



Original: English

**No. ICC-02/05-01/20
Date: 19 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

Decision on victims' participation and legal representation in trial proceedings

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

The Office of the Prosecutor
Karim A.A. Khan

Counsel for the Defence
Cyril Laucci

Legal Representatives of Victims
Natalie von Wistinghausen
Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims
Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section
Pieter Vanaverbeke

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**
Philipp Ambach

Other
Amal Clooney

1. During the confirmation of charges stage of proceedings, the Pre-Trial Chamber II (the ‘PTC II’) Single Judge issued a decision setting out the principles applicable to victims’ participation and representation during the confirmation hearing, appointing legal representatives for the purpose of the confirmation of charges and adopting a system to assess victims’ applications (the ‘ABC Approach’).¹
2. In preparation for the first status conference, and as instructed by the Chamber,² the Registry, the parties and the legal representatives of victims appointed during the confirmation of charges stage of the proceedings (the ‘LRVs’) filed observations, *inter alia*, on victims application for participation in the proceedings.³
3. On 11 October 2021, following a submission by Ms Amal Clooney,⁴ and as instructed by the Chamber,⁵ a Registry report,⁶ and submissions thereof made by the Defence,⁷ Office of Public Counsel for Victims (the ‘OPCV’)⁸ and Ms Natalie von Wistinghausen,⁹ the Chamber issued an order appointing Ms von Wistinghausen as legal representative of victims,¹⁰ and instructing her as well as Ms Massidda and Mr

¹ Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing, 18 January 2021, ICC-02/05-01/20-259; Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance, 5 February 2021, ICC-02/05-01/20-277; Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position, 19 March 2021, ICC-02/05-01/20-314; Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests, 20 May 2021, ICC-02/05-01/20-398 (with annex ICC-02/05-01/20-398-Anx-Corr).

² Order scheduling first status conference, 16 August 2021, ICC-02/05-01/20-451, paras 1(J)-2.

³ See Registry Submissions in View of the Upcoming Status Conference in accordance with “Order scheduling first status conference” (ICC-02/05-01/20-451), 1 September 2021, ICC-02/05-01/20-462, para. 21 (with 2 annexes: ICC-02/05-01/20-462-Conf-Exp-AnxI; ICC-02/05-01/20-462-AnxII-Red); Victims’ joint submissions on the matters identified in the “Order scheduling first status conference”, 1 September 2021, ICC-02/05-01/20-463, paras 24-28; Prosecution’s submissions pursuant to the “Order scheduling first status conference”, 1 September 2021, ICC-02/05-01/20-464-Conf-Exp (confidential and public redacted versions: ICC-02/05-01/20-464-Conf-Red; ICC-02/05-01/20-464-Red2), para. 47; *Rectificatif aux Observations de la Défense en vertu de l’Ordonnance ICC-02/05-01/20-451*, 2 September 2021, ICC-02/05-01/20-461-Corr, paras 45-46. See also Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, in particular p. 73, lines 13-17.

⁴ Submissions on the issue of legal representation of victims, 21 September 2021, ICC-02/05-01/20-474.

⁵ Email instructions from the Chamber to the Registry, 22 September 2021 at 10:17; Email instructions from the Chamber to the legal representatives of victims, 4 October 2021 at 14:07.

⁶ Registry Report on Common Legal Representation, 1 October 2021, ICC-02/05-01/20-477 (the ‘Registry Report’).

⁷ *Réponse aux Observations du Greffe ICC-02/05-01/20-477*, 5 October 2021, ICC-02/05-01/20-479.

⁸ Observations on the Registry Report on Common Legal Representation, 8 October 2021, ICC-02/05-01/20-480 (the ‘OPCV Observations’).

⁹ Transmission of “Submissions on legal representation of victims”, 12 October 2021, ICC-02/05-01/20-484 (with one annex: ICC-02/05-01/20-484-AnxA).

¹⁰ Order on victims representation, ICC-02/05-01/20-482, para. 12.

