

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 January 2021

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 Document

**Request for Guidance on Modalities for Submissions
relating to Applications for Victim Participation**

Source: Legal Representative of Applicants

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

Mr James Stewart

Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims**Legal Representatives of the Applicants**

Ms Amal Clooney

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****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****Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. These submissions are made on behalf of 102 individuals seeking permission to participate as victims of crimes within the jurisdiction of the Court ('Applicants') pursuant to Article 68(3) of the Rome Statute and Rules 85-86 and 89-93 of the Rules of Procedure and Evidence. Applicants' Legal Representative is admitted to the list of counsel for the ICC and works on this case on a *pro bono* basis, supported by a legal team including Arabic speakers and specialists on Darfur.¹
2. Applicants' Legal Representative is aware that the Registry's Victim Participation and Representation Section ('VPRS') has submitted observations recommending a system for the victim application process² and expressed a readiness to submit 'observations on how an approach that prioritizes victims' choice of counsel may proceed'.³ However, given that a number of questions related to the scope of victim participation have already arisen in applications for victim participation in these proceedings, counsel seeks guidance from the Chamber as soon as is practicable for the benefit of Applicants and other victims. This includes guidance in relation to the temporal and geographical scope of applications based on the definition of terms used in the two arrest warrants in this case. In addition, a decision from the Chamber regarding legal representation for victims and disclosure of case-related material will enable victims to participate in a meaningful manner at this stage of the case.
3. Applicants' Legal Representative therefore respectfully seeks guidance and/or permission to file submissions on these issues as soon as possible.

¹ ICC, List of counsel before the ICC <<https://www.icc-cpi.int/about/registry/pages/list-of-counsel.aspx>> accessed 7 January 2021.

² Registry, Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, 17 November 2020, ICC-02/05-01/20-203, para 8.

³ Ibid., para 11.

II. BACKGROUND

4. Applicants' Legal Representative has been instructed to represent a number of victim advocacy groups including the Darfur Women Action Group, the Darfur Bar Association, the African Centre for Justice and Peace Studies, the Darfur Network for Monitoring and Documentation, and iACT, a non-governmental organisation providing humanitarian and legal aid to refugees in thirteen camps in Chad that host nearly 340,000 Darfuri refugees.
5. In the course of counsel's work with some of these organisations, survivors of crimes described in the arrest warrant issued in this case on 27 April 2007 ('First Arrest Warrant') and the warrant issued on 16 January 2018 ('Second Arrest Warrant') (jointly the 'Arrest Warrants') have been identified and interviewed.⁴ According to existing assessments, 102 of these survivors have suffered harm that falls either squarely or potentially within the scope of the charges in this case.
6. The Applicants have suffered harm in all the locations described in the Arrest Warrants: Kodoom, Bindisi, Mukjar, Arawala, and Deleig. They include victims of rape, torture, persecution, imprisonment, forcible transfer and pillaging. And they include a significant number of victims who are eyewitnesses to relevant crimes.
7. At the time of filing, Applicants' Legal Representative has already submitted applications on behalf of 30 of the Applicants to participate in the proceedings pursuant to Rules 85 and 89 of the Court's Rules of Procedure and Evidence. These applications are currently under review by the VPRS. The remaining applications will be submitted shortly⁵ and interviews in various jurisdictions are ongoing.
8. In addition, a number of survivors have indicated that they are victims of crimes that appear to currently fall outside of the geographic or other scope of the charges

⁴ Pre-Trial Chamber I, Warrant of arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr; Pre-Trial Chamber II, Public redacted version of 'Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")', 16 January 2018, ICC-02/05-01/07-74- Secret-Exp, 11 June 2020, ICC-02/05-01/07-74-Red.

