

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 22 June 2021

**THE APPEALS CHAMBER**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**Public**

**Registry Observations in the Defence Appeal against the “Decision establishing the principles applicable to victims’ applications for participation” (ICC-01/14-01/21-56)**

**Source: The Registrar**

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

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## I. Introduction

1. In accordance with the Appeals Chamber' "Decision on the filing of additional submissions in the appeal" issued on 17 June 2021 ("Decision"),<sup>1</sup> the Registry submits the following observations in the Defence appeal against the "Decision establishing the principles applicable to victims' applications for participation" ("Victim Application Decision")<sup>2</sup> issued on 16 April 2021 by the Single Judge of Pre-Trial Chamber II ("Single Judge") in the case of *The Prosecutor v. Mahamat Said Abdel Kani* ("Case").

## II. Procedural History

2. On 26 February 2021, the Registry submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings in the Case ("Registry Observations on admission process").<sup>3</sup>
3. On 16 April 2021, the Single Judge issued the Victim Application Decision, adopting an admission process whereby the Registry would only transmit to the parties those victims applications for which it could not make a clear determination ("ABC application process").<sup>4</sup>
4. On 21 May 2021, following a request by the Defence,<sup>5</sup> the Single Judge granted the latter leave to appeal on the question whether the Victim Application Decision is

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<sup>1</sup> Appeals Chamber, "Decision on the filing of additional submissions in the appeal", 17 June 2021, ICC-01/14-01/21-101.

<sup>2</sup> Pre-Trial Chamber II, "Decision establishing the principles applicable to victims' applications for participation", 16 April 2021, ICC-01/14-01/21-56.

<sup>3</sup> Registry, "Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings", 26 February 2021, ICC-01/14-01/21-25.

<sup>4</sup> See *supra*, footnote 2.

<sup>5</sup> Defence, "Demande d'autorisation d'interjeter appel de la 'Decision establishing the principles applicable to victims' applications for participation (ICC-01/14-01/21-56)'" , 26 April 2021, ICC-01/14-01/21-63.

in compliance with the statutory framework, in particular rule 89 of the Rules of the Rules of Procedure and Evidence ("Rules").<sup>6</sup>

5. On 3 June 2021, the Defence filed its document in support of the appeal ("Defence Appeal Brief").<sup>7</sup>
6. On 7 June 2021, the Office of Public Counsel for Victims ("OPCV") requested to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court ("OPCV Request").<sup>8</sup>
7. The Defence replied to the OPCV Request on 8 June 2021.<sup>9</sup>
8. On 9 June 2021, the Registry submitted a request for leave to submit observations in the appeal ("Registry Request").<sup>10</sup>
9. On 11 June 2021, the Defence responded to the Registry Request.<sup>11</sup> On the same day, the Prosecutor filed a response to the Defence Appeal Brief ("Prosecution's Response").<sup>12</sup>
10. On 17 June 2021, the Chamber issued the Decision, granting *inter alia* the Registry leave to file submissions "on the matter on appeal, [and] in particular on [the Registry's] role in the challenged system",<sup>13</sup> by 22 June 2021.<sup>14</sup>

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<sup>6</sup> Pre-Trial Chamber II, "Decision on the Defence's request for leave to appeal the 'Decision establishing the principles applicable to victims' applications for participation", 21 May 2021, ICC-01/14-01/21-79, para. 21, p. 8.

<sup>7</sup> Defence, "Mémoire d'appel de la Défense au soutien de son appel contre la 'Decision establishing the principles applicable to victims' applications for participation' (ICC-01/14-01/21-56) du Juge Unique rendue le 16 avril 2021", 3 June 2021, ICC-01/14-01/21-88..

<sup>8</sup> OPCV, "Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", 7 June 2021, ICC-01/14-01/21-90.

<sup>9</sup> Defence, Public redacted version of "Réponse de la Défense à la 'Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-01/14-01/21-90)", 8 June 2021, ICC-01/14-01/21-93-Red.

<sup>10</sup> Registry, "Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56", 9 June 2021, ICC-01/14-01/21-95.

<sup>11</sup> Defence, "Réponse de la Défense à la 'Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56' (ICC-01/14-01/21-95)", dated 10 June 2021 and notified on 11 June 2021, ICC-01/14-01/21-96.

