



**Original: English**

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

**Date: 5 February 2021**

**PRE-TRIAL CHAMBER II**

**Before: Judge Rosario Salvatore Aitala, Single Judge**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**

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

**Public**

Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance

**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

**Counsel for Mr Abd-Al-Rahman**  
Mr Cyril Laucci

**Legal Representatives of Victims**

**Counsel for Some Applicant Victims**  
Ms Amal Clooney

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**  
Ms Paolina Massidda

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

**States Representatives**

*Amicus Curiae*

## **REGISTRY**

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**Registrar**  
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**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,<sup>1</sup> issues this ‘Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance’.

## **I. Procedural background**

1. On 8 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,<sup>2</sup> which was granted by the Single Judge on 4 November 2020 (the ‘4 November 2020 Decision’).<sup>3</sup>

2. On 17 November 2020, following the Single Judge’s instructions,<sup>4</sup> the Registry submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings (the ‘Registry Observations’).<sup>5</sup>

3. On 19 November 2020, the Defence requested the Single Judge to, *inter alia*, (i) reject *in limine* the Registry Observations based on their alleged tardiness, or reject the admission procedure proposed by the Registry; and (ii) order the Registry to transmit to the parties all victim applications, with the necessary redactions, in accordance with rule 89(1) of the Rules of Procedure and Evidence (the ‘Rules’) (the ‘Defence Rule 89(1) Request’).<sup>6</sup>

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<sup>1</sup> Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

<sup>2</sup> Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case (with one confidential Annex), 8 October 2020, ICC-02/05-01/20-178-Conf (public redacted version filed on 2 November 2020, ICC-02/05-01/20-178-Red).

<sup>3</sup> 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. This decision was subject to a request for leave to appeal by the 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), which was rejected by the Chamber with its Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198, 12 January 2021, ICC-02/05-01/20-254.

<sup>4</sup> Email dated 16 September 2020 (09:57); *see also* 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, para. 14.

<sup>5</sup> Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, 17 November 2020, ICC-02/05-01/20-203.

<sup>6</sup> *Requête en vertu de la Règle 89-1 du Règlement de Procédure et de Preuve*, 19 November 2020, ICC-02/05-01/20-206.

4. On 26 November 2020, the Prosecutor responded to the Registry Observations supporting the admission process recommended therein.<sup>7</sup>
5. On 8 January 2021, a request for guidance as to the modalities of victims' legal representation in the case was submitted by external Counsel designated by some applicant victims ('Counsel for Some Applicant Victims' or 'Counsel' and the 'Counsel's First Request', respectively).<sup>8</sup> The Defence responded to Counsel's First Request on 13 January 2021.<sup>9</sup>
6. On 18 January 2021, the Single Judge issued the 'Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing', thereby (i) imparting the necessary instructions to the Registry and the parties to commence the victims' admission and participation process in the case; (ii) rejecting the Defence Rule 89(1) Request; and (iii) appointing the Office of Public Counsel for Victims (the 'OPCV') as 'common legal representative for the purposes of the confirmation proceedings' (the '18 January 2021 Decision' or 'First Decision').<sup>10</sup>
7. On the same day, the Prosecutor and the Defence submitted the 'First Joint Report regarding the "Order instructing the parties to liaise with a view to reaching an agreement as [to] evidence to rule 69 of the Rules of Procedure and Evidence"'.<sup>11</sup>

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<sup>7</sup> Prosecution's response to "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 26 November 2020, ICC-02/05-01/20-212.

<sup>8</sup> Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation, 8 January 2021, ICC-02/05-01/20-251.

<sup>9</sup> *Observations en Réponse à la Requête ICC-02/05-01/20-251*, 13 January 2021, ICC-02/05-01/20-255.

<sup>10</sup> Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing, 18 January 2021, ICC-02/05-01/20-259. On 22 January 2021, the Defence requested leave to appeal the 18 January 2021 Decision; *Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259*, 22 January 2021, ICC-02/05-01/20-264. On 28 January 2021, the OPCV responded to the Defence request; Common Legal Representative Response to the "Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259", 28 January 2021, ICC-02/05-01/20-270.

<sup>11</sup> First Joint Report regarding the "Order instructing the parties to liaise with a view to reaching an agreement as [to] evidence to rule 69 of the Rules of Procedure and Evidence", 18 January 2021, ICC-02/05-01/20-260; *see also* Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence, 8 December 2020, ICC-02/05-01/20-226.

