

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/05-01/20**  
Date: **3 February 2021**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public**

**Request for leave to submit *Amicus Curiae* Observations Pursuant to Rule 103 of  
the Rules of Procedure and Evidence**

**Source:** International Federation for Human Rights (FIDH)

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

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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. The International Federation for Human Rights (“FIDH”) requests Pre-Trial Chamber II (the “Chamber”) for leave to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”) in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al Rahman* (“Ali Kushayb”).
2. FIDH is an international NGO founded in 1922 made up of a federation of 192 national human rights organisations from 117 countries, with the mandate of defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.
3. One of its priorities is to fight against impunity for the most serious crimes and support the realisation of victims’ rights to truth, justice and reparations. Along with its member organisations, the Sudan Human Rights Monitor (“SHRM”) and the African Center for Justice and Peace Studies (“ACJPS”), FIDH has documented serious human rights violations in Sudan and has advocated for access to truth, justice and reparations for victims of international crimes, including sexual crimes, committed in the country and in Darfur since 2002.<sup>1</sup>
4. FIDH has maintained a permanent representation in The Hague since 2004, and along with its member organisations has submitted numerous article 15 communications to the Office of the Prosecutor on specific situations. FIDH has also advocated for a victim-centered approach in Court-wide policies, progressive provisions on victims’ rights and their effective implementation, and

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<sup>1</sup> See for example a report published in 2019 by FIDH entitled ‘Will There Be Justice for Darfur? Persisting Impunity in the Face of Political Change,’ available at: <https://www.fidh.org/en/region/Africa/sudan/darfur-17-years-on-reign-of-impunity-must-end>

the meaningful participation of victims at the International Criminal Court ("ICC").<sup>2</sup>

5. Furthermore, FIDH has advocated for victims' rights to information, participation, legal representation, protection and reparations in various fora and justice processes, including at the national, regional and international levels. FIDH has also engaged in strategic litigation, through its Litigation Action Group ("LAG"), a global network of lawyers, magistrates and legal experts, working *pro bono* and acting as the legal representatives for victims of international crimes.
6. This request is made in relation to the 'Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing.' ("Decision").<sup>3</sup> In this Decision, the Single Judge decided that it would be premature to set in motion the selection process for one or more common legal representatives and appointed the Office of Public Counsel for Victims ("OPCV") to represent the collective interests of the victims during the confirmation of charges proceedings.<sup>4</sup> Furthermore, the Single Judge did not request the Registry's observations regarding common legal representation for victims who would be eligible to participate in the proceedings.

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<sup>2</sup> See for example, 'Victims Rights before the International Criminal Court : A Guide for Victims, their Legal Representatives and NGOs,' (2007), available at : <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/Victims-Rights-Before-the-icc>; 'FIDH Report: Enhancing Victims' Rights Before the ICC- A View from Situation Countries on Victims' Rights at the International Criminal Court,' (2013), available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>; '5 Myths about Victim Participation in ICC Proceedings,' (2014), available at : <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>; 'Position paper: Judges seeking to join ICC's bench must have proven expertise on victims' rights,' (2020), available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/position-paper-judges-seeking-to-join-icc-s-bench-must-have-proven>.

<sup>3</sup> ICC-02/05-01/20-259.

<sup>4</sup> *Ibid*, para. 37.

7. Following this, the Legal Representative of the Applicants requested for appointment or alternatively reconsideration of the decision, or leave to appeal. The Defence, Prosecution and the OPCV all filed separate responses.
8. FIDH submits that its submissions on meaningful victim participation and effective legal representation for victims would be beneficial to the Chamber's deliberations regarding the Legal Representative of the Applicants' 'Request for appointment, or in the alternative, reconsideration or leave to appeal.'<sup>5</sup>

## II. PROCEDURAL HISTORY

9. On 11 January 2021, the Legal Representative of the Applicants requested the Chamber to clarify the temporal and geographical scope of the charges and to be provided with guidance in terms of the modalities for legal representation, including access to documents in the case file.<sup>6</sup> On 13 January 2021, the Defence responded to the request for clarification from the legal representative.<sup>7</sup>
10. On 18 January 2021, the Single Judge, acting on behalf of the Chamber, issued its Decision,<sup>8</sup> establishing principles for the participation of victims in the confirmation proceedings and appointing the OPCV as common legal representative ("CLR") for the purposes of said proceedings.
11. On 22 January 2021, the Defence filed its 'Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259,'<sup>9</sup> where it argued, *inter alia*, that a failure to seek the views of victims on the question of their legal representation was contrary to the founding texts of the Rome Statute. The Defence further stated that the OPCV

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<sup>5</sup> ICC-02/05-01/20-268.

