

**Cour
Pénale
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**International
Criminal
Court**

Original: *English*

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

Date: 25 May 2021

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

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

Public Redacted Version of ICC-02/05-01/20-374-Conf

**Joint Observations on the Second Registry Assessment Report and Transmission
of Victim Applications for Participation in Pre-Trial Proceedings**

Source: Legal Representatives of the Victims
Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Legal Representatives of the Victims authorised to participate in the proceedings and Counsel from the Office of Public Counsel for Victims ('OPCV', jointly 'Counsel') file the following joint observations on the 'Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings' ('Second Assessment Report').
2. The Second Assessment Report seeks the Chamber's guidance on a number of issues related to the scope of the charges that the Victims Participation and Reparations Section ('VPRS') was not able to clearly determine in assessing the eligibility of victims to participate in the case. It annexes 12 examples of applications that raise these issues, all of which include powers of attorney appointing the Legal Representatives as counsel, and 3 of which relate to victims who the Chamber had provisionally admitted to participate in the case.
3. Pursuant to the decision of the Single Judge of 19 March 2021, victims, 'via their legal representatives and for the purpose of presenting their views or concerns, shall be entitled to file both written submissions on any matter they consider relevant as well as responses and replies to any document presented to the Chamber under regulation 24 of the Regulations of the Court'.¹ Pursuant to the decision of the Single Judge of 5 February 2021, Counsel from the OPCV is appointed to provide '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' of the Court (the 'Regulations') throughout the stage between the collection of the applications and their transmission and adjudication by the Chamber.² The Chamber's approach to the issues raised by the VPRS will

¹ Pre-Trial Chamber II, [ICC-02/05-01/20-314](#) (19 March 2021), para. 33. See also para. 29 (the Chamber reserved 'the right to grant additional entitlements to victims during the proceedings either at their request or *proprio motu*') and Regulation 24(2) of the Regulations of the Court.

² Pre-Trial Chamber II, [ICC-02/05-01/20-277](#) (5 February 2021), para. 18 and *Dispositif*. See also Pre-Trial Chamber II, [ICC-02/05-01/20-314](#) (19 March 2021), para. 26; Regulation 81(4) of the Regulations of the Court.

affect not only the 12 applications considered in the Second Assessment Report but also the overall number and categories of victims who have already filed or will file applications in the near future in the case. For these reasons, Counsel submit these joint observations on the Second Assessment Report.

4. Counsel submit that the Chamber should endorse the flexible and holistic approach recommended by the VPRS for assessing the geographic, temporal, and material parameters of the case when determining applications for victims' participation. This approach is appropriate based on the Court's established jurisprudence as well as the nature of the alleged crimes and personal circumstances of the victims.

II. CLASSIFICATION

5. Pursuant to regulations 23bis (1) and (2) of the Regulations of the Court, this filing is marked confidential on the basis that it refers to documents marked with the same classification. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

6. On 18 January 2021, the Single Judge of Pre-Trial Chamber II (the 'Chamber') issued a decision authorising the VPRS to classify all complete applications for victim participation into three categories: Group A, for applicants who clearly qualify as victims in the case; Group B, for applicants who clearly do not qualify as victims in the case; and Group C, for whom the VPRS could not make a clear determination.³
7. On 5 February 2021, the Single Judge issued the "Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance".⁴
8. On 26 February 2021, the VPRS filed its 'First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings' ('First Assessment Report'),⁵ which recognised that 28 applicants had been classified

³ Pre-Trial Chamber II, [ICC-02/05-01/20-259](#) (18 January 2021).

⁴ See *supra* note 2.

⁵ Registry, [ICC-02/05-01/20-288](#) (26 February 2021).

under Group A and that their forms nominated counsel to represent them in the proceedings.

9. On 19 March 2021, the Chamber recognised these 28 applicants as victims provisionally admitted to participate in the case, pending the filing of the Document Containing the Charges ('DCC').⁶
10. On 29 March 2021, the Office of the Prosecutor filed the DCC, and on 16 April 2021 the Office of the Prosecutor filed its Pre-Confirmation Brief ('PCB') and List of Evidence.
11. On 21 April 2021, the Registry filed the Second Assessment Report, together with annexes 1 to 21, classified ex parte and only available to the Registry, and annexes 22 to 33, filed in confidential redacted form. The Second Assessment Report annexed the application forms for 12 applicants who were assessed to fall within Group C following the filing of the DCC: a/25061/21, a/25011/21, a/25013/21, a/25007/21, a/25016/21, a/25017/21, a/25014/21, a/25026/21, a/25006/21, a/25021/21, a/20684/20, and a/25044/21. All 12 applicants appointed one or both of the Legal Representatives for Victims as their counsel.⁷

IV. SUBMISSIONS

12. Pursuant to Regulation 86(2) of the Regulations, applications to participate as a victim in an ICC case should contain 'to the extent possible' information including the location and date of incidents and the harm that was suffered. As the Court has found, this means that a person must establish that she or he meets the definition

⁶ Pre-Trial Chamber II, [ICC-02/05-01/20-314](#) (19 March 2021).