<sup>12</sup> Prosecution, "Prosecution's response to Mahamat Said Abdel Kani's appeal against the 'Decision establishing the principles applicable to victims' applications for participation'", 11 June 2021, ICC-01/14-01/21-97.

### III. Submissions

11. In implementing victim participation in ICC proceedings, the Registry fulfils a dual role in the Rome Statute framework: on the one hand, through its Victims Participation and Reparations Section (“VPRS”), the Registry is tasked to facilitate victims’ access to the Court<sup>15</sup> and the exercise of their participatory rights in judicial proceedings;<sup>16</sup> on the other hand, the Registry - as a neutral service provider to the Court pursuant to article 43(1) of the Statute – aims to ensure a most effective support in keeping with the applicable legal framework.
12. The administration of the victim application system as envisaged in the Court’s legal texts falls within the remit of the Registrar.<sup>17</sup> This entails notably the collection of victims’ applications in the field and their transmission to the relevant Chamber in accordance with rule 89(1) of the Rules. Over the years, the transmission system has evolved in that Chambers entrusted the Registry increasingly with the task of a judicial pre-screening of applications as to their conformity with rule 85 of the Rules.<sup>18</sup> Chambers have always retained their role of ultimate arbiter whilst providing the Registry with a forum to improve and optimise the victim application system, not least in light of the increasing number of victims seeking to participate in ICC proceedings across situations and cases.
13. The key quadrants of Registry efforts to design the most adequate system are:
  - a. To enable access of the most representative and comprehensive pool of victims who wish to participate in ICC proceedings through a time-efficient and resource-balanced application process;

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<sup>13</sup> Decision, para. 16.

<sup>14</sup> Decision, para. 17.

<sup>15</sup> Rule 16(1)(3) of the Rules. The Victims and Witnesses Unit provides protection to witnesses and victims appearing before the ICC in keeping with article 43(6) of the Statute and rule 17 of the Rules.

<sup>16</sup> The exercise of such rights is facilitated through victims’ legal representatives as per rules 90, 91 of the Rules; the Registry, through the VPRS, assists victims in obtaining and organising said legal representation, *see* rule 16(1)(b) of the Rules.

<sup>17</sup> *See* rules 16(1)(c) and 89(1) of the Rules (“[i]n order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber”; and regulation 86 of the Regulations of the ICC.

<sup>18</sup> *See in detail infra* at paras. 28 *et seq.*

- b. To ensure that the application assessment process is meaningful and provides adequate control and assurance to the Chamber in light of the criteria of rule 85 of the Rules;
- c. To protect the applicants' and participating victims' "safety, physical and psychological well-being, dignity and privacy"<sup>19</sup> to the highest degree; and, as an all-encompassing notion;
- d. To ensure that the victim application and assessment system remains in full compliance with the applicable legal framework of the ICC, and notably the rights (and obligations) of the Prosecution and Defence ("Parties").

14. A fundamental part of the Registry's role in the victim application system is the relationship of trust between the – often highly vulnerable – victims coming forward to tell their story and the Registry. The latter ensures that victims can exercise their rights as a participant in ICC proceedings in the specifically designated role of 'participant' – as opposed to a witness – in keeping with article 68(3) of the Statute and rules 89 to 91 of the Rules. While key provisions pertaining to the handling of evidence such as article 69 of the Statute and rules 63 *et seq.* of the Rules (and notably rule 77) apply to witnesses before the ICC, they do not to victims<sup>20</sup> – unless they are also called to take the oath and provide evidence as witnesses.<sup>21</sup> This distinction is important because the fair trial rights of the Defence

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<sup>19</sup> Article 68(1) of the Statute.

<sup>20</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011", 9 February 2012, ICC-01/05-01/08-2012-Red, paras. 100 ("[...] Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court. They are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to rule 89 of the Rules. [...]") and 101; *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, "Decision on Victims' Participation in Trial Proceedings", 6 February 2015, ICC-01/04-02/06-449 ("*Ntaganda* TC Decision on Victim Participation"), para. 36.