<sup>6</sup> Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation, 11 January 2021, ICC-02/05-01/20-251.

<sup>7</sup> Observations en Réponse à la Requête ICC-02/05-01/20-251, ICC-02/05-01/20-255.

<sup>8</sup> ICC-02/05-01/20-259.

<sup>9</sup> ICC-02/05-01/20-264.

does not have a field presence in Darfur and therefore would be unable to conduct effective consultations with victims.<sup>10</sup>

12. On 25 January 2021, the Legal Representative of the Applicants filed her 'Request for appointment, or in the alternative, reconsideration or leave to appeal,'<sup>11</sup> where she requested that the Decision by the Single Judge be reconsidered as it violates the right of victims to choose their counsel and the Chamber's duty to consult with victims.<sup>12</sup>
13. On 28 January 2021, the Office of the Prosecutor filed its 'Prosecution Response to "Request for appointment or in the alternative , reconsideration or leave to appeal,"'<sup>13</sup> where it agreed with the Legal Representative of the Applicants that the Single Judge should reconsider his decision. Furthermore, the Prosecution requests that the Single Judge postpone the decision on the appointment of legal representatives until after the Pre-Trial Chamber receives and considers the victims' views and concerns on their legal representation.<sup>14</sup>
14. On 28 January 2021, the OPCV filed its 'Common Legal Representative Response to the "Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259,"' ("OPCV Response")<sup>15</sup> where it stated that it would avoid involvement in litigation by external counsel concerning the legal representation of victims.<sup>16</sup>

### III. APPLICABLE LAW

15. Rule 103(1) of the RPE provides that "[A]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any

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<sup>10</sup> *Ibid*, paras 20-23.

<sup>11</sup> ICC-02/05-01/20-268.

<sup>12</sup> *Ibid*, para. 37.

<sup>13</sup> ICC-02/05-01/20-271.

<sup>14</sup> *Ibid*, para. 7.

<sup>15</sup> ICC-02/05-01/20-270.

<sup>16</sup> *Ibid*, para.2.

observation on any issue the Chamber deems appropriate.”

16. The RPE foresee that unsolicited applications can be submitted by States, organisations, or individuals interested in addressing issues of consequence to the proceedings.
17. Pre-Trial Chambers, in deciding on a submission, have applied “the proper determination test” to various cases, including by the Appeals Chamber granting a leave for *amicus curiae* submissions in the case against Thomas Lubanga.<sup>17</sup> Pre-Trial Chamber II has espoused an “exceptional basis test” where the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations provide specific expertise on specific topics.<sup>18</sup>
18. More recently, the Appeals Chamber has allowed *amicus curiae* submissions as long as they were “desirable for the proper determination of the case” and in cases where the novelty of the issues raised could benefit from *amicus curiae* submissions.<sup>19</sup>
19. In the Afghanistan situation, the Appeals Chamber held that the caliber and professional standing of the individuals and organisations who applied to participate as *amici curiae* and the diversity of the issues at stake meant that they

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<sup>17</sup> Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed *Amicus Curiae* Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04- 01/06 OA 11, 22 April 2008, para. 7-8.

<sup>18</sup> PRE-TRIAL CHAMBER II, "Decision on the Application by the Redress Trust to Submit *Amicus Curiae* Observations", 18 February 2014, ICC-01/04-02/06-259, Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as *Amicus Curiae*'", 12 April 2011, ICC-01/09-01/11-49, para. 14; Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as *Amicus Curiae*'", 12 April 2011, ICC-01/09-02/11-54, para. 15; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 11 May 2011, ICC-01/09-01/11-84, para. 8; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 11 May 2011, ICC-01/09-02/11-87, para. 8.