⁷ Registry, [ICC-02/05-01/20-358](#) (21 April 2021), paras. 26, 31, 34 and 40. Referring as examples to application n° a/25061/21, a/25011/21, a/25013/21, a/25007/21, a/25016/21, a/25017/21, a/25014/21, a/25026/21, a/25006/21, a/25021/21 (appointing Ms Amal Clooney); a/20684/20 (appointing Mr Nasser Mohamed Amin Abdalla), and a/25044/21 (appointing Ms Amal Clooney and Mr Nasser Mohamed Amin Abdalla). Counsel notes that the Second Assessment Report erroneously refers at para. 40 to application n° 'a/25011/21' as appointing Mr Nasser Mohamed Amin Abdalla as counsel, whereas Ms Amal Clooney is the victim's appointed counsel: cf. paras. 31 and 34.

of a ‘victim’ under Rule 85(a) of the Rules of Procedure and Evidence only to a ‘prima facie’ standard.⁸

13. Applying this standard, this Chamber has held that the VPRS should accept applications as long as they are ‘internally coherent’, ‘clearly relate to the events described’ in the Prosecution’s charging documents, ‘and/or, where appropriate, the information in other victim applications’.⁹ And other Chambers have made clear that the ‘omission of information need not automatically result in the rejection of an application for participation’.¹⁰

14. Counsel submit that these underlying principles should apply when addressing each of the issues raised in the Second Assessment Report, namely: (1) the temporal scope of the case; (2) the geographic scope of the case; and (3) the material scope of the case when it comes to witnessing crimes. These issues will be considered in turn below.

(i) Temporal scope of the case

15. Counsel support the VPRS request that the Chamber endorse a ‘wholistic approach’ to determining whether the information in an application ‘provides sufficient certainty that the victim’s reported harm is indeed within the scope of the Case’ from a temporal perspective.¹¹

16. A flexible and contextual approach would be in line with the Court’s jurisprudence providing that when an application ‘does not provide the precise date of the alleged acts’ this should not preclude a victim’s eligibility to participate in a case.¹²

⁸ Pre-Trial Chamber I, *Al Hassan*, [ICC-01/12-01/18-146-tENG](#) (8 October 2018), para. 20.

⁹ Pre-Trial Chamber II, *Yekatom and Ngaïssona*, [ICC-01/14-01/18-227-Red](#) (21 June 2019), para. 24. See also Pre-Trial Chamber I, *Gbagbo*, [ICC-02/11-01/11-138](#) (4 June 2012), para. 21.

¹⁰ Pre-Trial Chamber I, *Al Hassan*, [ICC-01/12-01/18-146-tENG](#) (8 October 2018), para. 21. See also Pre-Trial Chamber I, *Gbagbo*, [ICC-02/11-01/11-384-Corr](#) (6 February 2013), para. 37; Trial Chamber I, *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-379](#) (7 January 2016), para. 45.

¹¹ Registry, [ICC-02/05-01/20-358](#) (21 April 2021), paras. 28 and 30.

¹² Pre-Trial Chamber I, *Al Hassan*, [ICC-01/12-01/18-146-tENG](#) (8 October 2018), para. 20.

17. Such an approach is also in line with the charges contained in the DCC, which are framed using broad temporal qualifiers.¹³ For example, the DCC describes a widespread and systematic attack '[b]etween at least August 2003 and at least April 2004' in a number of locations across the Wadi Salih and Mukjar Localities.¹⁴ This includes crimes committed in Kodoom, Bindisi and surrounding areas 'between about 15 and about 16 August 2003';¹⁵ in Mukjar and surrounding areas between 'at least' the 'end of February 2004 and the beginning of March 2004';¹⁶ in Deleig '[b]etween at least August 2003 and March 2004', '[o]n or about Friday, 5 March 2004', and 'until at least 7 March 2004'.¹⁷

18. This Chamber has also recognised that a flexible approach to temporal designations may be appropriate based on the 'personal circumstances' of the specific victims in question.¹⁸ That is the case here. For instance, many victims appear to have agricultural backgrounds, as is common with the Fur tribe as whole which has traditionally been an agrarian-based community.¹⁹ As a result, many accounts include broad seasonal descriptors, referring to the 'harvest' seasons, 'rainy' and 'dry' seasons, and to 'summer', 'winter' and 'fall' or 'autumn' in 2003 and 2004, rather than specific dates using a Western calendar system. Indeed, it appears to be common within the community not to record an individual's date of birth using a Western calendar system, and in a significant proportion of applications, the applicant's official identification documents only refer to their year of birth and refer by default to '1 January' for the date and month of their birth.

