

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

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

Date: 30 July 2021

PRE-TRIAL CHAMBER II

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

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

Public

Public redacted version of “URGENT Confidential *Ex parte*, only available to the Registry, Registry’s Observations on the Single Judge’s Request for Specific Information on Victims’ Legal Representation”, 2 February 2021, ICC-02/05-01/20-275-Conf-Exp

Source: Registry

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

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Mr Philipp Ambach

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I. Introduction

1. Pursuant to the Single Judge's instruction conveyed by email on 29 January 2021 ("Order"),¹ the Registry hereby provides the present observations on the status of the transmission of complete applications relating to the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Case") to the Office of Public Counsel for Victims ("OPCV") following the "Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing" ("Decision on Legal Representation") whereby the Single Judge appointed OPCV as common legal representative for the purposes of the confirmation proceedings.² Pursuant to the Order, these observations will also outline the Victims Participation and Reparations Section's ("VPRS") interactions with Ms Clooney, along with other external counsel who have submitted victim application forms or who have indicated a willingness to represent victims before the Court in this Case.

II. Classification

2. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), these observations are classified confidential *ex parte*, only available to the Registry, in accordance with the classification attached to the underlying email [REDACTED]. The Registry stands ready to file a public redacted version of these observations upon the Chamber's order.

III. Procedural history

¹ Email of Pre-Trial Chamber II Communications to VPRS, 29 January 2021 at 17:24 [REDACTED].

² Pre-Trial Chamber II, 'Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing', 18 January 2021, ICC-02/05-01/20-259, p. 15.

3. On 21 January 2018, Ms Diana Constantinide submitted two victim applications concerning the Case to the VPRS.³ The victims, through these application forms, nominated Ms Constantinide as their legal representative.
4. On 9 October 2020, the VPRS requested authorization from Pre-Trial Chamber II (“Chamber”) to use a modified standard application form to facilitate victim participation in the Case.⁴
5. On 4 November 2020, the Single Judge of the Chamber issued the “Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation”.⁵
6. On 12 November 2020, Mr Nasser Amin submitted six victim applications within the scope of the Case to the VPRS. The victims, through these application forms, nominated Mr Amin as their legal representative.
7. On 17 November 2020, the VPRS filed the “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”,⁶ noting *inter alia* that “the Registry stands ready to submit, in a timely manner, observations on how an approach that prioritizes victims’ choice of counsel may proceed, in accordance with rule 90 of the Rules. These observations would include a description of the steps necessary for the Registry to facilitate the coordination of victim representation before the confirmation of charges hearing.”⁷

³ At that time, the case was still called *The Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”) and *Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”), ICC-02/05-01/07.

⁴ Registry, “Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case”, dated 8 October 2020 and notified on 9 October 2020, ICC-02/05-01/20-178 (“Registry Request to Use Modified Form”).

⁵ 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, “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-198”, 9 November 2020, ICC-02/05-01/20-201.

⁶ Registry, “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”, 17 November 2020, ICC-02/05-01/20-203.

⁷ *Id.* at para. 11.

8. [REDACTED].
9. Starting on 17 December 2020, Ms Amal Clooney submitted eleven victim applications concerning the Case to the VPRS. The victims, through these application forms, nominated Ms Clooney as their legal representative.
10. On 18 December 2020, the Chamber postponed the commencement of the confirmation hearing to 24 May 2021.⁸
11. On 11 January 2021, Ms Clooney, as legal representative of victim applicants, requested the Chamber to clarify the temporal and geographical scope of the charges and to be provided with guidance in terms of the modalities for legal representation.⁹
12. On 18 January 2021, the Single Judge issued his Decision on Legal Representation, which *inter alia* appointed the OPCV to act “as common legal representative for the purposes of the confirmation proceedings” and “represent the collective interests of the victims during the confirmation hearing”.¹⁰
13. On 19 January 2021, the VPRS sent separate emails to all three of the aforementioned external legal representatives of applicants informing them of the Decision on Legal Representation and inviting them to discuss the transitional matter of access to the victims’ files directly with the Principal Counsel of the OPCV.¹¹

⁸ 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.

⁹ Legal Representative of Applicants, ‘Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation’, 11 January 2021, ICC-02/05-01/20-25.

¹⁰ Decision on Legal Representation, para. 37 and p. 15.

¹¹ Email correspondence from VPRS Chief Mr Philipp Ambach to Ms Diana Constantinide, Mr Nassir Amin and Ms Amal Clooney, on 19 January 2021 at 15:50; 15:53 and 16:00 respectively.

