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PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

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

Public

**Common Legal Representative Response to the “Demande d’autorisation d’appel
de la Décision ICC-02/05-01/20-259”**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The request for leave to appeal filed by the Defence on 22 January is particularly concerning to the extent the Defence attempts to speak on the victims' behalf and identify – or speculate as to – their interests and priorities independently of their appointed common legal representative. In this regard, the Common Legal Representative recalls that she is the only one who can meaningfully represent the Victims' interests in the present proceedings.

2. In light of the OPCV's long-standing policy to avoid involvement in litigation by external counsel concerning the legal representation of victims, the Common Legal Representative does not respond to those portions of the Request for Leave that pertain – more or less directly– to the appointment of the Office. Instead, she limits her response to three issues raised by the Defence, namely: (a) the Chamber's adoption of the so-called "A-B-C Approach", its impact on the Victims' interests and the lack of consultations in this respect (part of Question 2 in the Request for Leave); (b) the alleged violation of the Defence's right to receive all victims' application forms pursuant to rule 89(1) of the Rules (Question 4); and (c) the role of the VPRS in vetting intermediaries (Question 5).

3. In relation to these three issues, the Common Legal Representative contends that they do not fulfil the requirements for leave to appeal pursuant to article 82(1)(d) of the Statute because the Defence either misconstrues or simply disagrees with the Impugned Decision, failing to demonstrate the existence of an appealable issue. Moreover, said issues do not significantly affect the fair and expeditious conduct of the proceedings, nor would their immediate resolution by the Appeals Chamber materially advance the proceedings.

4. Finally, the Common Legal Representative rectifies some factually incorrect statements contained in the Request for Leave.

II. PROCEDURAL HISTORY

5. On 9 October 2020, the Registry, through the Victims Participation and Reparations Section (the “VPRS”), submitted a request to modify the standard application form for victims’ participation in the present case (the “VPRS Request”).¹ The VPRS Request was granted on November 2020 (the “Modified Application Form Decision”),² and a Defence request for leave to appeal said decision³ was rejected by the Pre-Trial Chamber II (the “Chamber”) on 12 January 2021.⁴

6. On 17 November 2020, the VPRS submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings (the “VPRS Observations”).⁵ On 19 November 2020, the Defence requested, *inter alia*, the Chamber to dismiss the VPRS Observations *in limine* and opposed the procedure for admission of victims proposed therein (the “19 November Request”).⁶ On 26 November 2020, the Prosecutor responded to the VPRS Observations (the “Prosecutor’s Response”).⁷

¹ See the “Public Redacted version of ‘Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case’, 8 October 2020, ICC-02/05-01/20-178-Conf”, [No. ICC-02/05-01/20-178-Red](#), 2 November 2020. See also the “Version publique expurgée de la Réponse à la Requête ICC-02/05-01/20-178”, [No. ICC-02/05-01/20-182-Red](#), 12 October 2020; and the “Public Redacted version of ‘Registry Observations on the Defence’s Réponse à la Requête ICC-02/05-01/20-178 (ICC-02/05-01/20-182-Conf)’, 26 October 2020, ICC-02/05-01/20-194-Conf”, [No. ICC-02/05-01/20-194-Red](#), 29 October 2020.

² See the “Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-198](#), 4 November 2020, p. 8.

³ See the “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-198”, [No. ICC-02/05-01/20-201](#), 8 November 2020.

⁴ See the “Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-254](#), 12 January 2021.

⁵ See the “Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings”, [No. ICC-02/05-01/20-203](#), 17 November 2020.

⁶ See the “Requête en vertu de la Règle 89-1 du Règlement de Procédure et de Preuve”, [No. ICC-02/05-01/20-206](#), 19 November 2020.

⁷ See the “Prosecution’s response to ‘Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings’”, [No. ICC-02/05-01/20-212](#), 26 November 2020.

7. On 18 December 2020, the Chamber postponed the commencement of the confirmation of charges hearing to 24 May 2021.⁸ A Defence request for leave to appeal said decision⁹ was opposed by the Prosecution,¹⁰ and ultimately rejected by the Chamber.¹¹

8. On 11 January 2021, a legal representative of applicants requested the Chamber to clarify the temporal and geographical scope of the charges and provide guidance in terms of the modalities for legal representation.¹² On 13 January 2021, the Defence responded to said request.¹³

9. On 18 January 2021, the Single Judge, acting on behalf of the Chamber, issued the “Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing” (the “Impugned Decision”),¹⁴ *inter alia* rejecting the 19 November Request, establishing principles for the participation of victims in the confirmation proceedings and appointing the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as common legal representative for the purposes of said proceedings (the “Common Legal Representative”).¹⁵

10. On 22 January 2021, the Defence filed a request for leave to appeal the Impugned Decision on the basis of six separate issues (the “Request for Leave”).¹⁶

⁸ See the “Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-238](#), 18 December 2020.

