



Original: English

No. ICC-01/14-01/21 OA2

Date: 14 September 2021

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public document

Judgment

on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled “Decision establishing the principles applicable to victims’ applications for participation”

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

The Office of the Prosecutor
Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Philipp Ambach

Other

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled “Decision establishing the principles applicable to victims’ applications for participation” of 16 April 2021 (ICC-01/14-01/21-56),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision establishing the principles applicable to victims’ applications for participation” is confirmed.

REASONS

I. KEY FINDINGS

1. Rule 89(1) of the Rules of Procedure and Evidence (hereinafter: “Rules”) must be interpreted in such a way that it gives effect both to article 68(1) of the Rome Statute (hereinafter: “Statute”) – reflecting the duty to ensure the protection of victims – and article 68(3) of the Statute – requiring the Court to ensure meaningful victim participation in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. While rule 89(1) of the Rules provides that copies of victims’ applications should be provided to the parties for them to make observations, it also allows for exceptions. Indeed, nothing in the text or spirit of rule 89(1) of the Rules, article 68 of the Statute or the statutory framework more broadly suggests that the non-transmission of victim applications is *per se* impermissible. The only limit in this regard is that the procedure put in place by the relevant chamber when exercising its discretion under rule 89 of the Rules (transmission of redacted application forms or their non-transmission) cannot be prejudicial to, or inconsistent with, the rights of a suspect or an accused to a fair trial.
3. In assessing whether any such exception is appropriate in a given case, it is incumbent upon a chamber to strike the right balance among all of the interests at stake:

the interest of the Defence in having access to victims’ applications for participation and, if deemed necessary, challenging the admission of victims to participate in the proceedings against the suspect/accused; the safety, physical and psychological well-being, dignity and privacy of the victims; the need to ensure that victim participation is meaningful; as well as the expeditiousness of the proceedings.

4. Regardless of the system adopted by a chamber to transmit and process victims’ applications, when victims admitted to participate in the proceedings testify before the court as witnesses called by the Prosecutor (“dual status witnesses”), the disclosure regime becomes applicable and therefore the onus would be on the Prosecutor to provide the Defence with all of the disclosable information in his possession, including victims’ applications, in redacted form, if necessary.

5. The A-B-C Approach described in paragraphs 7 and 21 of this judgment is in principle an adequate tool to ensure the fairness and expeditiousness of the proceedings, while at the same time respecting the rights of both the accused and the victims. Nonetheless, in cases where the number of victims’ applications is expected to remain low, the interest of the suspect or accused in receiving copies thereof and replying thereto may outweigh the benefits gained by the implementation of the A-B-C Approach. In such cases, the safety and well-being of the victims may be more appropriately safeguarded by implementing necessary redactions to the victims’ applications prior to their transmission to the parties.

II. INTRODUCTION

6. In the present appeal, the Appeals Chamber is called upon to determine whether the approach for transmitting victims’ applications for participation to the parties and admitting victims to participate in the proceedings adopted by Pre-Trial Chamber II (hereinafter: “A-B-C Approach” and “Pre-Trial Chamber”),¹ in the “Decision establishing the principles applicable to victims’ applications for participation” (hereinafter: “Impugned Decision”)² is compatible with rule 89(1) of the Rules and with the Statute legal framework more broadly.

¹ [Decision on the designation of a Single Judge](#), 25 January 2021, ICC-01/14-01/21-3.

² [Decision establishing the principles applicable to victims’ applications for participation](#), 16 April 2021, ICC-01/14-01/21-56 (hereinafter: “Impugned Decision”).

7. According to the A-B-C Approach, the Registry examines the applications for participation in light of rule 85 of the Rules and the criteria set by the relevant chamber and classifies the applicants into three categories: (a) applicants who clearly qualify as victims (“Group A”); (b) applicants who clearly do not qualify as victims (“Group B”); and (c) applicants for whom the Registry could not make a clear determination for any reason (“Group C”). While the Registry transmits to the Chamber all applications in unredacted form, it only transmits to the parties the Group C applications³ with redactions as necessary.⁴ The A-B-C Approach was first adopted by the *Ntaganda* Trial Chamber,⁵ and subsequently followed in the *Al Hassan* case (at pre-trial and trial),⁶ in the *Yekatom and Ngaïssona* case (at pre-trial and trial),⁷ in the *Abd-Al-Rahman* case (at pre-trial),⁸ and more recently by the Pre-Trial Chamber in the present case.

8. The Defence raises one ground of appeal, submitting that the Pre-Trial Chamber committed a legal error when interpreting rule 89(1) of the Rules which, according to the Defence, provides that copies of all victims’ applications for participation shall be transmitted to the parties who are entitled to reply thereto.⁹ In the view of the Defence,

³ See e.g. [Registry Observations in the Defence Appeal against the “Decision establishing the principles applicable to victims’ applications for participation” \(ICC-01/14-01/21-56\)](#), 22 June 2021, ICC-01/14-01/21-106 (OA2) (hereinafter: “Registry Observations”), paras 34-35.

⁴ See Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision Establishing the Principles Applicable to Victims’ Applications for Participation](#), 5 March 2019, ICC-01/14-01/18-141 (hereinafter: “*Yekatom and Ngaïssona* Pre-Trial Decision on Victim Participation”), para. 41, incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

⁵ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda* [Decision on victims’ participation in trial proceedings](#), 6 February 2015, ICC-01/04-02/06-449 (hereinafter: “*Ntaganda* Trial Decision on Victim Participation”), paras 29-32.

⁶ Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision Establishing the Principles Applicable to Victims’ Applications for Participation](#), 24 May 2018, ICC-01/12-01/18-37-tENG (hereinafter: “*Al Hassan* Pre-Trial Decision on Victim Participation”); Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial](#), 12 March 2020, ICC-01/12-01/18-661 (hereinafter: “*Al Hassan* Trial Decision”).

⁷ [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#); Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Order Scheduling First Status Conference](#), 19 March 2020, ICC-01/14-01/18-459 (hereinafter: “*Yekatom and Ngaïssona* Trial Decision on Victim Participation”), para. 8 (iv).

⁸ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, [Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing](#), 18 January 2021, ICC-02/05-01/20-259 (hereinafter: “*Abd-Al-Rahman* Pre-Trial Decision on Victim Participation”).

⁹ [Mémoire d’appel de la Défense au soutien de son appel contre la « Decision establishing the principles applicable to victims’ applications for participation » \(ICC-01/14-01/21-56\) du Juge Unique rendue le 16 avril 2021](#), ICC-01/14-01/21-88 (OA2); an English translation was filed on 22 June 2021 ([ICC-01/14-01/21-88-tENG](#)) (hereinafter: “Appeal Brief”), paras 16-48.

this error materially affected the Impugned Decision.¹⁰ The Defence requests that the Appeals Chamber reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber.¹¹

9. For the reasons elaborated in this judgment, the Appeals Chamber rejects the appeal lodged by the Defence and confirms the Impugned Decision.

10. This judgment sets out the procedural history of the appeal, followed by the relevant parts of the Impugned Decision of the Pre-Trial Chamber, the parties' submissions, the determination of the Appeals Chamber and the appropriate relief.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

11. On 26 February 2021, the Registry filed the 'Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings' (hereinafter: "Registry Submissions before the Pre-Trial Chamber").¹²

12. On 11 March 2021, the Defence filed its response to those submissions (hereinafter: "Defence Response to the Registry Submissions before the Pre-Trial Chamber").¹³

13. On 16 April 2021, the Single Judge acting on behalf of the Pre-Trial Chamber rendered the Impugned Decision.¹⁴

14. On 26 April 2021, the Defence filed an application seeking leave to appeal the Impugned Decision in relation to three issues (hereinafter: "Application for Leave to

¹⁰ [Appeal Brief](#), paras 49-50.

¹¹ [Appeal Brief](#), pp 18-19.

¹² [Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings](#), 26 February 2021, ICC-01/14-01/21-25 (hereinafter: "Registry Submissions before the Pre-Trial Chamber").

¹³ [Réponse de la Défense aux « Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings » \(ICC-01/14-01/21-25\)](#), ICC-01/14-01/21-36; an English translation was filed on 15 June 2021 ([ICC-01/14-01/21-36-tENG](#)).

¹⁴ [Impugned Decision](#).