14. On 25 January 2021, Ms Clooney, as legal representative of applicants, submitted her “Request for appointment, or in the alternative, reconsideration or leave to appeal” (“Second Request”).¹²
15. On 26 January 2021, the Principal Counsel of the OPCV sent an email to the Chamber on an *ex parte* basis (“OPCV Email”) which triggered the present Order. [REDACTED]
16. On 26 January 2021, the Director of Judicial Services of the Registry instructed the VPRS to transmit all applications relating to the Case in its possession to the OPCV forthwith. On 27 January 2021, the VPRS transmitted said applications to the OPCV.

IV. Applicable Law

17. The Registry submits the present observations pursuant to article 68(1) and (3) of the Rome Statute (“Statute”), rules 16(1)(a) and 90 of the Rules of Procedure and Evidence (“Rules”), regulations 23*bis*(1), 24*bis*, 79 and 80 of the RoC, and pursuant to the Order.

V. Observations

On the classification of the Second Request

18. The Second Request was received by the Court Management Section (“CMS”) of the Registry on 25 January 2021.¹³
19. Due to a miscommunication and internal oversight in CMS, the submission was not filed following the instructed procedure of a transmission filing,¹⁴ but directly on the case record.

¹² Legal Representative of the Applicants, ‘Request for appointment, or in the alternative, reconsideration or leave to appeal’, 25 January 2021, ICC-02/05-01/20-268.

¹³ E-mail received on 25 January 2021 at 16:02.

¹⁴ E-mail received on 15 January 2021 11:00 from the Office of the Director of Judicial Services, instructing to file such submissions by means of transmission filing with a confidential classification.

20. CMS regrets the oversight and has subsequently put in place a procedure to prevent such oversights occurring in future.

Status of the transmission to OPCV of victim applications in the possession of the VPRS relating to the Case

21. As noted in the procedural history, all applications in the possession of the VPRS and assessed as relating to the Case have been transmitted to the OPCV on 27 January 2021¹⁵ pursuant to the Single Judge's oral instruction.
22. Following the issuance of the Decision on Legal Representation, the VPRS sought to facilitate the transition of representation, including access to the victim applications, by fostering dialogue between the three legal representatives of applicants who have submitted forms on behalf of victims to the VPRS to date and the OPCV. On 19 January 2021, the VPRS wrote separate identical emails to each of the legal representatives of applicants informing them of the following:

“As a next step, we anticipate that the OPCV will request access to the applications you have submitted to the VPRS to date / will be submitting in the future. We advise that it would be most conducive if you were to discuss this matter directly with colleagues from the OPCV. We will then follow whichever arrangement is being agreed upon between yourself and OPCV. If you want to reach out to OPCV directly, you may want to write to Principal Counsel Mrs. Paolina Massidda [...]”.

¹⁵ VPRS sent an email confirmation of access to the relevant TRIM container at 10:45 on 27 January 2021. This email confirmation was preceded by an email announcement by the VPRS Chief to OPCV on 26 January at 16:40 that the transfer of relevant files was imminent (“[t]he container will be ready later today, technology permitting”).

23. [REDACTED] In accordance with prior practice at the Court¹⁶ including the practice of victim counsel¹⁷ on issues pertaining to the fiduciary responsibilities between counsel and clients during a transition of appointment, the VPRS sought to connect the legal representatives of the applicants with the OPCV in order for both sides to come together to a workable solution in accordance with their respective professional responsibilities regarding the timing and modalities of the transfer of relevant victim application forms.
24. Following the issuance of the abovementioned message to the legal representatives of the applicants, and on the same day, the VPRS shared with the OPCV contact information of the three legal representatives. It also informed the OPCV of the abovementioned correspondence. During a meeting held between VPRS and OPCV on 21 January 2021, the Chief of VPRS reiterated the VPRS's readiness to implement any modalities as regards the timing of the transfer of relevant victim information as instructed by and agreed upon between the OPCV and the legal representatives of applicants.. On 22 January, the OPCV requested the VPRS to provide the former with the relevant victim applications as soon as possible, and to inform the OPCV of the modalities of such transmission by 25 January 2021.
25. [REDACTED].¹⁸

¹⁶ Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", 5 August 2011, ICC-01/09-01/11-249, para. 81 ("*Ruto, et. al.* CLR Decision") The Registry notes that in this Decision, the Single Judge cites to responsibilities under the Code of Professional Conduct for Counsel, namely articles 15(2) and 18(5), that call on counsel previously representing victims to *inter alia* "convey to replacement counsel the entire case file." However, in effectuating the change, the Single Judge anticipated a "transitional phase, including by way of holding meetings with the victims in order to explain the reasons and the process of appointment of the common legal representative."

