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No. ICC-02/05-01/20

Date: 20 May 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

With a public annex

Decision on victim applications for participation, legal representation, leave to appeal
and *amicus curiae* requests

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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Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Court’),¹ having regard to articles 67(1), 68(1) and (3), article 82(1)(d) of the Rome Statute (the ‘Statute’), rules 16, 85-86, 89-93, 103(1) of the Rules of Procedure and Evidence (the ‘Rules’), and regulations 79-81 and 86 of the Regulations of the Court, issues this Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 8 October 2020, the Registry, through the Victims Participation and Reparations Section (the ‘VPRS’), submitted a request to modify the standard application form for victim participation in the present case,³ which was granted by the Single Judge on 4 November 2020.⁴
3. On 18 January 2021, the Single Judge issued a decision on the principles applicable to victims’ participation and representation during the confirmation hearing (the ‘First Decision’).⁵

¹ [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-02/05-01/20-307.

² See e.g. [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, paras 1-9.

³ [Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case](#), ICC-02/05-01/20-178-Conf. A public redacted version was filed on 2 November 2020, ICC-02/05-01/20-178-Red.

⁴ [Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation](#), ICC-02/05-01/20-198. On 9 November 2020, the Defence submitted a request for leave to appeal this decision: [Demande d’autorisation d’interjeter appel de la Decision ICC-02/05-01/20-198](#), ICC-02/05-01/20-201, which was rejected by the Chamber in its 12 January 2021 [Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198](#), ICC-02/05-01/20-254.

⁵ [Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing](#), ICC-02/05-01/20-259. On 22 January 2021, the Defence submitted a request for leave to appeal this decision: [Demande d’autorisation d’appel de la Decision ICC-02/05-01/20-259](#) (the ‘[Defence Leave to Appeal Victims Participation](#)’), ICC-02/05-01/20-264. The Chamber issued a decision on 9 February 2021 in which it rejected the request: [Decision on the request for leave to appeal the Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing](#) (the ‘[Decision on Leave to Appeal Victims Participation](#)’), ICC-02/05-01/20-281.

4. On 3 February 2021, the International Federation for Human Rights (the ‘FIDH’) filed a request for leave to submit *amicus curiae* observations (the ‘Amicus Curiae Request’).⁶ No responses were filed to this request.
5. On 5 February 2021, the Single Judge issued a decision supplementing the First Decision (the ‘Supplementary Decision’).⁷
6. On 9 February 2021, the Defence filed a request for leave to appeal the Supplementary Decision (the ‘First Leave to Appeal Request’).⁸ No responses were filed to this request.
7. On 24 February 2021, the Single Judge orally instructed the Registry to file all complete applications for participation which it had already assessed as qualifying for participation, together with an accompanying report (the ‘Instructions’).
8. On 26 February 2021, pursuant to the Instructions, the Registry submitted its first assessment report and transmission of victim applications for participation in the proceedings (the ‘First Assessment Report’).⁹
9. On 3 March 2021, the Defence submitted a response to the First Assessment Report (the ‘Defence First Response’).¹⁰
10. On 19 March 2021, the Chamber ruled on the First Assessment Report and related matters (the ‘First Assessment Decision’).¹¹

⁶ [Request for leave to submit Amicus Curiae Observations Pursuant to Rule 103](#), ICC-02/05-01/20-283 (notified on 10 February 2021).

⁷ [Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance](#), ICC-02/05-01/20-277.

⁸ [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-277](#), ICC-02/05-01/20-282 (notified on 10 February 2021).

⁹ [Registry’s First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings](#), ICC-02/05-01/20-288 (notified on 1 March 2021). On 9 March 2021, the Registry submitted an addendum for the First Assessment Report, in which it informed the Chamber that applicant victim a/15002/18 had chosen Ms Clooney as Counsel instead of the lawyer initially designated in the victim application form, *see* [Registry’s Addendum to the First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings](#), 9 March 2021, ICC-02/05-01/20-296, para. 4. The Registry also confirmed that, unlike a/15002/18’s initial choice of Counsel, both Ms Clooney and Mr Nasser Amin are on the ICC List of Counsel, *see* Email from VPRS to the Chamber sent on 3 March 2021 at 14:46.

¹⁰ [Observations en Réponse au Rapport ICC-02/05-01/20-288](#), ICC-02/05-01/20-290.

¹¹ [Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position](#), ICC-02/05-01/20-314.