<sup>21</sup> Where a victim also appears before the ICC in order to provide evidence, all relevant materials submitted under rule 85 of the Rules is transmitted to the Parties; the disclosure regime applicable to such 'dual status' victims is not affected by the ABC application process; see also *The Prosecutor v. Al*

are a fundamental building block of the evidence regime at the ICC, while they may be much less impacted in administrative processes such as the facilitation of victims' access to the ICC.

15. The relationship of trust between victims and the Registry chiefly encompasses victims' safety, security, privacy and well-being, pursuant to article 68(1) of the Statute, when interacting with the Court. The situations before the ICC provide multiple examples of prevailing armed conflict where victims reside in high risk areas, and exposure of their interaction with the ICC as victims of potential crimes under the ICC's jurisdiction could lead to grave consequences for them and their families.<sup>22</sup>
16. These two fundamental notions – (1) the distinct role of victims participating in ICC proceedings from the ICC evidentiary framework, and (2) the vulnerability of victims mirrored by the Registry's role to provide a safe and secure interaction – are expressed not only in article 68(1) of the Statute but also more specifically in rule 89(1) of the Rules in direct relation to the Registry's role and obligations regarding the admission of victims to participate in ICC proceedings.
17. Embedded in this legal framework and the factual crossroads between victims in the field and the courtroom in The Hague, the Registry has strived to fully comply with its dual role of (1) being an *effective* and *efficient* service provider, and (2) attempting to maximise access options for victims in the given time frame for their application while ensuring their security, safety, and understanding of the system.

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*Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, "Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial", 12 March 2020, ICC-01/12-01/18-661 ("*Al Hassan* TC Decision on Victim Participation"), para. 23 (speaking of a 'separate regime' applying to dual status witnesses vis-à-vis victims).

<sup>22</sup> It is on the Registry to make a case-specific assessment of the victims' exposure to security risks in regards to article 68(1) of the Statute and report them to the Chamber already at the earliest stages of judicial proceedings. This may directly impact the Chamber's determination of the Registry's transmission obligations to the Parties under rule 89(1) of the Rules.

18. The ABC application process is the result of a number of initiatives since 2012 to improve the victim admission system in light of the above key quadrants,<sup>23</sup> bearing in mind past practice and experience.<sup>24</sup> After some submissions on the legality of the ABC application process against rule 89(1) of the Rules, the Registry will outline in this submission key efficiency benefits of the system as per the VPRS's role in the facilitation of victim participation.

*A. An admission system which complies with the Rome Statute Framework*

19. The ABC application process with its limited transmission regime to the Parties was first applied by the Registry in the case of *The Prosecutor v. Bosco Ntaganda* ("Ntaganda case") following Trial Chamber VI's order.<sup>25</sup> Subsequently, since 2018 it has been approved by different Chambers and applied as Registry standard practice in the cases of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (at pre-trial and trial),<sup>26</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (at pre-trial and trial),<sup>27</sup> and *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"),<sup>28</sup> prior to the present Case.

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<sup>23</sup> See *supra*, para. 13.

<sup>24</sup> As recently stressed by a group of experts mandated by the Assembly of States Parties to strengthen the Court system and enhance its overall functioning: "developing an efficient and effective [admission] process from scratch for such a major innovation without any really comparable pattern to follow should take time and involve trying different possibilities along the way. [...]", Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, para. 849, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).

<sup>25</sup> *Ntaganda* TC Decision on Victim Participation, paras 29-33.

<sup>26</sup> Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37 ("*Al Hassan* PTC Decision on Victim Participation"), paras. 56-63; *Al-Hassan* TC Decision on Victim Participation, para. 17.

<sup>27</sup> Pre-Trial Chamber II, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 5 March 2019, ICC-01/14-01/18-141, ("*Yekatom/Ngaïssona* PTC Decision on Victim Participation"), paras. 42-43; Trial Chamber V, "Order Scheduling First Status Conference", 19 March 2020, ICC-01/14-01/18-459, para. 8(iv).

<sup>28</sup> See Pre-Trial Chamber II, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 18 January 2021, ICC-02/05-01/20-259, ("*Abd-Al-Rahman* PTC Decision on Victim Participation"), paras. 25-33.