⁹ See the “Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-238”, [No. ICC-02/05-01/20-245](#), 27 December 2020.

¹⁰ See the “Prosecution’s Response to ‘Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-238’”, [No. ICC-02/05-01/20-253](#), 11 January 2021.

¹¹ See the “Decision on the request for leave to appeal the Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limit” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-266](#), 25 January 2021.

¹² See the “Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation”, [No. ICC-02/05-01/20-251](#), 11 January 2021.

¹³ See the “Observations en Réponse à la Requête ICC-02/05-01/20-251”, [No. ICC-02/05-01/20-255](#), 13 January 2021.

¹⁴ See the “Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-259](#), 18 January 2021.

¹⁵ *Idem*, p. 15.

¹⁶ See the “Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-259”, [No. ICC-02/05-01/20-264](#), 22 January 2021 (the “Request for Leave”).

III. SUBMISSIONS

A. Preliminary remarks

1. *The Defence does not represent the Victims' interests*

11. As a preliminary matter, it is “*not the Defence’s responsibility to safeguard the victims’ interests in the proceedings*”.¹⁷ The detailed regime for victims’ participation, a fundamental feature of the Court’s legal framework, entails that victims are entitled to participate in criminal proceedings in their own right, with the assistance of counsel as appropriate, and independently from the parties. The Request for Leave is thus particularly concerning to the extent it appears to set a dangerous precedent whereby the Defence would feel entitled to speak on the victims’ behalf and identify – or rather speculate as to – their interests and priorities independently of their appointed common legal representative.

12. The basic premise of the Request for Leave that the Defence may challenge any deviation from the letter or spirit of the Court’s legal texts governing the participation of victims and their representation, to the extent said deviation infringes the defendant’s right to a fair trial,¹⁸ is also misplaced. As explored in further detail *infra*, the Defence’s arguments to the effect that the specific infringements of the victims’ rights alleged in the Request for Leave prejudiced Mr Abd-Al-Rahman’s own interests are speculative, ill-founded and devoid of any substance.¹⁹

13. At the risk of stating the obvious, the Common Legal Representative must emphasise that, while the Victims’ interests and those of a defendant may be aligned in certain circumstances, they may equally – and likely more frequently – diverge.²⁰ It

¹⁷ See the Impugned Decision, *supra* note 14, para. 32.

¹⁸ See the Request for Leave, *supra* note 16, para. 2 (“*Toute déviation de la lettre et/ou de l’esprit des textes de la Cour régissant la participation des victimes et/ou leur représentation qui en constitue le média est ainsi susceptible d’être contestée par la Défense si elle estime qu’elle porte préjudice aux droits de Mr Ali Muhammad Ali Abd-Al-Rahman, notamment son droit à une procédure équitable*”).

¹⁹ See *infra*, paras. 25-28.

²⁰ See the “Observations en Réponse à la Requête ICC-02/05-01/20-251”, *supra* note 13.

is therefore particularly important that the roles of Defence counsel and victims' legal representative remain separate and clearly defined.

2. *Scope of the present Response*

14. In light of the OPCV's long-standing policy to avoid involvement in litigation by external counsel concerning the legal representation of victims, the Common Legal Representative will not respond to those portions of the Request for Leave that pertain, more or less directly, to the appointment of the Office.²¹ At the same time, she is conscious that the litigation pending before the Chamber does not have suspensive effect on said appointment, and will thus continue to represent the Victims' interests in the present proceedings unless otherwise instructed.

15. The present Response will thus be limited to three specific issues discussed in the Request for Leave (the "Three Issues") that directly affect the Victims' interests, namely:

- (a) the Chamber's adoption of the so-called "A-B-C Approach",²² its impact on the Victims' interests and the lack of consultations in this respect (part of Question 2 in the Request for Leave);²³
- (b) the alleged violation of the Defence's right to receive all victims' application forms pursuant to rule 89(1) of the Rules (Question 4);²⁴ and
- (c) the role of the VPRS in vetting intermediaries (Question 5).²⁵

²¹ Counsel notes, in this respect, that despite the Defence's use of creative terminology including exclusive ("*exclusif*") or "*unique*" legal representative of victims to describe the Common Legal Representative's role in the present proceedings (see the Request for Leave, *supra* note 16, paras. 10, 15 and 36), the Impugned Decision unequivocally appointed her "*common legal representative*" for the purposes of the confirmation proceedings, a term that has a specific, well-defined meaning within the Court's legal framework. See rule 90 of the Rules.

