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PRE-TRIAL CHAMBER II

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

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

Public

**Public Redacted version of “Registry Observations on the Defence's “Réponse à la
Requête ICC-02/05-01/20-178”(ICC-02/05-01/20-182-Conf)”, 26 October 2020,
ICC-02/05-01/20-194-Conf**

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

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I. Introduction

1. In accordance with an order conveyed by email by Pre-Trial Chamber II on 19 October 2020 (“Chamber” and “Order”),¹ the Registry hereby submits its observations on the legal and factual issues raised by the Defence in its “Réponse à la Requête ICC-02/05-01/20-178” (“Defence Response”).²

II. Procedural history

2. On 9 October 2020, the Victims Participation and Reparations Section of the Registry (“VPRS”) requested authorization from the Chamber to use a modified standard application form to facilitate victim participation in the *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* case (“Case” and “Request”).³
3. On 12 October 2020, the Defence raised a number of legal and factual issues in response to the Registry’s Request.⁴
4. On 19 October 2020, the Single Judge of the Chamber issued the Order, requesting the Registry “to submit a detailed report on the legal and factual issues raised” in the Defence Response, no later than 26 October 2020.⁵

III. Classification

5. In accordance with regulation 23bis(2) of the Regulations of the Court (RoC), the present submission is classified as confidential since it refers to the Defence Response with the same classification. Upon the Chamber’s indication, the Registry stands ready to file a public version of the present submission.

¹ Email of the Single Judge of Pre-Trial Chamber II to the Registry (OD DJS and VPRS), of 19 October 2020, at 15 :44.

² Defence, “Réponse à la Requête ICC-02/05-01/20-178”, ICC-02/05-01/20-182, 12 October 2020.

³ Registry, “Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case”, ICC-02/05-01/20-178, dated 8 October 2020 and notified on 9 October 2020.

⁴ Defence Response, ICC-02/05-01/20-182, 12 October 2020.

⁵ See fn. 1.

IV. Submissions

[Redacted]

6. [Redacted]^{6 7 8 9}

7. [Redacted]¹⁰

8. [Redacted]

The procedural legal vehicle of the Request

9. The Defence submits that the VPRS does not indicate the provisions that form the Request's legal basis and its nature.¹¹ It identifies the Request, failing an explicit qualification by the Registry, as a "document" within the meaning of regulation 22 of the RoC.¹²
10. The Registry indicated in its "Applicable Law" section the material provisions it considered the most relevant for the Request, all relating to the discharge of its functions in the victim application process in the present proceedings pursuant to Rule 89 of the Rules of Procedure and Evidence ("RPE").¹³ Yet, it omitted to refer to the fact that its filing was in fact made pursuant to an instruction of the Single Judge to the VPRS to file in the record of the case the proposed victim application form, together with any relevant observations.¹⁴ Due to an oversight, this circumstance was not explicitly mentioned. At the same time, the Registry submits that in the circumstances and particularly in light of the subject-matter of the Request, the omission of an explicit reference of the procedural vehicle was not prejudicial to the Defence.

⁶ [Redacted]

⁷ [Redacted]

⁸ [Redacted]

⁹ [Redacted]

¹⁰ [Redacted]

¹¹ Id., paras. 5-6.

¹² Id., para. 6.

¹³ Request, para. 2.

¹⁴ Email of Pre-Trial Chamber II Communications to the Chief of VPRS, 16 September 2020, 09:57.

Legal basis of the Request (subject-matter)

11. In reference to the Request, the Defence contends that, pursuant to article 43 of the Statute, the Registry lacks standing to make proposals that are not in line with prior practice at the Court.¹⁵ The Defence suggests that challenging jurisprudence is the parties' prerogative and that the Registry, as a neutral administrative organ, has no mandate to do so.¹⁶

12. The Registry respectfully submits that its mandate pursuant to article 43(1) of the Statute appropriately covers its Request. Article 43(1) states in relevant part that "[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court [...]." Matters pertaining to victim participation fall within the Registry's remit as evidenced by the very same provision (article 43 (6) of the Statute) which grants the Registrar the authority to "set up a Victims and Witnesses Unit within the Registry" to provide assistance to *inter alia* "victims who appear before the Court". Rule 16 of the RPE further specifies that the Registrar is responsible for "[a]ssisting [victims] in participating in the different phases of the proceedings in accordance with rules 89 to 91; [...]". To further clarify the responsibilities delegated to the Registry with respect to victims, the judges of the Court adopted, *inter alia*, regulation 86(9) of the RoC which mandates that "[t]here shall be a specialised unit dealing with victims' participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims."¹⁷ The VPRS's proposal to adopt a modified version in addition to the standard application form for use in the present Case was submitted in execution of its mandate under rule 16 of the RPE and regulation 86 of the RoC and for the sole purpose of optimising its assistance to victims to participate, this may well include at times a proposal for

¹⁵ Defence Response, paras. 8, 9, 17.