20. In brief, the ABC application process includes the following features:

- The Registry receives applications and assesses these applications against rule 85 of the Rules and any other criteria set by the Chamber. Further, it categorizes the applicants into three groups:
  - o Group A: Applicants who clearly qualify as victims;
  - o Group B: Applicants who clearly do not qualify as victims;
  - o Group C: Applicants for whom the Registry could not make a clear determination for any reason;
- The Registry then transmits on a rolling basis all complete applications to the Chamber alongside a report thereon;<sup>29</sup>
- The applications that, in the Registry's view, are incomplete and/or fall clearly outside the scope of the concerned case are not transmitted to the Chamber;<sup>30</sup>
- The Registry prepares periodic reports which list the victim applications falling into each of the aforementioned three groups. These reports are notified to the Chamber, the parties and participants. They are without application-by-application reasoning or analysis;
- For Groups A and B, barring a clear and material error apparent in the Registry's assessment, the Chamber would endorse the assessments regarding these applicants;
- Only Group C applications presenting unclear or borderline issues on which the Registry is unable to make a clear determination would be transmitted to

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<sup>29</sup> In keeping with the Chambers Practice Manual, version of 29 November 2019 (at: <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>), para. 96(i) and (ii).

<sup>30</sup> In keeping with the Chambers Practice Manual, para. 96(iv).

the Parties (with the necessary redactions) for observations and the Chamber's subsequent decision pertaining to each of these applications.<sup>31</sup>

The Registry notes that the contentious issue in the present appeal is not the subdivision of applications into A, B and C as such (and as outlined in the Chambers Practice Manual)<sup>32</sup>, but the fact that Group A and B applications are not transmitted to the parties.

21. In designing the ABC application process, the Registry has been guided by the Chambers' consistent jurisprudence underlining the need to balance effective and meaningful victim participation with aspects of "fairness or expeditiousness of the proceedings or the rights of the accused".<sup>33</sup> The Registry notes that the *Ntaganda* and subsequent Chambers held that "the [ABC application process] achieves the necessary balance in a manner fully consistent with the statutory framework and appropriate to the specific circumstances of th[e] case".<sup>34</sup> To illustrate this, the *Ntaganda* Trial Chamber made a fundamental finding based on the wording of rule 89(1) of the Rules, namely that the right of parties to reply to victim applications set out in rule 89(1) is not absolute, but subject to limitations by provisions of the Statute.<sup>35</sup> This finding has since been cited and endorsed by subsequent Chambers when deciding to adopt the ABC application process.<sup>36</sup> The Judges have held that the reference in rule 89(1) to "the provisions of the Statute, in particular article 68, paragraph 1", provides a margin of discretion to the Judges to develop appropriate procedures by which victims may engage safely with the

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<sup>31</sup> The Registry also provides a report to the Chamber and Parties that clearly highlights the issues arising from the application forms that the Registry was unable to make a clear determination on. For the latest outline of the ABC application process see *supra*, footnote 3 (Registry Observations on admission process).

<sup>32</sup> Chambers Practice Manual, para. 96(i)-(iv).

<sup>33</sup> *Ntaganda* TC Decision on Victim Participation, para. 26.

<sup>34</sup> *Id.*, para. 27; *Al Hassan* PTC Decision on Victim Participation, para. 60; *Yekatom/Ngaïssona* PTC Decision on Victim Participation, para. 42.

<sup>35</sup> *Ntaganda* TC Decision on Victim Participation, para. 29.

<sup>36</sup> *Al Hassan* PTC Decision on Victim Participation, para. 61 and *Al Hassan* TC Decision on Victim Participation, para. 20; *Yekatom/Ngaïssona* PTC Decision on Victim Participation, para. 43; *Abd-Al-Rahman* PTC Decision on Victim Participation, para. 25; most lately also see Victim Application Decision, para. 33.