²² See the Request for Leave, *supra* note 16, para. 5.

²³ *Idem*, paras. 20-23.

²⁴ *Idem*, paras. 29-33.

²⁵ *Idem*, paras. 34-35.

16. For the reasons detailed *infra*, the Defence failed to demonstrate that the requirements for leave to appeal are met in respect of each of the Three Issues. The merits of the Defence's appeal arguments – or lack thereof – will be discussed only to the extent they have a bearing on the criteria set out in article 82(1)(d) of the Statute.²⁶

B. The Three Issues do not fulfil the requirements for leave to appeal under article 82(1)(d) of the Statute

1. Applicable legal framework

17. The legal requirements applicable to requests for leave to appeal under article 82(1)(d) of the Statute are well-established, and were recently summarised by the Chamber as follows:

“[F]or leave to appeal to be granted pursuant to article 82(1)(d) of the Statute, the matter at hand must constitute an appealable issue that could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and in the opinion of the Chamber, the immediate resolution of the matter by the Appeals Chamber could materially advance the proceedings. The above requirements are cumulative in nature and therefore each criterion must be met in order to obtain leave to appeal”.²⁷

18. An appealable issue must arise from the relevant decision and must be an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²⁸ In relation to each of the Three Issues, the Defence either misconstrues the record or simply disagrees with the Impugned Decision, failing to demonstrate the existence of an appealable issue genuinely arising therefrom.

²⁶ See the “Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-154](#), 21 March 2019, para. 14; and the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 9.

²⁷ See the “Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198”, *supra* note 4, para. 5 (references omitted).

²⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), 13 July 2006, [No. ICC-01/04-168](#), para. 9.

19. Further, the Three Issues do not significantly affect the fair and expeditious conduct of the proceedings, nor does the Impugned Decision infringe Mr Abd-Al-Rahman's rights more broadly. Finally, the immediate resolution of the Three Issues by the Appeals Chamber would not materially advance the proceedings, but would simply cause further delays as a result of unnecessary interlocutory appeal proceedings.²⁹

2. *The adoption of the 'A-B-C Approach', its impact on the Victims' interests and the lack of consultations in this respect (part of Question 2)*

20. According to the A-B-C Approach proposed by the Registry and adopted by the Single Judge in the Impugned Decision, the VPRS is responsible for dividing complete application forms in three categories: applicants who clearly qualify as victims of this case (Group A), applicants who clearly do not qualify as victims of this case (Group B) and applicants for whom the VPRS could not make a clear determination (Group C). All completed applications are transmitted to the Chamber, that certifies the Registry's proposed decision for Group A and B applicants, barring clear errors in the VPRS's assessment. By contrast, applications falling into Group C are transmitted to the parties with appropriate redactions and, following their observations, the Chamber rules on whether each applicant from said group meets the applicable requirements.³⁰

21. With respect to the relevant portion of Question 2, concerning the adoption of the A-B-C Approach, the Defence argues that:

“Les victimes n’ont pas [...] été consultées relativement à la mise en œuvre de l’Approche A-B-C qui affecte directement leurs intérêts personnels dans la mesure où elle prive leur participation dans la procédure de toute visibilité et de tout sens (‘meaningfulness’). La participation des victimes est ainsi effacée de la part visible et publique de la procédure et limitée pour l’essentiel – à l’exception

²⁹ See the “Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled ‘Decision on the Defence Request to provide written reasoning for two oral decisions’” (Appeals Chamber), [No. ICC-02/05-01/20-236](#), 18 December 2020, para. 12.

³⁰ See the Impugned Decision, *supra* note 14, para. 34.

des victimes du Groupe C – à des échanges confidentiels et ex parte entre le Greffe et l'Honorable Chambre Préliminaire II, à l'exclusion de la Défense. À titre de comparaison, la même Honorable Chambre Préliminaire II avait suivi une approche radicalement différente pour sa détermination sur la participation des victimes en faisant une large place à la leur consultation par le Greffe dans l'affaire Yekatom et Ngaïssona".³¹

22. The Common Legal Representative notes that – while repeatedly and instrumentally invoking the Victims' interests – the Request for Leave reflects, primarily, a fundamental disagreement by the Defence with the Single Judge's adoption of the A-B-C Approach and his rejection of the arguments set out in the 19 November Request.³² As consistently held by the Appeals Chamber, a mere disagreement with the Impugned Decision does not constitute a sufficient basis for granting leave to appeal.³³

23. The A-B-C Approach has been adopted, with minor variations, in several recent cases before the Court, including *Ntaganda*,³⁴ *Al Hassan*,³⁵ and *Yekatom & Ngaïssona*,³⁶ in

³¹ See the Request for Leave, *supra* note 16, para. 21 (references omitted).

