

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/05-01/20

Date: 25 January 2021

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')

Public Document

Request for appointment, or in the alternative, reconsideration or leave to appeal

Source: Legal Representative of the Applicants

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

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**Unrepresented Applicants
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I. INTRODUCTION

1. This filing is submitted on behalf of 112 individuals ('Applicants') who are victims of crimes within the jurisdiction of the Court. Each of these individuals has suffered harm within the scope of this case and seeks to participate in it pursuant to article 68(3) of the Rome Statute and rules 85-86 and 89-93 of the Rules of Procedure and Evidence. Some Applicants have already submitted applications to the Victim Participation and Reparations Section (VPRS) of the Registry. And all 112 Applicants have signed Powers of Attorney appointing this Legal Representative to represent them in the 'conduct of [the victim's] participation in any and all legal proceedings' before this Court.¹
2. Last week, the Single Judge ruled on legal representation in the 'Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing' ('Decision'). The Decision states that 'it would be premature for the Chamber to set in motion the formal selection process for one or more common legal representatives'.² But then, in the disposition, the Judge 'appoints' the Office of Public Counsel for the Victims (OPCV) as 'common legal representative for the purposes of the confirmation proceedings'.³ In addition, while paragraph 37 states that the provisional appointment relates to representation 'during the confirmation *hearing*', the disposition makes the appointment 'for the purposes of the confirmation *proceedings*'. The scope of the Decision is therefore unclear.
3. The Applicants' primary request is based on the interpretation that the Decision does not exclude the designated Legal Representative's ability to represent the interests of over 100 victims who have appointed her in Powers of Attorney before the Court. If this is correct, it is requested that the Chamber recognise the Applicants' right to select their counsel and appoint this Legal Representative to

¹ See PTC II, Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing, 18 January 2021, [ICC-02/05-01/20](#) (Decision), para 12.

² Ibid., para 37 (emphasis added).

³ Ibid., Disposition, para 7.

represent them during the confirmation proceedings in accordance with rule 90(1) of the Court's Rules of Procedure and Evidence.

4. In the alternative, it is submitted that the Chamber should set in motion the appointment process for one or more Common Legal Representatives given that victims have selected only three counsel, that all three counsel have agreed to jointly act within a single team, and that none are seeking payment from the budget of the Court.⁴
5. To the extent that the Decision should be understood to mean that the OPCV has in fact been appointed as the Common Legal Representative for all victims to the exclusion of victims' designated counsel – despite the fact that the Decision states that it was 'premature' to make such an appointment – the Legal Representative respectfully requests that this should be reconsidered. This would be appropriate because such a ruling (a) violates the right of victims to choose their counsel and the Chamber's duty to consult victims and the Registry under article 68(3) of the Statute and rule 90 of the Rules; (b) it causes an injustice by excluding victims' chosen counsel at this crucial stage of the proceedings; and (c) the Legal Representative's agreement to act within a single team with the other two external counsel constitutes a new fact justifying a reconsidered approach. For the same reasons, the Legal Representative submits that it would be appropriate to grant leave to appeal this aspect of the Decision.
6. Given that the Decision potentially significantly curtails crucial victim rights, goes against this Chamber's previous jurisprudence, and may set a precedent for future cases, the Legal Representative respectfully requests – pursuant to articles 39(2)(b)(iii) and 57(2)(b) of the Statute, rule 7(3) of the Rules and this Chamber's previous decisions⁵ – that the full Chamber consider and determine this application.

⁴ See Rules of Procedure and Evidence, rule 91(2) (A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber *and any modification thereof given under rules 89 and 90* (emphasis added)).

⁵ PTC II, Decision on the designation of a Single Judge, 9 June 2020, [ICC-02/05-01/07-80](#), paras 8-9.

7. After waiting for 17 years, victims finally see the prospect of justice, and it is encouraging that many are seeking to exercise their right to participate in this case. But victims' right to participate is already attenuated by the fact that they must do so through a lawyer, and they should be able to count on the Court to honour their choice of legal representative for this purpose.