Appeal”).¹⁵ On 21 May 2021, leave was granted in respect of one issue,¹⁶ identified as concerning

the question whether the Single Judge erred in finding, in line with previous jurisprudence of this Court, that the system for the transmission and admission of victims’ applications set out into three categories of groups – A, B and C – (the ‘A-B-C Approach’) is in compliance with the statutory framework, in particular rule 89 of the Rules.¹⁷

B. Proceedings before the Appeals Chamber

15. The Defence filed its appeal brief on 3 June 2021 (hereinafter: “Appeal Brief”)¹⁸ and the Prosecutor’s response was filed on 11 June 2021 (hereinafter: “Prosecutor’s Response”).¹⁹

16. Following relevant requests by the Office of Public Counsel for Victims (hereinafter: “OPCV”) and the Registry,²⁰ the Appeals Chamber authorised the filing of submissions by the OPCV and the Registry.²¹ Such submissions were received on 22 June 2021,²² with a consolidated response thereto filed by the Defence on 28 June 2021.²³

¹⁵ [Demande d’autorisation d’interjeter appel de la « Decision establishing the principles applicable to victims’ applications for participation » \(ICC-01/14-01/21-56\)](#), 26 April 2021, ICC-01/14-01/21-63; an English translation was filed on 16 June 2021 ([ICC-01/14-01/21-63-tENG](#)) (hereinafter: “Application for Leave to Appeal”).

¹⁶ [Decision on the Defence’s request for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’](#), 21 May 2021, ICC-01/14-01/21-79 (hereinafter: “Decision Granting Leave to Appeal”).

¹⁷ [Decision Granting Leave to Appeal](#), para. 21.

¹⁸ [Appeal Brief](#).

¹⁹ [Prosecution’s response to Mahamat Said Abdel Kani’s appeal against the ‘Decision establishing the principles applicable to victims’ applications for participation’](#), 11 June 2021, ICC-01/14-01/21-97 (OA2) (hereinafter: “Prosecutor’s Response”).

²⁰ [Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court](#), 7 June 2021, ICC-01/14-01/21-90 (OA2); [Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56](#), 9 June 2021, ICC-01/14-01/21-95 (OA2). See also [Réponse de la Défense à la « Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court » \(ICC-01/14-01/21-90\)](#), 8 June 2021, ICC-01/14-01/21-93-Red (OA2) (original confidential version filed on the same day); [Réponse de la Défense à la « Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56 » \(ICC-01/14-01/21-95\)](#), 10 June 2021, ICC-01/14-01/21-96 (OA2).

²¹ [Decision on the filing of additional submissions in the appeal](#), 17 June 2021, ICC-01/14-01/21-101 (OA2) (hereinafter: “Decision on additional submissions”).

²² [Submissions in the general interest of victims in the Defence’s Appeal against the ‘Decision establishing the principles applicable to victims’ applications for participation’ \(ICC-01/14-01/21-56\)](#), 22 June 2021, ICC-01/14-01/21-105 (OA2) (hereinafter: “OPCV Observations”); [Registry Observations](#).

²³ [Réponse consolidée de la Défense aux « Submissions in the general interest of victims in the Defence’s Appeal against the “Decision establishing the principles applicable to victims’ applications for](#)

IV. MERITS

A. The Impugned Decision

17. The Impugned Decision, “establishing principles applicable to victims’ applications for participation”, dealt with the following issues: outreach activities;²⁴ application forms for participation;²⁵ documents as proof of identity;²⁶ collection and processing of applications;²⁷ transmission and admission of applications; and legal representation.²⁸ It is the issue concerning the transmission and admission of applications which is currently on appeal, and in relation to which leave to appeal was granted.

18. The Pre-Trial Chamber noted the Registry’s recommendation to adopt the procedure followed in other cases and the Defence’s opposition to the Registry’s recommendation and request to have access to all victim applications.²⁹ By reference to previous jurisprudence on the matter, the Pre-Trial Chamber held that:

the arguments in support of the Defence Admission Request and the Defence Alternative Admission Request have been previously considered. More specifically, it has been determined that “the parties’ right to reply to victim applications set out in Rule 89(1) of the Rules is not absolute” as it is “[s]ubject to the provisions of the Statute”, including “the Court’s obligation under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims” and the obligation to ensure the fairness and expeditiousness of the proceedings. Furthermore, it has been found that “Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to ‘consider the applications in such a manner as to ensure the effectiveness of proceedings’”. Therefore, contrary to the Defence’s submissions, rule 89(4) of the Rules allows the Chamber to organise the application and admission process in light of the circumstances of each case. [Footnotes omitted].³⁰

[participation” \(ICC-01/14-01/21-56\) » \(ICC- 01/14-01/21-105\) et aux « Registry Observations in the Defence Appeal against the “Decision establishing the principles applicable to victims’ applications for participation” \(ICC-01/14-01/21-56\) » \(ICC-01/14-01/21-106\).](#), 28 June 2021, ICC-01/14-01/21-109 (OA2); an English translation was filed on 25 August 2021 ([ICC-01/14-01/21-109-tENG](#)) (hereinafter: “Defence Response to OPCV and Registry Observations”).

²⁴ [Impugned Decision](#), paras 24-25.

²⁵ [Impugned Decision](#), paras 26-27.

²⁶ [Impugned Decision](#), paras 28-29.

²⁷ [Impugned Decision](#), paras 30-31.

²⁸ [Impugned Decision](#), paras 32-37.

²⁹ [Impugned Decision](#), para. 32.

³⁰ [Impugned Decision](#), para. 33, referring to [Ntaganda Trial Decision on Victim Participation](#), paras 29-32; [Al Hassan Pre-Trial Decision on Victim Participation](#), paras 60-63; [Yekatom and Ngaïssona Pre-](#)

19. The Pre-Trial Chamber further considered that the Defence had failed to take into account “the challenges presented by the difficult security situation in the CAR and, hence, the extensive redactions anticipated to protect the victims in accordance with article 68(1) of the Statute” as well as the “substantial number of victims” expected to submit applications to participate in the proceedings.³¹

20. In light of the above, the Pre-Trial Chamber considered that:

the system proposed by the Registry is: (i) in compliance with the Court’s legal framework; (ii) conducive to the expeditious conduct of the proceedings as a whole, which includes Mr. Said’s right to have the proceedings conducted expeditiously; and (iii) in the interests of the victims by enabling the greatest number of victims to apply to participate in the hearing on the confirmation of charges.³²

21. The Pre-Trial Chamber thus adopted *mutatis mutandis* the system for the transmission and admission of victim applications followed in the *Yekatom and Ngaiissona* proceedings and rejected the Defence request for the transmission of all victim applications and its alternative request for the transmission of groups A and C victim applications.³³ This system is as follows:

(i) The Registry examines the applications per the instructions given by the Chamber in the present decision and classifies the applicants into three categories: (a) applicants who clearly qualify as victims (“Group A”); (b) applicants who clearly do not qualify as victims (“Group B”); and (c) applicants for whom the Registry could not make a clear determination for any reason (“Group C”).

(ii) The Registry transmits to the Chamber on a rolling basis and in unredacted form all complete applications and any supporting documentation in its possession.

(iii) The Registry prepares regular reports that list the applications for participation and classify them according to the three groups, but need not justify the classification of each individual application. It addresses the reports to the Chamber, the Prosecutor, the Defence and, if applicable, to the legal representatives chosen to represent the victims authorised to participate.

(iv) Upon submitting each report, the Registry also discloses to the Prosecutor and the Defence all Group C applications, redacted as needed. As regards applications provided to the Defence, when redactions are a necessary protective

[Trial Decision on Victim Participation](#), paras 42-45; and [Ab-Al-Rahman Pre-Trial Decision on Victim Participation](#), paras 25-28.

³¹ [Impugned Decision](#), para. 34.

³² [Impugned Decision](#), para. 35.

³³ [Impugned Decision](#), para. 35.

measure, the Chamber orders the Registry to remove all identifying information while respecting the principle of proportionality prescribed by article 68(1) of the Statute.

(v) The Registry also prepares assessment reports for the attention of the Chamber and the parties, highlighting the difficulties encountered regarding Group C applications.

(vi) In addition, the Registry provides assessment reports for Group B applications exclusively to the Chamber, which contain the reasons for rejecting the applications, in order to allow the Chamber to take a final decision on such applications if necessary.

(vii) To guarantee that all applications are processed before the commencement of the hearing to confirm or decline to confirm the charges, the Registry proceeds as follows for the remaining application forms: (a) Group C applications are transmitted to the Chamber and the parties no later than 30 days before the date the hearing is scheduled to commence; and (b) Group A and B applications are transmitted to the Chamber no later than 15 days before the date of commencement of the hearing. The Registry submits the remaining corresponding reports within the same time limits. Upon expiry of that limit, no new applications for participation may be submitted for consideration.

(viii) Upon receipt of the Group C applications, the Prosecutor and the Defence shall have 10 days to make submissions, should they wish to do so.