11. On 23 March 2021, the Defence filed a request for leave to appeal the First Assessment Decision (the ‘Second Leave to Appeal Request’).¹² No responses were filed to this request.
12. On 29 March 2021, the Prosecutor filed the Document Containing the Charges (the ‘DCC’).¹³
13. On 16 April 2021, the Prosecutor filed the Pre-Confirmation Brief and List of Evidence.¹⁴
14. On 21 April 2021, the Registry submitted its second assessment report and transmission of victim applications for participation in the proceedings (the ‘Second Assessment Report’).¹⁵
15. On 30 April 2021, the Defence submitted a response to the Second Assessment Report (the ‘Defence Second Response’).¹⁶
16. On 3 May 2021, the Prosecutor submitted observations on the Second Assessment Report (the ‘Prosecutor’s Observations’).¹⁷ On the same day, the Legal Representatives of Victims (the ‘LRVs’) and the Office of Public Counsel for Victims (the ‘OPCV’) submitted their joint observations on the Second Assessment Report (the ‘Joint Victims Observations’).¹⁸
17. On 7 May 2021, the Registry submitted its third assessment report and transmission of victim applications for participation in the proceedings (the ‘Third Assessment Report’).¹⁹

¹² [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-314](#), ICC-02/05-01/20-320.

¹³ [Prosecution’s submission of the Document Containing the Charges](#), ICC-02/05-01/20-325.

¹⁴ Prosecution’s submission of the Pre-Confirmation Brief and the List of Evidence, ICC-02/05-01/20-346-Conf.

¹⁵ [Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings](#), ICC-02/05-01/20-358.

¹⁶ [Corrigendum des Observations en Réponse au Rapport du Greffe ICC-02/05-01/20-358](#), ICC-02/05-01/20-370-Corr.

¹⁷ [Prosecution’s Observations on the Victim Applications for Participation transmitted by the Registry on 21 April 2021](#), ICC-02/05-01/20-373.

¹⁸ Joint Observations on the Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings, ICC-02/05-01/20-374-Conf.

¹⁹ [Third Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings](#), ICC-02/05-01/20-383-Red (registered on 10 May 2021).

II. ANALYSIS

18. In this decision, the Single Judge will rule on the Second and Third Assessment Reports, the First and Second Leave to Appeal Requests, as well as on the Amicus Curiae Request.

A. Authorisation for victims' participation

19. In this section, the Single Judge will rule on the Registry's Second and Third Assessment Reports as well as on any related submissions by the parties. In particular, the Single Judge will address the following issues:

- Control and validate Group A classification;
- Control and validate Group B applications;
- Rule on Group C applications; and
- Legal representation of admitted victims.

1. Preliminary Issues

20. Before analysing the Registry's reports, the Single Judge will first address two related requests that were made by the Defence in this context. The first is a request for the Chamber to reconsider and abandon the A-B-C approach. The Defence argues that the Second Assessment Report constitutes a changed circumstance necessitating review, in that it allegedly demonstrates the Registry's fundamental inability to implement the A-B-C approach in an appropriate and neutral manner.²⁰

21. The second is a request to be provided with all applications referring to events that took place in one of the locations mentioned in the DCC, irrespective of the date on which these events allegedly took place. According to the Defence, it is important for the manifestation of the truth that certain applications claim that the charged crimes took place on a different date from the one alleged by the Prosecutor in the DCC.

22. As for the Defence submissions on the inadequacy of the A-B-C approach and its request for reconsideration, the Single Judge recalls the Chamber's ruling on the exceptional nature of reconsideration.²¹ The Single Judge notes, in this regard, that

²⁰ [Defence Second Response](#), paras 25-26.

²¹ [Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la défense \(ICC-02/05-01/20-113\)](#), 23 September 2020, ICC-02/05-01/20-163, para. 12;

the Defence has already had an opportunity to raise its objections to the A-B-C approach in the context of its request for leave to appeal against the First Decision. The Single Judge also rejects the Defence's claim that here is a change of circumstances warranting reconsideration of the First Decision. On the contrary, the Single Judge finds that the Second Assessment Report confirms that the Registry has implemented the Chamber's instructions appropriately without encountering significant problems that might be attributable to the A-B-C approach.

23. Turning now to the Defence's request to be provided with applications that mention crimes committed in locations that are included in the charges but that provide a different date, the Single Judge observes that this is a repetition of an argument the Chamber has already considered and rejected previously. In particular, the Single Judge recalls that the Chamber made it clear in the First Decision that '[t]he factual statements made by the applicants in the application forms do not constitute evidence, neither against nor in favour of the accused and cannot be relied upon outside of the limited scope of the admission process'.²² Accordingly, this is yet another example of the Defence attempting to relitigate matters that have already been decided by the Chamber. The Chamber has already repeatedly warned the Defence against this practice and hereby reiterates its strong disapproval.

