



Original: English

No. ICC-02/05-01/20

Date: 4 November 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

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

Public

Decision on the Registry's Request for Authorisation to use a Modified Standard
Application Form for Victim Participation

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Julian Nicholls

Counsel for Mr Abd-Al-Rahman

Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,¹ having regard to articles 43(1), 68(1) and (3) of the Rome Statute (the ‘Statute’), rules 16 and 89 of the Rules of Procedure and Evidence (the ‘Rules’), regulations 23(2), 26(2), and 86 of the Regulations of the Court (the ‘Regulations’), and regulation 100 of the Regulations of the Registry issues this Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. 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 victim participation in the present case (the ‘Request’).³ The VPRS requests to use a wholly electronic victim application form for the present case, and to replace the signature box on the form with a solemn undertaking text box. The Registry further submits, *inter alia*, that due to the pandemic and the security and political situation in Sudan, a document that can be downloaded and filled in completely electronically on a tablet or smart device, then sent back to the Court electronically, could significantly help facilitate victim engagement ahead of the confirmation hearing.
3. On 12 October 2020, the Defence submitted its response to the Request, indicating that the Request should be dismissed *in limine*, as it is without legal basis, and should have been submitted to the Presidency (the ‘Response’).⁴ The Defence further submits, *inter alia*, that (i) the form posted on the Court’s website for the present case should be removed pending its approval, and the Defence should be

¹ Decision on the designation of a Single Judge, 9 June 2020, [ICC-02/05-01/07-80](#).

² *See, for example*, Decision on the Defence Request to provide written reasoning for two oral decisions, 18 August 2020, [ICC-02/05-01/20-118](#), paras 1-4.

³ Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case, ICC-02/05-01/20-178-Conf. A public redacted version was filed on 2 November 2020, ICC-02/05-01/20-178-Red.

⁴ Réponse à la Requête ICC-02/05-01/20-178, ICC-02/05-01/20-182-Conf.

consulted regarding this form (the ‘Defence Request’); and (ii) pursuant to the Court’s jurisprudence and certain statutory provisions, victim application forms must be signed, and removing this requirement would raise concerns about the potential for fraudulent applications.

4. On 27 October 2020,⁵ pursuant to the instruction of the Chamber,⁶ the Registry submitted its observations on the Response (the ‘Observations’).⁷ The Registry submits, *inter alia*, that (i) the Chamber has general discretion to accept and authorise the use of specifically tailored forms taking into account the circumstances of each case; (ii) none of the rules or regulations referred to by the Defence require a victim to sign an application form; and (iii) should the Chamber find that some form of signature is required, the VPRS could ask victims to sign a blank piece of paper, which could be photographed and submitted electronically together with the ID document and application form – however, the Registry considers that the victim identification document is the more legitimate source of authentication.

5. On 30 October 2020, the Registry contacted the Chamber by email indicating that out of an abundance of caution, it could apply redactions to portions of a paragraph of the Request called into question by the Defence, should the Chamber so wish.⁸ On the same day, the Prosecutor⁹ and the Defence¹⁰ responded, indicating that they had no objection to the proposed redactions. On 2 November 2020, the Chamber ordered the Registry to file a public redacted version of the Request, and to reclassify the original version of the Request as confidential.¹¹

⁵ The Observations were submitted on 26 October 2020, and notified the following day. The Registry submitted a courtesy copy to the Chamber by email on 26 October 2020 at 17:52.

⁶ Email from the Chamber to the Registry sent on 19 October 2020 at 15:44.

⁷ Registry Observations on the Defence’s “Réponse à la Requête ICC-02/05-01/20-178” (ICC-02/05-01/20-182-Conf), ICC-02/05-01/20-194-Conf.

⁸ Email from the Registry to Pre-Trial Chamber II, copying the parties, sent on 30 October 2020 at 16:29.

⁹ Email from the Prosecutor to Pre-Trial Chamber II sent on 30 October 2020 at 16:45.

¹⁰ Email from the Defence to Pre-Trial Chamber II sent on 30 October 2020 at 16:49.

¹¹ Email from the Chamber to the Registry sent on 2 November 2020 at 10:03.

II. ANALYSIS

Paragraph 10 of the Request

6. The Defence has submitted that certain information contained in paragraph 10 of the Request should not be available to the public. The Single Judge notes the Registry's submission that the paragraph refers to a fictitious example. Nevertheless, out of an abundance of caution, the Chamber has directed the Registry to redact portions of the paragraph.¹² Accordingly, the Single Judge considers that no further action is required on this issue.

The Defence Request

7. As to the shorter standard application forms for victims available for download on the ICC victim webpage, the Single Judge notes the Registry's submission that these standard forms are used as the default from the time of the situation stage of a case, when it is still uncertain as to whether the case may develop, and that these standard forms were approved by the Presidency in October 2017.¹³ In light of the above, and considering that the Defence has had the opportunity to provide its observations in relation to the present Request for modification of the victim application form, the Single Judge rejects the Defence Request.

The Request

8. The Single Judge recalls that electronic forms have been used in previous cases, and that they tend to expedite the collection and processing of information and foster wider victim participation, especially when there is limited access to potential victims in the field.¹⁴ The Single Judge notes that the amendment sought by the Registry in this case, to replace the signature box with a solemn undertaking box, is intended to overcome certain limitations with the previous electronic template. Namely, the

¹² Email from the Chamber to the Registry sent on 2 November 2020 at 10:03.

¹³ Registry Observations on the Defence's "Réponse à la Requête ICC-02/05-01/20-178" (ICC-02/05-01/20-182-Conf), ICC-02/05-01/20-194-Conf, paras 19 and 21.