(ix) Upon receiving any submissions from the parties on the Group C applications, the Chamber will assess them individually. Furthermore, barring a clear, material error in the Registry's assessment of Groups A and B, it will also ratify the Registry's assessment of the Group A and B applications. While VPRS's conclusions may be of assistance, it is for the Chamber to ultimately authorise or reject an applicant to participate in the proceedings.

(x) The Registry maintains a database of information provided by the victims admitted to participate in the proceedings, and makes available to each legal representative in the case the data provided by the victims who he or she represents so that he or she knows to which group said victims belong.³⁴

B. Submissions before the Appeals Chamber

22. In its Appeal Brief, the Defence submits that given the role played by participating victims in the proceedings, "a victim participation procedure under which the defence is prohibited from accessing and analysing all applications for participation causes prejudice to the defence in a manner likely to undermine the fairness of the

³⁴ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41, incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

proceedings”.³⁵ The Defence avers that the Pre-Trial Chamber erred in law by misinterpreting rule 89(1) of the Rules.³⁶

23. In support of its argument, the Defence submits first, that the Pre-Trial Chamber’s interpretation of rule 89(1) of the Rules infringes the right under that rule by virtue of which victims’ applications for participation “shall” be transmitted to the parties.³⁷ In its view, this is supported by: (i) a literal interpretation of rule 89(1) of the Rules;³⁸ (ii) the Chambers Practice Manual, the Registry’s single policy document on the Court’s legal aid system, and the Regulations of the Registry;³⁹ and (iii) academic literature.⁴⁰ Second, the Defence contends that the legal provisions invoked in the Impugned Decision (articles 64(2) and 68(1) of the Statute and rule 89(4) of the Rules) do not undermine the principle that applications for participation “shall” be transmitted to the parties.⁴¹ Third and finally, the Defence maintains that the fact that there may be a large number of applications for participation cannot cast doubt on the principle that those applications “shall” be transmitted to the parties.⁴² In the Defence’s view, the alleged error of law materially affected the Impugned Decision.⁴³ It requests that the Appeals Chamber reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new determination.⁴⁴

24. In response, the Prosecutor argues that rule 89(1) of the Rules “is not absolute” and does not necessarily prevent a chamber from withholding victim applications from the parties “if that is necessary, for instance, to protect the applicant victims or to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the accused”.⁴⁵ The Prosecutor submits that since the Defence has not shown an error of law, the appeal lodged by the Defence should be rejected.⁴⁶ Finally, the Prosecutor submits that given the scope of the issue on appeal, the Appeals Chamber

³⁵ [Appeal Brief](#), para. 13. *See also* paras 6-12.

³⁶ [Appeal Brief](#), p. 6.

³⁷ [Appeal Brief](#), paras 19-33.

³⁸ [Appeal Brief](#), paras 19-22.

³⁹ [Appeal Brief](#), paras 23-30.

⁴⁰ [Appeal Brief](#), paras 31-33.

⁴¹ [Appeal Brief](#), paras 34-42.

⁴² [Appeal Brief](#), paras 43-46.

⁴³ [Appeal Brief](#), paras 49-50.

⁴⁴ [Appeal Brief](#), p. 19.

⁴⁵ [Prosecutor’s Response](#), para. 5.

⁴⁶ [Prosecutor’s Response](#), paras 5, 27.

need not assess whether the Pre-Trial Chamber properly exercised its discretion under rule 89(1) of the Rules, but that, in any event, considering the impact that the Impugned Decision would have on the fair and expeditious conduct of the proceedings and on the interests of victims, it did so.⁴⁷

25. In her observations, counsel for the OPCV submits that the Pre-Trial Chamber did not err in law when interpreting rule 89(1) of the Rules in light of the Statute’s relevant provisions, and in particular article 68(1) of the Statute.⁴⁸ In her view, rule 89(4) of the Rules affords chambers discretion to consider victims’ applications “in such a manner as to ensure the effectiveness of proceedings”.⁴⁹ She avers that chambers have a duty to ensure a fair and expeditious trial for all participants.⁵⁰ It is her position that the Defence fails to show any prejudice arising from the approach adopted in the Impugned Decision, which according to the OPCV was “correct and reasonable”.⁵¹ She therefore requests that the Appeals Chamber reject the appeal lodged by the Defence and confirm the Impugned Decision.⁵²

26. The Registry submits that the system of transmission of victims’ applications received under rule 89(1) of the Rules “has evolved in that Chambers entrusted the Registry increasingly with the task of judicial pre-screening of applications as to their conformity with rule 85 of the Rules” but “[c]hambers have always retained their role of ultimate arbiter”.⁵³ It avers that rule 89(1) of the Rules, in the same way as article 68(1) of the Statute, reflects “two fundamental notions”, namely “the distinct role of victims participating in ICC proceedings from the ICC evidentiary framework” and “the vulnerability of victims mirrored by the Registry’s role to provide a safe and secure interaction”.⁵⁴

27. By reference to previous cases in which the A-B-C Approach has been endorsed, the Registry submits that it had “identified and reported to the Chambers clear and

⁴⁷ [Prosecutor’s Response](#), para. 6.

⁴⁸ [OPCV Observations](#), para. 2.

⁴⁹ [OPCV Observations](#), para. 3.

⁵⁰ [OPCV Observations](#), para. 3.

⁵¹ [OPCV Observations](#), paras 3-4.

⁵² [OPCV Observations](#), paras 1, 4.

⁵³ [Registry Observations](#), paras 12. *See also* paras 24, 33.

⁵⁴ [Registry Observations](#), para. 16.

pressing concerns regarding victims' safety, security and well-being due to the challenging situations on the ground" that would require "extensive redactions of any application forms going to the Parties" and that the same applies to the present case.⁵⁵ In the Registry's view, reducing the need to transmit victims' applications to the parties results in "a decreased risk of victim exposure" and is an "effective tool to safeguard victims' safety and security".⁵⁶ The Registry further submits that the A-B-C Approach has "led to substantial time and resource efficiencies, thus enhancing the sustainability and meaningfulness of the victim participation system".⁵⁷ It concludes by asserting that with the A-B-C Approach the Registry "duly fulfils its role of providing an effective and efficient victim application handling process in line with the ICC's regulatory framework, while safeguarding victims' safety and well-being".⁵⁸

28. In response to the OPCV observations, the Defence submits that counsel for the OPCV misinterprets the wording of rule 89(1) of the Rules as well as previous jurisprudence of the Appeals Chamber,⁵⁹ and that she relies on irrelevant jurisprudence.⁶⁰ It further avers that although it is correct that the Chambers Practice Manual is not binding, it is important as it sets out the "'best' practice to be followed".⁶¹ The Defence submits that, contrary to the OPCV's argument, regulation 99 of the Regulations of the Registry does support its proposed interpretation of rule 89(1) of the Rules.⁶² It also argues that the OPCV's arguments related to the standard of proof applicable when verifying the criteria to allow applicants to participate as victims has no bearing on the issue on appeal.⁶³

29. Finally, the Defence affirms that the OPCV is wrong in submitting that the A-B-C Approach is not prejudicial to the accused.⁶⁴ In addition to the prejudice resulting from the absence of an adversarial procedure as to the admission of victims to the proceedings, and the prejudice resulting from the nature of victims' participation in the

⁵⁵ [Registry Observations](#), para. 23.

⁵⁶ [Registry Observations](#), paras 23-24.

⁵⁷ [Registry Observations](#), para. 26. *See also* paras 29-37.

⁵⁸ [Registry Observations](#), para. 38.

⁵⁹ [Defence Response to OPCV and Registry Observations](#), paras 10-12.

⁶⁰ [Defence Response to OPCV and Registry Observations](#), paras 13-14.

⁶¹ [Defence Response to OPCV and Registry Observations](#), paras 15-17.

⁶² [Defence Response to OPCV and Registry Observations](#), paras 18-21.

⁶³ [Defence Response to OPCV and Registry Observations](#), paras 22-23.