II. PROCEDURAL HISTORY

8. On 8 January 2021, the Legal Representative filed a submission seeking clarification and/or the right to make submissions regarding the scope of victims' participation and the modalities of legal representation.⁶ On 13 January 2021, the Defence responded to this filing, supporting the request.⁷ On 18 January, the Single Judge issued the Decision that is the subject of this filing, noting the Legal Representative's filing and that a 'valid power of attorney was submitted with the Registry'.⁸ On 22 January, the Defence filed a request for leave to appeal this Decision.⁹

III. SUBMISSIONS

9. Article 68(3) of the Statute provides that where 'the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented ... by the legal representatives of the victims where the Court considers it appropriate' and 'in accordance with the Rules of Procedure and Evidence'. Article 57(3) provides that a Pre-Trial Chamber may '[w]here necessary, provide for the protection and privacy of victims...'. And rule 86 provides that '[a] Chamber in making any direction or order ... shall take into account the needs of all victims and witnesses in accordance with article 68'. In addition, rule 93 provides that '[a] Chamber may seek the views of victims or their legal representatives participating

⁶ Legal Representative of Applicants, Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation, 8 January 2021, [ICC-02/05-01/20-251](#).

⁷ Defence, Observations en Réponse à la Requête ICC-02/05-01/20-251, 13 January 2021, [ICC-02/05-01/20-255](#).

⁸ Decision, para 12.

⁹ Defence, Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259, 22 January 2021, ICC-02/05-01/20-264.

pursuant to rules 89 to 91 on any issue ... In addition, a Chamber may seek the views of other victims, as appropriate’.

The Chamber is Requested to Recognise the Appointment of the Applicants’ Legal Representative under Rule 90(1) or to Activate the Process for Appointing One or More Common Legal Representatives under Rule 90(2)

10. A victim’s right to participate in proceedings before the Court is set out in article 68(3) and other provisions of the Statute. This Chamber has held that victims must be allowed to participate ‘meaningfully’¹⁰ and this necessarily includes the right to select the person who will represent them. Like an accused, a victim’s right to choose their lawyer is not absolute. But the circumstances under which such a choice can be overridden are strictly and narrowly defined in rule 90 of the Court’s Rules.¹¹

11. In his Decision, the Single Judge expressly found that it would be ‘premature for the Chamber to set in motion the formal selection process for one or more common legal representatives’ in accordance with rule 90.¹² But at the same time he made a ‘provisional’ appointment of the OPCV to represent victims’ ‘collective interests’.¹³ If this provisional appointment is not intended to preclude the appointment of counsel selected by victims under rule 90, the Chamber is hereby requested to recognise the Applicants’ right to continue to have their counsel represent them in these proceedings. Alternatively, the Chamber is respectfully requested to activate

¹⁰ See PTC II, *Prosecutor v. Yekatom and Ngaïssona*, Decision on the Legal Representation of Victims, 23 May 2019, [ICC-01/14-01/18-205](#) (Yekatom May 2019 Decision), para 13.

¹¹ See PTC II, *Prosecutor v. Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural right, 27 November 2015, [ICC-02/04-01/15-350](#), para 17 (‘Under rule 90(1) of the Rules, victims are generally free to choose a legal representative. It is only for reasons of practicality that the Single Judge may disturb this freedom, as regulated in paragraphs 2 and 3 of the same rule’); PTC 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, 4 June 2012, [ICC-02/11-01/11-138](#), para 35.

¹² Decision, para 37.

¹³ *Ibid.*, para 36. See also Defence, Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-259, 22 January 2021, ICC-02/05-01/20-264, para 4 (‘la Défense précise qu’elle se réjouit de la désignation d’un Représentant Légal des Victimes (« RLV ») dans la présente affaire’).

the process allowing for the appointment of designated counsel as Common Legal Representative, alongside the OPCV if appropriate, at this time.