8. On 25 January 2021, the OPCV filed the ‘Request on behalf of the Victims with regard to any agreement reached pursuant to rule 69 of the Rules of Procedure and Evidence’ (the ‘OPCV 25 January 2021 Request’).<sup>12</sup>

9. On the same day, Counsel for Some Applicant Victims submitted a ‘Request for appointment, or in the alternative, reconsideration or leave to appeal’ (‘Counsel’s Second Request’),<sup>13</sup> to which the Prosecutor responded on 28 January 2021.<sup>14</sup>

## **II. Determinations by the Single Judge**

10. In light of developments following the issuance of the First Decision (in particular, Counsel’s Second Request), the Single Judge considers it necessary to provide additional details as to the Chamber’s understanding of the process whereby individuals alleging to have suffered harm as a result of a crime within the jurisdiction of the Court within the meaning of rule 85 of the Rules are allowed to submit an application for participation in the confirmation of charges proceedings with the relevant services of the Court.

11. The Single Judge also acknowledges that the First Decision contained a few clerical errors<sup>15</sup> and instances of inconsistent use of language. The additional purpose of this decision is therefore to supplement the First Decision’s reasoning to the extent necessary to ensure that the process leading to the admission of victims and the determinations relating to their legal representation continues to run smoothly and orderly, in accordance with the statutory framework.

12. The first clerical error relates to the title of the First Decision: it only refers to victims’ ‘representation’, preceded by ‘and’, whereas the main subject matter of the Decision was rather the broader and more general topic of victims’ participation, with the issue of representation only incidentally addressed. In the context of the overall

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<sup>12</sup> Request on behalf of the Victims with regard to any agreement reached pursuant to rule 69 of the Rules of Procedure and Evidence, 25 January 2021, ICC-02/05-01/20-267.

<sup>13</sup> Request for appointment, or in the alternative, reconsideration or leave to appeal, 25 January 2021, ICC-02/05-01/20-268.

<sup>14</sup> Prosecution Response to “Request for appointment, or in the alternative, reconsideration or leave to appeal”, 28 January 2021, ICC-02/05-01/20-271.

<sup>15</sup> For instance, the date of Counsel’s First Request was erroneously stated as 11 January 2021, instead of 8 January; the date of the submission of Registry filing ICC-02/05-01/20-178-Conf was erroneously stated as 9 October 2020, instead of 8 October 2020; the Prosecutor’s response to the ‘Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings’, 26 November 2020, ICC-02/05-01/20-212, was referred to as being a response to the Defence Rule 89(1) Request.

system of victims' participatory rights, representation is only a specific and discrete aspect of that system. The core and immediate purpose of the First Decision was to set the process of participation in motion, first and foremost by imparting instructions to the VPRS as to the modalities in which victim applications would have to be transmitted to the Chamber. Whilst the full scope of the First Decision is correctly stated in its entirety in the chapeau, the Single Judge cannot exclude that the unintended emphasis on the representation aspect appearing in the title might have contributed to generate confusion.

13. The Single Judge also acknowledges that this first step in the matter of victims' participation has been taken at a later stage than it is usually the case. This is due to a large extent to the difficulties inherent both to the situation in Darfur and specifically to this case, the first where a suspect appears before the Court in the context of a situation referred by the Security Council under article 13(b) of the Statute. As signalled by the Registry since the initial stages of these proceedings, these difficulties range from the fact that the case has been dormant for a long time to the complexities and logistic challenges arising throughout the last year, including in connection with the COVID-19 pandemic. The uniqueness of this scenario was also the reason underlying the Chamber's 4 November 2020 Decision, authorising the Registry to modify the electronic victim application form by replacing the signature field with a solemn undertaking text field, mainly with a view to expediting the collection and processing of information and hereby enhancing the accessibility of the system to potential victims in the field. In the 4 November 2020 Decision, the Single Judge also noted how the Registry was 'still to submit a filing ... in relation to additional matters concerning victim participation'.

14. It is against this background, unprecedented in more than one aspect, that the First Decision must be considered and construed. Whilst coming at a stage where, in other cases, the Registry's transmission of applications to the Chamber would most likely have already at least started, no such transmission had yet occurred at the time of the issuance of the First Decision, or has since then. It was only on 17 November 2020 that the Registry filed its first 'observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings'. These observations formed the basis for the Chamber's dictating, in the First Decision, the principles and rules presiding over the role of the VPRS in the process of collecting and

processing the applications for the purposes of bringing them to the attention of the Chamber, and the modalities in which this should happen. Consistently with the determinations made in the 4 November 2020 Decision, some of those principles and rules, whilst being spelt out to some necessary detail, were shaped in a provisional way so as to provide the necessary flexibility required by the specific features and unique challenges of the situation in Darfur.