⁶⁴ [Defence Response to OPCV and Registry Observations](#), paras 24-31.

proceedings, the Defence further stresses the prejudice resulting from the lack of access to the victims' applications in the context of the preparation of its defence.⁶⁵

30. In response to the Registry's observations, the Defence submits that the Registry does not demonstrate at any point in its submissions that the non-transmission of victims' applications to the parties is justified.⁶⁶ In the Defence's view, it is incorrect to justify the non-transmission of victims' applications on the basis of general security concerns in the relevant situation.⁶⁷ The Defence also considers that the failure to comply with the transmission of victims' applications to the parties cannot be justified by the number of redactions that will be required, and recalls that in this case the Registry has so far identified only a small number of potential victims.⁶⁸ It submits that, contrary to the Registry's assertion, there does not seem to be a correlation between the different systems of admission of victims and the number of participating victims.⁶⁹

31. The Defence contends that the rights of the victims are ensured by the application of redactions to the victims' applications prior to their transmission.⁷⁰ It also submits that in this case the implementation of the A-B-C Approach would result in favouring the expeditiousness of the proceedings in the abstract over the concrete exercise of rights by the accused which are explicitly provided for in the Statute and the Rules.⁷¹ The Defence affirms that the Registry is wrong in submitting that the A-B-C Approach is not prejudicial to the accused.⁷²

C. Determination of the Appeals Chamber

1. *Preliminary Issue: Defence request to dismiss the Registry Observations* in limine

32. In its response to the Registry Observations, the Defence submits that the fact that the Registry raises no legal or factual arguments concerning the question at issue and

⁶⁵ [Defence Response to OPCV and Registry Observations](#), para. 25. *See also* paras 26-30.

⁶⁶ [Defence Response to OPCV and Registry Observations](#), paras 35-47.

⁶⁷ [Defence Response to OPCV and Registry Observations](#), paras 35-38.

⁶⁸ [Defence Response to OPCV and Registry Observations](#), paras 39-41, 43.

⁶⁹ [Defence Response to OPCV and Registry Observations](#), para. 42.

⁷⁰ [Defence Response to OPCV and Registry Observations](#), paras 44-47.

⁷¹ [Defence Response to OPCV and Registry Observations](#), paras 48-49.

⁷² [Defence Response to OPCV and Registry Observations](#), paras 50-53.

focuses solely on logistical and financial questions justifies dismissing those observations *in limine*.⁷³

33. The Appeals Chamber recalls that in its decision granting the Registry leave to file submissions on appeal, it considered it appropriate “[g]iven the role of the Registry in the overall admission system of victim applications to participate [...] to receive submissions from the Registry on the matter on appeal, in particular on its role in the challenged system”.⁷⁴ The Appeals Chamber did “not find that this would be inappropriate and/or risk the Registry’s neutrality in the proceedings”.⁷⁵ The Appeals Chamber did not limit the scope of the Registry’s submissions to legal or factual matters, or instruct it not to make submissions on logistical or financial questions relating to the A-B-C-Approach, particularly since these considerations may be relevant to the legal issue on appeal. In light of the foregoing and for the reasons further explained below when determining the legal question before it, the Appeals Chamber finds that the Registry Observations are relevant and do not exceed the scope of the issue on appeal. Accordingly, the Defence request to dismiss the Registry Observations *in limine* is rejected.

2. Standard of Review

34. The ground of appeal raised by the Defence alleges a legal error in the Pre-Trial Chamber’s interpretation of the relevant law.⁷⁶ Regarding errors of law, the Appeals Chamber has previously held that it

will not defer to the relevant Chamber’s legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.⁷⁷

⁷³ [Defence Response to OPCV and Registry Observations](#), paras 33-34.

⁷⁴ [Decision on additional submissions](#), para. 16.

⁷⁵ [Decision on additional submissions](#), para. 16.

⁷⁶ See e.g. [Appeal Brief](#), para. 49; p. 19.

⁷⁷ [The Prosecutor v. Uhuru Muigai Kenyatta, Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23; [The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; [The Prosecutor v. Bosco Ntaganda, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6](#)

35. The Appeals Chamber further held:

If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.⁷⁸

36. A decision is “materially affected by an error of law” if the Trial Chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.⁷⁹

3. *The issue on appeal*

37. The Prosecutor argues that “[d]ue to the narrow scope of the Appeal, the Appeals Chamber need not assess whether the Single Judge correctly exercised his discretion under rule 89(1) by limiting the applications to be transmitted to the Parties to those for which the VPRS could not make a clear determination for any reason (Group C)”.⁸⁰

38. The Prosecutor therefore submits that “the Appeals Chamber should not entertain [arguments concerning the Single Judge’s exercise of discretion], because they exceed the scope of the Appeal”.⁸¹

39. The Appeals Chamber recalls that the Defence sought leave to appeal in respect of three issues identified as errors of law, namely that: (i) the Impugned Decision is vitiated by an error of law because it is contrary to the letter of rule 89(1) of the Rules;⁸² (ii) the Impugned Decision is vitiated by an error of law in that it took into account irrelevant criteria to justify the non-disclosure to the parties of all of the victims’

[and 9](#)”, 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33. *See also The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense*, 19 February 2020, ICC-01/12-01/18-601-Red (OA) (confidential version notified on the same day, ICC-01/12-01/18-601-Conf (OA)) (hereinafter: “Al Hassan OA Judgment”), para. 38.

⁷⁸ [Al Hassan OA Judgment](#), para. 38; Appeals Chamber, *The Prosecutor v. Simone Gbagbo, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo*”, 27 May 2015, ICC-02/11-01/12-75-Red (OA) (confidential version filed on the same day (ICC-02/11-01/12-75-Conf (OA)) (hereinafter: “Simone Gbagbo OA Judgment”), para. 40.

⁷⁹ [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41.

⁸⁰ [Prosecutor’s Response](#), para. 6.

⁸¹ [Prosecutor’s Response](#), para. 18.

⁸² [Application for Leave to Appeal](#), paras 22-29.

applications for participation,⁸³ namely (a) the issue of redactions;⁸⁴ (b) the question of the potential number of applications for participation;⁸⁵ and (c) the unequal treatment of parties from one ICC case to the next that results from the Impugned Decision's consideration of the above two criteria;⁸⁶ and (iii) the Impugned Decision is vitiated by an error of law in that it misinterpreted the principle of expeditiousness of proceedings.⁸⁷

40. The Pre-Trial Chamber granted leave to appeal *only* in respect of the first issue.⁸⁸ It rejected leave to appeal in respect of the remaining issues, finding as follows:

22. [...] With respect to the Second Issue, [...] the Single Judge finds that the Defence's submissions amount to a mere disagreement with the Single Judge's additional reasons in support of the A-B-C Approach and is not an appealable issue for which the resolution "is essential for the determination of matters arising in the judicial cause under examination". In that regard, the Defence presents its own views on these criteria and, in particular, speculates on the Single Judge's starting point of his reasoning regarding potential redactions that would need to be applied to victims' applications before they can be communicated to the parties. [...] Equally amounting to a disagreement with the Single Judge's finding is the Defence's views on the potential number of applicants which fail to establish how this issue requires the immediate intervention of the Appeals Chamber.

23. With regard to the Third Issue, the Single Judge finds that it does not arise from the [Impugned Decision] but rather rests on a misrepresentation of the Single Judge's finding. The Defence challenges the finding that the A-B-C Approach is "conducive to the expeditious conduct of the proceedings as a *whole*, which includes Mr Said's right to have the proceedings conducted expeditiously". Contrary to the Defence's contention, this finding concerns the overall expeditiousness of the entire proceedings in this case, rather than being an issue confined specifically to the [Impugned Decision]. Hence, it is incorrect for Mr Said to allege that it is for him to decide how this fair trial principle should be applied during the course of the proceedings in the present case. In the same vein, the Defence's claim that the right to be judged expeditiously is a right of the suspect (only) and that it cannot be used to prevent him from exercising his other statutory rights misrepresents the Single Judge's finding. The Single Judge was mindful of the Chamber's duty to ensure the fairness and expeditiousness of the proceedings, which entails a delicate balance between different interests, including, but not limited to, Mr Said's statutory right to have proceedings being

⁸³ [Application for Leave to Appeal](#), paras 30-39.

⁸⁴ [Application for Leave to Appeal](#), paras 30-33.

⁸⁵ [Application for Leave to Appeal](#), paras 34-37.

⁸⁶ [Application for Leave to Appeal](#), paras 38-39.

⁸⁷ [Application for Leave to Appeal](#), paras 40-42.

⁸⁸ [Decision Granting Leave to Appeal](#), para. 21.

conducted in a fair and expeditious manner as provided under article 67 of the Statute. [Footnotes omitted.]⁸⁹

41. In this regard, the Appeals Chamber notes that the parties' submissions on appeal, including those of the appellant, are focused on the legal question of whether the A-B-C Approach is compatible with rule 89(1) of the Rules and the statutory framework more broadly, rather than on the Pre-Trial Chamber's exercise of discretion.