ICC.<sup>37</sup> This discretion extends to deciding whether, or to what extent, victim applications should be transmitted to the parties. In addition, the *Ntaganda* Trial Chamber held that rule 89 of the Rules “contains no express requirement for individual consideration of each application by the Chamber” and that that “[r]ule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to ‘consider the applications in such a manner as to ensure the effectiveness of proceedings’;”<sup>38</sup> these findings were likewise endorsed by subsequent Chambers.<sup>39</sup>

22. It is also noteworthy that the relevant *Ntaganda* findings to the legality of the ABC application process have, in a number of proceedings, remained unopposed by the Prosecution or Defence.<sup>40</sup>
23. The Registry notes that Chambers have given due attention to the explicit reference in rule 89(1) of the Rules to victims’ safety and well-being under article 68(1) of the Statute. In all of the more recent cases (where Chambers adopted the ABC application process), the Registry had previously identified and reported to the Chambers clear and pressing concerns regarding victims’ safety, security and well-being due to the challenging situations on the ground<sup>41</sup> - including in the

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<sup>37</sup> *Ntaganda* TC Decision on Victim Participation, para. 37; *Abd-Al-Rahman* PTC Decision on Victim Participation, para. 26.

<sup>38</sup> *Ntaganda* TC Decision on Victim Participation, para. 31.

<sup>39</sup> See references *supra* at para. 21, footnote 36.

<sup>40</sup> *Al Hassan* PTC Decision on Victim Participation, para. 63, as also noted by Trial Chamber X in the same case (*Al Hassan* TC Decision on Victim Participation, at para. 19); *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, “Decision Establishing the Principles Applicable to Victims’ Applications for Participation”, ICC-01/14-01/18-141, para. 45.

<sup>41</sup> *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Registry, “Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings”, dated 9 May 2018 and notified 11 May 2018, ICC-01/12-01/18-28, para. 8; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, “Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings”, 20 February 2019, ICC-01/14-01/18-116, para. 9; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, 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”, 29 October 2020, , ICC-02/05-01/20-194-Conf, para. 39; 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”, 2 November 2020, ICC-02/05-01/20-178-Red, paras. 5, 9.

present Case.<sup>42</sup> Similar to the situation in DRC, Mali, Darfur or the *Yekatom/Ngaissona* proceedings in the CAR II situation, also in the present Case extensive redactions of any application forms going to the Parties are anticipated in order to protect the victims in accordance with article 68(1) of the Statute. Furthermore, in all cases where heightened risks for victims engaging with the ICC have to be assumed, it is important to consider that the Victims and Witnesses Unit provides active protection only for those victims “that appear before court” or who are at risk because of testimony given by a witness (e.g. immediate family members), as per article 43(6) of the Statute. For the vast majority of victims, the only guarantee of safety and security in their interactions with the ICC is the Registry’s responsible handling of their (personal) information. Decreasing the need to transmit – often heavily redacted – victim applications to the Parties translates from the Registry’s perspective into a decreased risk of victim exposure, also as the margin of inadvertent redaction mistakes is notably reduced.

24. In the Registry’s experience, the limitation of transmission of victim applications is an effective tool to safeguard victims’ safety and security. Since increased security and/or safety concerns in ICC cases are in fact the rule and not the exception, the Registry considers that to facilitate its own role to protect victims in interaction with the Court, limiting the transmission of applications as per the ABC application process is appropriate and necessary, and in the view of several Pre-Trial and Trial Chambers<sup>43</sup> consistent with the applicable legal framework.
25. As for the need of adequate judicial control of the Registry’s assessments to guarantee that the Parties’ rights are fully respected, the Registry notes that in all its assessments it remains under the constant scrutiny and ultimate control of the

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<sup>42</sup> Registry, “Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings”, 26 February 2021, ICC-01/14-01/21-25, paras. 12, 16.

<sup>43</sup> Namely Pre-Trial Chambers I and II, and Trial Chambers IV, V and X; *see supra* at para. 21, footnote 36.

relevant Chamber,<sup>44</sup> as illustrated through relevant Chambers' findings on Registry reports within the ABC application process.<sup>45</sup>

