative has not yet been appointed [emphasis added].

42. Nevertheless, given that the majority declined to consider the Additional Applications, thereby leaving such applications ‘pending’, I consider that the OPCV, in compliance with its general mandate, under regulation 81(4)(c) of the Regulations, still has the possibility to seek access to the *ex-parte* annexes to the Registry’s Transmission, with a view to seeking leave of the Appeals Chamber to consider the views incorporated in the Additional Applications when filing its observations on this appeal. This is an appeal in which the Appeals Chamber could confirm, reverse or amend the impugned decision, or order a new trial, under article 83(2) of the Statute. Given that one of those possibilities is the confirmation of the acquittal and that such a possibility could permanently affect the rights of the applicants, failure to consider their views remains inconsistent with the proper administration of justice. Thus, it is appropriate that the OPCV considers the Additional Applications in order to fulfil the object and purpose of the Statute.

43. Disenfranchising victims from participating in the appellate stage because, in the majority’s view, they did not submit their applications before a deadline discretionally imposed during the trial stage, or because they did not provide reasons for not meeting such a deadline, while the Registrar omitted to ask for such reasons and transmit the applications to the Trial Chamber, would violate the applicable law of this Court. It would breach the applicants’ statutory rights to present their views and concerns at any stage of the proceedings, as well as their procedural right to apply to participate in the appeal proceedings. It would negate both their substantive and procedural rights under the Statute and their internationally recognised human rights of access to justice and to an effective remedy, as well as the interests of the proper administration of justice. It would leave the applicants who filed the Additional Applications defenceless.

VI. CONCLUSIONS

44. On the basis of the foregoing, I find that:

- i) Declining to entertain the Additional Applications, as the majority did in this case, may re-victimise the applicants. They came before a court of law to have their legal situation defined, but in the absence of such a decision, they continue to be defenceless, and remain in legal limbo. The majority's decision amounts to an abstention that could represent a vast injustice or a denial of justice that is inconsistent with article 68(3) of the Statute and the applicants' internationally recognised human rights of access to justice and to an effective remedy.
- ii) Article 68(3) of the Statute, rule 89(1) of the Rules, and regulation 86(3) of the Regulations, in addition to previous jurisprudence of the Appeals Chamber in *Lubanga* sustain the applicants' right to have the Additional Applications decided by the Appeals Chamber at this stage of the proceedings. The Appeals Chamber should have directed the Registrar to transmit the Additional Applications to the parties and, according to the mentioned statutory provisions, it should thereafter have decided on the applicants' victim status and participation at this stage of the proceedings, in order to ensure the proper administration of justice.
- iii) The Appeals Chamber could, alternatively, have directed the Registrar to transmit the Additional Applications to the OPCV for it to take them into account under its general mandate to represent *all* victims as per regulation 81(4)(c) of the Regulations.
- iv) The Statute and internationally recognised human rights law enable victims to participate in proceedings affecting their rights and interests. This is confirmed by the jurisprudence of this Court and human rights tribunals. The inaction of the Registry, the Trial Chamber and the Appeals Chamber is inconsistent with the law.

- v) The majority has left the Additional Applications pending. Thus, in this concrete case, under regulation 81(4)(c) of the Regulations and the OPCV's general mandate to represent *all* victims, it is still possible for the OPCV to request access to the Additional Applications and thereafter seek leave of the Appeals Chamber, in order to consider the views incorporated in the Additional Applications when filing its observations on this appeal. This would provide the applicants with the minimum safeguards of their rights.

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



Judge Luz del Carmen Ibáñez Carranza

Dated this 25th day of March 2020
At The Hague, The Netherlands