Abdalla, to indicate ‘whether they are willing to represent **all victims** (presently participating and future victims) acting as **one single team**’.¹¹

4. On 14 October 2021, Ms von Wistinghausen, Ms Massidda and Mr Abdalla, filed joint submissions on common legal representation.¹²

5. On that same date, Ms Clooney requested authorisation to withdraw as legal representative of victims in the case and sought permission to transfer copies of the case file to Ms Von Wistinghausen.¹³

6. At the outset, the Chamber notes that no conflicting interests between participating victims have been identified.¹⁴ The Chamber considers that the sweeping statements, lacking in any detail, made by the LRVs in their joint submissions are not helpful for the determination to be made by the Chamber.¹⁵ In fact, counsel have failed to identify any conflicting interests that would prevent them from acting together as a team in the interests of their clients.¹⁶ Accordingly, the Chamber reiterates that the appointment of one team of legal representatives for the continuation of the trial would more appropriately ensure the effectiveness of the proceedings.¹⁷

7. Although the Chamber notes that victims have expressed their preference for one of the three abovementioned counsel to continue acting as their legal representative, a balance must be struck between the victims’ wishes and the Court’s available resources.¹⁸ The decision to appoint a common legal representative takes into account the need to have the victims’ views presented as a whole during the trial proceedings.

¹¹ Order on victims representation, ICC-02/05-01/20-482, para. 11.

¹² Information on Common Legal Representation, ICC-02/05-01/20-487.

¹³ Request for permission to withdraw as a legal representative of victims and to transfer copies of the case file, including confidential victim information, to replacement counsel, ICC-02/05-01/20-488.

¹⁴ Registry Report, ICC-02/05-01/20-477, para. 25.

¹⁵ Information on Common Legal Representation, ICC-02/05-01/20-487, paras 11, 13.

¹⁶ The Chamber notes in fact that in the confirmation of charges stage of the proceedings, the OPCV had informed that to the contrary, there was no basis to believe that an insurmountable conflict of interests exists between different victim groups. *See* Report on the Activities of the Office of Public Counsel for Victims pursuant to the “Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing (ICC-02/05-01/20-259)” and the “Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance (ICC-02/05-01/20-277)”, 12 March 2021, ICC-02/05-01/20-297-Conf-Exp, para. 22. The Chamber notes this filing was filed confidential *ex parte*, but considers that the general reference above does not warrant this confidentiality level. The OPCV is instructed to file a public and confidential redacted version of this filing.

¹⁷ Email instructions from the Chamber to the Registry, 22 September 2021 at 10:17; Email instructions from the Chamber to the legal representatives of victims, 4 October 2021 at 14:07.

¹⁸ Registry Report, ICC-02/05-01/20-477, fn. 31.

Further, the appointment of a single team will have the effect of ensuring both that the views and concerns of all the victims may be presented in a balanced manner and avoid repetitive submissions which could impact the smooth running of the trial.

8. The Chamber notes that Rule 90(3) of the Rules states that if victims are unable to choose a common legal representative the Chamber may request the Registrar to choose a common legal representative. The Chamber notes that for the selection of a common legal representative, the Registry proposed a procedure that appears resource-intensive and estimated to last at least ten weeks.¹⁹ It is thus incompatible with the timetable set by the Chamber towards the start of trial, scheduled to commence on 5 April 2021, and particularly the deadlines for submissions where potentially the interests of victims may be affected.²⁰ Pursuant to Regulation 80(1) of the Regulations, the Chamber considers it is in the interests of justice to appoint a common legal representative with immediate effect, particularly bearing in mind the stage of the proceedings and the timeline running towards the start of trial.

9. Although the Chamber acknowledges that there may be more victims participating at a later stage, its decision must bear in mind the views of those victims currently participating in the trial proceedings. The Chamber notes in this regard that the overwhelming majority of the victims currently participating in this case wish to be represented by the team composed of Ms von Wistinghausen and Mr Abdalla.²¹

10. The Chamber therefore appoints Ms von Wistinghausen and Mr Abdalla to work as a single team of common legal representatives (the ‘CLRs’) to represent victims throughout the trial proceedings.