¹⁴ See, *inter alia*, Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 5 March 2019, ICC-01/14-01/18-141, para 23, referring to Registry, *Situation in the Islamic Republic of Afghanistan*, Annex 1 to "Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017", 20 February 2018, ICC-02/17-29-Anx1-Red, para. 18.

Registry submits that the previous electronic form required a steady internet connection, and that the PDF version had to be printed out, signed, and scanned prior to submission. The Defence, however, submits that a signature is required by the Court's jurisprudence and certain statutory provisions, including regulations 23(2), 26(2), and 86(2)(b) of the Regulations, and that removing the signature box would raise concerns about the potential for fraudulent applications.

9. At the outset, the Single Judge recalls that other Chambers have tailored victim application forms to the particular circumstances of the case.¹⁵ Such modifications have taken into consideration the need to improve the system of victim participation, in order to ensure its 'sustainability, effectiveness and efficiency'.¹⁶ In a similar vein, the Independent Expert Review of the ICC recently commented that developing a major innovation such as the victim participation regime, without a comparable pattern to follow, would be expected to take time and 'involve trying different possibilities along the way'.¹⁷

10. The Single Judge takes note of the Registry's submissions that an entirely electronic form would facilitate victim applications in areas where there is limited or no internet connectivity, by enabling an intermediary to collect numerous applications offline on a single personal handheld device. Applications could then be sent to the ICC, along with the photos taken and stored of the applicants' relevant ID documents, once a secure internet connection became available. This would, the Registry argues, also remove the need for an intermediary to travel with printing and scanning equipment, and external sources of electricity, thus making the process more efficient and cost effective, and allowing an intermediary to keep a lower profile. In light of the

¹⁵ See, for example, Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, "Decision Establishing Principles on the Victims' Application Process", 28 May 2013, ICC-01/04-02/06-67, paras 17-25; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision Establishing Principles on the Victims' Application Process, 4 March 2015, ICC-02/04-01/15-205, paras 14-22; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz*, Décision fixant les principes applicables aux demandes de participation des victimes, 27 May 2018, ICC-01/12-01/18-37, paras 25, 29, and page 28

¹⁶ See Pre-Trial Chamber I, *The Prosecutor v. Al Hassan*, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 20 July 2018, ICC-01/12-01/18-37-tENG, para. 21, referring to Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, 'Decision Establishing Principles on the Victims' Application Process', 28 May 2013, ICC-01/04-02/06-67, para. 17.

¹⁷ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf, para. 849.

above, the Single Judge finds that an entirely electronic form may make the application more accessible to victims and facilitate the role of the VPRS in the field.

11. While ensuring the authenticity of applications is of fundamental importance, the Single Judge is of the view that a signature or a mark on the page is not in itself a guarantee of authenticity. While previous Chambers have required the use of a signature or thumbprint on victim application forms,¹⁸ the Single Judge notes that none of the relevant provisions in the statutory framework, including regulations 23(2), 26(2), and 86 of the Regulations, contain such a requirement. Furthermore, as submitted by the Registry, the concept of a signature does not exist in certain countries with low levels of literacy or without a formal written tradition. As a result, a mark on the page tends to be used in lieu of a signature, and, as submitted by the Registry, the VPRS does not have the capacity to verify the authenticity of such marks, short of reaching out to the victim in question directly if the legitimacy of the application were called into question. In light of the above, and taking into account the experience and recommendation of the Registry, the Single Judge considers that the proof of identification required of an applicant is a more reliable means of ensuring legitimacy than a signature.

12. The Single Judge further considers the Registry's submission that victims and their counsel maintain a relationship throughout the duration of the proceedings, and that this serves as an additional method of verifying the legitimacy of applicants. In 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. As the Registry anticipates that the majority of victims in the present case will require the assistance of an intermediary, their presence in the field may serve as another means of working to ensure the authenticity of applications.

¹⁸ See, for example, Pre-Trial Chamber I, *The Prosecutor v. Al Hassan*, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 24 May 2018, ICC-01/12-01/18-37-tENG, para. 46; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 5 March 2019, ICC-01/14-01/18-141, para. 31.

13. Recalling the need to continue to improve the system of victim reparations, the Single Judge considers it appropriate to incorporate amendments that make use of modern technology and facilitate the application process for victims, while at the same time ensuring that measures are in place to ensure the authenticity of applications. The Single Judge considers that the use of an entirely electronic form, with a solemn undertaking field in lieu of a signature field, would facilitate the victim application process, and that the above outlined measures, in particular, the proof of identity document submitted along with an application, serve as a strong form of authentication. In light of the above, the Single Judge grants the Request to replace the signature field on the electronic form for the present case with a solemn undertaking field.

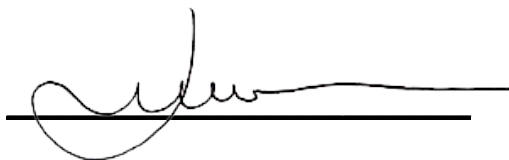
14. The Single Judge further directs the Registry to ensure, to the extent possible, that victim application forms are available to applicants in the languages that they understand. As the Request relates solely to the issue of the victim application form, the Single Judge notes that the Registry is still to submit a filing, in due course, in relation to additional matters concerning victim participation in the present case.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence's Request; and

GRANTS the Request to modify the electronic victim application form for the present case by replacing the signature field with a solemn undertaking text field.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Wednesday, 4 November 2020

At The Hague, The Netherlands