¹³ See also references in PCB, *Public Redacted Version of Annex A*, [ICC-02/05-01/20-346-AnxA-Red](#) (21 May 2021), paras. 20-21, 32, 43, 50, 53, 58, 135, 152, 156, 167, 169, 175, 180, 187, 193, 226, 227, 242, 260, 263, 278, 281-282, 285, 290, 295.

¹⁴ DCC, *Public Redacted Version of Annex 1*, [ICC-02/05-01/20-325-Anx1-Corr2-Red](#), (23 April 2021), paras. 2, 9, 16.

¹⁵ *Idem*, paras. 32, 34, 41, 61.

¹⁶ *Idem*, paras. 73, 75, 76, 84, 92. See also paras. 73 ('[b]etween at least February and March 2004') and 74 ('[i]n February 2004').

¹⁷ *Idem*, paras. 118, 119, 121, 129, 131.

¹⁸ Pre-Trial Chamber II, *Yekatom and Ngaïssona*, [ICC-01/14-01/18-227-Red](#), (21 June 2019), para. 24. See also Pre-Trial Chamber I, *Al Hassan*, [ICC-01/12-01/18-146-tENG](#) (8 October 2018), para. 19.

¹⁹ UN Commission of Inquiry, [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General](#) (25 January 2005), para. 52.

19. A flexible approach is also warranted given that some charges have a very narrow temporal scope and that the challenges of remembering precise dates in the context of traumatic incidents and violent conflict recalled at paragraph 24 of the Second Assessment Report are acutely exacerbated when many years have elapsed since the relevant events. For instance, Counsel are aware of a number of applicants who describe harm during events that clearly correspond to the description of incidents at the police station in Deleig described in the DCC as taking place ‘on or about’ 5-7 March 2004. These accounts are also consistent with the ones provided by other victims of these events. But – understandably given that the events took place almost twenty years ago – victims do not necessarily recall those specific dates.
20. The need for flexibility in such a context has already been recognised by this Chamber in the *Yekatom and Ngaïssona* case. In that case the Pre-Trial Chamber held that ‘minor discrepancies in terms of dates ... should not lead to the exclusion of applications’²⁰ and that ‘flexibility with respect to the precise dates of the alleged acts’ was required given ‘in particular the time that had elapsed since the events’.²¹ Given that in the *Yekatom and Ngaïssona* case the Pre-Trial Chamber was considering a period of approximately five years that had elapsed between the start of the armed conflict in the Central African Republic and its decision on the VPRS’ assessment report, Counsel submit that the Chamber should adopt at least the same flexibility in this case where victims have had to wait over 17 years to provide their account.²²
21. As a result, Counsel support the VPRS submission that ‘when an applicant provides a detailed description of the relevant events in question, including locations and alleged crimes that fit squarely within the events described in the

²⁰ Pre-Trial Chamber II, *Yekatom and Ngaïssona*, [ICC-01/14-01/18-227-Red](#), (21 June 2019), para. 24.

²¹ *Ibid.* See also Trial Chamber VIII, *Al Mahdi*, [ICC-01/12-01/15-97-Red](#) (8 June 2016), paras. 31-32; Trial Chamber III, *Bemba*, [ICC-01/05-01/08-1862](#) (25 October 2010), para. 24.

²² Pre-Trial Chamber II, *Ntaganda*, [ICC-01/04-02/06-211](#) (15 January 2014), paras. 51-54. See also ICTR Appeals Chamber, *Nchamihigo*, [ICTR-2001-63-A](#) (18 March 2010), para. 149; ICTR Appeals Chamber, *Simba*, [ICTR-01-76-A](#) (27 November 2007), para. 159.

DCC, and provides a date that is within the relevant period (2003-2004)', the applicant should be assessed to fall within Group A.