15. As said, the First Decision's focus was on the collection and transmission of the applications, rather than on representation. Only its fifth - and last - Section, comprising one out of 15 pages, was devoted to the matter of the legal representation. The Registry's delay in submitting its own observations in the first place, and the awareness of the difficulties it had and might still encounter in approaching applicant victims in the field, led the Chamber to realistically consider it unfeasible to have the matter of representation directly and comprehensively addressed at that stage. The Chamber is yet to receive from the Registry the available applications, as well as any recommendation in matters of legal representation. Accordingly, the First Decision considered that it 'would be premature for the Chamber to set in motion the formal selection process for one or more common legal representative'. By the same token, taking into account the relatively advanced stage at which the Decision intervened and mindful that appropriate and timely assistance is instrumental to every potential victim's right to meaningfully participate in the proceedings, the Chamber considered it necessary to proceed to devise a *temporary* arrangement, consisting in having the OPCV appointed 'to represent the collective interests of the victims', with a view to avoiding any lacuna in terms of protecting the interests of the applicant victims pending completion of the transmission of their applications to the Chamber pursuant to the system devised in the First Decision, and the Chamber's consideration of their merits.

16. The Single Judge acknowledges that, in the context of a measure taken with the explicit objective of remedying the potential prejudice entailed by the Registry's late transmission of applications to the Chambers, the First Decision should neither have referred to the OPCV being 'appointed' to represent the collective interests of the victims 'during the confirmation hearing', nor referred to this measure being adopted 'for the purposes of the confirmation proceedings'; to the extent that this second reference to the confirmation proceedings as a whole also appears in the operative part,

the need for clarification and interpretation is indeed a matter of importance and urgency.

17. Whilst not strictly inaccurate (every measure taken by a Pre-Trial Chamber between a suspect's first appearance and the issuance of the decision on the confirmation of the charges is indeed taken 'for the purposes of the confirmation proceedings'), the reference to the 'confirmation proceedings' appearing in paragraph 37 and the operative part of the First Decision is extremely broad in scope : the stressing of the *temporary* and *provisional* nature of the OPCV's involvement, coupled with the note to the effect that adjudicating matters of legal representation *stricto sensu* would have been *premature* at the time of the Decision, requires to construe the OPCV's involvement as limited to the stage between the First Decision itself and the Chamber's eventual decision on matters of legal representation. Because of the unique circumstances and timeline of this case, as detailed above, this decision will be taken at a later stage than in some other cases and jointly with the determinations as to whether the applications transmitted to the Chamber will have been found as meeting the statutory requirements.

18. The specific circumstances of the case made it also necessary to take measures aimed at preserving the interests of the applicant victims throughout the stage between the collection of the applications by the Registry and their transmission to and adjudication by the Chamber: this, with a view to avoiding that the delay in the transmission of the applications, as dictated by objective and external circumstances, result in potential prejudice of those individuals having already submitted their applications to the Court. In devising a role for the OPCV in respect of this stage, the Single Judge relied on the applicable statutory framework, including regulation 81(4) of the Regulations of the Court (the 'Regulations'), as construed and applied by the jurisprudence of the Court since its early days.<sup>16</sup> As a unique and independent organ within the institutional framework of the Rome Statute, the role that the OPCV can be called to exercise to the benefit of either applicant victims or victims admitted before

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<sup>16</sup> Pre-Trial Chamber II, *Situation in Uganda, The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, ICC-02/04-01/05-134, para. 13.



the Court is at least twofold: besides legal representation *stricto sensu*, the OPCV can be, and regularly is, also tasked with the broader responsibility to provide ‘general support and assistance’ to the benefit not only of applicant or admitted victims but also of their legal representatives; the time frame between the submission of the applications and the Chamber’s determination of its merits is one of those stages where those responsibilities can indeed prove critical.

19. The Single Judge is relieved to note that, notwithstanding the fact that regulation 81 of the Regulations was not listed among the provisions indicated as legal basis for the First Decision, the first initiative taken by the OPCV following that decision constitutes a step entirely in line with the rationale underlying its involvement at this stage of the proceedings. The OPCV 25 January 2021 Request, relating to agreements reached pursuant to rule 69 of the Rules, identified the matter of agreed facts as one of those where, if no action is promptly taken to secure that victims are involved in the process, there would be a risk that, by the time the phases of admission and legal representation are completed, it might be too late to adequately take into account and preserve the interests of both applicants and of admitted victims. This request, obviously submitted on behalf of all those individuals whose application the Chamber has not yet had an opportunity to even consider, makes it apparent that, whilst the OPCV refers to itself as ‘common legal representative’ of victims (mirroring the language of the First Decision), strictly speaking the term ‘common legal representative’ does not adequately convey the nature of the task entrusted to the OPCV at this stage, and in particular the role of general support and assistance within the meaning of regulations 81(4) of the Regulations; a task which, pending the Chamber’s determination of the merits of the applications, is now to be exercised to the benefit and in the interests of all applicant victims. Within the context and for the purposes of confirmation proceedings, only those individuals whose applications will be found to meet all relevant requirements qualify as ‘victims’. Accordingly, the Single Judge considers it appropriate as a matter of principle for the OPCV to receive all the applications received by the VPRS, also with a view to allowing the OPCV, in close consultation with VPRS as appropriate, to discharge its responsibilities to bring to the attention of the Chamber any potential issue of conflict of interest prior to the Chamber making its final determinations in the matter of representation.