26. Since rule 89(1) of the Rules also refers to the provisions of the Statute more generally, the *Ntaganda* Trial Chamber explicitly considered factors of judicial efficiency as potentially curtailing the Registrar's duty of transmission of applications to the Parties. It noted in particular "the right of the accused to not have measures adopted which are prejudicial to or inconsistent with his/her right to be tried with undue delay, as required by Articles 67(1)(c) and 68(1) and (3) of the Statute; and [...] the Chamber's general obligation under Article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings".<sup>46</sup> This finding has also been endorsed by subsequent (Pre-)Trial Chambers.<sup>47</sup> In this regard, the Registry submits, as further developed *infra*, that specifications of the rule 89(1) of the Rules admission system as per the ABC application process have led to substantial time and resource efficiencies, thus enhancing the sustainability and meaningfulness of the victim participation system.
27. Lastly, the Registry recalls that in an application form the victim applicant provides information only for the purposes of substantiating a request to provide views and concerns in the proceedings pursuant to article 68(3) of the Statute - and not to give evidence on points of fact or law.<sup>48</sup> In the same vein, the process set out

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<sup>44</sup> See *Ntaganda* TC Decision on Victim Participation, para. 32, and referred to in subsequent decisions, *see* references in para. 21, footnote 36.

<sup>45</sup> See, e.g., for the *Yekatom/Ngaïssona* case, *infra* footnote 56. See also for the *Al Hassan* case Trial Chamber X, "Third decision on the admission of victims to participate in trial proceedings", 10 August 2020, ICC-01/12-01/18-992, "Fourth decision on the admission of victims to participate in trial proceedings", 14 December 2020, ICC-01/12-01/18-1204, "Fifth decision on the admission of victims to participate in trial proceedings", 29 January 2021, ICC-01/12-01/18, "Sixth Decision on the admission of victims to participate in trial proceedings", 12 March 2021, ICC-01/12-01/18-1364, and "Seventh decision on the admission of victims to participate in trial proceedings", 21 May 2021, ICC-01/12-01/18-1493. In these decisions, the Chambers admitted all the applications assessed as Group A by the Registry.

<sup>46</sup> *Ntaganda* TC Decision on Victim Participation, para. 29.

<sup>47</sup> See references in para. 21, footnote 36.

<sup>48</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case", 8 July 2009, ICC-01/09-01/11-169, para. 9; *Ntaganda* TC Decision on Victim Participation, para. 36; *see also previously The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, "Decision on the

in rule 89(1) of the Rules pertains to victims' options to present their views and concerns where their personal interests *as victims* are affected.<sup>49</sup> In the ICC's jurisprudence, victims' applications and their content have no bearing on the Chambers' findings relevant under article 74 of the Statute.<sup>50</sup> With different Chambers applying the ABC application process, the Registry considers that the Parties' procedural and material rights are not affected if a controlled number of victim application forms is withheld under the Chamber's general guidance and authority, and for manifest reasons of victims' safety and security.

### *B. An admission system providing greater efficiency*

#### *The system in earlier proceedings*

28. The victim admission process pursuant to rule 89(1) of the Rules that was developed in the early pre-trial and trial proceedings before the ICC required the following:

- the Registry transmits, in redacted forms for the Parties and in unredacted forms for the Judges, all applications for participation that it assessed to be complete and linked to the relevant case;
- alongside the applications, the Registry prepares and transmits to the Judges detailed individual assessments for each application for participation, including individual summaries of each claim;
- the Parties submit observations on the applications;

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confirmation of charges", 1 October 2008, ICC-01/04-01/07-717, para. 232; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011", 9 February 2012, ICC-01/05-01/08-2012-Red, paras. 100, 101.

<sup>49</sup> See *supra*, at para. 14.

<sup>50</sup> See references to jurisprudence in footnotes 20, 48; as noted *supra* at para. 14, dual status victim/witnesses' application forms are subject to disclosure to the Parties and thus fall outside of the remit of the ABC application process.

- the Judges issue individual decisions on the merits of each application, including individual summaries of each claim.<sup>51</sup>

29. With the commencement of new cases before the Court and the growing number of applicants applying for participation, the above system proved to be inefficient and resource-intensive for all involved – not just the Registry but also the Parties, participants and Chambers, as hundreds and potentially thousands of victim application forms had to be assessed by all the aforementioned offices. The system necessitated the transmission of large volumes of applications, and extensive redactions to be applied on each application and supporting documents before their transmission to the Parties.<sup>52</sup> It involved a significant amount of work particularly also for the Parties to make observations on the applications, and for Chambers that had to rule on each application transmitted in the record of the case encompassing all litigation by the Parties.