³² *Idem*, para. 22. See also para. 29.

³³ See e.g. the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 28, para. 9; the "Decision on the 'Request for Leave to Appeal against the Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-490](#), 11 December 2013, para. 5; the "Decision on the Defence 'Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts'" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-130-tENG](#), 18 September 2018, para. 33; the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), 11 February 2013, [No. ICC-01/09-01/11-596](#), para. 6; and the "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-322](#), 4 July 2014, para. 33.

³⁴ See the "Decision on victims' participation in trial proceedings" (Trial Chamber VI), [No. ICC-01/04-02/06-449](#), 6 February 2015 (the "*Ntaganda* Participation Decision"), para. 24(iv), (vi) and (vii).

³⁵ See the "Decision Establishing the Principles Applicable to Victims' Applications for Participation" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-37-tENG](#), 24 May 2018 (the "*Al Hassan* Pre-Trial Participation Decision"), pp. 28-30; and the "Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial" (Trial Chamber X), [No. ICC-01/12-01/18-661](#), 12 March 2020 (the "*Al Hassan* Trial Participation Decision").

³⁶ See the "Decision Establishing the Principles Applicable to Victims' Applications for Participation" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-141](#), 5 March 2019 (the "*Yekatom & Ngaïssona* Participation Decision"), paras. 39-45.

each case without prior consultation of the applicants.³⁷ It should be recalled in this context that the A-B-C Approach amounts, in essence, to an internal procedure implemented by the Court to assess whether applicants fulfil the requirements for the status of victim and should thus be admitted to participate in the proceedings in a given case. The Common Legal Representative notes that the Defence's arguments as to how this approach may affect the Victims' interests are misguided.³⁸ She refers, in this respect, to the findings of other chambers of this Court, concluding that said approach is clearly in the Victims' interests "*since it enables the greatest number of victims to apply to participate*".³⁹

24. The Defence contends that this issue would "*significantly affect the fair and expeditious conduct of the proceedings*", as required by article 82(1)(d) of the Statute, on two separate grounds.

25. On the one hand, the Defence argues, the adoption of the A-B-C Approach, combined with other issues raised in the Request for Leave, would deprive both the Defence and the Chamber of "*all means to ensure that the victims who will be categorised in Groups A and B exist*".⁴⁰ This argument neglects to mention the role played by the VPRS, as a neutral entity within the Registry, in the assessment of the application forms and supporting documentation provided by applicants,⁴¹ with a view to ascertaining both that they exist and that they fulfil the applicable requirements for being granted the status of participating victims in the present case. Further, the Common Legal Representative, in accordance with her professional duties set out *inter alia* in the Code of Professional Conduct for Counsel, will be in contact with each victim

³⁷ The Defence's statement suggesting that in the *Yekatom & Ngaïssona* case, applicants were consulted on the adoption of the A-B-C Approach (see the Request for Leave, *supra* note 16, para. 21) is plainly inaccurate.

³⁸ See *infra*, paras. 25-28.

³⁹ See the *Al Hassan* Trial Participation Decision, *supra* note 35, para. 19; the *Yekatom & Ngaïssona* Participation Decision, *supra* note 36, para. 44; and the *Al Hassan* Pre-Trial Participation Decision, *supra* note 35, para. 62.

⁴⁰ See e.g. the Request for Leave, *supra* note 16, paras. 14, 32, and 38-39.

⁴¹ See e.g. the Impugned Decision, *supra* note 14, paras. 18-19, with reference to identification documentation to be provided by applicants.

admitted to participate in the proceedings providing further guarantees as to their existence – if ever this was in doubt.⁴²

26. On the other hand, the Request for Leave argues that the absence of consultation with applicants in relation to the adoption of the A-B-C Approach is prejudicial to the Defence insofar as it precluded the applicants from potentially supporting the Defence's position on this point.⁴³ According to the Defence, "*sur l'Approche A-B-C, les victimes auraient ainsi pu demander à être reconnues comme victimes dans la procédure, au lieu de rester dans l'anonymat*".⁴⁴ The Common Legal Representative submits that the Request for Leave appears to confuse, in this context, the essence of the A-B-C Approach adopted in the Impugned Decision with the separate issue of the possible anonymity of participating victims, which is not discussed in said ruling.