<sup>19</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the “Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence” 13 September 2013, para.10.

could potentially contribute to the proper determination of the matters under appeal.<sup>20</sup>

20. The International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”), and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) have provisions equivalent to rule 103(1) and have permitted third party interventions using a rationale similar to the ICC.<sup>21</sup>

21. In their determinations, these tribunals considered whether *amicus curiae* submissions would assist the court in achieving “the end of justice”.<sup>22</sup>

22. The International Court of Justice (“ICJ”) permits the appearance of *amicus curiae* in both contentious and advisory proceedings.<sup>23</sup> The European Court of Human Rights (“ECtHR”) accepts *amicus curiae* submissions ‘in the interest of the proper administration of justice’ to any person concerned other than the applicant.<sup>24</sup>

23. At the SCSL, the Appeals Chamber has observed that the intervening party may have an interest in the issue where the decision ‘*will be likely to create a precedent affecting [it] in the future*’, or where a ‘*State or NGO or campaigning group may wish to*

<sup>20</sup> *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, ‘Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims,’ ICC-02/17-97, para. 33.

<sup>21</sup> ICTY Rules of Procedure and Evidence, Rule 74; ICTR Rules of Procedure and Evidence, Rule 74; SCSL Rules of Procedure and Evidence, Rule 74; ECCC Internal Rules, Rule 33.

<sup>22</sup> See for example *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an *Amicus Curiae*, 3 July 2009; *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, “Order Granting Leave for *Amicus Curiae* to Appear”, 12 February 1998.

<sup>23</sup> In contentious proceedings, Article 34(2) of the Statute of the ICJ provides that the Court “subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative’. The Rules of the Court define an international organisation as ‘an international organisation of states’, so public interest organisations do not have standing in contentious proceedings: Rule 69(4). In relation to advisory opinions, standing is less restrictive: any state or “international organization” considered likely to be able to furnish information on the question will be notified by the Registrar “that the Court will be prepared to receive . . . written statements, or to hear, at a public sitting to be held for the purpose, oral statement relating to the question”: Art 66(4) Statute of the ICJ.

<sup>24</sup> Rule 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of *amicus* briefs.)



*have the law clarified or declared or developed in a particular way*'.<sup>25</sup>

24. The participation of victims in legal proceedings is a cornerstone of the Rome Statute system and allows victims to present their 'views and concerns' where their personal interests are affected. In addition, the participation of victims in the proceedings also enables them to take 'ownership' of the process and engage with the issues before the Court in a holistic manner.
25. The Decision has a grave impact on the rights of victims at the ICC and in particular, their meaningful participation in proceedings. Therefore, FIDH's proposed submissions will enable the Pre-Trial Chamber to make an informed decision on the modalities of victim participation in this case.
26. FIDH proposes to submit *amicus curiae* submissions on three issues: (1) ensuring that victim participation is meaningful; (2) ensuring the effective legal representation of victims; and (3) the importance of victims' participation in the confirmation of charges hearings.

#### IV. SUBMISSIONS

##### *Ensuring victim participation in ICC proceedings is meaningful*

27. The victim participation framework established by the Rome Statute is a 'milestone in international criminal justice' and is 'part of a consistent pattern of evolution of international law... which recognizes victims as actors and not only passive subjects of the law, and grants them specific rights.'<sup>26</sup>
28. The Statute and RPE provide little guidance in terms of the practicalities of victim participation, leaving it to the ICC judges to decide in each case. Broadly, the

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<sup>25</sup> *Prosecutor v Kallon* 'Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *Amicus Curiae* brief and to Present Oral Arguments' SCSL-2003- 07, 1 November 2003 (SCSL) at para 4.

<sup>26</sup> Office of the Prosecutor (OTP), ICC, "Policy Paper on Victims' Participation," April 2010, <https://www.legal-tools.org/doc/3c204f/>, p. 5

established practice at the Court has allowed victims' representatives to: attend and participate in hearings; file written submissions; make opening and closing statements; call witnesses; submit and challenge evidence with the permission of the judges; gain access to confidential submissions by the parties and the evidence; and to be notified of issues or proceedings which could affect the victims.<sup>27</sup>

29. The jurisprudence of this Court has emphasized that the participation of victims must be 'meaningful' as opposed to 'purely symbolic'.<sup>28</sup>

30. The concept of meaningful participation necessarily requires that victims are not treated as an 'abstract or symbolic entity, but as individual rights-bearers with opinions' that are relayed to the Court.<sup>29</sup> Consequently, 'to avoid being purely symbolic, victim representation models must ensure that there are proper avenues for frequent communication and consultation between victims and the Court.'<sup>30</sup>