2. *Group A Applications*

24. In the First Assessment Decision, the Single Judge provisionally approved a batch of 28 Group A victim applications, subject to review on the basis of the DCC.²³ After reviewing the 28 applications in light of the DCC, the Registry now considers that 22 of these applications remain in Group A,²⁴ whilst 4 applications were assessed as falling in Group C²⁵ and 2 others as 'incomplete'.²⁶

Prosecutor v. Yekatom and Ngaïssona, Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters' (the '[Yekatom and Ngaïssona Leave to Appeal Decision](#)'), 24 May 2019, ICC-01/14-01/18-206, para. 20.

²² [First Decision](#), para. 31.

²³ [First Assessment Decision](#), para. 22. See p. 13.

²⁴ [Second Assessment Report](#), para. 18, referring to a/15002/18, a/20218/20, a/20221/20, a/20222/20, a/20223/20, a/20668/20, a/20669/20, a/20670/20, a/20673/20, a/20674/20, a/25004/21, a/25005/21, a/25009/21, a/25010/21, a/25012/21, a/25018/21, a/25019/21, a/25020/21, a/25022/21, a/25023/21, a/25025/21, a/25031/21.

²⁵ [Second Assessment Report](#), para. 18, referring to a/25007/21, a/25016/21, a/25017/21, a/25014/21.

²⁶ [Second Assessment Report](#), n. 18. As for the 'incomplete' applications, the Single Judge notes the Registry's updated information in its Third Assessment Report that they were 'mistakenly reported as three, when in fact it was only two applications' and that no additional information from the LRVs

25. With its Second Assessment Report, the Registry transmitted a batch of 21 applications of persons who the Registry assessed to fall into category A, whilst in the Third Assessment Report it transmitted a batch of 101 applications. The Registry explains that it has determined that all applicant victims fulfil the criteria for participation as set out in paragraph 17 of the First Decision.

a) Submissions

26. Regarding the update on the First Assessment Report, the Defence submits that the mere need for a review of applications is evidence of the Registry's inability to implement the A-B-C approach.²⁷ It further avers that the remaining 22 applications for participation in Group A are not sufficiently precise and that the 2 'incomplete' applications should already have been discarded in the First Assessment Report.²⁸ In this regard, the Defence asserts that the Registry's reclassification of applications from Group A to Group C underlines the inadequacy of the A-B-C approach.²⁹

27. With respect to the 21 new Group A applicants, the Defence submits that the Registry does not provide sufficient information and that therefore this categorisation is unreliable as well as illegal.³⁰

28. In line with the Chamber's instructions in the First Decision, the Prosecutor, the OPCV and LRVs refrained from making substantive submissions in relation to Group A applications.

b) Analysis

29. The Single Judge will not entertain the Defence objection to the authorisation of participation of the 21 new Group A applicants. As the Chamber has explained, the parties are not expected to make submissions in relation to applications falling in Group A. Instead, the review of the Registry's suggested classification is conducted by the Chamber on the basis of the unredacted applications. The Single Judge recalls, in this regard, that the First Decision expressly mentioned that, for

was received at the time of the filing of the report. [Third Assessment Report](#), para. 24, referring to a/25015/21 and a/25024/21. As their applications remain incomplete at this time, the applications of a/25015/21 and a/25024/21 will not be considered any further.

²⁷ [Defence Second Response](#), para. 4.

²⁸ [Defence Second Response](#), paras 5-6.

²⁹ [Defence Second Response](#), para. 8.

³⁰ [Defence Second Response](#), para. 9.

applications falling in Group A, reports are not required to include application-by-application justification but must explain the criteria and methodology applied.³¹ The Registry did so at paragraph 19 of the Second Assessment Report. The Defence's objection to the lack of detailed information provided by the Registry is thus rejected.

30. The Single Judge approves the Registry's methodology and concurs with the Registry's assessment. Accordingly, the Single Judge decides that all 144 individuals mentioned in the First, Second and Third Assessment Reports are henceforth authorised to participate in the confirmation proceedings.

3. *Group B applications*

31. In the Third Assessment Report, the Registry explains that it received a total of 611 applications falling into Group B. Of these, an overwhelming majority fall outside the temporal and geographical scope of the charges by a wide margin. In accordance with the Chamber's instructions, these applications are not transmitted to the Chamber. The Registry did transmit 26 applications which are *prima facie* within the scope of the charges, but which mention specific harm that the Registry was unable to link to the parameters of the DCC.

32. The Single Judge approves the Registry's methodology³² and concurs with the Registry's assessment of the 26 applications that were transmitted to the Chamber. Accordingly, the Single Judge decides that all individuals referred to in the Third Assessment Report as falling into Group B are not authorised to participate in the confirmation proceedings.

4. *Group C Applications*

33. In the Second Assessment Report, the Registry identified 12 applications which it was unable to categorise for a number of reasons.³³ In particular, the Registry considers that it is unable to make a clear determination in relation to certain applications where:

- (i) in the application, 'the precise date of the alleged crime(s) is missing and only inferable from the circumstances' (the 'First Temporal Issue');

³¹ [First Decision](#), para. 34; [First Assessment Decision](#), para. 20.