¹⁷ *Al Mahdi*, Registry, [OPCV] Notification of a Request for Withdrawal of an Application for Participation, 19 August 2016, ICC-01/12-01/15-159; *Banda*, Trial Chamber IV, Decision on common legal representation, 25 May 2012, ICC-02/05-03/09-337, para. 49; *Muthaura et. al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267, para. 95; *Ruto, et. al.* CLR Decision, para. 81.

¹⁸ [REDACTED].

26. In the early afternoon of 26 January 2021, the Chief of VPRS and Principal Counsel of the OPCV discussed, [REDACTED] the VPRS's difficult position as a result of the legal representatives of applicants' indications and of the pending litigation filed by Ms Clooney before the Chamber with respect to the legal representation of victims. Both agreed to reflect on the matter and to stay in contact with a view to finding a solution. Later that afternoon, the Director of Judicial Services conveyed to the VPRS the above-referenced instruction that the applications in the possession of VPRS relating to the Case were to be made available to OPCV immediately. The VPRS complied and transmitted the application forms as described above.¹⁹

VPRS interaction with Ms Clooney and all other legal representatives who have demonstrated a willingness to represent victims before the ICC in this Case

27. As the VPRS has made plain since the outset of proceedings, there have been considerable challenges to overcome in organizing victim participation in the Case, including: travel restrictions, quarantines and social distancing requirements associated with the global pandemic; inability to access the relevant areas in Sudan; considerable security concerns [REDACTED] and the relatively large and geographically dispersed number of victims potentially impacted by the charges brought in this Case.

28. The VPRS notes that it is extremely time and resource intensive to try and identify, train and vet potential intermediaries [REDACTED].²⁰ [REDACTED]. Each of these factors has contributed to the relative dearth of applications so far received in the Case.²¹ [REDACTED].

¹⁹ The VPRS informed the three legal representatives of this by email of 27 January 2021.

²⁰ Registry Request to Use Modified Form.

²¹ While the overall number of applications received is in the hundreds, only a very limited number have been assessed as falling within the temporal and geographical scope of the Case as outlined by

29. With respect to legal representation, the VPRS sought from the very beginning to target [REDACTED] lawyers and legal organizations with basic messages on how to represent victims before the Court. Information and training sessions were conducted [REDACTED]. Information sheets about the Case and victim participation were generated in Arabic, and training sessions were recorded and translated. [REDACTED]. Despite these efforts, by early November 2020, the VPRS had not yet received any victim applications concerning the Case since Mr Abd-Al-Rahman had been arrested (and only a total of three applications were on file with VPRS from the period before his arrest).
30. [REDACTED]²² [REDACTED].²³ [REDACTED].
31. After the initial meeting on 16 October 2020, the VPRS met with Ms Clooney and her team via remote consultations at two further occasions to discuss issues pertaining to the completion of application forms; the VPRS also explained the victim admission system it had proposed to the Chamber in its relevant submission of 17 November 2020.²⁴ [REDACTED]. The VPRS received the first application nominating Ms Clooney as legal representative on 17 December 2020. During a virtual meeting with Ms Clooney and colleagues from the Clooney Foundation on 4 January 2021, the VPRS provided information on its assessment of the victim application forms received at that point.
32. With respect to Mr Amin, a first remote meeting was organised on 27 August 2020 during which the VPRS provided key information on the ICC victim participation regime and the victim application process.²⁵ For Ms Constantinide,

the Chamber in its Decision on Legal Representation, para. 34 (*ie* “refer[ring] to crimes allegedly committed in 2003-2004 in Western Darfur”).

²² [REDACTED].

²³ [REDACTED].

²⁴ 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.

²⁵ The VPRS had been in contact with Mr Amin subsequent to his participation in a meeting [REDACTED] organized by [REDACTED] together with the Outreach Unit of the ICC’s Public Information and Outreach Section where key information on the *Abd-Al-Rahman* case was shared with a large group of external interlocutors including regional NGOs and the legal community.

a first information session regarding the Case and her clients (through previously submitted application forms) was held on 9 September 2020. For both legal representatives, individual training sessions were held in the following weeks and months pertaining to the usage of the victim application forms, key messages to victims to explain the participation regime, and details on the submission of participation forms and legal representation.



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

Dated this 30 July 2021
At The Hague, The Netherlands