31. Indeed, meaningful victim participation depends on adequate and effective legal representation and '[O]ne of the most important elements of adequate and effective legal representation is maintaining proper communication between victims' lawyers and their clients.'<sup>31</sup>

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<sup>27</sup> Rules 91-92, and 144 of the RPE; Decision on Victims' Participation, *Lubanga*, ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008; Decision on the Modalities of Victim Participation at Trial, *Katanga and Ngudjolo*, ICC-01/04-01/07-1788, Trial Chamber II, 22 January 2010; and Fourth Decision on Victim's Participation, *Bemba*, ICC-01/05-01/08-320, Pre-Trial Chamber III, 12 December 2008.

<sup>28</sup> Decision on Victims' Participation, *Lubanga*, ICC-01/04-01/06-1119, Appeals Chamber, 22 January 2008, para. 85; Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga*, ICC-01/04-01/06-1432, Appeals Chamber, 11 July 2008, para. 97; Order on the Organisation of Common Legal Representation of Victims, *Katanga and Ngudjolo*, ICC-01/04-01/07-1328, Trial Chamber II, 22 July 2009, para. 10(a); Decision on the Modalities of Victim Participation at Trial, *Katanga and Ngudjolo*, ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, para. 57; Decision on Common Legal Representation of Victims for the Purpose of Trial, *Bemba*, ICC-01/05-01/08-1005, Trial Chamber III, 10 November 2010, para. 9(a).

<sup>29</sup> A. Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case, *Journal of International Criminal Justice*, Volume 16, Issue 3, July 2018, Pages 571–591, 580.

<sup>30</sup> *Ibid*, p. 581.

<sup>31</sup> Bianchini, Studzinsky, Sehmi & Tibori-Szabó, 'Communication Between Victims' Lawyers and Their Clients,' in Tibori-Szabó & Hirst, (2017). *Victim Participation in International Criminal Justice: Practitioners' Guide*, p.433.

32. The OPCV in their Response state as follows: ‘the Common Legal Representative recalls that she is the only one who can meaningfully represent the Victims’ interests in the present proceedings.’<sup>32</sup> However, the mere appointment of a CLR by a Chamber, whether the OPCV or external counsel does not automatically result in meaningful participation for victims, rather, consulting, listening, and building a relationship of trust with your clients is what makes victim participation meaningful.
33. Victims’ lawyers have a duty to build a relationship of trust with their clients and ensure that victims are able to understand the proceedings, present their views and concerns and partake in any relevant consultations that affect their interests. This necessarily requires that legal representatives have a field presence in the relevant situation country and are able to meet with their clients in person. Any other alternative results in ‘remote representation’ which is purely symbolic and pays lip-service to the rights guaranteed to victims under the Rome Statute of the ICC.
34. Furthermore, given that the bulk of the responsibility for representing the legal interests of the victims falls on their lawyers under the Rome Statute system, it is essential that victims are consulted on their choice of legal representative in order to avoid the symbolic participation of victims in ICC proceedings. This is even more important when a chamber decides to unilaterally change the representation of victims from one lawyer to another without first consulting the victims impacted by such a decision.
35. In addition, victims’ choice of counsel matters as it enables victims to develop the confidence that the lawyer who stands for them before the Court will represent their views, in turn building confidence in the court process itself.

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<sup>32</sup> OPCV Response para. 1.

36. Resolutions of the Assembly of States Parties (“ASP”) have also recognised the importance of dialogue with victims and have encouraged increased field presence to optimize the implementation of victims’ rights.<sup>33</sup>
37. FIDH’s understanding is that a number of potential victims are already represented by the Legal Representative of the Applicants. The Single Judge’s decision to unilaterally change their legal representation from the Legal Representative of the Applicants to the OPCV, without first consulting them on their views, is not only antithetical to the spirit of the Rome Statute and article 68(3), but also renders their participation in the proceedings as purely symbolic.
38. The Decision completely disregards any established relationship of trust between the Legal Representative of the Applicants and her clients and instead imposes upon them the OPCV. Given the ongoing Covid-19 pandemic, the security situation in Darfur, and the difficulties relating to communicating with victims in both Darfur and Chad, it is questionable how the OPCV will be able to establish a relationship of trust with victims who had previously been represented by the Legal Representative of the Applicants.
39. The Decision potentially could result in a level of distrust in the Court and its processes in victim communities who were previously represented by the Legal Representative of the Applicants, as well as other victims who were given no say in their choice of counsel.
40. Indeed, a failure to consult victims on their choice of legal representative could impact the legitimacy of the Court within the Darfurian victim community, given that the Decision, instead of empowering victims to express their views, silences them on the question of who will stand for them in Court. As expressed by ICC