27. Further, the Defence's arguments appear to be based on a fundamental misunderstanding of the scope and purpose of the A-B-C Approach which, contrary to its contentions, does not lead to a form of fictitious representation of victims, nor does it reduce them to simple identifying codes.⁴⁵ The A-B-C Approach adopted in the Impugned Decision, and in several other cases before the Court, concerns exclusively the procedure for assessment of application forms with a view to the *admission* of applicants as participating victims in the proceedings,⁴⁶ it does not affect the modalities or meaningfulness of each victims' *participation* once admitted. Regardless of the procedure adopted for the admission of applicants as victims (the A-B-C Approach or otherwise), the Common Legal Representative consults with *all* victim admitted to participate and represents their interests throughout the proceedings. The use of pseudonyms or codes to refer to victims in communications with the Prosecution and

⁴² See e.g. the "Public Redacted version of 'Registry Observations on the Defence's Réponse à la Requête ICC-02/05-01/20-178 (ICC-02/05-01/20-182-Conf)', 26 October 2020, ICC-02/05-01/20-194-Conf", *supra* note 1, para. 37.

⁴³ See the Request for Leave, *supra* note 16, para. 22.

⁴⁴ *Ibid.*

⁴⁵ *Idem*, para. 32 ("*l'Approche A-B-C crée ainsi les conditions d'une représentation purement fictive des victimes réduites à de simples numéros d'identifiant et formulaires*").

⁴⁶ See the Impugned Decision, *supra* note 14, para. 30.

the Defence is intended to protect the safety, physical and psychological well-being, dignity and privacy of victims in accordance with article 68(1) of the Statute, and does not render them “*simples numéros d’identifiant*”,⁴⁷ nor impedes their full and meaningful participation in the proceedings.

28. The Request for Leave appears to imply that the A-B-C Approach precludes victims from making public their identity and/or their account of the events and from participating in proceedings in a visible and meaningful manner⁴⁸ – this is not so. Participating victims will have the option to testify, if appropriate, present views and concerns to the Chamber, and make their identity known to the Defence and the public if they so wish.⁴⁹ The adoption of the A-B-C Approach, combined with the use of necessary redactions, only means that victims are *not obliged* to do so in order to be able to participate in the proceedings.

29. Finally, the Defence’s argument as to why the immediate resolution of this issue by the Appeals Chamber would “*materially advance*” the proceedings is limited to a formulaic reference to the Appeal Chamber’s intervention potentially purging the pre-trial stage of the proceedings of this ground of invalidity.⁵⁰ The Request for Leave provides no authorities indicating that the issue would be a cause of nullification of the confirmation proceedings or why it cannot be adequately – and more efficiently –

⁴⁷ See the Request for Leave, *supra* note 16, para. 22.

⁴⁸ *Idem*, para. 21 (“*la mise en œuvre de l’Approche A-B-C [...] prive leur participation dans la procédure de toute visibilité et de tout sens* (‘meaningfulness’)”).

⁴⁹ See e.g. the “Public redacted version of ‘Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns’ (10 February 2017, ICC-01/04-02/06-1780-Conf)” (Trial Chamber VI), [No. ICC-01/04-02/06-1780-Red](#), 15 February 2017; the “Public Redacted Version of the “Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns”, ICC-01/04-02/06-1739-Conf-Red, 23 January 2017”, [No. ICC-01/04-02/06-1739-Red2](#), 17 February 2017; the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), [No. ICC-01/05-01/08-2138](#), 22 February 2012; and the “Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber”, [No. ICC-01/05-01/08-1990-tENG](#), 6 December 2011, para. 22.

⁵⁰ See the Request for Leave, *supra* note 16, para. 23 (“*Son règlement immédiat par l’Honorable Chambre d’appel fera sensiblement progresser la procédure dans la mesure où il purgera la phase préliminaire de cette cause d’invalidation ultérieure*”).

be addressed by the Appeals Chamber as part of a subsequent appeal against a potential decision confirming the charges – or indeed rectified by the Trial Chamber, should the case proceed to trial. As recently noted by the Chamber:

*“Materially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal [...] Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, ‘will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process’”.*⁵¹

30. The Request for Leave falls well short of demonstrating that this requirement is fulfilled with respect to the alleged errors in the adoption of the A-B-C Approach.