(ii) Geographic scope of the case

22. Counsel support the VPRS request that the Chamber endorse a pragmatic approach to the term 'surrounding areas' referred to in the charges and that this should be interpreted as including any village in the Wadi Salih or Mukjar Localities so long as the remaining requirements are met.
23. Such an approach would be in line with the scope of the charges and the theory of the case detailed in the DCC and the Prosecution's Pre-Confirmation Brief ('PCB'). All of the charges arise from a single, 'widespread and systematic attack against the civilian population' which covers 'the Wadi Salih and Mukjar Localities of Western Darfur'.²³ And these two localities together encompass a limited area of 1,400 square kilometres²⁴ (out of 250,000 square kilometres for the Darfur region as a whole).²⁵
24. The DCC and PCB refer to relevant locations within these municipalities using non-exhaustive and inclusive terms. For instance:
- Charges for crimes committed in Kodoom and Bindisi include 'surrounding areas' in the Wadi Salih Locality²⁶ and 'Kodoom had separate areas, including Kodoom Ronga Tass, Kodoom Tineh and Kodoom Derliwa'. Similarly 'Bindisi was surrounded by several villages, such as Daguinda,[] Gausir,[] Kodoom, Gartaga,[] Seder,[] Tiro and others.'²⁷

²³ DCC, *Public Redacted Version of Annex 1*, para. 2. See also para. 5 (referring to other attacks 'including Arawala, Forgo, Taringa, Andi, Fere, Seder, Gausir, Kaskeidi and Um Jameina in the Wadi Salih Locality, and Tandy and Tiro in the Mukjar Locality).

²⁴ *Idem*, para. 6.

²⁵ UN Commission of Inquiry, [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General](#) (25 January 2005), para. 51.

²⁶ DCC, *Public Redacted Version of Annex 1*, paras. 32.

²⁷ PCB, *Public Redacted Version of Annex A*, para. 149.

- Charges for crimes committed in Mukjar include ‘surrounding areas’ in the Mukjar Administrative Unit of Mukjar Locality²⁸ and an armed attack took place in ‘several’ villages in the areas surrounding Mukjar, including Tendy,[] Abirla,[] Arada,[] Dembow Kabdy,[] Kirarow,[] Sigirgir,[] and Nyerli.[]’²⁹
- Charges for crimes committed in Deleig include ‘surrounding areas’ in the Wadi Salih Locality³⁰ and there was an attack on ‘several’ villages in the areas surrounding Deleig, including Arawala, Forgo, Taringa, Andi, Kakeidi and Um Jameina’.³¹

25. The DCC and PCB also describe the inter-connectedness between the incidents that occurred in each location. As the VPRS confirms, the ‘alleged acts and alleged perpetrators in [the] surrounding villages appear to be substantially similar to those applications received from the towns of Kodoom, Bindisi, Deleig or Mukjar’.³² And individuals were often forced to flee from one location to another, traversing and often being subjected to harm in the villages between Kodoom, Bindisi, Mukjar and Deleig along the way.³³ For instance, according to the DCC and the PCB:

- Thousands of victims were ‘forced to flee from Kodoom, Bindisi and surrounding areas, many eventually seeking refuge in Mukjar’.³⁴

²⁸ DCC, *Public Redacted Version of Annex 1*, para. 72.

²⁹ PCB, *Public Redacted Version of Annex A*, para. 226. See also para. 51 (referring to a ‘non-exhaustive list of other locations’).

³⁰ DCC, *Public Redacted Version of Annex 1*, para. 118.

³¹ PCB, *Public Redacted Version of Annex A*, para. 281 (also stating that Deleig is located in the Garsila-Deleig Administrative Unit and that the attacks caused thousands of civilians to seek shelter ‘in Deleig, Garsila and other towns’).

³² Registry, [ICC-02/05-01/20-358](#) (21 April 2021), para. 32.

³³ See, e.g., DCC, *Public Redacted Version of Annex 1*, paras. 6, 54, 98, 118-119. See also PCB, *Public Redacted Version of Annex A*, paras. 193-196, 226-227, 281-282.

³⁴ DCC, *Public Redacted Version of Annex 1*, para. 55. See also PCB, *Public Redacted Version of Annex A*, para. 149.

- Victims fled from Kodoom and other locations to Bindisi, before fleeing from Bindisi to Mukjar.³⁵
- Hundreds of victims were forced 'to seek shelter in Mukjar' after fleeing armed attacks against surrounding villages including Sindu.³⁶
- Thousands of victims fled to 'Deleig, Garsila and other towns' after armed attacks on several surrounding villages.³⁷

This geographic inter-connectedness is also reflected in accounts that Counsel have heard from victims. For instance, victims have reported fleeing Bindisi to Mukjar, before fleeing back to Bindisi during attacks on Mukjar, or being forced to flee from Mukjar to Garsila. Some victims arrived in Garsila from Mukjar, before being displaced from Garsila to Deleig. Others were forced to flee from the Arawala area to Deleig, and victims were forcibly displaced from Deleig to other locations, including Garsila, Zalengei and Nyala. In addition, some survivors report being kidnapped and taken to Janjaweed camps whose precise geographic location was not known to them but, given the estimated distances from known locations, clearly falls within the two Localities in which civilians were attacked.