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<sup>33</sup> See e.g. Resolution RC/Res.2, adopted at the Kampala Review Conference (2010), para 2.

Judge, René Blattman the rights recognised to victims under the Rome Statute are not concessions.<sup>34</sup> As rights, they must be respected, protected and fulfilled.

41. Therefore, FIDH would like to submit its observations to the Pre-Trial Chamber regarding the potential impact of the Decision and the importance of meaningful participation of victims in ICC proceedings.

*Legal representation of victims: the need to consult victims prior to the appointment of a CLR*

42. Legal representation is an essential component of victim participation at the ICC and constitutes the sole manner in which victims are able to present their views and concerns to the Court under article 68(3) of the Rome Statute.
43. The ICC's court-wide strategy on victims identifies "effective legal representation" as an element of ensuring the right of victims to fully exercise their rights of participation.<sup>35</sup>
44. Arguably, effective legal representation has two essential components: representing victims' interests genuinely before the Court and ensuring that victims meaningfully "participate" in proceedings by instructing their lawyers and communicating their views and concerns. Further, '[t]he quality of the legal representation victims receive is essential to their meaningful and effective participation in ICC proceedings.'<sup>36</sup>
45. The freedom to choose a counsel is a necessary pre-condition for the credibility and confidence in the client-lawyer relationship. Without a lawyer that is trusted

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<sup>34</sup> ICC 01/0401/06, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation of 18 January 2007. Para 13 page 59.

<sup>35</sup> Assembly of States Parties (ASP), "Court's Revised strategy in relation to victims," ICC-ASP/11/38, November 5, 2012, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-38-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf), p. 5.

<sup>36</sup> Independent Panel of Experts, "Report on Victim Participation at the ICC," July 2013, <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>, para. 12

and perceived as their real representative, victims would develop little sense of ‘ownership’ of ICC proceedings.<sup>37</sup>

46. Victims have a right under rule 90(1) of the RPE to choose a lawyer. However, the jurisprudence of the Court has illustrated that this right is not absolute. Rather, it is qualified by rule 90(2) and (3), which describe how “common legal representation” should be arranged. In previous cases the judges have asked victims to select a CLR with the assistance of the Registry.
47. The Registry has a general mandate to support victims in organizing their legal representation. Through the VPRS, the Court is able to ensure that victims are informed, respected and enabled in their choice of legal representation.
48. For example, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* the Registry undertook extensive consultations with victims on issues which included, *inter alia*, whether victims had already identified one or more legal representatives who were able to represent them before the Court and any potential conflict of interests between groups of victims.<sup>38</sup>
49. The Registry undertook similar consultations with victims in *Ruto, Kosgey and Sang* whereby it sought to establish a systematic approach to common legal representation through meaningful consultation with victims and an open transparent and objective selection process.<sup>39</sup> The Registry also laid out general criteria for the selection of CLRs under rule 90(3) of the RPE, which included: a relationship of trust with the victims; demonstrated commitment to working with

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<sup>37</sup> See ‘Enhancing Victims’ Rights Before the ICC: A View from Situation Countries on Victims’ Rights at the International Criminal Court,’ a report by FIDH, available at: [https://www.fidh.org/IMG/pdf/fidh\\_victimrights\\_621a\\_nov2013\\_ld.pdf](https://www.fidh.org/IMG/pdf/fidh_victimrights_621a_nov2013_ld.pdf)

<sup>38</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Public redacted version of “Annex I to the Registry’s Report on Legal Representation of Victims”, registered on 16 April 2019 and notified on 17 April 2019, ICC-01/14-01/18-178-Conf-Exp-AnxI.