12. Such a ruling would give effect to the Chamber's duty to respect a victim's choice of counsel. Rule 90(1) of the Rules states in explicit terms that '[a] victim shall be free to choose a legal representative'. And as this Chamber has held when considering legal representation of victims at the pre-trial stage, the Court 'places the utmost importance on the possibility for the victims to be represented, first and foremost, by a person they have chosen according to their interests and for their own reasons'.¹⁴
13. In the most recent case at the pre-trial stage before this Chamber, *Yekatom and Ngaïssona*, the Chamber directed the Registry to appoint six counsel who had been designated by the victims in their application forms, alongside the OPCV as common representative for one group.¹⁵ It did so after inquiring with these counsel whether they were 'willing to jointly act within a single team representing these victims', which counsel confirmed.¹⁶ According to the Chamber, this was 'in line with the principle contained in rule 90(1) of the Rules that '[a] victim shall be free to choose a legal representative' as read together with rule 90(2) of the Rules'.¹⁷ And the Court decided to initiate the appointment process approximately four months before the confirmation hearing, the same timeframe as is at issue here.¹⁸
14. The Single Judge does not explain why a different approach is warranted in this case. In *Yekatom* the appointment of designated counsel took place before the

¹⁴ PTC II, *Prosecutor v. Yekatom and Ngaïssona*, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 5 March 2019, [ICC-01/14-01/18-141](#) (Yekatom March 2019 Decision), para 46.

¹⁵ PTC II, *Prosecutor v. Yekatom and 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, 21 June 2019, [ICC-01/14-01/18-227-Red](#), para 36.

¹⁶ Ibid.

¹⁷ Yekatom May 2019 Decision, para 15.

¹⁸ The Chamber issued a decision requesting that the Registry submit its report on the system that should be adopted to appoint a Common Legal Representative on 5 March 2019, i.e. 3.5 months before the date set, at that time, for the confirmation hearing (18 June 2019). See Yekatom March 2019 Decision, paras 50-53.

confirmation of charges hearing and there is no reason not to do so here.¹⁹ A review of other cases also reveals many examples where the appointment process was initiated and completed in a shorter timeframe than the approximately 4 months now considered insufficient for this purpose.²⁰ And even if there were a lack of time, this would not justify appointing a legal team that has not been selected by the victims to the exclusion of one that has.

15. The Judge notes that victims' choice of counsel may be subject to 'practical, financial, and logistical constraints'.²¹ But none of these factors were the basis of the Decision.²² Moreover, as the Decision itself points out, those constraints only justify a limited exception to victims' choice of counsel, through the initiation of a rule 90(2) request that the victims *themselves* should choose one or more Common Legal Representatives to represent their views and interests.²³

16. And even if such 'constraints' could be a basis for the Decision, they are not relevant in this case. Unlike some cases that have come before the Court, this one does not involve the practical challenge of thousands of victim-applicants who have chosen to be represented by multiple counsel.²⁴ This is likely to be a result of

¹⁹ See PTC II, *Prosecutor v. Yekatom and 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, 21 June 2019, [ICC-01/14-01/18-227-Red](#), Disposition, para (d).

²⁰ See, e.g., Registry, *Prosecutor v. Gbagbo*, Proposal for the common legal representation of victims, 16 May 2012, [ICC-02/11-01/11-120](#), paras 1, 4 and p. 3 (Registry asked to start consultations 2.5 months before the start of the confirmation hearing and 'before any victim ha[d] been accepted for participation in the proceedings'); PTC III, *Prosecutor v. Bemba*, Decision on Victim Participation, 12 September 2008, [ICC-01/05-01/08-103-tENG-Corr](#), para 10 (Registry asked to start consultations 4 months before the start of the confirmation hearing).

²¹ Decision, para 35.

²² Contrast, e.g., Yekatom May 2019 Decision, para 16; PTC II, *Prosecutor v. Ntaganda*, Decision concerning the organisation of common Legal representation of Victims, 2 December 2013, [ICC-01/04-02/06-160](#), para 24.

²³ Decision, para 35.

²⁴ See, e.g., TC III, *Prosecutor v. Bemba*, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, [ICC-01/05-01/08-1005](#), paras 6-8 (pertaining to a total 1,335 victim applications); PTC II, *Prosecutor v. Ntaganda*, Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, [ICC-01/04-02/06](#), paras 23-24 (where 822 applicants had 'divergent' views regarding legal representation). Cf. PTC II, *Prosecutor v. Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015, [ICC-02/04-01/15-350](#), paras 16-18 ('there are no practical reasons that would make it necessary to trump the choice' of 249 victims for two external counsel to represent them); PTC

grave security concerns (including, in the past week, the killing of 232 civilians in Darfur),²⁵ the existence of an unprecedented global pandemic, and communications challenges in both Sudan and Chad: factors that are unlikely to change in the near future.