42. The Appeals Chamber recalls that it is for the relevant chamber "to determine not only whether a decision may be appealed, but also to what extent".⁹⁰ In the past, the Appeals Chamber has declined to consider grounds of appeal that went beyond the scope of the issue in relation to which leave to appeal was granted.⁹¹ Nonetheless, the Appeals Chamber has considered arguments that were outside the scope of the appeal if they were "intrinsically linked" to the issue on appeal as certified by the relevant chamber.⁹²

43. While it is correct, as argued by the Prosecutor, that the issue on appeal concerns the purely legal question of whether the A-B-C Approach is compatible with rule 89(1)

⁸⁹ [Decision Granting Leave to Appeal](#), paras 22-23.

⁹⁰ Appeals Chamber, *The Prosecutor v. Laurent Koudou 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\(7\)\(c\)\(i\) of the Rome Statute"](#), 16 December 2013, ICC-02/11-01/11-572 (OA5) (hereinafter: "*Gbagbo* OA5 Judgment"), para. 63. *See also* Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 20.

⁹¹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Public redacted Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016](#), 8 March 2017, ICC-01/04-02/06-1817-Red (OA4) (hereinafter: "*Ntaganda* OA4 Judgment"), para. 85, *citing* [Gbagbo OA5 Judgment](#), paras 63-66; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU'](#), 8 October 2010, ICC-01/04-01/06-2582 (OA18), para. 45; Appeals Chambers, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen.*, [Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II](#), 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA2), para. 32.

⁹² [Ntaganda OA4 Judgment](#), para. 85, *referring to* *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 '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 (OA8), paras 13, 19. *See also* [Gbagbo OA5 Judgment](#), fn 142.

of the Rules and the statutory framework more broadly, some, if not all, of the factors considered by the Pre-Trial Chamber in the Impugned Decision (including those related to redactions, the number of victims, and the efficiency/expeditiousness of the proceedings (essentially the issues raised within the second and third issues, for which leave to appeal was rejected)) may be relevant to the legal question before the Appeals Chamber.

44. This notwithstanding, the Appeals Chamber considers that in order to determine the legal question before it, it is unnecessary to review the correctness or otherwise of the manner in which the Pre-Trial Chamber exercised its discretion in this case.

45. Therefore, while in its determination of the issue on appeal, the Appeals Chamber will not consider arguments that appear to relate to the exercise of discretion by the Pre-Trial Chamber, as this aspect of the Impugned Decision falls outside the scope of the present appeal,⁹³ it may consider some of the factors taken into account by the Pre-Trial Chamber when determining the legal question certified for appeal.

46. Moreover, in light of some arguments raised by the Defence,⁹⁴ the Appeals Chamber deems it necessary to clarify that the legal question before it does not concern the modalities of participation of those victims who will eventually be admitted to participate in the proceedings against Mr Said and/or any reparations proceedings that may ensue. Indeed, there is a distinction between the procedure for the admission of victims regulated, *inter alia*, by rule 89(1) of the Rules, the modalities of participation of those victims who are admitted to participate regulated, *inter alia*, by rules 90 to 93 of the Rules, and the reparations proceedings set out in, *inter alia*, rules 94 to 99 of the Rules.

47. In this case, the Appeals Chamber is called upon to determine the compatibility with the Court's legal framework of one procedure that regulates the admission of victims to participate in the proceedings and not the extent to which those victims who are eventually admitted will participate in any concrete case. Therefore, the present

⁹³ See e.g. arguments advanced by the Defence at paragraphs 37, 43-46 of the [Appeal Brief](#) and at paragraphs 40-41 of the [Defence Response to OPCV and Registry Observations](#).

⁹⁴ See e.g. [Appeal Brief](#), paras 8-12; [Defence Response to OPCV and Registry Observations](#), paras 1-4.

judgment has no bearing on the extent of the participatory rights of those victims.⁹⁵ As a result, the arguments raised by the Defence related to the extent to which victims in this case will be allowed to participate⁹⁶ are speculative and the Appeals Chamber will not address them further. For the same reasons, the Appeals Chamber will not entertain arguments related to any possible future reparations proceedings⁹⁷ which, as noted by the OPCV, are “a different and separate stage of the proceedings” at which a higher standard of proof applies.⁹⁸

4. *Is the A-B-C approach compatible with Rule 89 of the Rules and the statutory framework in general?*

48. For the reasons that follow, the Appeals Chamber confirms the Impugned Decision insofar as the Pre-Trial Chamber concluded that the A-B-C Approach is not *per se* incompatible with rule 89(1) of the Rules and the statutory framework in general. The Appeals Chamber will first interpret rule 89(1) of the Rules to determine whether exceptions to the transmission of copies of victims’ applications to the parties are permissible, and if so, to what extent. It will then assess whether the A-B-C Approach could be one of any such exceptions.

(a) Rule 89(1) of the Rules

49. Rule 89(1) of the Rules (entitled “Application for participation of victims in the proceedings”) provides:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

50. The Defence submits that “it is unequivocally apparent from the wording of rule 89(1) that the Registry has a duty to transmit the applications for participation to the

⁹⁵ In this regard, the Pre-Trial Chamber has yet to determine which victims are admitted to participate and under which modalities ([Prosecutor’s Response](#), para. 25).

⁹⁶ [Appeal Brief](#), paras 8-11; [Defence Response to OPCV and Registry Observations](#), paras 1-4.

⁹⁷ [Appeal Brief](#), para. 12.

⁹⁸ [OPCV Observations](#), para. 25.

parties” for them to be able to reply thereto.⁹⁹ As noted by the Defence,¹⁰⁰ the Appeals Chamber has previously held that “[u]nder rule 89 (1) of the Rules, the Registry is under an obligation to provide copies of such applications to the defence and to the Prosecutor”.¹⁰¹ The purpose of transmitting the applications to the parties, pursuant to rule 89(1) of the Rules, is to allow the parties to make observations thereon and in this way assist the relevant chamber to determine whether or not the applicant qualifies as a victim for the purposes of participation. As further noted by the Appeals Chamber, rule 89 of the Rules “aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings”.¹⁰² Moreover, as noted by Trial Chamber VI, “notwithstanding any other purpose they may fulfil for the individuals concerned, victim applications are primarily intended as a procedural mechanism to participate in proceedings”.¹⁰³

51. The Appeals Chamber notes the Defence’s arguments regarding the importance of being able to challenge victims’ applications, given that their content “may in some way influence the decisions taken as to innocence or culpability”¹⁰⁴ and that victims’ applications “are crucial to the preparation of the Defence”.¹⁰⁵ The Appeals Chamber is not persuaded by this argument. As mentioned above, under rule 89(1) of the Rules, victims’ applications are, in principle, not provided for the purpose of allowing the

⁹⁹ [Appeal Brief](#), para. 19. *See also* paras 20-21.

¹⁰⁰ [Appeal Brief](#), para. 22; [Defence Response to OPCV and Registry Observations](#), para. 12. *See also* [Appeal Brief](#), paras 31-33 referring to academic commentaries that rephrase the content of rule 89(1) of the Rules.

¹⁰¹ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Public Redacted Version of Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016](#), 31 July 2017, ICC-02/11-01/15-915-Red (OA9) (hereinafter: “*Gbagbo/Blé Goudé* OA9 Judgment”), para. 56.

¹⁰² *Situation in Darfur, Sudan*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007](#), 2 February 2009, ICC-02/05-177 (OA OA2 OA3), para. 46.

¹⁰³ [Ntaganda Trial Decision on Victim Participation](#), para. 36. *See also* Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011](#), 9 February 2012, ICC-01/05-01/08-2012-Red, para. 100: “[u]nlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court. They are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to Rule 89 of the Rules”.

¹⁰⁴ [Defence Response to OPCV and Registry Observations](#), para. 6. *See also* para. 8.

¹⁰⁵ [Defence Response to OPCV and Registry Observations](#), para. 27. *See also* paras 25-30, 51-53.

defence to gather information that may be important for the preparation of its case.¹⁰⁶ Instead, the Statute and the Rules primarily establish for that purpose disclosure obligations on the Prosecutor,¹⁰⁷ which remain unaffected by rule 89(1) of the Rules.

52. Indeed, the Appeals Chamber has noted that:

the fact that victims' applications are provided to the defence by the Registry under rule 89 (1) of the Rules does not mean that they cannot be the subject of separate disclosure obligations of the Prosecutor once they are in her possession or control [...]. Depending on the circumstances, and in particular if the Prosecutor decides to call the victims in question as witnesses (so-called "dual status" victims), [the Prosecutor] may determine that the applications in question are disclosable under rule 77 of the Rules, as being material to the preparation of the defence.¹⁰⁸

53. The Appeals Chamber also finds that, contrary to the suggestion of the Defence,¹⁰⁹ the Pre-Trial Chamber was correct in finding that "the parties' right to reply to victim applications set out in Rule 89(1) of the Rules is not absolute" as it is "[s]ubject to the provisions of the Statute", including "the Court's obligation under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims".¹¹⁰ From the wording of rule 89(1) of the Rules, it is clear that the right of the parties to be provided with copies of victims' applications is not absolute and exceptions are explicitly provided for. Notably, rule 89(1) of the Rules states that the transmission of victims' applications to the parties is subject to article 68(1) of the Statute, as well as to other relevant considerations stemming from the statutory framework, as will be elaborated below.