3. *The alleged violation of the Defence’s right to receive all application forms pursuant to rule 89-1 of the Rules (Question 4)*

31. The Request for Leave admits that the Single Judge considered and rejected, within the Impugned Decision, the arguments advanced in the 19 November Request to the effect that the A-B-C Approach is irreconcilable with the spirit and letter of rule 89(1) of the Rules, the Chambers’ Practice Manual and the fairness of the proceedings.⁵² The Request for Leave appears to challenge, under Question 4, a specific element of the A-B-C Approach adopted by the Chamber in the Impugned Decision, namely the fact that the application forms in Groups A and B will not be disclosed to the Defence and the Prosecution, which will not be entitled to file observations thereon.⁵³

32. Once more, the Defence fails, in this context, to identify an appealable issue arising from the Impugned Decision.

⁵¹ See the “Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198”, *supra* note 4, para. 7.

⁵² See the Request for Leave, *supra* note 16, para. 29.

⁵³ *Idem*, paras. 30-31.

33. For instance, the Defence misconstrues the Impugned Decision and the Court's jurisprudence when it argues that the ruling deviates or derogates from the obligation to transmit all application forms to the Defence set out in rule 89(1) of the Rules:

*“La Décision dont appel propose, sans pouvoir s'appuyer sur une aucune [sic] jurisprudence, une interprétation de la Règle 89-4 du RPP qui permettrait de dévier de l'obligation de transmettre les demandes de participation à la Défense en vertu de la Règle 89-1 au nom de l'efficacité, alors que la portée de la Règle 89-4 est limitée au seul examen des demandes par les Chambres et ne saurait avoir un impact sur l'obligation de communication en vertu de la Règle 89-1 du RPP”.*⁵⁴

34. The Common Legal Representative submits that the Single Judge held, in the Impugned Decision, that rule 89(1) of the Rules, *properly interpreted*, does not entail any absolute right for the Defence to receive all application forms in a given case,⁵⁵ and no question of deviating or derogating from said obligation therefore arises. This conclusion is fully in line with the Court's jurisprudence. Indeed, since 2015, chambers of this Court have consistently adopted the A-B-C Approach, excluding the transmission of application forms falling in Groups A and B to the parties,⁵⁶ and confirmed that this procedure is fully compatible with the Court's statutory framework and the defendant's rights.⁵⁷

35. To the extent that, by ordering the non-transmission to the parties of applications falling in Group A and B, the Single Judge endorsed the approach of other Chambers and deviated from the Chambers' Practice Manual,⁵⁸ the Defence fails to identify any discernible error or abuse of discretion in doing so, given in particular the non-binding nature of said Manual. As recently noted by Trial Chamber X in its

⁵⁴ *Idem*, para. 30.

⁵⁵ See the Impugned Decision, paras. 25-26.

⁵⁶ See e.g. the *Ntaganda* Participation Decision, *supra* note 34; the *Al Hassan* Pre-Trial Participation Decision, *supra* note 35; the *Al Hassan* Trial Participation Decision, *supra* note 35; and the *Yekatom & Ngaïssona* Participation Decision, *supra* note 36.

⁵⁷ See e.g. the *Ntaganda* Participation Decision, *supra* note 34, paras. 29, 30 and 37; the *Al Hassan* Pre-Trial Participation Decision, *supra* note 35, para. 60; the *Al Hassan* Trial Participation Decision, *supra* note 35, para. 20; and the *Yekatom & Ngaïssona* Participation Decision, *supra* note 36, para. 43.

⁵⁸ See the Request for Leave, *supra* note 16, para. 30.

decision confirming the A-B-C Approach adopted by the Pre-Trial Chamber I in the *Al Hassan* case:

*“In its determinations the Chamber has strived to follow the Chambers Practice Manual, which represents the general recommendations and guidelines reflecting best practices, based on the experience and expertise of judges across divisions at the Court. However, 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. In this instance, particularly given the security situation in Mali and the challenges with respect to gathering information from applicants, the Chamber considered it appropriate to adopt the more streamlined approach”.*⁵⁹

36. While the Defence may disagree with the Single Judge’s conclusion in this respect, it fails to identify an appealable issue for the purposes of article 82(1)(d) of the Statute.

