Cour Pénale Internationale

International Criminal Court

JOINT DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA AND JUDGE SOLOMY BALUNGI BOSSA

I. INTRODUCTION

1. In the Decision on victims' requests to submit observations in the appeal against the "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice", the majority of the Appeals Chamber (hereinafter: "Majority") has rejected the victims' requests (hereinafter: "Majority's Decision").[1] For the reasons set out below,[2] we respectfully disagree with both the outcome of the Majority's Decision and its reasoning. In our view, the requests should have been granted and the victims should have been permitted to submit observations in the present appeal.

2. At the outset, we recall that the application and interpretation of the Court's legal framework must be consistent with internationally recognised human rights under article 21(3) of the Statute and with the Preamble of the Statute, which places the victims at the centre of international justice.[3] In this context, any statutory interpretation must be done in accordance with the *pro homine* principle, which requires the law "to be interpreted and applied in a way that most fully and adequately protects human beings".[4]

3. We further recall that the provisions of the Court's legal framework must not be interpreted in isolation. The Rome Statute and the Rules of Procedure and Evidence

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[1] Decision on victims' requests to submit observations in the appeal against the "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice", p. 3, para. 23.
[2] *See also Situation in the Islamic Republic of Afghanistan*, Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal, 5 December 2019, ICC-02/17-133 (OA-OA4); Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 10 March 2020, ICC-02/17-137-Anx-Corr (OA-OA4) (hereinafter: "*Afghanistan* OA-OA4 Dissenting Opinion").
[3] *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 (hereinafter: "*Lubanga* A7-A8 Separate Opinion"), pp. 5, 129.
[4] *Lubanga* A7-A8 Separate Opinion, para. 64; *see also*, paras 65-68.

(hereinafter: "Rules") require a systemic and holistic approach to interpretation, whereby any ambiguity or potential inconsistency must be resolved in accordance with the *pro homine* principle, ensuring that preference be given to the right of the person whose human right has been violated.[5]

II. MERITS

4. Pursuant to article 68(3) of the Statute, the Appeals Chamber "shall permit [the victims'] views and concerns to be presented and considered *at stages of the proceedings* determined to be appropriate by the Court" where their personal interests are affected (emphasis added). Accordingly, victims have substantive and procedural rights under the Rome Statute to participate at all stages of the proceedings, including the appellate stage, which emerge from the internationally recognised human rights of access to justice and an effective remedy.[6] These principles have been consistently affirmed by numerous human rights bodies, including the Inter-American Court of Human Rights.[7]

5. We agree with the Majority that the decision as to which stages of the proceedings are appropriate for allowing victims' participation is discretionary.[8] However, we disagree with the Majority's narrow reading of rule 92 of the Rules.

6. According to rule 92(1) of the Rules, notification to victims and their legal representatives applies "to all proceedings before the Court, except in proceedings provided for in Part 2", to which article 18 belongs. First, it is important to note that notification constitutes only one aspect of victims' participation in the proceedings. Second, rule 92 of the Rules is not the only provision regulating victims' participation, and cannot be understood as precluding victims from participating in any proceeding arising under "Part 2 of the Statute". Indeed, rules 89 to 91 of the Rules regulate other aspects of victims' participation such as the application to participate in the

[5] *Lubanga* A7-A8 Separate Opinion, pp. 7-8.
[6] *Afghanistan* OA-OA4 Dissenting Opinion, paras 32-50. *See also The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 4: Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber 1 of 15 January 2019 with written reasons issued on 16 July 2019, 31 March 2021, ICC-02/11-01/15-1400-Anx4-Red (A), para. 120.
[7] *Afghanistan* OA-OA4 Dissenting Opinion, paras 44-48 and references therein.
[8] Majority's Decision, para. 16.

proceedings, the selection of legal representatives, and the participation of legal representatives in the proceedings. None of these provisions exclude or draw a distinction with proceedings at the investigation stage. Third, under the same rule, rule 92(6) refers to the duty of the Registrar to notify victims or their legal representatives "that have participated in *a certain stage* of the proceedings" (emphasis added), without additional qualification.[9]

7. The above rules, which regulate different aspects of victims' participation in the proceedings, have to be read in a systemic, systematic, and holistic manner and in accordance with international human rights norms, as mandated by article 21(3) of the Statute. This, as mentioned above, requires resolving any inconsistency in light of the *pro homine* principle, thereby favouring the interpretation that best safeguards the human rights of the victims.[10]