54. Article 68 of the Statute (regulating "Protection of the victims and witnesses and their participation in the proceedings") provides in relevant part:

¹⁰⁶ See e.g. Pre-Trial Chamber II, *Situation in Uganda*, [Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 10 August 2007, ICC-02/04-101, para. 13: "the purpose of a decision under rule 89 of the Rules is not [...] to make a final determination of the nature of the crimes which the events described by the applicant may constitute, or to analyse whether the constituent elements of each such crime are effectively present: both these analyses pertain to the determination of the guilt of the accused, rather than to the assessment of the status of victims whose personal interests are affected within the meaning of article 68, paragraph 3, of the Statute".

¹⁰⁷ See, *inter alia*, article 67(2) of the [Statute](#); rules 76 and 77 of the [Rules](#).

¹⁰⁸ [Gbagbo/Blé Goudé OA9 Judgment](#), para. 56.

¹⁰⁹ [Defence Response to OPCV and Registry Observations](#), para. 11: "[the Registry] 'always' transmits a copy of an application for participation, with no exceptions".

¹¹⁰ [Impugned Decision](#), para. 33.

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where 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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

55. The Appeals Chamber notes the Defence's submissions that article 68(1) of the Statute does not grant chambers the possibility of preventing the parties from access "to all victims' applications [...] as a matter of policy" and "cannot be used as the basis for deciding, across the board and in generic terms, to deprive the defence of rights expressly laid down" in the Rules.¹¹¹ For the reasons that follow, the Appeals Chamber considers this argument to be misguided.

56. As previously found by Trial Chamber V, the Appeals Chamber considers that rule 89 of the Rules must be applied in a way that minimises the risk to the safety, physical and psychological well-being, dignity and privacy of the victims in accordance with article 68(1) of the Statute.¹¹² This is also reflected in the Registry's duty under regulation 99(1) of the Regulations of the Registry to "review the application and assess whether the disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety and security of the victim concerned or any third person", as well as its obligation under regulation 99(3) to "inform the Chamber of the results of the assessment and [...] make

¹¹¹ [Appeal Brief](#), paras 35-36. See also [Defence Response to OPCV and Registry Observations](#), paras 20, 43.

¹¹² Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on victims' representation and participation](#), 3 October 2012, ICC-01/09-01/11-460, para. 30.

recommendations regarding the disclosure of all or part of the information provided by the victim”.

57. The Appeals Chamber notes in this regard the Registry’s submission that

It is on the Registry to make case-specific assessment of the victims’ exposure to security risks in regards to article 68(1) of the Statute and report them to the Chamber already at the earliest stages of judicial proceedings. This may directly impact the Chamber’s determination of the Registry’s transmission obligations to the Parties under rule 89(1) of the Rules.¹¹³

58. The Registry also recalls that pursuant to article 43(6) of the Statute, “the Victims and Witnesses Unit provides active protection only for those witnesses ‘that appear before the Court or who are at risk because of testimony given by a witness (e.g. immediate family members)’” and therefore “[f]or the vast majority of victims, the only guarantee of safety and security in their interactions with the ICC is the Registry’s responsible handling of their (personal) information”.¹¹⁴

59. One way for the Court to comply with the requirement of transmission under rule 89(1) of the Rules while observing its duty to protect victims under article 68(1) of the Statute, would be for the Registry to transmit the applications to the parties in redacted form, after having carried out an individual assessment of each victim application.

60. However, as correctly noted by Trial Chamber V, “[i]n cases involving crimes that allegedly caused harm to a large number of victims, the process of assessing their applications is time consuming [...] Such delay would compromise the presentation of [the victims’] views and concerns as set out in Article 68(3) of the Statute.”¹¹⁵ In this regard, the Appeals Chamber concurs with the holding of Trial Chamber V about the importance of not subjecting victims “to an unnecessarily complicated or protracted

¹¹³ [Registry Observations](#), fn. 22. *See also* para. 23: “In all the more recent cases (where Chambers adopted the ABC application process), the Registry had previously identified and reported to the Chambers clear and pressing concerns regarding victims’ safety, security and well-being due to the challenging situations on the ground”.

¹¹⁴ [Registry Observations](#), para. 23.

¹¹⁵ *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on victims' representation and participation](#), 3 October 2012, ICC-01/09-02/11-498, para. 30.

procedure and that their safety, physical and psychological well-being, dignity and privacy are duly protected”.¹¹⁶

61. Indeed, delays in the process of applying redactions and transmitting copies of victims’ applications to the parties may result in the late admission of victims to participate in the proceedings, thereby calling into question the meaningfulness of their participation and potentially affecting their well-being and dignity.¹¹⁷ This would be contrary to the participatory rights afforded to victims in article 68(3) of the Statute.

62. In light of the above, the Appeals Chamber considers that rule 89(1) of the Rules must be interpreted in such a way that it gives effect both to article 68(1) of the Statute – reflecting the duty to ensure the protection of victims – and article 68(3) of the Statute – requiring the Court to ensure meaningful victim participation in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such a holistic interpretation of rule 89(1) of the Rules is reinforced by the wording of the provision itself, which refers to the Statute as a whole and not just to its article 68(1). Depending on the circumstances, a procedure of individual assessment of applications for the purpose of applying redactions – while ensuring the protection of the victims – may undermine meaningful victim participation. The narrow interpretation of rule 89(1) of the Rules, which would allow only for one potential procedure for the transmission of victim applications,¹¹⁸ must therefore be rejected.

¹¹⁶ Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on victims’ representation and participation](#), 3 October 2012, ICC-01/09-01/11-460, para. 12.

¹¹⁷ See [Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008](#), 11 July 2008, ICC-01/04-01/06-1432 (OA10), para. 97: “To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful”. For example, in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, as of the commencement of the trial on 22 November 2010 ([Judgment pursuant to Article 74 of the Statute](#), 21 March 2016, ICC-01/05-01/08-3343 (hereinafter: “*Bemba Trial Judgment*”), para. 10), Trial Chamber III had reached final determinations only with respect to 912 of the 5,708 victims’ applications that were transmitted by the VPRS ([Bemba Trial Judgment](#), paras 20-21; [Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants](#), 22 February 2010, ICC-01/05-01/08-699; [Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings](#), 12 July 2010, ICC-01/05-01/08-807-Corr; [Decision on 772 applications by victims to participate in the proceedings](#), 18 November 2010, ICC-01/05-01/08-1017).

¹¹⁸ [Appeal Brief](#), para. 38.

63. In this regard, the Appeals Chamber considers that the Pre-Trial Chamber was correct in finding that “Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to ‘consider the applications in such a manner as to ensure the effectiveness of proceedings’”, allowing the Chamber “to organise the application and admission process *in light of the circumstances of each case*” (emphasis added).¹¹⁹ Furthermore, rule 89(4) of the Rules provides that “[w]here there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision”. Contrary to the Defence’s submission,¹²⁰ nothing in the text or spirit of rule 89(4) of the Rules and rule 89 more generally suggests that the discretion afforded by it is limited to the possibility of issuing one decision. The preparatory works of rule 89 seem to confirm that a high degree of discretion is afforded to chambers in the consideration of victims’ applications.¹²¹

64. In exercising such discretion, as correctly held by the Pre-Trial Chamber, the parties’ right to receive victims’ applications should also be considered in light of the chamber’s general obligation to ensure the fairness and expeditiousness of the proceedings.¹²² When interpreting rule 89(1) of the Rules in light of other relevant statutory provisions addressing the need for expeditious proceedings before the Court (in particular articles 61(1),¹²³ 64(2)¹²⁴ and 67(1)(c) of the Statute),¹²⁵ rule 89 must be

¹¹⁹ [Impugned Decision](#), para. 33.

¹²⁰ [Appeal Brief](#), para. 41.

¹²¹ R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 460: “[a]rticle 68, paragraph 3, establishes the principle of victims’ right to participate in the relevant proceedings. Discussions in the Paris Seminar and the Preparatory Commission confirmed that the statutory powers of the Court pursuant to that article to determine when and in what manner the victims’ right to participation should be exercised in a particular case should also be safeguarded in the Rules. This was actually part of the compromise reached at the Rome Conference and an important element for making the scheme workable in case a large number of victims is involved. Hence, this principle is a cornerstone of the rules on victims’ participation and is clearly reflected, *inter alia*, in sub-rule 1 of Rule 89”.

