

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-01/20**
Date: **14 October 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

Information on Common Legal Representation

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

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

The Office of the Prosecutor

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Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Lucci

Mr Iain Edwards

Legal Representatives of the Victims

Ms Paolina Massidda

Mr Nasser Mohamed Amin Abdalla

Ms Nathalie von Wistinghausen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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**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. PROCEDURAL BACKGROUND

1. On 20 May 2021, Pre-Trial Chamber II issued the “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests”, authorising 151 victims to participate in the proceedings and appointing, on the one hand, Counsel from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as one of the legal representatives and, on the other hand, Mr Abdalla and Ms Clooney jointly, as a distinct team of legal representatives in the case (the “Joint Legal Representatives”).¹

2. On 21 September 2021, Ms Clooney filed a submission on legal representation of victims,² informing the Chamber that she wishes to discontinue her mandate as one of the Joint Legal Representatives and proposing Ms von Wistinghausen as a replacement.³

3. On 22 September 2021, the Chamber issued by e-mail an Order instructing the Registry to submit a report on common legal representation by 1 October 2021, and the parties and participants to file observations thereon by 8 October 2021.⁴

4. On 1 October 2021, the Registry filed the Report.⁵

5. On 4 October 2021, the Chamber instructed by e-mail the Joint Legal Representatives to inform the Chamber “(a) *whether all victims (presently participating and future victims) could be represented by Ms Wistinghausen and Mr Nasser acting as one single team; and (b) whether Ms Wistinghausen and Mr Nasser wish to continue representing victims participating in this case on a pro bono basis*”.⁶

¹ See the “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests” (Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-398](#), 20 May 2021.

² See the “Submissions on the issue of legal representation of victims”, [No. ICC-02/05-01/20-474](#), 21 September 2021.

³ *Idem*, paras. 6 and 7.

⁴ See the e-mail the Chamber’s email on 22 September 2021 at 10:17 hours.

⁵ See the “Registry Report on Common Legal Representation”, [No. ICC-02/05-01/20-477](#), 1 October 2021 (the “Registry’s Report”).

⁶ See the Chamber’s email on 4 October 2021 at 14:07 hours.

6. On 5 October 2021, the Defence filed its Response to the Registry's Report.⁷
7. On 8 October 2021, the Legal Representative from the OPCV filed her submissions.⁸ On that same date, Ms von Wistinghausen submitted observations on behalf of victims who wish her to replace Ms Clooney.⁹ Mr Nasser Mohamed Amin Abdalla did not file a response.
8. On 11 October 2021, the Chamber issued the "Order on victim's legal representation", instructing - differently from the question posed in its previous e-mail dated 4 October 2021¹⁰ - "*Ms Massidda, Ms Wistinghausen and Mr Nasser Mohamed Amin Abdalla, to indicate by 14 October 2021, whether they are willing to represent **all victims** (presently participating and future victims) acting as **one single team**, pursuant to Rule 90(2) of the Rules of Procedure and Evidence. If the answer is in the affirmative, then counsel should decide among themselves who will act as lead counsel and inform the Chamber accordingly by the same deadline*".¹¹

II. SUBMISSIONS

9. Pursuant to the Chamber's instructions,¹² Counsel have consulted among themselves and with the groups of victims they respectively represent.
10. At the outset, Counsel note that the concept of *lead counsel* is a typical common law notion not necessarily applicable to the legal representation scheme adopted before the Court, particularly when a chamber defers to the free choice of victims its appointment of legal representative(s) in a case. In fact, when a chamber maintains the

⁷ See the "Réponse aux Observations du Greffe ICC-02/05-01/20-477", [No. ICC-02/05-01/20-479](#), 5 October 2021.

⁸ See the "Observations on the Registry Report on Common Legal Representation", [No. ICC-02/05-01/20-480](#), 8 October 2021.

⁹ See the "Annex A to the Transmission of 'Submissions on legal representation of victims'", [No. ICC-02/05-01/20-484-AnxA](#), transmitted by the Registry on 12 October 2021 (dated 8 October 2021).