11. Regulation 81(4)(a) of the Regulations sets out that the OPCV may provide support and assistance to the CLRs, and, on instruction, or with the leave of the Chamber, advise on and assist the CLRs with the detailed factual circumstances of the case. The Chamber considers that it would be helpful for the OPCV to assist the CLRs in this manner. The Chamber notes in particular that the OPCV has recently recruited two new staff members with knowledge of Darfuri dialects and the victim communities,

¹⁹ Registry Report, ICC-02/05-01/20-477, para. 45.

²⁰ See Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 80, lines 19-25.

²¹ Registry Report, ICC-02/05-01/20-477, p. 6. The Registry reports that 125 victims are represented by Ms Von Wistinghausen and Mr Abdalla, while 25 victims are represented by OPCV.

whom the Chamber considers could assist the CLR's.²² For example, as suggested by the OPCV,²³ a model in which a field counsel in the situation country assists the CLR's could be appropriate in this case. The Chamber instructs the OPCV to advise on and assist the CLR's with the detailed factual circumstances of the case.

12. The Registry's Victims Participation and Reparations Section (the 'VPRS'), in consultation with the OPCV and the CLR's, is instructed to inform all victims about the appointment of the CLR's and facilitate their communication with the victims.

13. The Chamber notes that new applications have been transmitted after the confirmation of charges stage.²⁴ Accordingly, the Registry is instructed to transmit to the CLR's all current applications and thereafter on a rolling basis. The OPCV is likewise instructed to transmit to the CLR's any records in its possession concerning its representation of victims.

14. As regards the request filed by Ms Clooney seeking authorisation to withdraw from the case, the Chamber can only repeat its dismay that prior authorisation for the withdrawal was not sought in accordance with Regulation 82 of the Regulations of the Court.²⁵ However, it formally authorises her withdrawal and the transmission of any records to the CLR's.

15. In respect of the procedure for the admission of victims to participate in the trial proceedings, the Chamber concludes that there is no reason to depart from the procedural scheme established during the confirmation of charges stage of the proceedings.²⁶ Accordingly, the Registry is to re-assess, in light of the confirmed charges, the applications of the 151 victims admitted during the confirmation of charges stage of the proceedings. The Registry is also to assess any new applications received to date for the purpose of participation in trial. It shall group applications pursuant to

²² OPCV Observations, ICC-02/05-01/20-480, para. 19.

²³ OPCV Observations, ICC-02/05-01/20-480, para. 20.

²⁴ Registry Report, ICC-02/05-01/20-477, fn. 14; OPCV Observations, ICC-02/05-01/20-480, para. 24.

²⁵ Order on victims representation, ICC-02/05-01/20-482, para. 9.

²⁶ Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing, 18 January 2021, paras 13-20, 34. *See also* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial, 12 March 2020, ICC-01/12-01/18-661, para. 17. On the matter of the ABC Approach, *see* Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation", 14 September 2021, ICC-01/14-01/21-171.

the ABC Approach. A report on both aspects should be supplied to the Chamber by 6 December 2021 and thereafter periodically and on a rolling basis.

16. For these reasons, the Chamber:

- i. **appoints** Ms von Wistinghausen and Mr Abdalla to work as a single team of CLRs to represent victims throughout the trial proceedings;
- ii. **instructs** the OPCV to provide support and assistance to the CLRs pursuant to Regulation 81(4) of the Regulations;
- iii. **instructs** the Registry's VPRS, in consultation with the OPCV and the CLRs, to inform all victims about the appointment of the CLRs and facilitate their communication with the victims;
- iv. **instructs** the Registry to transmit to the CLRs all applications received so far and thereafter on an rolling basis;
- v. **instructs** the OPCV to transmit to the CLRs any records in its possession concerning victims it has until now represented;
- vi. **authorises** Ms Clooney to withdraw from the case as legal representative for victims and to transmit any records to the CLRs;
- vii. **instructs** the Registry to reassess the applications of the 151 victims admitted at the confirmation of charges stage of the proceedings; and
- viii. **instructs** the Registry to assess pursuant to the ABC Approach, any new applications received to date for the purpose of participation in trial
- ix. **instructs** the Registry to produce a report on both aspects by 6 December 2021 and thereafter periodically and on a rolling basis.



Judge Joanna Korner
Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 19 October 2021

At The Hague, The Netherlands