³² [Third Assessment Report](#), para. 22.

³³ [Second Assessment Report](#), paras 3-4, 41-42.

- (ii) ‘the applicant describes events and locations that correspond to the allegations contained in the DCC but where the dates cited for those events do not correspond’ (the ‘Second Temporal Issue’);
- (iii) the applicant refers to a location that, based on the Prosecutor’s narrative in the DCC, would belong to the ‘surrounding areas’ of the charged locations (the ‘Geographic Issue’);
- (iv) ‘the victims claim to have suffered harm as a result of crimes perpetrated against neighbours and other members of the Fur community’ (the ‘Material Issue’).³⁴

34. In relation to the First and Second Temporal Issues the Registry submits that, based on its experience in assisting victim applicants, some of them are likely to experience difficulties with recalling precise dates. Given this reality, the Registry recommends being flexible with regard to dates and points out that it may be possible to link the crimes alleged in the applications to the charges on the basis of a holistic analysis of other factual and contextual elements provided by the applicants. As regards the Geographic Issue, the Registry suggests that the reference to “surrounding areas” in the DCC could be interpreted as any village in the Wadi Salih or Mukjar localities, so long as the facts described in the applications are sufficiently linked to the charges. Finally, as regards the Material Issue, the Registry is of the view that applicants may be considered as indirect victims on the basis that they have sustained psychological harm.³⁵

a) Submissions

35. The Defence objects to the Registry’s proposed approach in relation to the first three issues. Regarding the First and Second Temporal Issues, it disagrees with the Registry’s proposal because it is imprecise and may lead to errors. In particular, in relation to the Second Temporal Issue, the Defence argues that the locations mentioned in the DCC may have been attacked several times during 2003-4. It therefore cannot be assumed that applicants who provide a specific date that does not match the timing of the charges must have been mistaken, as they may be describing a different attack on the same location.

36. On the Geographic Issue, the Defence submits that it would be inappropriate to extend the geographical scope of the charges to the entirety of the Wadi Saleh

³⁴ [Second Assessment Report](#), paras 24-40.

³⁵ [Second Assessment Report](#), paras 28, 30, 33, 39.

and Mukjar localities since the DCC expressly mentions a number of locations in these localities that are not included in the charges. Applications that mention locations that are expressly excluded from the DCC should therefore be rejected. The Defence further submits that in relation to certain applications, additional information should be requested from the applicants in order to determine whether they fall within the geographical scope of the charges.

37. In relation to the Material Issue, the Defence agrees that persons who witnessed the commission of crimes should be considered as direct victims as they have suffered trauma as a result of witnessing violence.³⁶

38. In addition to the above arguments, the Defence also notes that several applications refer to ‘Ali Kushayb’. The Defence recalls that it contests that this alias belongs to Mr Abd-Al-Rahman and submits that if the Chamber agrees with this assessment it should reject all applications that mention Ali Kushayb instead of Mr Abd-Al-Rahman.³⁷

39. In the Prosecutor’s view, 7 out of the 12 Group C applicant victims meet the requirements to be admitted to participate in the proceedings.³⁸ As for the remaining 5 applicants, the Prosecutor submits that 3 of them should be required to provide further information,³⁹ leaving the remaining 2 for the Chamber’s discretion.⁴⁰

40. In the Joint Victims Observations, the OPCV and the LRVs propose a flexible and holistic approach for the Group C applications similar to the one suggested by the Registry in the Second Assessment Report. They aver that this approach is consistent with ‘the Court’s established jurisprudence as well as the nature of the alleged crimes and personal circumstances of the victims’.⁴¹

b) Analysis

41. At the outset, the Single Judge emphasises that the present analysis is without prejudice to the Chamber’s position in relation to whether the DCC complies with

³⁶ [Defence Second Response](#), paras 16, 19-22.

³⁷ [Defence Second Response](#), para. 23.

³⁸ [Prosecutor’s Observations](#), para. 1, referring to a/25006/21, a/25007/21, a/25016/21, a/25017/21, a/25021/21, a/25026/21 and a/25061/21. See paras 8-9.

³⁹ [Prosecutor’s Observations](#), para. 1, referring to a/20684/20, a/25014/21, and a/25013/21. See paras 10-12.

⁴⁰ [Prosecutor’s Observations](#), para. 1, referring to a/25044/21 and a/25011/21. See paras 13-14.