20. As regards the role for Counsel for Some Applicant Victims, the Single Judge acknowledges that it is conceivable that an individual might wish to entrust a particular lawyer with the task to assist him or her in the context of preparing his or her application to be submitted to the Court via the VPRS, possibly with a view to maximising the chances for that application to be successful. Indeed, there are precedents where a legal representative was appointed to the benefit of applicant victims, prior to their admission, as well as of procedural scenarios where applicant victims have been called to play a role in the proceedings. It is however beyond controversy that no standing or any other procedural prerogative before the Court are or can be associated to the simple fact of having assisted an applicant in the context of the submission of an application for participation and that, accordingly, no ‘filings’ emanating by ‘legal representatives’, in the absence of a Chamber’s appointment to this effect, should be received by the competent services of the Court.

21. The Single Judge trusts that these considerations suffice to clarify that, whilst making reference to ‘the confirmation proceedings’, the First Decision specifically addressed a particular, specific phase, and that all the *limited*, *temporary* and *provisional* measures (three qualifications which all appear in the relevant section) adopted in the matter of legal representation were specifically instrumental to that phase. This limited phase will be concluded once the Registry will have transmitted the applications pursuant to the system devised in the First Decision and a determination will have been made as to which of the applicants, having been found to meet the relevant requirements, will be admitted to participate as victims. At that stage, it goes without saying that, bar obstacles arising in connection with issues of conflict of interest or other legal impediment, the choices made by each individual victim as regards their own legal representation will be duly considered and honoured, in light of the relevant statutory provisions as well as considerations relating to any arrangements in place as to the costs of representation and their expected impact on the financial resources of the Court. In this context, the Single Judge has taken note of the statement made by Counsel for Some Applicants to the effect that, should one or more of those applicants be admitted as victims participating in the proceedings, no compensation will be sought from the Court.

22. The Single Judge is confident that these considerations adequately clarify that the Chamber will indeed soon ‘set in motion the appointment process for one or more

Common Legal Representatives’ and hence address the main concern voiced in Counsel’s Second Request, making it unnecessary to address in further detail its contents or *petitum*. The Single Judge will only note that Counsel’s Second Request appears to rely on some misconceptions of its own making, including the following: (i) it fails to give appropriate weight to the qualifications expressly attached by that First Decision to the measures taken in the matter of representation, whilst obviously having noted the temporary nature of the arrangements; (ii) it makes use of the terms ‘applicant’ and ‘victims’ as interchangeable (in some instances as a combined noun, ‘victim-applicants’, or accompanied by the qualification ‘prospective’) to designate individuals, among whom some seem not to have yet submitted an application, and none of whom has been yet recognised and admitted by the Chamber; (iii) it refers to Counsel for Some Applicant Victims as ‘legal representative of victims’, a qualification statutorily restricted to counsel having been appointed by the Chamber in that role.

23. Finally, the Single Judge notes that, at times, disrespectful language is used in connection with speculative scenarios stemming from the misconstruction of the First Decision: in particular, when submitting that (‘[...] due to one temporary decision by one judge [...] who assigned legal representation to the one counsel that *none* of the victims had chosen, the victims of heinous crimes committed in the situation in Darfur may lose their right to be represented by their counsel of choice for the entire duration of the case’. The Single Judge reminds Counsel for Some Applicants of the duty to be ‘respectful and courteous in his or her relations with the Chamber’, pursuant to article 7(1) of the Code of Professional Conduct for counsel, as well as of all the other duties and obligations set forth in it.

#### **FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**CLARIFIES** that the First Decision must be read, construed and applied jointly with and in light of the clarifications contained in this decision;

**CLARIFIES** that the appointment of the OPCV in accordance with the First Decision is aimed at ensuring the protection of the interests of applicant victims, as well as to provide assistance and support to applicants within the meaning of regulation 81(4) of the Regulations; as such, it is temporary and will be superseded by the decisions to be taken in matters of legal representation at the stage of the determinations of the merits of the applications by the Chamber;

**CLARIFIES** that final decisions on individual and common legal representation will be adopted in the context of the determinations on the status of victims;

**INSTRUCTS** the OPCV and VPRS to liaise and closely cooperate in respect of the recommendations to be submitted to the Chamber in matters of common legal representation;

**INSTRUCTS** VPRS to transmit all victim applications to the OPCV;

**INSTRUCTS** the Registry not to receive filings emanating by ‘legal representatives’, in the absence of the Chamber’s appointment to this effect.

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 Friday, 5 February 2021

At The Hague, The Netherlands