⁵ Applications are submitted to VPRS on a rolling basis. However, Applicants' Legal Representative has received almost 50 applications over the course of the past few days, causing a backlog in the submission process.

as described in the Arrest Warrants but may, depending on developments in the case, become applicants at a later stage.⁶

III. PROCEDURAL HISTORY

9. On 9 October 2020, the VPRS requested authorisation from Pre-Trial Chamber II ('Chamber') to use a modified standard application form to facilitate victim participation in the Case ('VPRS Request').⁷
10. On 4 November 2020, the Single Judge of the Chamber issued a decision granting the VPRS Request.⁸
11. On 17 November 2020, the VPRS submitted observations on the admission of victims for participation in the proceedings ('VPRS Observations'). The VPRS recommended an admissions process involving an initial assessment by the VPRS, categorising applications into Groups A (Applicants who clearly qualify as victims), B (Applicants who clearly do not qualify as victims), and C (Applicants for whom the VPRS could not make a clear determination for any reason), with the Group C applications to be shared with the parties (with necessary redactions) and assessed individually by the Chamber.⁹

⁶ See, e.g., Pre-Trial Chamber II, Situation in the Central African Republic II in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position, 21 June 2019, ICC-01/14-01/18, ('Yekatom 21 June 2019 Decision'), para 23.

⁷ Registry, 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.

⁸ Pre-Trial Chamber II, Single Judge, Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation, 4 November 2020, ICC-02/05-01/20-198. The Defence has since sought leave to appeal this decision: Defence, Demande d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-198, 9 November 2020, ICC-02/05-01/20-201.

⁹ Registry, Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, 17 November 2020, ICC-02/05-01/20-203, para 8.

12. On 19 November, the Defence submitted its response to the VPRS Observations, objecting to the proposals.¹⁰
13. On 26 November 2020, the Office of the Prosecutor filed its response in support of the recommendations contained in the VPRS Observations.¹¹
14. On 18 December 2020, the Chamber postponed the confirmation of charges hearing to 24 May 2020.¹²

IV. SUBMISSIONS

15. Under Article 68(3) of the Rome Statute, victims' views and concerns can be heard at any stage of the proceedings in which their personal interests are affected, so long as this is not prejudicial to the right of an accused to a fair trial. In addition, Rule 86 provides that a Chamber, in making any direction or order, 'shall take into account the needs of all victims and witnesses', in particular vulnerable victims such as children, elderly persons or 'victims of sexual or gender violence'. Rule 92 contemplates that certain notification rights arise for any 'legal representatives who ... have communicated with the Court in respect of the situation or case in question'. And Rule 93 gives the Chamber broad discretion to 'seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue'. This includes, according to the terms of Rule 93, 'issues referred to in rules 107, 109, 125, 128, 136, 139 and 191' which in turn encompass matters that arise at the pre-trial and even pre-confirmation of charges phase.
16. The Court's procedural framework makes clear that victims have the right to choose a lawyer to assist them in applying to present their 'views and concerns'

¹⁰ Defence, Requête en vertu de la Règle 89-1 du Règlement de Procédure et de Preuve, 19 November 2020, ICC-02/05-01/20-206.

¹¹ Office of the Prosecutor, Prosecution's response to 'Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings', 26 November 2020, CC-02/05-01/20-212.

¹² Pre-Trial Chamber II, Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits, 18 December 2020, ICC-02/05-01/20-238.

and to ‘attend and participate in the proceedings’ on their behalf.¹³ This Chamber has emphasised that ‘victims must be allowed to play a meaningful role in the proceedings’ and that as a result ‘legal representatives sh[ould] be allowed to consult all public and confidential documents. ... in the record’ unless they are filed *ex parte*.¹⁴

17. Issues relating to the scope of applications for victim participation include:

- a. the definition or application of the term ‘surrounding areas’ in relation to the ‘Kodoom villages’, ‘Bindisi town’, ‘Mukjar town’, ‘Arawala town’ mentioned in the First Arrest Warrant;
- b. the definition or application of the term ‘in or around December 2003’, ‘in or around August 2003’, ‘in or around March 2004’, and ‘on or about 15 August 2003’, and ‘on or about 31 August’ mentioned in the First Arrest Warrant;
- c. the definition or application of the term ‘Deleig and surrounding areas’ mentioned in the Second Arrest Warrant; and
- d. the definition or application of the term ‘on or about 5 to 7 March 2004’ mentioned in the Second Arrest Warrant.