17. At this time there are only three counsel who have been appointed to represent victims in this case. The Legal Representative represents 112 applicants. And the other two counsel – Mr Nasser Amin, who represents 11 applicants and Ms Diana Constantinide, who represents 2 applicants – have confirmed they are willing to act jointly with her as one team.²⁶ In *Yekatom*, this Pre-Trial Chamber considered it relevant whether ‘the legal representatives already designated’ by the victims were ‘willing to act jointly as a single team representing these victims’.²⁷ And that is the case here.
18. Nor are there ‘financial’ constraints at issue. As the Legal Representative confirmed in her previous filing, she acts *pro bono*, and all three counsel have confirmed that they will not seek any funding from the Court at any stage of the case. Indeed, the Legal Representative has already spent almost half a year working *pro bono* along with a team of lawyers (including former ICC staff), Sudanese and Darfuri experts and community leaders, paid Arabic translators, and a full-time Fur interpreter.
19. Finally, in terms of ‘logistical’ constraints, the Legal Representative’s team has developed a network of trusted relationships with victims and their representatives on the ground in Darfur and Chad to overcome such challenges. The Legal Representative has also consulted over a number of months with – and acts as counsel to – NGOs with a significant on-the-ground presence like the Darfur Bar Association and iACT, a group operating in thirteen camps in Chad that host

I, *Prosecutor v. Mbarushimana*, Decision on the 138 applications for victims' participation in the proceedings, 11 August 2011, [ICC-01/04-01/10-351](#), paras 46-48 (appointing victims' choice of legal representatives as common legal representatives of 138 victims, 91 of whom had been unrepresented).

²⁵ Office of the High Commissioner for Human Rights, [Press Briefing Notes on Sudan – Darfur](#), 22 January 2021 [accessed 24 January 2021].

²⁶ Correspondence from Nasser Amin and Diana Constantinide on file with VPRS.

²⁷ *Yekatom* May 2019 Decision, para 15.

nearly 340,000 Darfuri refugees. It is therefore questionable how logistical factors would favour excluding victims' chosen counsel at this stage.²⁸

20. Indeed, as a judge of the Court has recognised, when it comes to 'establishing [a] relationship of trust and proximity', victims 'may prefer to be represented by counsel who are external to the Court'.²⁹ In this case, interviewers and clients have expressed their fear of being known to be associated with the Court, and have, for instance, requested the removal of ICC insignia from any paperwork. And in previous cases a significant number of victims have indicated that they did not wish to be represented by another lawyer or specifically one who was internal to the Court. For instance, in the *Al Hassan* case, the Pre-Trial Chamber was informed that the vast majority of victims reported that 'they would refuse to change their lawyer', and a number of others 'indicated that they only trust the legal representative that they nominated to represent them in the proceedings'.³⁰
21. The brief reasoning in the Decision does not address the role of designated counsel and merely states that it was 'premature' to proceed to a formal appointment. It also provides that 'consultations' should only take place with victims 'once they have been authorised to participate' which should be *after* the Prosecutor has filed the Document Containing the Charges (DCC).³¹ But this system goes against this Chamber's past practice, including in *Yekatom*, where both consultations and the appointment of legal representation took place before the DCC was filed.³² And

²⁸ Ibid. (noting that existing legal representatives 'have already established contact with victims').

²⁹ TC VI, *Prosecutor v. Ntaganda*, Partly dissenting opinion of Judge Ozaki, 16 June 2015, [ICC-01/04-02/06-650-Anx](#), para 12. See also ICCBA, [Written submissions to the independent expert review](#), April 2020, pp. 42-44 [accessed 22 January 2021].

³⁰ See Registry, *Prosecutor v. Al Hassan*, Annex I to the Registry's Second Report on Legal Representation of Victims, 19 December 2018, ICC-01/12-01/18-209-Conf-Exp-AnxI, [ICC-01/12-01/18-209-AnxI-Red](#), para 17. The Chamber subsequently determined that the victims' three chosen external counsel should form one Common Legal Representative team. PTC I, *Prosecutor v. Al Hassan*, Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings, 20 March 2019, [ICC-01/12-01/18-289-Red-tENG-Corr](#), para 36-37.