¹⁶ *Id.*, paras. 8-9.

¹⁷ This provision also laid the basis for the Victims Participation and Reparations Section ("VPRS") of the Registry.

adjustment of previous jurisprudence as victims' participation in ICC proceedings is a still evolving matter.

13. As noted in the final report of the Independent Expert Review of the International Criminal Court, on the topic of victim participation, "it is not surprising that developing an efficient and effective process from scratch for such a major innovation without any really comparable pattern to follow should take time and involve trying different possibilities along the way."¹⁸
14. With respect to prior practice at the Court, the Registry's VPRS has routinely been called upon by the various Chambers to make context-specific submissions and proposals for the effectuation of victim engagement in the specific cases. These proposals are often specifically designed for the case at hand and not as proposals for standard processes or forms as such. The consistent practice across the cases with respect to victim engagement has been that the Pre-Trial and Trial Chambers have each recognized the value in designing and adopting systems and tools that are fit for purpose in the context in which the respective case arises, while keeping in focus the need for standardisation across cases where appropriate. The most recent cases before the Trial Chambers bear testimony to this, following a standardised victim application process¹⁹ while also heeding to the specific circumstances of each case, respectively.²⁰

¹⁸ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf para. 849.

¹⁹ See, eg, Pre-Trial Chamber I, Public redacted version of 'Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings', 20 March 2019, ICC-01/12-01/18-289-Red-tENG-Corr, and Pre-Trial Chamber II, 'Decision Establishing the Principles Applicable to Victims' Applications for Participation', 05 March 2019, ICC-01/14-01/18-141, adopting a similar standard victim application and reporting process.

²⁰ See, eg, Trial Chamber X, 'Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial', 12 June 2020, ICC-01/12-01/18-880, and Trial Chamber V, 'Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, on the deadline for the transmission of victim applications by the Registry.

15. Adopting a context-specific approach may imply a break from prior practice as what may be a suitable tool in one situation may be less compatible or efficient in another. With the aim of continuing to develop effective and efficient pathways for victims to engage with the Court, the VPRS has frequently made context-specific submissions to different Chambers with respect to application forms,²¹ participation admission systems²² and reparations processes.²³ The VPRS's request for a modification to the *Abd-Al Rahman* standard application form should be considered in the same light (e.g. a context-specific proposal designed to assist victims in this Case).
16. The Registry respectfully submits that in order to fulfil its above-referenced mandate, it is not constrained by previous jurisprudence of Chambers in other cases before the Court, as long as the Registry proposition is properly motivated, not in contravention of the ICC's governing legal texts, and submitted to a

²¹ See, for example, VPRS submissions at the Pre-Trial stage in the following cases: *The Prosecutor v. Laurent Gbagbo*, Public Annex A to "Proposal on a partly collective application form for victim's participation", 29 February 2012, ICC-02/11-01/11-45, paras. 8-12; *The Prosecutor v. Bosco Ntaganda*, "Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf", 29 May 2013, ICC-01/04-02/06-57, paras. 5-19; *The Prosecution v. Al Hassan Ag Abdoul Aziz*, "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 11 May 2018, ICC-01/12-01/18-28, paras. 5-11; Registry, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 21 February 2019, ICC-01/14-01/18-116, paras. 9-15.

²² See, for example, more recent VPRS submissions at the Pre-Trial and Trial stages in the following cases: *The Prosecution v. Al Hassan Ag Abdoul Aziz*, "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 11 May 2018, ICC-01/12-01/18-28, paras. 12-17; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 21 February 2019, ICC-01/14-01/18-116, paras. 6-8; and *The Prosecutor v. Bosco Ntaganda*, "Registry submission pursuant to "Order Scheduling a Status Conference and Setting a provisional Agenda", 14 August 2014, ICC-01/04-02/06-350, paras. 12-21.

²³ See, for example, recent VPRS submissions on reparations in the following cases: *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public Redacted Annex I to "Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/1201/15-172 of 29 September 2016", 05 December 2016, ICC-01/12-01/15-193-AnxI-Red; and the different submissions in the case of *The Prosecutor v. Bosco Ntaganda*: Public Annex I to "Registry's observations, pursuant to the Single Judge's "Order for preliminary information on reparations " of 25 July 2019, ICC-01/04-02/06-2366", 06 September 2019, ICC-01/04-02/06-2391-AnxI; Public Annex I to "Registry's Observations on Reparations", 28 February 2020, ICC-01/04-02/06-2475-AnxI; and Registry's First Report on Reparations, 01 October 2020, ICC-01/04-02/06-2602.

competent Chamber with the affected parties being able to react.²⁴ This ensures that relevant discussions including the parties can be held before the relevant Chamber, to best inform that Chamber's decision. The proper administration and servicing the Court as enshrined in article 43(1) of the Statute entail the constant re-assessment of applicable workflows and practices with a view to continuous improvement and optimisation within the legal architecture of the Court. There is no express provision that the Registry is prevented from suggesting an adjustment of previous jurisprudence to a chamber. The Registry Request is made within that remit.