8. The Majority further notes that the instances allowing victims to participate at the investigation stage are those that are contemplated by the Rome Statute.[11] While this is true, we recall that the Appeals Chamber has previously allowed victims to participate in appellate proceedings at the investigation stage beyond the instances expressly provided for by the Statute, thereby expanding the scope of victims' participation at the situation stage.[12] We find the distinction drawn by our colleagues between the present appeal and the decisions of the Appeals Chamber in the Situations in the Republic of the Philippines and in the Bolivarian Republic of Venezuela I, where victims were allowed a certain involvement in the appellate proceedings under article 18(2) of the Statute, to be artificial and lacking justification.[13]

9. The present appeal concerns a question relating to article 18(1) of the Statute. The title of article 18 of the Statute reads "Preliminary rulings regarding admissibility" and

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[9] *See* rule 92(6) of the Rules.
[10] *Lubanga* A7-A8 Separate Opinion, paras 64-68.
[11] Majority's Decision, para. 17.
[12] *See, for example*, Appeals Chamber, *Situation in the Republic of the Philippines*, Decision on requests for victims' involvement and access to filings, 21 March 2023, ICC-01/21-66 (OA); Appeals Chamber, *Situation in the Bolivarian Republic of Venezuela I*, Decision on requests for victims' involvement, 24 August 2023, ICC-02/18-60 (OA); Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", 4 April 2023, ICC-02/17-218 (OA5).
[13] Majority's Decision, para. 18.

its sub-provisions collectively regulate the various components of such admissibility rulings at the situation stage. While article 18 of the Statute does not envisage victim participation, it does not set forth a prohibition for victims to participate either. As recalled above, the Appeals Chamber has indeed allowed victims to participate in appellate proceedings under article 18(2) of the Statute. Similarly, there is no legal basis to deny their right to participate in an appeal concerning an article 18(1) notification, because a court cannot make a distinction where the law does not, as reflected in the general principle of law *ubi lex non distinguit, nec nos distinguere debemus*. Furthermore, in the context of the present case, the introduction of such a distinction would be to the detriment of the victims and their right of access to justice and to an effective remedy. Therefore, denying the right of victims to provide observations in the present appeal is without legal basis, and inconsistent with article 21(3) of the Statute as well as the recent jurisprudence of the Appeals Chamber. For the same reasons, we consider the decisions of the Appeals Chamber in the Philippines and Venezuela Situations to be directly applicable to the present appeal.[14]

10. Furthermore, we consider the question of whether victims have participated in the proceedings leading to the impugned decision to be immaterial in the present case.[15] Article 68(3) of the Statute allows for victims' participation at "stages of the proceedings" without requiring their involvement in the first instance proceedings.

11. It is therefore for the Appeals Chamber, once the matter is properly before it, to consider whether victims' participation is appropriate. The determination of whether victims should be allowed to participate must be based on an assessment of whether their personal interests would be affected by the outcome of the decision. In the present case, we consider that the personal interests of the victims are necessarily affected by proceedings that may result in the suspension of investigations involving the alleged commission of atrocious crimes.

12. As to the timing of the requests, in our view, in the absence of a time limit established by law, the victims' requests should not be rejected on the basis of their late submission.[16] To do so would run counter to the principle of legality and the fairness

[14] Majority's Decision, para. 19.
[15] Majority's Decision, para. 20.
[16] Majority's Decision, para. 21.

of the proceedings, and would result in denying the victims' right to access to justice and effective remedy.[17] Moreover, we consider that setting a brief time limit for the victims to submit observations and any responses to those observations, if any, would not have caused any significant delay in the conduct of the proceedings.

13. Finally, and most importantly, we are of the view that receiving observations from the victims on the issue on appeal would be in the interest of the Appeals Chamber. We consider that it is crucial that victims express their views on the prospect of a new notification and on whether a substantial change occurred in the parameters of the investigation into the situation following 7 October 2023, for the purposes of the determination of the present appeal.

III. CONCLUSION

14. In light of the foregoing, we would have granted the victims' requests and would have set a short deadline for the submission of the victims' observations and for any responses by the parties.

15. We would like to recall that "[u]nder international human rights law, access to justice is an expression of the principles of equality and non-discrimination before the law. Access to justice is not only a fundamental human right but also a guarantee of proper administration of justice".[18]

[17] *See The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Separate Concurrent Opinion of Judge Luz del Carmen Ibáñez Carranza, 7 March 2025, ICC-01/12-01/18-2688-OPI, para. 4 and references therein.
[18] *Afghanistan* OA-OA4 Dissenting Opinion, para. 78.ii.

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

Judge Luz del Carmen Ibáñez Carranza

Judge Solomy Balungi Bossa

Dated this 17th day of October 2025

At The Hague, The Netherlands