

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **7 December 2021**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)

Public

Observations on the « Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant »

Source: The Common Legal Representatives of Victims

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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I. Introduction

1. As requested from Trial Chamber I (the “Chamber”) during the Status Conference on 12 November 2021¹, the Common Legal Representatives of Victims (the “CLR”) hereby submit its observations and suggestions regarding the “Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant” (“Protocol”)².

II. Procedural History

2. On 17 August 2020 Pre-Trial-Chamber II issued an “Order on Disclosure and Related Matters”. Annex 2 to this decision was the Protocol.
3. On 1 September 2020 the former Legal Representatives of Victims stated that they had no observations on the said “Protocol”³.
4. On 12 December 2021, the Chamber informed the parties and participants that it is considering the issuance of a new protocol relating to contacts with witnesses⁴. The Chamber also suggested that the CLR submit in writing its observations on the matter⁵.

III. Submissions

5. The CLR wish to reiterate that they agree with the content of the Protocol so far. However, and as raised during the status conference on 12 November 2021, the CLR suggest the following.

¹ Transcripts of the second status conference, 12 November 2021, No. ICC-02/05-01/20-T-017-RED-ENG, 12 November 2021 (the “Transcripts”), p. 32, lines 14 to 19.

² See Annex 2 to the “Order on Disclosure and Related Matters (Pre Trial Chamber II), No. [ICC-02/05-01/20-116-Anx2](#), 17 August 2020.

³ See “Victims’ joint submissions on the matters identified in the Order scheduling the first status conference”, [ICC-02/05-01/20-463](#), 1 September 2021, (the “Victims’ joint submissions”), para 31.

⁴ Transcripts, *supra* note 1, p. 29, lines 18 to 23.

⁵ *Idem*, p. 32, lines 14 to 19.

6. The current Protocol omits to regulate the situation where a party wants to speak to or to interview a person, without knowing that he or she is a participating victim in the case. Therefore, the CLRV considers that it would be appropriate to widen the scope of the Protocol in such a way that it doesn't only address the contact with witnesses, but also with victims represented by the CLRV.
7. Under article 28 of the Code of Conduct, which equally applies to defence counsel and legal representatives for victims, "[c]ounsel shall not address directly the client of another counsel except through or with the permission of that counsel".
8. Therefore, every person approached by a party in the course of investigations should be asked whether he or she is a victim represented by counsel, in which case the code of conduct suggests that the legal representative should be informed of that contact.
9. The CLRV takes the position that - ultimately - it will be the victim's choice to decide whether he or she wishes to be assisted by his or her counsel during a meeting with another party, and the party in question must comply with the victim's decision. In any case, the CLRV must be informed in advance in order to advise his or her client about his or her rights.
10. The CLRV therefore advocate for an amended protocol or for an additional and separate protocol on the contact between victims in the case and parties, as adopted by Trial Chamber II in the *Katanga and Ngudjolo* case.⁶
11. Moreover, the CLRV reiterates the *petitum* of the former Legal Representative of Victims of an adoption of a protocol on dual status individuals as well as a Witness Familiarisation Protocol, and reminds the Trial Chamber of the submissions previously made by the former Legal Representative of Victims in

⁶ *Katanga and Ngudjolo* case, "Decision on the arrangements for contact between represented victims and the parties"(Trial Chamber II), 23 November 2010, No. [ICC-01/04- 01/07-2571-tENG](#), paras 29-39.

this regard⁷. The CLRV suggest that the Chamber adopts a Protocol on dual status individuals similar to the one in the *Ongwen* and in the *Yekatom and Ngaïssona* cases that also includes a Witness Familiarisation Protocol.⁸



Natalie v. Wistinghausen

Nasser Mohamed Amin Abdalla

Common Legal Representatives of Victims

Dated this 7 December 2021

At The Hague, the Netherlands

⁷ See Victims' joint submissions, *supra* note 3, para 33.

⁸ See in the *Ongwen* case, Annex 2 to the "Decision on Protocols to be Adopted at Trial" (Trial Chamber IX), No. [ICC-02/04-01/15-504-Anx2](#), 22 July 2016; See in the *Yekatom and Ngaïssona* case, Annex 2 to the "Decision on Protocols at Trial" (Trial Chamber V), [ICC-01/14-01/18-677-Anx2](#), 8 October 2020.