³¹ Decision, paras 34 and 36.

³² The Court appointed external counsel as the Common Legal Representatives on 21 June 2019, which was approximately 2 months before the DCC was filed (19 August) and almost 3 months before the confirmation hearing (19 September) : *Yekatom* May 2019 Decision, Disposition, para (b). See also PTC II, *Prosecutor v. Yekatom and Ngaïssona*, Decision regarding the Registry's First Assessment Report on

since in other cases chambers have held that appointing designated counsel after the DCC is filed may be too *late*,³³ this creates a ‘catch 22’ whereby a victim’s right to choose is inevitably denied as it is either too early or too late for their lawyer to be appointed. Such an outcome would be particularly unfortunate in this case given that the Chamber has twice postponed the confirmation hearing and that it has a duty to notify victim-applicants of the hearing and organise it in a manner that allows for their participation.³⁴

22. The fact that the exclusion of victims’ counsel is stated to be ‘temporary’³⁵ does not change this analysis. The Court has consistently recognised how important victim participation is at the confirmation stage.³⁶ And Trial Chambers usually make the legal representation in place at the pre-trial stage permanent at trial to promote continuity. This means that, due to one temporary decision by one judge who assigned legal representation to the one counsel that *none* of the victims had chosen, the victims of heinous crimes committed in Darfur may lose their right to be represented by their counsel of choice for the entire duration of the case.
23. The Legal Representative therefore respectfully requests that the Chamber give effect to victims’ choice to be represented by their Legal Representative under rule 90(1).³⁷ This can be done without modifying the terms of the Decision, which

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, 21 June 2019, [ICC-01/14-01/18-227-Red](#), Disposition, paras (c)-(d); PTC II, *Prosecutor v. Yekatom and Ngaïssona*, Public redacted version of “Document Containing the Charges” ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019, 18 September 2019, [ICC-01/14-01/18-282-AnxB1-Red](#).

³³ PTC II, *Prosecutor v. Ntaganda*, Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, [ICC-01/04-02/06](#), para 21.

³⁴ Rome Statute, article 68(3); Rules of Procedure and Evidence, rule 92(3).

³⁵ Decision, para 37.

³⁶ See.e.g., PTC I, *Prosecutor v. Abu Garda*, Decision on Victims’ Modalities of Participation at the Pre-Trial Stage of the Case, 6 October 2009, [ICC-02/05-02/09-136](#), para 5-7.

³⁷ See PTC II, *Prosecutor v. Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, 27 November 2015, [ICC-02/04-01/15-350](#), para 16 (noting with respect to external counsel who had been instructed by victims participating in the proceedings, that ‘[as] the Registry reports that it has validated the powers of attorney, there appears to the Single Judge no reason for the Registrar to further delay the acknowledgement of the appointment pursuant to rule 90(1) of the Rules and regulation 123(1) of the Regulations of the Registry, as this is an essential condition for the appointed legal representative to have standing in the present proceedings’). See also PTC I, *Prosecutor v. Al Hassan*, Decision on Principles Applicable to Victims’ Applications for

addresses the ‘collective interests’ of victims rather than the individual interests of specified victims or groups or the formal appointment of a Common Legal Representative.³⁸ Such an outcome would also be consistent with past practice where more than one legal representative has been appointed at the confirmation stage of a case.³⁹ In the alternative, the Chamber is requested to activate the appointment of one or more⁴⁰ Common Legal Representatives under the terms of rule 90(2).⁴¹

Alternatively, the Chamber is Requested to Reconsider its Decision or Grant Leave to Appeal it

24. If the Single Judge’s Decision should be understood to appoint a single Common Legal Representative, in effect making such an appointment through the ‘back door’ without regard to victims’ choice of counsel,⁴² the Chamber is respectfully requested to reconsider this aspect of the Decision or grant leave to appeal it as it

Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings, 20 March 2019, [ICC-01/12-01/18-289-Red-tENG](#), para 35.