30. By way of illustration, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Registry submitted to the Trial Chamber and the Parties 5,708 individual application forms in unredacted and redacted version, respectively. Each of these applications were analysed by the Parties who were entitled to file observations on them. Similarly, in the case of *The Prosecutor v. Dominic Ongwen*, the Registry

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<sup>51</sup> See for instance *The Prosecutor vs Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5)”, 9 November 2017, ICC-01/04-01-06-1022; “Decision inviting the parties’ observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08”, 6 May 2008, ICC-01/04-01/06-1308; see also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, “Annex to the Fourth Decision on Victims’ Participation”, 15 December 2008, CC-01/05-01/08-320-Conf-Anx.

<sup>52</sup> To ensure and protect victims’ safety and security, the VPRS was obliged to apply – often heavy - redactions of every victim application form received before transmitting these applications to the Parties, in keeping with article 68(1) of the Statute and rule 89(1) of the Rules. Particularly where a legal representative of victims was not (yet) known/assigned, the VPRS would have to conduct multiple rounds of redaction verifications on each application. Finally, the frequently legitimately heavy redactions would often compromise the receiving Party’s ability to make any meaningful submissions; see *Ntaganda* TC Decision on Victim Participation, para. 28.

transmitted and applied redactions on 2,048 applications at the pre-trial stage, and 2,093 applications at the trial stage.

31. In order to address the heavy resource needs and time-related bottleneck created by such a heavy system, Chambers – with the help of the Registry – have tested different systems aiming at streamlining and simplifying the victim application process (as well as the application form), in order to ensure its meaningfulness and sustainability, and notably to allow the ICC to manage the participation of large numbers of victims within existing resources while in keeping with the legal framework and the Parties’ rights.<sup>53</sup>

### *The gain in efficiencies*

32. In an effort to more efficiently manage the workload associated with the victim admission process, Chambers have increasingly encouraged the Registry to provide its own legal assessment to the relevant Chamber of whether or not applications should be accepted, based on criteria established by Judges. The most comprehensive expression of this entrustment – under the Judiciary’s supervision – came from Trial Chamber VI in the *Ntaganda* case, which approved for the first time the ABC application process that is subject to the present appeal.
33. As also noted by subsequent Chambers adopting the ABC application process, this system has the advantage of freeing the Parties from having to scrutinize the entirety of applications submitted; instead they can focus their resources on litigating issues arising from the much smaller pool of applications deemed ‘unclear’ by the Registry.<sup>54</sup> The approach has been found to be conducive to

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<sup>53</sup> See for instance, the partly collective approach adopted by Pre-Trial Chamber I in the case of *The Prosecutor v. Laurent Gbagbo*, “Second decision on issues related to the victims’ application process”, 5 April 2012, ICC-02/11-01/11-86; the registration approach adopted by Trial Chamber V in the cases of *The Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on victims’ representation and participation”, 3 October 2012, ICC-01/09-02/11-498, and of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on victims’ representation and participation”, 3 October 2012, ICC-01/09-02/11-460; and finally the standard ABC application process first adopted by Trial Chamber VI in the *Ntaganda* TC Decision on Victim Participation, paras. 23 *et seq.*

<sup>54</sup> See, e.g. *Al Hassan* PTC Decision on Victim Participation, para. 62; *Al Hassan* TC Decision on Victim Participation, para. 19.



expeditious proceedings. Apart from being in the interests of the victims (since it enables the greatest number of victims to apply to participate), the system is also in the interests of the accused, “as it guarantees his right to be tried within a reasonable time”. The Registry, as a neutral service provider to the proceedings, is entrusted to carry out a rule 85 assessment for each victim application; the relevant Chamber exercises scrutiny and judicial oversight over the Registry assessment of every single application, thus guaranteeing proper checks and balances.