¹²² [Impugned Decision](#), para. 33.

¹²³ Article 61(1) of the [Statute](#) reads: “Subject to the provisions of paragraph 2, within a reasonable time after the person’s surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”.

¹²⁴ Article 64(2) of the [Statute](#) reads: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

¹²⁵ Article 67(1)(c) of the [Statute](#) reads: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay”.

understood as affording chambers discretion to resort to effective systems to process victims' applications. In this context, the efficient and expeditious processing of victims' applications gives effect to article 68(3) of the Statute by ensuring the timely and thus meaningful participation of victims as well as giving effect to the chamber's general obligation to conduct proceedings in an expeditious and efficient manner.

65. Regarding the argument advanced by the Defence that "using article 64(2) to deny the defence a right conferred on it in rule 89(1) is to deny the spirit of article 64(2)" as the proceedings would no longer be fair,¹²⁶ the Appeals Chamber considers that any decision on the most appropriate system for the processing of victims' applications must always be case-specific, based on objective information and the result of a proper balancing of all of the interests at stake. Importantly, any such decision cannot be prejudicial to the accused, or inconsistent with his or her rights.

66. It follows that while rule 89(1) of the Rules provides that copies of victims' applications should be provided to the parties for them to make observations, it also allows for exceptions. Indeed, nothing in the text or spirit of rule 89(1) of the Rules, article 68 of the Statute or the statutory framework more broadly suggests that the non-transmission of victim applications is *per se* impermissible. The only limit in this regard is that the procedure put in place by the relevant chamber when exercising its discretion under rule 89 of the Rules (transmission of redacted application forms or their non-transmission) cannot be prejudicial to, or inconsistent with, the rights of a suspect or an accused to a fair trial.

67. In assessing whether any such exception is appropriate in a given case, it is incumbent upon a chamber to strike the right balance among all of the interests at stake: the interest of the Defence in having access to victims' applications for participation and, if deemed necessary, challenging the admission of victims to participate in the proceedings against the suspect/accused; the safety, physical and psychological well-being, dignity and privacy of the victims; the need to ensure that victim participation is meaningful; as well as the expeditiousness of the proceedings.

¹²⁶ [Appeal Brief](#), para. 42. *See also* [Defence Response to OPCV and Registry Observations](#), paras 48-49.

(b) The A-B-C Approach

68. Having determined that there may be exceptions within the Court’s legal framework to the transmission of copies of victims’ applications to the parties under rule 89(1) of the Rules, the Appeals Chamber turns now to the question of whether the A-B-C Approach is one of any such exceptions. The Appeals Chamber considers that, depending on the circumstances of each case, the A-B-C Approach may be compatible with rule 89 of the Rules and the legal framework governing the Court, and therefore the Pre-Trial Chamber did not err in so finding.¹²⁷

69. The Appeals Chamber notes the Registry’s submission that in its experience “[s]ince increased security and/or safety concerns in ICC cases are in fact the rule and not the exception, the Registry considers that to facilitate its own role to protect victims in interaction with the Court, limiting the transmission of applications as per the ABC application process is appropriate and necessary”.¹²⁸

70. The Appeals Chamber also observes the Registry’s submission that the system provides “greater efficiency” in cases where “hundreds and potentially thousands of victim application forms had to be assessed” by the Registry, the parties and participants, and the relevant chambers.¹²⁹ The Registry points out in this regard that, prior to the adoption of the A-B-C Approach, extensive redactions were necessitated in order to transmit the victims’ applications as well as supporting documents to the parties which “involved a significant amount of work”.¹³⁰ As noted by Trial Chamber VI, there may be instances where “the level of redaction necessary to satisfactorily provide the protection required by Article 68(1) of the Statute may compromise the receiving party’s ability to investigate them and/or make meaningful submissions”.¹³¹ In such cases, the A-B-C Approach may indeed “be conducive to expeditious proceedings”¹³² allowing victims “to participate through their LRVs at the earliest possible juncture”¹³³ thereby enhancing the meaningfulness of their participation.

¹²⁷ [Impugned Decision](#), para. 35.

¹²⁸ [Registry Observations](#), para. 24.

¹²⁹ [Registry Observations](#), p. 14, para. 29.

¹³⁰ [Registry Observations](#), para. 29.

¹³¹ [Ntaganda Trial Decision on Victim Participation](#), para. 28.

¹³² [Registry Observations](#), para. 33.

¹³³ [Ntaganda Trial Decision on Victim Participation](#), para. 33.

71. Importantly, the Appeals Chamber highlights that the A-B-C Approach preserves judicial oversight of the entire process with the relevant chamber being involved in the screening and processing of victims' applications. Indeed, the Registry examines each application and classifies them into the three above-mentioned categories further to the relevant chamber's instructions on, *inter alia*, the content of the applications,¹³⁴ the proof of identify,¹³⁵ the proof of harm,¹³⁶ the scope of victimhood,¹³⁷ and the nexus between the commission of the crime and the harm.¹³⁸

72. Moreover, the Registry transmits to the relevant chamber all complete victims' applications in unredacted form together with any supporting documentation as well as regular reports listing the applications and classifying them.¹³⁹ It is the chamber that orders the Registry to apply any necessary redactions of the Group C applications before they are transmitted to the parties.¹⁴⁰ In addition to the assessment reports prepared by the Registry highlighting the difficulties encountered regarding the Group C applications, the chamber also receives assessment reports for the Group B applications containing the reasons for rejecting those.¹⁴¹ It is also for the chamber to carry out an individual assessment of all of the Group C applications and to ratify the Registry's assessment of the Groups A and B.¹⁴² In this regard "[w]hile VPRS's conclusions may be of assistance, it is for the Chamber to ultimately authorise or reject an applicant to participate in the proceedings".¹⁴³

¹³⁴ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), paras 30-31, incorporated by reference in the [Impugned Decision](#) at paragraph 30, fn. 63.

¹³⁵ [Impugned Decision](#), paras 28-29.

¹³⁶ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 35, incorporated by reference in the [Impugned Decision](#) at paragraph 30, fn. 63.

¹³⁷ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), paras 35-36, incorporated by reference in the [Impugned Decision](#) at paragraph 30, fn. 63.

¹³⁸ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 37, incorporated by reference in the [Impugned Decision](#) at paragraph 30, fn. 63.

¹³⁹ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41(ii) and (iii), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

¹⁴⁰ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41(iv), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

¹⁴¹ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41(v) and (vi), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

¹⁴² See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41(ix), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

¹⁴³ See [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 41(ix), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

73. Furthermore, if at any point during the proceedings, it becomes clear that certain victims have been either wrongly admitted or rejected as participants, the relevant chamber retains the power to withdraw or grant victim status. The Appeals Chamber recalls in this regard that “the nexus between the commission of the crime and the harm suffered by the applicant [is] established on a *prima facie* basis”.¹⁴⁴ Specifically, rule 91(1) of the Rules provides that “[a] Chamber may modify a previous ruling under rule 89”. As noted by Trial Chamber I,

[i]n general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.¹⁴⁵

74. Noting in this regard the Defence’s submission on the need for “sufficient judicial review to ensure that victim participation does not disturb the equilibrium of the proceedings and give rise to infringement of the right to a fair trial of the person being prosecuted”,¹⁴⁶ the Appeals Chamber considers that, when adopting the A-B-C Approach, chambers have a heightened duty to exercise judicial oversight over the assessments made by the Registry. This is particularly so given the fact that a potentially large part of the victims’ applications are not provided to the parties for them to reply thereto.

75. The Appeals Chamber further observes that, while the A-B-C Approach prevents the parties from being provided with copies of the victims’ applications pertaining to the Groups A and B, it does provide the parties access to the Group C applications (applicants for whom the Registry could not make a clear determination for any reason).¹⁴⁷ The parties also receive Registry reports that list the applications for

¹⁴⁴ [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation, para. 37](#), incorporated by reference in the [Impugned Decision](#) at paragraph 30, fn. 63.

¹⁴⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment pursuant to Article 74 of the Statute](#), 14 March 2012, ICC-01/04-01/06-2842, para. 484. *See also The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika’s request for leave to terminate his mandate as said victims’ Legal Representative](#), 7 July 2011, ICC-01/04-01/07-3064-tENG, paras 42, 48-49.

¹⁴⁶ [Appeal Brief](#), para. 15.