³⁸ For instance, in this case, given that the suspect is charged with multiple acts of physical perpetration, it is anticipated that there will be a large number of dual-status victims who have a right to be represented in interviews by the Prosecutor and whose counsel requires formal standing in that process. See also note 41.

³⁹ See, e.g., Yekatom May 2019 Decision, para 16 and Disposition, para (b) and PTC II, *Prosecutor v. Yekatom and 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, 21 June 2019, [ICC-01/14-01/18-227-Red](#), Disposition, para (d) (external counsel appointed as Common Legal Representative for one group of victims and OPCV appointed as Common Legal Representative for other victims); PTC II, *Prosecutor v. Dominic Ongwen*, Decision on contested victims applications for participation, legal representation of victims and their procedural rights, 27 November 2015, [ICC-02/04-01/15](#), paras 16-17, 19 and Disposition, pp. 19-21 (OPCV appointed as Common Legal Representative of one group of victims and external counsel appointed as Legal Representatives for other victims); Registrar, *Prosecutor v. Bemba*, Désignation d’un représentant legal commun pour les victimes autorisées à participer à la procédure dans l’affaire *Le Procureur c. Jean Pierre Bemba*, 5 January 2009, [ICC-01/05-01/08](#), pp. 5-6 (External counsel appointed as Common Legal Representative for victims and OPCV as Legal Representative for other victims).

⁴⁰ See also Rules of Procedure and Evidence, rule 90(4) and Decision, para 37. It should be noted that some of the Applicants are victims of sexual and gender-based violence and article 68(1) and rule 90(4) recognise that this may lead to ‘distinct interests’ that need to be taken into account. Some Applicants in Darfur and in camps in Chad have interests and concerns that differ from those in the diaspora and may not wish to be represented counsel who are visibly linked to and part of the Court.

⁴¹ Yekatom May 2019 Decision, para 15.

⁴² See paragraph 2 above.

would clearly contravene victims' rights under Article 63 of the Statute as well as rule 90.

25. It is clear from the jurisprudence of the Court that chambers have the power to reconsider their decisions, and the Appeals Chamber has itself assessed a request for reconsideration based on whether the decision 'would cause an injustice'.⁴³ Other chambers, including one comprising a majority of this Chamber's judges, have held that they can reconsider decisions 'if a clear error of reasoning has been demonstrated' or 'if it is necessary to do so to prevent an injustice', and found that '[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment'.⁴⁴ And chambers have decided that a ruling relating to the selection of a Common Legal Representative could validly be reconsidered.⁴⁵
26. Alternatively, the Chamber is requested to grant leave to appeal the Decision under article 82(1)(d) of the Statute. Although this provision states that the right to appeal belongs to a 'party', the Court has found that the term 'should be interpreted as encompassing all those having a particular interest in the outcome of the proceedings'.⁴⁶ And judges have considered arguments raised by counsel for victims in similar circumstances.⁴⁷
27. For the reasons described below, the requirements for both reconsideration and leave to appeal are met.

⁴³ See, e.g., AC, *Prosecutor v. Ntaganda*, Decision on Mr Ntaganda's request for reconsideration of the decision on time and page extensions, 1 October 2019, [ICC-01/04-02/06-2426](#), para 6.

⁴⁴ See, e.g., TC X, *Prosecutor v. Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, [ICC-01/12-01/18-734](#), para 11. See also TC III, *Prosecutor v. Bemba*, Public redacted version of "Decision on 'Defence Request for Reconsideration of the 'Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186- Conf", 11 December 2014, [ICC-01/05-01/08-3204-Red](#), para 14 (finding that 'new and compelling reasons ... may justify reconsideration of a decision'). See also TC I, *Prosecutor v. Lubanga*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, [ICC-01/04-01/06-2705](#), paras 14-20.

⁴⁵ PTC II, *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims", 9 September 2011, [ICC-01/09-01/11](#), para 12.

⁴⁶ PTC A (Article 70), *Prosecutor v. Gicheru*, Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165', 23 December 2020, [ICC-01/09-01/20-68](#), paras 23-24.

⁴⁷ TC IV, *Prosecutor v. Banda and Jamus*, Decision on the application for leave to appeal the "Decision on common legal representation", 13 July 2012, [ICC-02/05-03/09-367](#), paras 7-8.