⁴¹ Joint Victims Observations, paras 4, 30.

the relevant legal requirements in terms of clarity and precision. The current assessment is limited to evaluating whether or not the applicants have demonstrated that the conditions established by rule 85 of the Rules are met *prima facie* on the basis of all the available information.⁴² The authorisation to participate is also limited to the confirmation of charges proceedings and subject to review in case the charges are to be confirmed. Given this limited purpose, the Single Judge is of the view that it would be inappropriate to be unduly strict in assessing victim applications. A flexible approach is appropriate considering, in particular, the time elapsed since the events as well as the personal circumstances of many of the victims. In this respect, information regarding the overall context of the alleged acts may suffice for the purposes of the confirmation proceedings.⁴³ Accordingly, ‘omission of information need not automatically result in the rejection of an application for participation’.⁴⁴

42. Bearing in mind these considerations, the Single Judge will now decide on how to address the four issues raised in the Second Assessment Report.

i. First Temporal Issue

43. The Single Judge notes the Registry’s submission that, based on its experience assisting victim applicants, some of them are likely to face difficulties with recalling precise dates of the alleged crime(s) given, for instance, the time elapsed between the alleged crime(s) and the start of the Court’s proceedings, lack of familiarity with the Gregorian calendar, or lack of recollection due to traumatic experience.⁴⁵ This may indeed explain why certain victim applicants have situated the alleged acts by

⁴² [First Decision](#), paras 17, 31. *See also* Pre-Trial Chamber I, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the Principles Applicable to Victims’ Applications for Participation, ICC-01/12-01/18-146-tENG (the ‘[Al Hassan Victims Decision](#)’), 8 October 2018, para. 20; *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position (the ‘[Yekatom and Ngaïssona Victims Decision](#)’), ICC-01/14-01/18-227-Red, 21 June 2019, para. 24. *See also* Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, [Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings](#), ICC-02/11-01/11-138, 4 June 2012, para. 21.

⁴³ [Yekatom and Ngaïssona Victims Decision](#), para. 24.

⁴⁴ [Al Hassan Victims Decision](#), para. 21. *See also* Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, [Corrigendum to the Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings](#), 6 February 2013, ICC-02/11-01/11-384-Corr, para. 37 (notified on 8 February 2013); Trial Chamber I, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on victims’ participation status](#), 7 January 2016, ICC-02/11-01/15-379, para. 45.

⁴⁵ [Second Assessment Report](#), para. 24.

using expressions, such as “2003”, “during the rainy season” and “during the harvest season”.⁴⁶

44. Accordingly, the Single Judge is of the view that, when it is possible to infer from the description of the event(s) reported in the application that they correspond to the crimes charged, the applicant may be authorised to participate even if the date provided is vague or imprecise.

ii. Second Temporal Issue

45. In relation to the Second Temporal Issue, the Single Judge is mindful of the concerns voiced by the Registry about the difficulty of remembering dates accurately. Accordingly, when the date provided is just a few days or weeks off from the dates of the charges, the Chamber will authorise the applicants to participate in the confirmation proceedings. However, when applications mention specific dates that are entirely incompatible with the dates of the charged incidents, these applicants cannot, in principle, be authorised to participate in the confirmation proceedings, unless there are clear and cogent reasons indicating that the applicant was indeed a victim of one of the charged crimes and made a mistake when filling out the application form. This must be determined on a case-by-case basis.

c) Geographic Issue

46. The Single Judge notes that the use of the expression ‘surrounding areas’ in the DCC and the Pre-Trial Brief in connection with the determination of the geographical scope of the charges is at the heart of one of the preliminary issues raised by the Defence under rule 122(3) of the Rules: in the view of the Defence, the expression would entail a degree of vagueness and uncertainty of such magnitude as to make it impossible for Mr Abd-Al-Rahman to be adequately informed of the nature and content of the charges.⁴⁷ The determination of the meaning and content of the expression ‘surrounding areas’ is therefore likely to be one of the matters to be discussed at the hearing and to be deliberated upon by the Chamber in the context of its decision on the confirmation of the charges; for this reason, and with a view to avoiding any predetermination of this issue, the Single

⁴⁶ [Second Assessment Report](#), para. 26.

⁴⁷ *Premières observations de la Défense en vertu de la Règle 122-3 (Régularité du Document indiquant les charges)*, 12 May 2021, ICC-02/05-01/20-387-Conf, paras 30-36 (a public redacted version was notified on the same day, ICC-02/05-01/20-387-Red).