¹⁰ Cf. the Chamber's email on 4 October 2021 at 14:07 hours, *supra* note 6.

¹¹ See the "Order on victim's legal representation" (Trial Chamber I), [No. ICC-02/05-01/20-482](#), 11 October 2021, para. 11.

¹² *Ibid.*

lawyer's choice made by the victims, it is not uncommon that more than one legal representative is appointed to represent the participating victims in the proceedings.

11. Counsel inform the Chamber that, despite their good will and efforts, they could not reach an agreement on the common legal representation scheme proposed. In fact, victims represented by Ms Massidda expressed their concerns in being represented by counsel they do not know and they never interacted with. Most of the victims indicate their opposition in sharing their personal information and stories with a larger pool of individuals, being newly appointed counsel or their assistants. In particular, victims of sexual violence refuse to disclose any sensitive information with a counsel, or assistant thereof, of the opposite gender.

12. Counsel recall that rule 90(3) of the Rules of Procedure and Evidence (the "Rules") provides that, if victims are unable to choose a common legal representative or representatives within a time limit set out for this purpose, the Chamber "*may*" appoint one or more common legal representatives.¹³ The Chamber has thus full discretion in the matter when victims are unable to express a choice or cannot reach an agreement. Nonetheless paragraph (4) of rule 90 imposes the obligation to ensure that in the selection of common legal representatives "*the distinct interests of the victims [...] are represented*".

13. Counsel stress that in order to achieve a meaningful involvement of victims in the proceedings the reality of Darfur needs to be taken into account, through the respect of the personal specificities and distinct needs of the participating victims. In addition, Counsel recall that due to the extensive diaspora specific to the case at hand, the different groups of victims respectively represented by the two teams reside in different parts of the world, have different needs in terms of interpretation and suffered different types of prejudice. As noted by the Registry,¹⁴ hundreds of victims

¹³ See rule 90(3) of the [Rules of Procedure and Evidence](#).

¹⁴ See the Registry's Report, *supra* note 5, para. 30.

are likely to participate at trial and there will be a need for constant interaction in the field and in a language they fully understand.

14. In this regard, Counsel submit that resources - including, if granted, the ones from the legal aid scheme as requested by Ms von Wistinghausen¹⁵ - can be better allocated and used to meet all these distinct needs if the two teams continue to act through their separate mandates. Ms von Wistinghausen wishes to reiterate that she will not act on a *pro bono* basis and funding for legal representation of victims will therefore be required from the Court's legal aid scheme. Similarly, Mr Abdalla indicates that he is no longer able to continue representing victims on a *pro bono* basis.

15. In light of the above, Counsel respectfully request that the representation scheme selected by Pre-Trial Chamber II be maintained for the trial proceedings.¹⁶ Counsel ask the Chamber to consider the choice of victims and appoint for the purposes of trial three legal representatives, forming two distinct teams - one of Counsel from the OPCV, Ms Massidda, and one of two external legal representatives Mr Abdalla and Ms von Wistinghausen, the latter acting as lead counsel for that team. Counsel agree that said scheme will in fact ensure continuity in the legal representation and respect of the victim's choice, while safeguarding the effectiveness of the proceedings.

16. Lastly, Counsel recall that such configuration - including two teams, one of Counsel from the OPCV and one of two external legal representatives - has been already adopted in the *Ongwen* case and proved to be efficient for this very reason. With this view, if appointed as two separate teams, Counsel undertake to continue cooperating closely to present the views and concerns of the participating victims, including by submitting joint filings, as appropriate.

¹⁵ See the "Annex A to the Transmission of 'Submissions on legal representation of victims'", *supra* note 9, para. 10, fn 12 and 13.

¹⁶ See the "Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests", *supra* note 1.

Respectfully submitted.



Paolina Massidda



Natalie von Wistinghausen



Nasser M. Amin Abdalla

Dated this 14th day of October 2021

At The Hague, The Netherlands