¹⁴⁷ *See Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation*, para. 41(iv), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

participation and classify them according to the three groups.¹⁴⁸ Therefore, since the parties will under this approach receive what are presumably the contentious victim applications – with redactions as necessary – participation of the parties in the admission process will be ensured.

76. The Appeals Chamber further recalls that regardless of the system adopted by a chamber to transmit and process victims’ applications, when victims admitted to participate in the proceedings testify before the court as witnesses called by the Prosecutor (“dual status witnesses”), the disclosure regime becomes applicable and therefore the onus would be on the Prosecutor to provide the Defence with all of the disclosable information in his possession, including victims’ applications, in redacted form, if necessary.

77. Regarding the Defence’s argument that the A-B-C Approach would not be in line with the interpretation of rule 89(1) of the Rules contained in the Chambers Practice Manual,¹⁴⁹ the Appeals Chamber notes that the A-B-C Approach is indeed not explicitly reflected in the Manual.¹⁵⁰ However, the Chambers Practice Manual “is not a binding instrument designed to have the same force and effect as the Statute, Rules of Procedure and Evidence or the Regulations of the Court” and therefore chambers “cannot be constrained in [their] application of [the relevant law] by a recommendation contained

¹⁴⁸ See [Yekatom and Ngaiisona Pre-Trial Decision on Victim Participation](#), para. 41(iii), incorporated by reference in the [Impugned Decision](#) at paragraph 35, fn. 71.

¹⁴⁹ [Appeal Brief](#), paras 23-28, 36; [Defence Response to OPCV and Registry Observations](#), paras 15-17.

¹⁵⁰ [Chambers Practice Manual](#), 2019, paras 95-96: “[...] The core elements of the system designed by Rule 89 are, in essence, the following: (i) victims who wish to participate in the proceedings must make written application to the Registrar; (ii) the application is transmitted to the Chamber; (iii) a copy of the application is provided to the Prosecutor and the Defence, who are entitled to reply within a time limit to be set by the Chamber; [...] In accordance with Rule 89(1), all complete applications falling within the scope of the concerned case that are transmitted to the Chamber, and any supporting documentation, are also provided, together with the transmission report, to the Prosecutor and the Defence, at the same time and by way of the same filing in the record of the case made for the transmission to the Chamber. (vi) Consistent with Article 68(1) of the Statute, which is also explicitly referred to in Rule 89(1) of the Rules, if there exist security concerns in case the applicant’s identity and involvement with the Court were to be known to the Defence, the Registry transmits the application, and any supporting documentation, to the Defence in redacted form, expunging the person’s identifying information. [...] (vii) The Prosecutor and the Defence, in accordance with Rule 89(1), are entitled to provide observations on the applications and request, as provided in Rule 89(2), that one or more individual applications be rejected”. Given that the current approach is not explicitly reflected in the Chambers Practice Manual, it may be useful to reconsider it with a view to reflecting this approach.

in the [...] Practice Manual”.¹⁵¹ In light of the foregoing, the Defence’s argument is dismissed *in limine*.

78. The Appeals Chamber also notes the Defence’s submission that the Registry single policy document on the Court’s legal aid system providing for the allocation of resources to the Defence to examine victims’ application for participation in the proceedings¹⁵² is incompatible with the A-B-C Approach.¹⁵³ As correctly observed by the OPCV,¹⁵⁴ the policy document on legal aid allocating resources to defence teams to review victims’ applications transmitted to them remains relevant for the Group C applications which are always provided to the Defence. In these circumstances, there is no apparent incompatibility between the above-quoted document and the A-B-C Approach. The Appeals Chamber notes that, even if there were, this would not affect the legality or otherwise of the A-B-C Approach – a policy document of the Registry cannot affect the Court’s legal framework.

79. Furthermore, the Appeals Chamber finds no merit in the Defence’s submission that rule 99(1) of the Regulations of the Registry prevents the adoption of the A-B-C Approach.¹⁵⁵ While on a plain reading this provision indeed seems to suggest that an individual security assessment of each victim application is required, as explained above, there may be instances where such an approach may prevent the meaningful participation of victims pursuant to article 68(3) of the Statute. In such cases, pursuant to the law applicable at the Court, article 68(3) of the Statute takes precedence over regulation 99(1) of the Regulations of the Registry.

80. Finally, the Appeals Chamber finds no merit in the Defence’s submission that based on the modalities of victims’ participation in cases before the Court, “a victim participation procedure under which the defence is prohibited from accessing and analysing all applications for participation causes prejudice to the defence in a manner likely to undermine the fairness of the proceedings”.¹⁵⁶ As noted above,¹⁵⁷ the system

¹⁵¹ [Gbagbo OA7 Judgment](#), para. 54.

¹⁵² [Registry’s single policy document on the Court’s legal aid system](#), Assembly of States Parties, 4 June 2013, ICC-ASP/12/3, para. 69.

¹⁵³ [Appeal Brief](#), para. 29.

¹⁵⁴ [OPCV Observations](#), para. 18.

¹⁵⁵ [Appeal Brief](#), para. 30; [Defence Response to OPCV and Registry Observations](#), paras 19-21.

¹⁵⁶ [Appeal Brief](#), para. 13.

¹⁵⁷ *See supra* “Issue on appeal”.

of admission of victims regulated, *inter alia*, in rule 89(1) of the Rules is different from the modalities of participation of those victims who are admitted to participate regulated, *inter alia*, in rules 90 to 93 of the Rules, and the present judgment therefore has no bearing on the extent of the participatory rights of those victims who will eventually be admitted to participate. Therefore, it is inapposite to submit that a system regulating the admission of victims is prejudicial to the suspect/accused by speculating on the possible modalities of participation that a chamber may decide to implement. In any event, the Appeals Chamber considers that when eventually deciding on the modalities of participation of victims, the relevant chamber must remain mindful of the fact that a large part of victims' applications were not transmitted to the parties for observations.

(c) Conclusion

81. In light of the above, the Appeals Chamber finds that the A-B-C Approach is not *per se* incompatible with rule 89(1) of the Rules and the Statute legal framework. The concrete assessment of its (in)compatibility will always depend on the specific circumstances of each case.¹⁵⁸ As mentioned above, in deciding whether the A-B-C Approach is the most appropriate system in a given case, chambers must bear in mind the specific circumstances of the case, and carefully balance the interests at stake, namely the interest of the Defence in reviewing and if deemed necessary contesting the admission of victims to participate in the proceedings against the safety, physical and psychological well-being, dignity and privacy of the victims; the need to ensure that victim participation is meaningful; and the effectiveness and expeditiousness of the proceedings.

82. In light of the above, the A-B-C Approach is in principle an adequate tool to ensure the fairness and expeditiousness of the proceedings while at the same time

¹⁵⁸ See e.g. [Al Hassan Pre-Trial Decision on Victim Participation](#), para. 60: “the procedure described above is consistent with the applicable law before the Court and [...] it was prompted by the need to strike a balance between the expeditiousness and fairness of the proceedings, *while taking into consideration the particular circumstances of the case*” (emphasis added); [Ntaganda Trial Decision on Victim Participation](#), para. 37: “the relevant provisions are flexible enough to allow for different approaches *when this is appropriate*” (emphasis added); [Yekatom and Ngaïssona Pre-Trial Decision on Victim Participation](#), para. 42: “it is prompted by the need to strike a balance between the expeditiousness and fairness of the proceedings, *while taking into consideration the particular circumstances of the case*” (emphasis added); [Al Hassan Trial Decision on Victim Participation](#), para. 21: “[h]owever, noting that the manual is not binding on the Chamber, in some instances it was considered necessary to depart from its practices for specific reasons related to the circumstances of the case”.

respecting the rights of both the suspect/accused and the victims. Nonetheless, in cases where the number of victims' applications is expected to remain low, the interest of the suspect or accused in receiving copies thereof and replying thereto may outweigh the benefits gained by the implementation of the A-B-C Approach. In such cases, the safety and well-being of the victims may be more appropriately safeguarded by implementing necessary redactions to the victims' applications prior to their transmission to the parties.

83. In light of the foregoing, and without prejudice to the correctness or otherwise of the Pre-Trial Chamber's exercise of discretion in this particular case, the Appeals Chamber finds that it did not err in law when determining that the A-B-C Approach is in compliance with the Court's legal framework.

V. APPROPRIATE RELIEF

84. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision and reject the appeal lodged by the Defence.

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

გ. ლორდიპანიძე

Judge Gocha Lordkipanidze
Presiding



Judge Piotr Hofmański



Judge Luz del Carmen Ibáñez
Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa

Dated this 14th day of September 2021

At The Hague, The Netherlands