<sup>39</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ‘Proposal for the common legal representation of victims’, ICC-01/09-01/11-243.

vulnerable persons; familiarity with the situation country; relevant litigation experience; and sufficient availability.<sup>40</sup>

50. Furthermore, the established practice of the Court demonstrates that the Registry has sought to implement the common legal representation of victims ahead of trial in order to ensure the efficient but meaningful participation on victims during trial proceedings.<sup>41</sup>

51. In the Decision, the Single Judge asserts that ‘it is unlikely that it will be possible for the VPRS to conduct the necessary consultations with all the victims, once they have been authorised to participate, and to identify suitable common legal representatives in time for the commencement of the confirmation hearing’ and argues that it would be ‘premature for the Chamber to set in motion the formal selection process for one or more common legal representatives.’<sup>42</sup>

52. However, the Single Judge fails to recognize that victims’ views on legal representation may be sought concurrently with the victim application process, as has been the Registry’s practice in the previous cases highlighted above. Indeed, the Registry has consulted victims regarding their choice of legal representation before the Chambers recognised their status as participating victims.<sup>43</sup>

53. Furthermore, it would be useful to seek the views of the Registry on whether consultations with victims on their choice of legal representation can take place in practical terms.

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<sup>40</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap*, Annex 3, ‘General criteria for the selection of common legal representatives under rule 90(3) of the Rules of Procedure and Evidence’, ICC-01/09-01/11-243-Anx3.

<sup>41</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ‘Report recommending a decision concerning the common legal representation of victims participating in the case’, ICC-02/05-03/09-134. See also ‘Report on the organization of common legal representation’, ICC-02/05-03/09-187 in the same case.

<sup>42</sup> Decision, paras. 36-37.

<sup>43</sup> See e.g. ICC-01/14-01/18-178-AnxI-Red (*Yekatom & Ngaïssona*), paras. 8 (explaining that “the Registry directly consulted with potential victims applicants [] in the context of the victim application process”); ICC-01/04-02/06-141-Red2 (*Ntaganda*), para. 3; see also ICC-01/09-01/11-243 (*Ruto, Kosgey & Sang*), para. 6 (where the Registry consulted with members of various victim communities in order to establish an understanding on the victims’ preferences on legal representation).

54. Lastly, the Single Judge states that '[I]f the OPCV concludes that there are insurmountable conflicts of interest between different victim groups, it shall inform the Chamber forthwith.'<sup>44</sup> However, it is unclear how the OPCV will inform the Chamber of any potential conflicts of interest given that it has no field presence in Sudan or Chad, and nor will it be likely for missions with the purpose of consulting victims to take place in the current context of the Covid-19 pandemic. Indeed, the subtleties of these types of consultations would require the OPCV to meet with all the participating victims over a period of time in order to ascertain whether there exists a conflict of interest amongst the victim communities.
55. Consequently, FIDH believes that it would be beneficial for the Chamber to receive their *amicus curiae* submissions on the importance on ensuring victims are consulted on their choice of legal representative.

*Participation in confirmation of charges proceedings*

56. Article 68(3), lays out the foundation for victim participation in ICC proceedings and states as follows '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at states 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 fair and impartial trial.'
57. In his Decision, the Single Judge appears to imply that the confirmation of charges hearings are of limited importance to victims and states that 'any appointment of common legal representatives at this stage of the proceedings is necessarily provisional, given that it is uncertain whether all charges against the suspect will be confirmed, if any.'<sup>45</sup>

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<sup>44</sup> Decision, para. 37.

<sup>45</sup> Decision, para.36.



58. Although the confirmation of charges hearings have the limited purpose of allowing the judges to determine whether or not there is sufficient evidence to establish substantial grounds to believe that the suspects committed each of the crimes charged, the jurisprudence of the Court emphasizes that victims have the right to truth, justice and reparations.<sup>46</sup> Vindicating victims' right to the truth and justice also implicates charges that accurately reflect the true nature and extent of the harm they suffered. Therefore, the confirmation of charges hearings are of acute importance to victims given the role they play in determining whether a case will proceed to trial or not.

59. During the confirmation of charges hearings, victims' legal representatives are allowed to making closing and opening statements, question witnesses with the permission of the Chamber, make submissions on issues relating to the admissibility and probative value of the evidence on which the prosecution and defence intend to rely on at the confirmation hearing and submit their observations on whether the charges against a suspect should be confirmed or not. Victims representatives, through consultations with their clients can also 'humanize' these proceedings and demonstrate the types of harm suffered by victims as a result of the crimes in question.