Judge considers it appropriate to adopt a broad approach and to authorise all applicants included in the Registry's report referring to events the date and description of which correspond to the charges, irrespective of whether the narrative of those applicants specifically mentions one of the locations expressly mentioned in the DCC.

d) Material Issue

47. Finally, as regards the Material Issue, the Single Judge is of the view that, when victim applicants report having sustained psychological harm as a result of witnessing atrocities committed against other individuals in their community, this qualifies them as victims for the purpose of rule 85 of the Rules.⁴⁸

e) References to 'Ali Kushayb'

48. Regarding the Defence request that applications which refer to Mr Abd-Al-Rahman as 'Ali Kushayb' be declared inadmissible, the Single Judge emphasises that the decision to authorise applicant victims to participate is based on the Prosecutor's allegations. Since the Prosecutor maintains that 'Ali Kushayb' is an alias for Mr Abd-Al-Rahman, there is no reason to distinguish between applicant-victims who mention Mr Abd-Al-Rahman and those who mention 'Ali Kushayb'. This is without prejudice to the position the Chamber may take on the matter of identity in the confirmation decision.

f) Conclusion

49. In light of the above, and having carefully assessed the Group C applications contained in the Second Assessment Report, the Single Judge considers that 7 out of the 12 applications fall within the scope of the case and fulfil the relevant criteria set out in the First Assessment Decision: a/25061/21, a/25007/21, a/25006/21, a/25016/21, a/25017/21, a/25021/21 and a/25026/21. Accordingly, the Single Judge authorises these applicants to participate in the confirmation proceedings.

5. Overall conclusion

50. For the foregoing reasons, the Single Judge authorises 151 victims to participate in the proceedings. They are listed in an annex to this decision.

⁴⁸ See [Al Hassan Victims Decision](#), para. 35.

6. *Legal representation*

51. The Registry has provided a list outlining the choice of counsel by each of the applicants, in line with the Supplementary Decision.

52. The Single Judge notes that the Second and Third Assessment Reports indicate that (i) all applicant victims have appointed Counsel, except a/2747/10; (ii) some of them have nominated Ms Amal Clooney and/or Mr Nasser Mohamed Amin Abdalla as their legal representatives; (iii) others have nominated the OPCV. The Single Judge recalls that Mr Nasser Mohamed Amin Abdalla and Ms Amal Clooney have already been appointed as joint legal representatives of the 22 victims who were provisionally authorised to participate in the proceedings in the First Assessment Decision. It is further recalled that they have both previously expressed their willingness to act jointly as one team and to represent the interests of their clients together, as well as affirmed that they “will not seek any funding from the Court at any stage of the case”.⁴⁹

53. Seeing that, with one exception, all the victims that are hereby authorised to participate in these proceedings, have appointed either the OPCV or the joint legal representatives, there is no reason not to honour the victims’ choice. Accordingly, the Single Judge appoints the OPCV and the joint legal representatives in line with the victims’ choices, as listed in the annex of the present decision.

54. The Single Judge also notes that one applicant, a/2747/10, apparently did not record a choice for a counsel to represent him or her. Under these circumstances, the Single Judge considers that it is in the interest of justice to instruct the OPCV to represent a/2747/10 during the confirmation hearing.

⁴⁹ See [First Assessment Decision](#), para. 25.

B. The First and Second Leave to Appeal Requests

1. Applicable law

55. For requests for leave to appeal, article 82(1)(d) of the Statute sets the following requirements which must be met to grant such a request:

- a. *The matter constitutes, singly or collectively, an "appealable issue";*
- b. *The(se) issue(s) could significantly affect:*
 1. *The fair and expeditious conduct of the proceedings, or*
 2. *The outcome of the trial; and*
- c. *In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*⁵⁰

56. Requirements a, b and c above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.⁵¹ There is no prescribed order in which the requirements must be considered.

57. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that

*[o]nly an "issue" may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.*⁵²

⁵⁰ [Yekatom and Ngaïssona Leave to Appeal Decision](#), para. 10; Pre-Trial Chamber II, *Prosecutor v. Ntaganda*, [Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'](#), 4 July 2014, ICC-01/04-02/06-322, para. 9; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008 (the '[Lubanga Leave to Appeal Decision](#)'), 26 February 2008, ICC-01/04-01/06-1191, para. 9.

⁵¹ [Yekatom and Ngaïssona Leave to Appeal Decision](#), para. 11; Pre-Trial Chamber I, *Situation in Democratic Republic of the Congo*, [Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6](#), 31 March 2006, ICC-01/04-135-tEN, para. 28; [Lubanga Leave to Appeal Decision](#), para. 10.

⁵² *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (the '[DRC Leave to Appeal Judgment](#)'), 13 July 2006, ICC-01/04-168, para. 9. See also Pre-Trial Chamber II, *Prosecutor v. Joseph Kony and Vincent Otti*, [Decision on the Defence Request for leave to appeal the 21 November 2008 Decision](#), 10 February 2009, ICC-02/04-01/05-367, para. 22; Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the "Prosecution's Application

58. The single Judge emphasises that ‘the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal’.⁵³

59. As previously stated by the Chamber,

*[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, “will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process”.*⁵⁴

60. Moreover, it is important to stress that the term ‘proceedings’ in the second part of article 82(1)(d) of the Statute refers to the proceedings in their entirety.⁵⁵ Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage – as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁵⁶ Indeed, such interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.⁵⁷

61. Finally, the Appeals Chamber has determined that “it is for the Pre-Trial [...] to determine not only whether a decision may be appealed, but also to what extent”.⁵⁸

for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali"', 1 April 2011, ICC-01/09-02/11-27, para. 7.