26. For these reasons, Counsel support VPRS' submission that 'surrounding areas' term should be interpreted as including any village in the Wadi Salih and Mukjar Localities.

(iii) Material scope of the case

27. Counsel agree with the approach proposed by the VPRS that all victims who allege personal harm 'by virtue of witnessing crimes allegedly perpetrated against neighbours and other members of the Fur community, albeit without mentioning any family relationship' should be considered eligible to participate in the case if

³⁵ PCB, *Public Redacted Version of Annex A*, paras. 164, 194-195.

³⁶ DCC, *Public Redacted Version of Annex 1*, paras. 73 and 101(a). See also PCB, *Public Redacted Version of Annex A*, para. 226.

³⁷ DCC, *Public Redacted Version of Annex 1*, para. 118. See also PCB, *Public Redacted Version of Annex A*, para. 281.

other requirements are met.³⁸ Indeed, this conclusion also has been acknowledged and supported by the Defence.³⁹

28. The VPRS is correct to note that ‘persons witnessing atrocities committed in their community may sustain direct psychological harm, particularly in an environment where these individuals have to fear that similar physical harm may befall them imminently’.⁴⁰ The Prosecution case makes clear that the crimes were committed in villages that have (at least) a majority of Fur inhabitants, and the charges of persecution make clear that this community was targeted on the basis of protected characteristics.⁴¹ In this context, eyewitnesses evidently could be expected to sustain psychological harm not only due to the experience of witnessing atrocities being committed against neighbours and others in their community, but also because they themselves were clearly facing the same harm for the same reason.

29. This Court’s established jurisprudence recognises that psychological harm amounts to qualifying harm for purpose of victims’ participation⁴² and that crimes may ‘irreversibly impact not only direct victims but also those who witnessed the crimes being committed’.⁴³ In this regard, in the *Al Hassan* case, the Single Judge found that in order to establish that an individual suffered psychological harm it was sufficient that they were present at the location of the attack and ‘witnessed

³⁸ Registry, [ICC-02/05-01/20-358](#) (21 April 2021), para. 37. This broad interpretation is all the more important in circumstances in which it is difficult for many victims to prove a family relationship to those who have suffered physical harm given that many of the relatives who could attest to this are themselves deceased and/or where access to official documentation is restricted.

³⁹ Defence, [ICC-02/05-01/20-370-Corr](#) (30 April 2021), para. 22.

⁴⁰ *Ibid.*

⁴¹ See, e.g., DCC, *Public Redacted Version of Annex 1*, paras. 57-58, 66, 81, 93, 136. See also PCB, *Public Redacted Version of Annex A*, paras. 22, 33-36, 41, 54-55, 125-149, 168-169, 175, 193, 218, 227-228, 231, 256, 261, 281, 285, 295-296, 330.

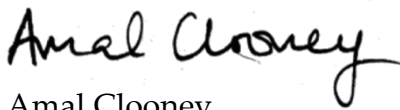
⁴² Appeals Chamber, *Lubanga*, [ICC-01/04-01/06-1432](#) (11 July 2008), paras. 1, 32, 34.

⁴³ Trial Chamber VI, *Ntaganda*, [ICC-01/04-02/06-2659](#) (8 March 2021), para. 128. See also Appeals Chamber, *Lubanga*, [ICC-01/04-01/06-1432](#) (11 July 2008), para. 32 ([‘m]aterial, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims ...’); Trial Chamber VI, *Ntaganda*, [ICC-01/04-02/06-2442](#) (7 November 2019), paras. 49-52.

crimes perpetrated against other members of the population'.⁴⁴ Counsel submit that the same approach is warranted here.

V. CONCLUSION

30. For the reasons outlined above, Counsel respectfully request that the Chamber direct the VPRS to assess applications for victims' participation in line with the Second Assessment Report and the principles set out above, including but not limited to the 12 applications annexed to the Second Assessment Report.


Amal Clooney


Nasser Mohamed Amin Abdalla



Paolina Massidda

Dated this 25th of May 2021

In London (UK), in Cairo (Egypt), and in The Hague (The Netherlands)

⁴⁴ Pre-Trial Chamber I, *Al Hassan*, [ICC-01/12-01/18-146-tENG](#) (8 October 2018), paras. 35-37.