The Decision on Legal Representation Violates Victims' Right to Choose their Counsel, the Duty to Consult with Victims and Registry, and Causes an Injustice

The Decision violates victims' right to choose their counsel under the Statute and rule 90

28. Under article 68 and rule 90, victims have the right to choose counsel who will present their 'views and concerns' before the Court. When necessary for the purposes of 'ensuring the effectiveness of the proceedings' the Chamber may 'request the victims or particular groups of victims to choose a common legal representative or representatives' pursuant to rule 90(2).⁴⁸ But as this Chamber has emphasised when considering rule 90(2), 'the choice of a common legal representative *belongs to the victims*'.⁴⁹
29. The only justification contemplated by the Court's Rules for imposing a lawyer against victims' will is provided in rule 90(3).⁵⁰ This provision establishes that *if* the victims have been requested but '*are unable to choose* a common legal representative or representatives within a time limit that the Chamber may decide' then the Chamber may 'request the Registrar to choose one or more common legal representatives'.⁵¹ This Chamber has characterised rule 90(3) as a 'last resort'⁵² and it does not come into play unless common legal representation is needed *and* the victims have been asked to choose a common lawyer and failed to do so. This is not the case here. And even if it were, it is 'the Registrar' – not a Chamber or a Single Judge – who is empowered to make that choice on the victims' behalf.⁵³

⁴⁸ Rules of Procedure and Evidence, rule 90(2).

⁴⁹ Yekatom March 2019 Decision, para 47 (emphasis added).

⁵⁰ Other than competency requirements which are addressed elsewhere. The Legal Representative fulfils all of the requirements (i.e. the Legal Representative is admitted to the ICC list of counsel (see ICC, [List of Counsel](#) [accessed 23 January 2021]) and has extensive experience representing victims of international crimes and before international criminal courts: <https://www.doughtystreet.co.uk/barristers/amal-clooney>.

⁵¹ See also Rules of Procedure and Evidence, rule 90(4).

⁵² Yekatom March 2019 Decision, para 48.

⁵³ In addition, a victim under this scenario has 30 days to challenge this decision: Regulations of the Court, regulation 79(3).

30. It is unclear how the portion of the Decision related to legal representation can be consistent with rule 90. The Single Judge references regulation 80⁵⁴ – which allows a Chamber to ‘appoint a legal representative of victims where the interests of justice so require’ – and potentially (although not explicitly) relies on this provision for his decision instead. But regulation 80, like any other regulation, is subordinate to a victim’s rights under the Rules – including rule 90 – as well as their rights under articles 57 and 68 of the Statute.⁵⁵ The Regulations themselves make this clear by stating that they ‘shall be read subject to the Statute and the Rules’.⁵⁶ Regulation 80 cannot, therefore, override the rights of victims under article 68(3) of the Statute and rule 90 of the Rules, or the duty of the Chamber to give effect to those rights.
31. And even if regulation 80 were able to provide a basis for the Decision, the Decision does not comply with its terms. Regulation 80 states that a Chamber may only appoint ‘a legal representative’ of victims –as opposed to a ‘common legal representative’ under rule 90 – and only ‘following consultation with the Registrar’, ‘when appropriate, after hearing from the victim or victims concerned’ *and* ‘where the interests of justice so require’. These requirements are explicit and cumulative, but none has been met in the Decision.

The Decision violates rule 90 and regulation 80 as there was no consultation with victims or Registry

32. Before imposing a Common Legal Representative, a Chamber has a duty to consult victims. This is explicit in rule 90(2) which states that a Chamber may ‘request the victims’ or groups of victims to ‘choose’ one or more Common Legal Representatives if this is necessary for ‘ensuring the effectiveness of the

⁵⁴ Decision, chapeau.

⁵⁵ Rome Statute, article 52(1). See also David Donat-Cattin, ‘Article 68’, in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos, 2016), 1701.

⁵⁶ Regulations of the Court, regulation 1(1).

proceedings’.⁵⁷ Regulation 80 also contemplates ‘hearing from the victims’ when appointing ‘a legal representative’.