⁵³ Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, [Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58](#), 19 August 2008, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21.

⁵⁴ [Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198](#), 12 January 2021, ICC-02/05-01/20-254, para. 7, referring to Pre-Trial Chamber II, *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2015, ICC-01/05-01/13-801, para. 17; quoting [DRC Leave to Appeal Judgment](#), para. 16.

⁵⁵ [DRC Leave to Appeal Judgment](#), para. 17.

⁵⁶ [Lubanga Leave to Appeal Decision](#), para. 12.

⁵⁷ Pre-Trial Chamber II; *Prosecutor v. Yekatom and Ngaïssona*, [Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’](#), 21 March 2019, ICC-01/14-01/18-154, para. 12; [Lubanga Leave to Appeal Decision](#), paras 12-13.

⁵⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled](#)

2. *First Leave to Appeal Request*

62. In the First Leave to Appeal Request, the Defence seeks leave to appeal the Supplementary Decision. According to the Defence, the Supplementary Decision, which deferred the appointment of legal representatives for victims, will inevitably lead to further postponement of the confirmation of charges hearing. The question which the Defence wants to submit to the Appeals Chamber is:

Whether the Chamber violated its obligation to organise without undue delay the participation and representation of victims in the present case with a view to holding the confirmation of charges hearing within a reasonable time pursuant to article 61(1) of the Statute, by failing to issue clear and timely instructions and deadlines to the Registry.⁵⁹

63. The Defence avers that the issue is directly linked to the expeditiousness of the proceedings and that its immediate resolution by the Appeals Chamber may materially advance the proceedings.⁶⁰

64. The Single Judge considers that the issue identified in the First Leave to Appeal Request does not arise from the Supplementary Decision. It is entirely based on speculation about the potential impact of the Supplementary Decision on the start of the confirmation hearing. As it is now clear that the Supplementary Decision did not have any effect on the start of the confirmation hearing, the issue is also moot. Consequently, the First Leave to Appeal Request is rejected.

3. *Second Leave to Appeal Request*

65. In the Second Leave to Appeal Request, the Defence seeks permission to appeal the First Assessment Decision. According to the Defence, this decision compounds the negative effect of the First and the Supplementary Decisions on Mr Abd-al-Rahman's right to be presumed innocent and his right to be tried

[“Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744, para. 13, *quoting* Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, [“Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(1\) of the Rome Statute’”](#), 16 December 2013, ICC-02/11-01/11-572, para. 63. *See also* Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”](#), 23 December 2015, ICC-01/05-01/13-1533, para. 16, p. 9, n. 29.

⁵⁹ [First Leave to Appeal Request](#), paras 11-13, 21.

⁶⁰ [First Leave to Appeal Request](#), para. 21. *See p.* 12.

impartially and in full equality.⁶¹ In particular, the Defence wishes to submit the following four issues to the Appeals Chamber:

- (i) whether the Chamber's rejection as 'baseless' of the questions raised in the Defence First Response was sufficiently motivated in light of the importance and gravity of the issues they addressed (the 'First Issue');*
- (ii) whether, in the absence of the DCC, the applications received by the Registry could be classified in any category other than Group C and therefore had to be communicated to the Defence for observations (the 'Second Issue');*
- (iii) whether the Instructions constituted a new decision amending the First Decision that had to be notified to the parties, in order to allow them to exercise their right to seek leave to appeal (the 'Third Issue');* and
- (iv) whether the Chamber violated its duty of impartiality by issuing the Instructions and directing the Registry to not transmit Group B and C applications that are clearly incompatible with the charges or whose compatibility with the charges is impossible to determine (the 'Fourth Issue').⁶²*

66. The Single Judge starts by noting that the First and Fourth Issues fail to articulate an appealable issue. Indeed, they constitute mere disagreements with the Chamber's decision. Moreover, the Single Judge notes with dismay that the First and Fourth Issues appear to be another attempt by the Defence to seek leave to appeal the A-B-C approach by formulating its objection to it differently.⁶³ The Single Judge recalls that the A-B-C approach was adopted in the First Decision and that the Defence sought but was refused leave to appeal it. Contrary to what the Defence contends, the First Assessment Decision did not change the Chamber's approach towards the processing of victim applications, as set out in the First Decision, in any way. The Defence is therefore barred from appealing the First and Fourth Issues as they do not arise from the First Assessment Decision.