34. The overall result in the *Ntaganda* case was that during the trial stage less than 50 application forms were submitted to the Parties for observations out of more than 2,000 admitted to participate. Resources could be saved on the Registry end due to the heavily reduced redaction needs; but also the Parties saved considerable time and resources as only a fraction of application forms had to be scrutinised for relevant litigation.
35. Similarly, at the pre-trial stage of the *Yekatom and Ngaïssona* case, and following the ABC application process, a total of 23 forms was submitted to the Parties out of altogether 1085 admitted by Pre-Trial Chamber II in that case, with litigation focused on a distinct number of issues clearly outlined by the Registry to the Chamber and the Parties. This system has since been adopted at the trial stage with similar results.
36. The application of the ABC application process at the pre-trial and (presently) trial stages of the *Al Hassan* case has led to similar economies of time and resources which, as the *Ntaganda* Trial Chamber held, “is clearly in the interests of the victims and the parties”.<sup>55</sup>
37. The Registry notes that the ABC application process also has the advantage of resulting in the timely admission of qualified victims to participate as, owing to the Judges’ guidance and a more focused discussion on unclear issues before the

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<sup>55</sup> *Ntaganda* TC Decision on Victim Participation, para. 33.

Chamber, the Registry produces well informed assessments of a high number of victims which are speedily ruled upon by the Judges.<sup>56</sup> As a result, victims enjoy speedy access to the proceedings as well as their legal representative in order to submit their views and concerns in the proceedings<sup>57</sup> – much faster than was the case still at the pre-trial stage of the *Ntaganda* case or other earlier cases in the Democratic Republic of Congo situation. This result is an expression of the Chambers' compliance with their duty under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.<sup>58</sup>

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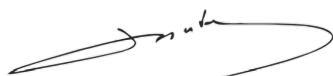
<sup>56</sup> For instance, in the *Yekatom and Ngaïssona* case, the Registry transmitted to the Trial Chamber between 19 October 2020 and 17 June 2021 altogether 40 applications categorised in Group C, 701 applications categorised in Group A and 382 applications in Group B, together with reports thereon. The Trial Chamber issued eight decisions on the merits of those applications between 23 November 2020 and 16 June 2021, endorsing fully the Registry's assessments of Group A and B applications. See Trial Chamber V, "Decision on Victims' Participation in Trial Proceedings", 23 November 2020, ICC-01/14-01/18-738; "Second Decision on Victims' Participation in Trial Proceedings (Group A)", 11 December 2020, ICC-01/14-01/18-765; "Third Decision on Victims' Participation in Trial Proceedings (Group A)", 29 December 2020, ICC-01/14-01/18-798; "Fourth Decision on Victims' Participation in Trial Proceedings (Group A)", 29 January 2021, ICC-01/14-01/18-858; "Fifth Decision on Victims' Participation in Trial Proceedings (Group A)", 1 April 2021, ICC-01/14-01/18-943; "Sixth Decision on Victims' Participation in Trial Proceedings (Groups A and B)", 4 May 2021, ICC-01/14-01/18-980; "Seventh Decision on Victims' Participation in Trial Proceedings (Groups A and B)", 1 June 2021, ICC-01/14-01/18-1009; and "Eighth Decision on Victims' Participation in Trial Proceedings (Group A)", 16 June 2021, ICC-01/14-01/18-1028.

<sup>57</sup> The Registry notes in passing that the ABC application process is considered in external *fora* as enhancing the efficiency of the victim participation system before the ICC. See Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, paras. 844-854, at : [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf); FIDH, "Whose Court is it?", in: Judicial handbook on victims' rights at the International Criminal Court, April 2021, Chapter 5, pp. 45-46, at : [https://www.fidh.org/IMG/pdf/fidh\\_whose\\_court\\_is\\_it\\_en.pdf](https://www.fidh.org/IMG/pdf/fidh_whose_court_is_it_en.pdf).

<sup>58</sup> See also *Ntaganda* TC Decision on Victim Participation, paras. 29, 37.

#### IV. Conclusion

38. For the reasons set out above, the Registry submits that with its ABC application process, it duly fulfils its role of providing an effective and efficient victim application handling process in line with the ICC's regulatory framework, while safeguarding victims' safety and well-being.



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Marc Dubuisson, Director, Division of Judicial Services,  
on behalf of  
Peter Lewis, Registrar

Dated this 22 June 2021

At The Hague, the Netherlands