18. The Chamber has in the past emphasised that judges should apply a flexible approach to applications for victim participation at the pre-trial stage since ‘Warrants of Arrest are by no means determinative as to the scope of the confirmation hearing or any trial’, and it has provided guidance on how key terms in arrest warrants should be interpreted for this purpose.¹⁵ However, no guidance on scope of admissible applications has been provided so far in this case.

19. Given the challenges for survivors who cooperate with the ICC process, as well as upcoming deadlines in the case, Applicants’ Legal Representative seeks guidance

¹³ Rules 89-91 of the Rules of Procedure and Evidence.

¹⁴ Yekatom 21 June 2019 Decision, paras 39-40.

¹⁵ See, e.g., *ibid.*, paras 23-24.

from the Chamber regarding the timing and modalities for making submissions relating to the scope of admissible applications for participation.

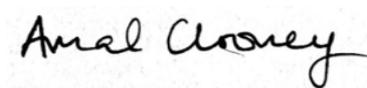
20. Outreach to victims in 2020 has taken place in the midst of a crippling global pandemic, in the context of grave security concerns in Darfur and elsewhere, and with severe difficulties in establishing secure communications with people in some parts of Sudan and Chad. It would therefore be very helpful to obtain guidance as soon as possible on the permissible scope of applications so that counsel can focus time and resources on contacts with persons most likely to be considered 'victims' with rights of participation at the Court.
21. In addition, if any counsel for victims is to play a meaningful role in advance of the confirmation of charges hearing and/or during such hearing they will need guidance from the Chamber regarding the modalities for legal representation and access to documents in the case file as soon as possible. This would ensure that counsel is in a position to file submissions due in advance of the confirmation hearing¹⁶ and to adequately prepare for such a hearing.
22. Clarity about the scope of applications and the role and rights of counsel would also provide an opportunity for counsel to make representations relating to whether the scope of the charges adequately reflects the relevant criminal conduct as early as possible in the process, when such submissions could still be acted upon. Such a role is central to the value that victims' counsel can add at this stage of proceedings, if given sufficient notice, access and time to be able to do so in a meaningful manner.
23. Bearing in mind that the Document Containing the Charges is due to be filed in less than 3 months' time, Applicants' Legal Representative seeks guidance on the manner and timing of submissions on the scope for applications, as well as information about the modalities of legal representation and rights of access to material by legal representatives of victims as soon as possible.

¹⁶ See, e.g., *ibid.*, para 42.

24. Applicants' Legal Representative is aware that, in the past, clarifications relating to the issue of scope of applications -- as well as legal representation and the right to access to confidential material in the case file -- have been dealt with by the Chamber in a decision responsive to a filing by the Registry. This was the case, for instance, in *Yekatom*, when the Chamber issued very helpful guidance in response to a Registry filing.¹⁷ However, in the absence of such a filing, and given the limited time in which counsel may play a meaningful role on behalf of victims at this stage of the case, Applicants' Legal Representative respectfully seeks guidance from the Chamber directly.

V. CONCLUSION

25. Applicants' Legal Representative respectfully seeks guidance from the Chamber on the modalities and timing of submissions relating to the acceptable temporal and geographic scope of applications for victims' participation and/or permission to file such submissions as soon as possible. Applicant's Legal Representative also requests clarification regarding when the Chamber will determine legal representation of victims at this stage of the case and the right of legal representatives to access material in the case file and/or permission to file submissions on these issues as soon as possible.



Ms Amal Clooney

Legal Representative of Applicants

Dated this 8th day of January 2021

¹⁷ See, e.g., *Yekatom* 21 June 2019 Decision.