67. As regards the Second Issue, this appears to be based on a misconstrual of the Instructions and the First Assessment Decision. As noted in the First Assessment Decision, the categorisation in the First Assessment Report was provisional and subject to review once the DCC had been filed. Indeed, in accordance with paragraph 22 of the First Assessment Decision, the Registry has now reassessed the

⁶¹ [Second Leave to Appeal Request](#), para. 2.

⁶² [Second Leave to Appeal Request](#), para. 13.

⁶³ [Defence Leave to Appeal Victims Participation; Decision on Leave to Appeal Victims Participation](#), paras 15, 21.

applications and updated its recommendations in the Second Assessment Report.⁶⁴ As far as communicating the applications to the parties and participants is concerned, this issue does not arise from the First Assessment Decision but from the First Decision. The Defence is therefore barred from raising this issue again.

68. Finally, as regards the Third Issue, the Single Judge recalls that the Instructions were addressed exclusively to the Registry and did not affect the rights or interests of the Defence in any way. It is not open to the parties to seek leave to appeal the Chamber's purely organisational instructions to the Registry. The Defence's attempt to do so anyway via the First Assessment Decision is misplaced and hereby rejected. As regards the Defence's claim that the Chamber should have issued its Instructions to the Registry in a formal decision, this amounts to a disagreement with how the Chamber has exercised its discretion but does not constitute an appealable issue.

69. In light of the above, the Single Judge concludes that none of the four issues raised by the Defence are appealable. In addition, even if they were, the Single Judge does not consider that immediate appellate attention could materially advance the proceedings. Accordingly, the Single Judge rejects the Second Leave to Appeal Request in its entirety.

C. The Amicus Curiae Request

70. In the Amicus Curiae Request, the FIDH requests leave from the Chamber to submit observations on the following issues (the 'Three Issues'): (i) 'the importance of meaningful participation of victims in ICC proceedings' and the potential impact of the First Decision in this regard;⁶⁵ (ii) the importance of consulting victims on their choice of legal representative in order to ensure 'effective legal representation';⁶⁶ and (iii) the importance of victims' participation in the confirmation hearing and their need to be properly represented by a legal representative that 'they are satisfied with' at this time.⁶⁷ According to the FIDH, its

⁶⁴ [Second Assessment Report](#), paras 3-4, 16-18.

⁶⁵ [Amicus Curiae Request](#), paras 27-41.

⁶⁶ [Amicus Curiae Request](#), paras 42-55, *quoting* Assembly of States Parties (ASP), [Court's Revised strategy in relation to victims](#), ICC-ASP/11/38, 5 November 2012, p. 5.

⁶⁷ [Amicus Curiae Request](#), paras 56-62.

amicus curiae observations on these issues would enable the Chamber ‘to make an informed decision on the modalities of victim participation in this case’.⁶⁸

71. Rule 103(1) of the Rules gives the Chamber discretion to invite or grant leave for *amicus curiae* observations on any issue deemed appropriate. According to the Chamber’s previous jurisprudence, the Chamber ‘will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations providing specific expertise are needed on particular topics, and subject to the Chamber’s consideration that this is desirable for the proper determination of the case’.⁶⁹

72. The Single Judge notes that the matters on which the applicant offered its observations have already been addressed and resolved in the Supplementary Decision and the First Assessment Decision. Therefore, the request is moot. Moreover, the Single Judge stresses the well-known principle of ‘*iura novit curia*’.

⁶⁸ [Amicus Curiae Request](#), para. 25.

⁶⁹ *Prosecutor v. Bosco Ntaganda*, [Decision on the Application by the Redress Trust to Submit Amicus Curiae Observations](#), 18 February 2014, ICC-01/04-02/06-259, para. 3. *See also* Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on the “Request by Ms. Moraa Gesicho to Appear as Amicus Curiae”](#), 12 April 2011, ICC-01/09-02/11-54, para. 15; Pre Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the “Request for leave to submit Amicus Curiae Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence”](#), 11 May 2011, ICC-01/09-01/11-84, para. 8.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence requests for reconsideration of the A-B-C approach;

AUTHORISES 151 applicant victims listed in the annex to this decision to participate in the confirmation proceedings;

APPOINTS the OPCV, Mr Nasser Mohamed Amin Abdalla and Ms Amal Clooney as legal representatives as indicated in the annex to this decision;

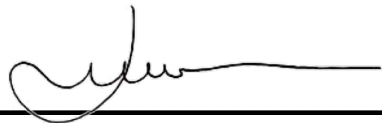
INSTRUCTS the OPCV to represent victim a/2747/10;

REJECTS the First and Second Leave to Appeal Requests;

REJECTS the Amicus Curiae Request; and

INSTRUCTS the LRVs and the OPCV to file a public redacted version of the Joint Victims Observations.

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



Judge Rosario Salvatore Aitala

Single Judge

Dated this Thursday, 20 May 2021

At The Hague, Netherlands