37. The Defence also argues that the non-transmission of applications falling into Groups A and B violates the defendant’s rights to the extent that the information contained therein, while not constituting evidence,⁶⁰ is nevertheless highly relevant for the preparation of the Defence:

*“L’information relative aux soumissions des victimes dans leurs demandes de participation [...], qui n’a pas valeur de preuve, est pourtant hautement pertinente pour la préparation de la Défense : à titre de simples exemples, des victimes du Groupe B pourraient avoir été jugées en dehors du champ de l’affaire parce qu’elles allèguent que les attaques visées dans les charges ont eu lieu à une différente date, en un différent lieu ou ont été perpétrées par des personnes différentes de celles visées dans les charges, ce qui constituerait une information manifestement pertinente pour la Défense dont l’Approche A-B-C la prive ; d’autres victimes du Groupe A pourraient faire un narrative totalement différent des événements visés dans les charges qu’elles ont vécus, ce qui serait aussi pertinent pour la Défense et à quoi elle doit avoir accès”.*⁶¹

38. While it is undisputed that the information set out in victims’ applications may be of interest to the Defence, the latter has simply no entitlement to receive it under

⁵⁹ See the *Al Hassan* Trial Participation Decision, *supra* note 35, para. 21.

⁶⁰ See the Impugned Decision, *supra* note 14, para. 31; and the Request for Leave, *supra* note 16, para. 31.

⁶¹ See the Request for Leave, *supra* note 16, para. 31.

the Court's legal framework. The Common Legal Representative recalls the Court's consistent jurisprudence to the effect that the defendant's fair trial rights under article 67 of the Statute do not entail an obligation for victims to disclose to the Defence any information in their possession, even where exculpatory.⁶² This applies, *a fortiori*, to the victims' application forms, which are recognised to be documents "*administrative in nature*".⁶³ Access to the victims' application forms should thus not be regarded as a substitute for – or supplement to – the Defence carrying out its own investigations with a view to building a defensive case.

39. Finally, the arguments put forward by the Defence as to why the issues raised under Question 4 could significantly affect the fair and expeditious conduct of the proceedings and their immediate resolution by the Appeals Chamber could materially advance the proceedings are virtually identical to those advanced in relation to Question 2.⁶⁴ Accordingly, the Common Legal Representative refers the Chamber to its position on the matter as articulated *supra*.⁶⁵

4. *The role of the VPRS in vetting intermediaries (Question 5)*

40. The fifth question advanced in the Request for Leave pertains to the VPRS' ability to vet intermediaries "*sur le terrain*"⁶⁶ responsible for the collection of victims' application forms. The Defence submits that the VPRS lacks both the mandate and the resources to carry out the vetting of intermediaries, and thus the Impugned Decision manifestly erred in assigning it this task.⁶⁷

⁶² See e.g. the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'" (Appeals Chamber), [No. ICC-01/04-01/07-2288 OA11](#), 16 July 2010, para. 87; the "Decision on the participation of victims in the trial proceedings" (Trial Chamber IV), [No. ICC-02/05-03/09-545](#), 20 March 2014, para. 40; and the "Decision on Defence request for provision of victims' applications", [No. ICC-01/12-01/18-1248](#), 12 January 2021, para. 11.

⁶³ See the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011" (Trial Chamber III), [No. ICC-01/05-01/08-2012-Red](#), 9 February 2012, para. 100.

⁶⁴ See the Request for Leave, *supra* note 16, paras. 32-33.

⁶⁵ See *supra*, paras. 25 and 29.

⁶⁶ See the Request for Leave, *supra* note 16, para. 34.

⁶⁷ *Ibid.*

41. The issue set out in Question 5 is not an appealable issue arising from the Impugned Decision, which merely recalls in passing that “[t]he VPRS is responsible for ensuring the appropriate vetting and training of its intermediaries”.⁶⁸ In the Common Legal Representative’s view, said statement is simply a reflection of the VPRS standard practice, and indeed part and parcel of its functions in interacting with intermediaries.⁶⁹

42. Further, and crucially, the Chamber had already referred to the VPRS’s vetting role in its earlier Modified Application Form Decision, where it noted that “[i]n regard to the risk of unprofessional intermediaries, the Single Judge notes that it is for the Registry to identify potentially untrustworthy or unsuitable actors, and that this vetting process generally takes place during training exercises and/or field activities carried out by the VPRS”.⁷⁰ The Common Legal Representative notes that, in its subsequent request for leave to appeal the Modified Application Form Decision,⁷¹ which was ultimately rejected,⁷² the Defence did not raise the VPRS’s vetting role as an issue it sought to appeal.

43. Finally, the arguments put forward by the Defence as to why the present issue could significantly affect the fair and expeditious conduct of the proceedings and its immediate resolution by the Appeals Chamber could materially advance the proceedings are virtually identical to those advanced in relation to Question 2.⁷³ Accordingly, the Common Legal Representative refers the Chamber to its position on the matter as articulated *supra*.⁷⁴

⁶⁸ See the Impugned Decision, *supra* note 14, para. 14

⁶⁹ See e.g. the *Al Hassan* Pre-Trial Participation Decision, *supra* note 35, para. 40.