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<sup>46</sup> The *Prosecutor v Thomas Lubanga Dyilo*, "Separate opinion of Judge Sang-Hyun Song" appended to the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), ICC-01/04-01/06-925, 13 June 2007, para. 16: "victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms". See also The *Prosecutor v. Germain Katanga*, "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), ICC-01/04-01/07-474, 13 May 2008, stating that "the latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body" (para. 31) and acknowledged that "when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings" (para. 34). See also The *Prosecutor v Thomas Lubanga Dyilo*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 97; The *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, "Decision on victims' representation and participation" (Trial Chamber V), ICC-01/09-01/11-460, 3 October 2012, para. 10; The *Prosecutor v. Uhuru Muigai Kenyatta* "Decision on victims' representation and participation" (Trial Chamber V), ICC-01/09-02/11-498, 3 October 2012, para. 9; The *Prosecutor v. Jean Pierre Bemba* "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), ICC-01/05-01/08-1005, 10 November 2010, para. 9(a).

60. Furthermore, previous cases before this Court have illustrated that a myriad of issues vital to the personal interests of victims have arisen during the confirmation of charges hearings and the pre-trial phase of a case. For example, issues relating to challenges to the jurisdiction of the Court;<sup>47</sup> interim release;<sup>48</sup> challenges to admissibility;<sup>49</sup> the location of the confirmation of charges hearing;<sup>50</sup> and the re-characterization of certain crimes,<sup>51</sup> have all arisen at the pre-trial phase of the proceedings or during the confirmation hearings.
61. Therefore, it is arguable that the confirmation of charges proceedings are as important to victims as any other phase of proceedings given that these hearings have the greatest impact on their right to truth, justice and reparations depending on whether the charges against a suspect are confirmed or not. Indeed, it is at this time that victims are in need of suitable and qualified legal representatives they are satisfied with and who will be able to represent their interests and ensure that the case is able to proceed to trial.
62. Therefore, FIDH believes that its *amicus curiae* submissions will enable the Chamber to make an informed decision regarding modalities of victim participation in this case and on the Legal Representative of the Applicants' 'Request for appointment, or in the alternative, reconsideration or leave to appeal.'

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<sup>47</sup> Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006, *Lubanga*, ICC-01/04-01/06-349, Pre-Trial Chamber I, 24 Aug. 2006; Observations on behalf of victims on the Defence Challenge to the Jurisdiction of the Court, *Mbarushimana*, ICC-01/04-01/10-417, Pre-Trial Chamber I, 12 Sept. 2011.

<sup>48</sup> Observations of victims a/001/06, 1/002/06 and a/003/06, in respect of the application for release filed by the Defence, *Lubanga*, ICC-01/04-01/06-530, Pre-Trial Chamber I, 9 Oct. 2006.

<sup>49</sup> In the *Ruto* case, victims, through the OPCV, were invited to participate in the proceedings on the admissibility challenge by the Government of the Republic of Kenya. See, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Ruto, Kosgey & Sang*, ICC-01/09-01/11-101, Pre-Trial Chamber II, 30 May 2011.

<sup>50</sup> In the *Ruto* Case, the Chamber decided that victims should submit their observations through the OPCV prior to the appointment of the CLRs. See, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, *Ruto, Kosgey & Sang*, ICC-01/09-01/11-106, Pre-Trial Chamber II, 3 June 2011.

<sup>51</sup> Issues relating to Regulation 55 arose in *The Prosecutor v. Abdallah Banda Abakaer Nourain*, *The Prosecutor v. Uhuru Muigai Kenyatta*, *The Prosecutor v. William Samoei Ruto*, and *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*.

## V. RELIEF SOUGHT

63. FIDH respectfully requests the Pre-Trial Chamber for leave to submit *amicus curie* submissions on: (1) ensuring that victim participation is meaningful; (2) ensuring the effective legal representation of victims; and (3) the importance of victims' participation in the confirmation of charges hearings.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a cursive 'M' and a final flourish.

**Alice Mogwe, FIDH President**

**On behalf of FIDH**

Dated this 3<sup>rd</sup> day of February 2021

At Paris, France