33. In addition, regulation 80 requires consultation with the Registry, and in other cases where the Court appointed a Common Legal Representative of victims, this followed such consultations.⁵⁸ But here the Single Judge simply states that it is ‘unlikely that it will be possible for the VPRS to conduct the necessary consultations with all the victims ... and to identify suitable common legal representatives in time for the commencement of the confirmation hearing’.⁵⁹ Substituting a consultation with a prediction violates the legal framework in place for such a landmark decision.

Excluding Victims’ Chosen Counsel is not in the Interests of Justice

34. Regulation 80 requires that any appointment of legal representatives of victims by the Court must not simply be made when ‘appropriate’ but also ‘where the interests of justice so require’.⁶⁰ Yet the Decision includes no mention of the interests of justice nor how they could ‘require’ the exclusion of victims’ chosen counsel or a refusal to activate the appointment process for common legal representation at the confirmation stage of the case. On the contrary, as explained above, the interests of justice would not support curtailing victims’ rights at this stage – and potentially for the rest of the case⁶¹ – by imposing lawyers that none of them have selected.

⁵⁷ See also Regulations of the Court, regulation 79(2).

⁵⁸ Cf. PTC I, *Prosecutor v. Blé Goudé*, Decision on victims’ participation in the pre-trial proceedings and related issues, 11 June 2014, [ICC-02/11-02/11-83](#), paras 22-25 (where alternative practice was based on fact that all 199 individuals who applied to participate in the pre-trial phase of the Blé Goudé case were already admitted to participate in the Laurent Gbagbo case, during which consultations with the Registry had taken place).

⁵⁹ Decision, para 36.

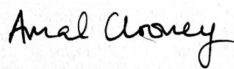
⁶⁰ Regulations of the Court, Regulation 80(1).

⁶¹ See paragraph 22 above.

IV. CONCLUSION

35. A victims' right to participate in proceedings before the Court is a key feature of the Rome Statute. But since they must participate through a lawyer, their right to choose their representative is critical, and the circumstances in which this choice can be overridden are necessarily narrowly defined. In this case, there is no justification for overriding victims' right to choose their lawyer at this crucial stage of the proceedings after they have waited 17 years for this case to come before a court.
36. The Applicants' Legal Representative therefore requests that the Chamber recognise the Applicants' right to continue to have their Legal Representative represent them during the confirmation proceedings, as provided in rule 90(1), or else activate the appointment process for one or more Common Legal Representatives under rule 90(2). Given that victims in this case have selected three counsel, that all three counsel have agreed to jointly act within a single team, and that they will all work without seeking payment from the Court, it is submitted that the appointment of one or more Common Legal Representatives can be triggered now to allow for meaningful representation during the confirmation proceedings.
37. In the alternative, to the extent that the Decision should be understood to mean that the OPCV has been appointed as the Common Legal Representative to the exclusion of victims' designated counsel, paragraphs 36-37 and the disposition of the Decision 'appoint[ing] the OPCV as common legal representative' for the purposes of the confirmation proceedings should be reconsidered. This would be appropriate because such a ruling (a) is erroneous in that it violates the right of victims to choose their counsel and the Chamber's duty to consult the victims and Registry and (b) it causes an injustice by excluding victims' chosen counsel at this crucial stage of the proceedings. In addition, the Legal Representative's agreement to jointly act within a single team with the other two external counsel constitutes a new fact justifying a reconsidered approach.

38. For the same reasons, it would be appropriate to grant leave to appeal the issue (at paragraphs 35 – 37 and in the disposition of the Decision)_of whether the Single Judge erred in excluding victims’ chosen counsel from representing them in the confirmation proceedings in violation of the provisions of article 68(3), rule 90 and associated regulations. This issue affects the fair and expeditious conduct of the proceedings since it determines legal representation for this key stage of the case, which in turn will resolve matters as fundamental as the scope of the charges and whether the case ever proceeds to trial. Resolution of the issue would materially advance proceedings as it clarifies the role of existing counsel for a substantial number of prospective victims wishing to participate in this case, and it would provide guidance for associated and future cases in which this question will inevitably arise.



Ms Amal Clooney

Legal Representative of Applicants

Dated this 25th day of January 2021