⁷⁰ See the “Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation”, *supra* note 2, para. 12.

⁷¹ See the “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-198”, *supra* note 3.

⁷² See the “Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198”, *supra* note 4.

⁷³ See the Request for Leave, *supra* note 16, para. 35.

⁷⁴ See *supra*, paras. 25 and 29.

C. Rectification of factually incorrect statements contained in the Request

1. *The Common Legal Representative's ability to access victims in Sudan*

44. The Defence contends, throughout its Request for Leave, that the Common Legal Representative does not have access to the territory of Sudan, is unable to contact victims in Sudan and will thus not be in a position to efficiently and effectively fulfil her functions of legal representation with regard to the victims located on the territory of that State.⁷⁵ The only basis offered for these contentions – which are, by the Defence's own admission, entirely speculative –⁷⁶ is an email dating from over four months ago in which the "*Registry of the Court*" would have stated that it had no "*operational footprint*" [sic] in the territory of Sudan.⁷⁷ The Common Legal Representative is not familiar with this email communication, but can only remind the Defence that the OPCV, while administratively attached to the Registry, is a fully independent Office,⁷⁸ and that the Registry as such would not be privy to the details of the Office's contacts, internal organisation and work on this or other judicial matters.

45. Nor does the Defence have any knowledge – or indeed any right to be notified – of the Office's internal organisation, working methods and its work to date in the *Darfur* situation. Suffice it to note in this context that:

- (a) Counsel of the Office have extensive experience in maintaining frequent, fruitful and long-term contacts with victims even when the latter are located in remote and/or hostile locations;
- (b) the Office consistently cooperates with a variety of local partners and intermediaries and endeavours to recruit field counsel based in the situation country in each case in which its Counsel represent participating victims; and

⁷⁵ See e.g. the Request for Leave, *supra* note 16, paras. 22 and 37. The Common Legal Representative notes, for completeness, that a significant portion of the victims that may be eligible for participation in this case are likely to be located outside the territory of Sudan.

⁷⁶ *Idem*, para. 22 ("*sous réserve d'indication du contraire*").

⁷⁷ See the Request for Leave, *supra* note 16, para. 36 and footnote 45.

⁷⁸ See regulation 81(2) of the Regulations of the Court.

(c) physical presence in the situation country is, in any event, only one of many components allowing for proper consultation with victims, also considering that an important number of potential victims reside outside Sudan.

46. Finally, the Common Legal Representative recalls that, pursuant to the Code of Professional Conduct for Counsel, she is under a duty to refuse to represent a client if she is “*incapable of dealing with the matter diligently*”.⁷⁹ Accordingly, if she were to consider that she is unable to properly perform her duties as Common Legal Representative, including because of the impossibility of duly consulting her clients, she would promptly raise the matter with the Chamber.

2. *Victims’ participation and the postponement of the confirmation of charges hearing*

47. The Defence argues that the Chamber and the Registry failed to organise the participation and representation of victims in the present proceedings within a reasonable time (Question 3).⁸⁰ Without commenting on other aspects of said contention, the Common Legal Representative simply notes that the statement in the Request for Leave that these alleged failings contributed to generate a situation of *fait accompli*, leaving no other choice than to proceed with successive postponements of the opening of the confirmation of charges hearing to February 2021, then to 24 May 2021⁸¹ is plainly incorrect. The grounds on which the Chamber decided to postpone the confirmation of charges hearing are set out in detail in the relevant rulings and are entirely unrelated to the questions of victims’ participation and legal representation.⁸²

⁷⁹ See article 13(2)(b) of the ICC Code of Professional Conduct for Counsel.

⁸⁰ See the Request for Leave, *supra* note 16, paras. 24-28.

⁸¹ *Idem*, para. 27 (“La Défense soumet que cette carence de l’Honorable Chambre Préliminaire II et ce retard du Greffe ont contribué à générer une situation de fait accompli, ne donnant d’autre choix que de procéder aux reports successifs de l’ouverture de l’audience de confirmation des charges au 22 février 2021, puis au 24 mai 2021” (references omitted)).

⁸² See the “Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-196](#), 2 November 2020; and the “Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-238](#), 18 December 2020.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Chamber to dismiss the Defence Request in relation to the Three Issues.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 28th day of January 2021

At The Hague, The Netherlands