The Chamber's authority to rule over the Request / Presidency-approved forms

17. The Defence submits that the form presently available on the ICC website for the *Abd-Al-Rahman* case is not a standard application form approved by the Presidency in accordance with regulation 86 RoC.²⁵ The Defence further argues that the Registry ought to have sought the Presidency's approval for said form, and that pending such approval the form should be taken off the ICC website.²⁶ As for the draft modified form subject to the VPRS's Request, the Defence submits that this likewise needs to be approved by the Presidency, not the Chamber, and that the Request is therefore addressed to the wrong authority.²⁷
18. The Registry notes that there are two victim application forms presently at issue: (i) the application form presently available for download on the ICC website for the *Abd-Al-Rahman* case;²⁸ and (ii) the draft amended application form subject to the Request. They shall be addressed in turn.

²⁴ It is respectfully submitted that the Registry Request fulfils these conditions.

²⁵ Defence Response, para. 10.

²⁶ Id., paras. 12-13. The Defence also submits the need for consultation of the Parties on the form.

²⁷ Id., para. 14.

²⁸ See at: <https://www.icc-cpi.int/pages/victims-info-page.aspx?for=%27abd-al-rahman%27>.

(i) *The application form available on the Abd-Al-Rahman webpage of the ICC*

19. The application form presently available for download on the ICC website for the *Abd-Al-Rahman* case is the product of consultation with the Presidency pursuant to regulations 86(1), 23(2) RoC, albeit in a prior case before the Court. In 2017, the Registry sought and obtained Presidency approval pursuant to regulations 23(2), 86(1) RoC, and regulation 11 of the Regulations of the Registry, for a short (two-page) standard victim application form that had already been successfully used and tested in the *Ntaganda* and *Ongwen* proceedings.²⁹ At the time, the Presidency had noted its understanding with the Registrar that adjustments to said form may be required in the future, which would likewise be subject to consultation with the Presidency. In early 2019, the Registry addressed the Presidency again, proposing a number of adjustments to the previously approved standard form. These adjustments included in most relevant part a reparation component alongside a number of streamlining suggestions to render the form more user-friendly. Approval of relevant modifications was sought of the Presidency to use the amended standard application form in the case of *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona* (*Yekatom and Ngaïssona* case).³⁰ The Presidency accepted all proposed amendments to the previously approved standard form for use in the *Yekatom and Ngaïssona* case, in the understanding that the Registry would revert to the Presidency in due course regarding potential permanent adjustments to the application form as a result of the experience drawn from the CAR II proceedings. Following Presidency approval of the set of forms (for individuals and organizations, pursuant to Rule 85 of the RPE) in the context of the *Yekatom and Ngaïssona* case,³¹ these same application forms have

²⁹ On said standard form see also *infra*, para. 22.

³⁰ See also reference in 'Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings', 6 February 2019, ICC-01/14-01/18-78, footnote 3.

³¹ <https://www.icc-cpi.int/carII/yekatom-ngaïssona>, under 'Information for Victims.' See also Pre-Trial Chamber II, approving the application form for use in the *Yekatom and Ngaïssona* case, 'Decision

since been applied in the subsequent cases, namely *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*,³² and most recently the *Abd-Al-Rahman* case.³³

20. The correspondence of 8 July 2020 between the Chamber and the Registry referenced to in footnote 1 of the Request³⁴ served as an assurance for the Registry that the Chamber would approve the use of said application forms in the *Abd-Al-Rahman* case, without any alterations to the forms that the Chamber could have seen fit within its discretion and authority. As this correspondence exclusively covered an application form that had already passed through Presidency consultation in 2019 in the *Yekatom and Ngaïssona* proceedings and has since been successfully used also in the *Al Hassan* case, the Registry did not consider that there is a need to seek a renewed Presidency approval.
21. The Registry notes the Defence's reference³⁵ to the shorter standard application forms for victims (individuals and organisations) presently available for download on the *general* ICC victim webpage.³⁶ This set of forms was approved by the Presidency in October 2017³⁷ and does not contain any of the adjustments made in 2019, particularly regarding the insertion of reparations-related

Establishing the Principles Applicable to Victims' Applications for Participation', 5 March 2019, ICC-01/14-01/18-141, paras. 19-23, p. 22.

³² <https://www.icc-cpi.int/pages/victims-info-page.aspx?for='al-hassan'>, under 'Information for Victims.' See also Trial Chamber X, '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, paras. 36-37.

³³ <https://www.icc-cpi.int/about/victims>, under 'Victim participation in the *Abd-Al-Rahman* case'. The English and French versions of the forms were posted on the ICC website on 15 July 2020; the Arabic version was posted on 21 July 2020; and the on-line form in English and French were posted on 23 July 2020 and the Arabic version of the on-line form will be posted in the coming days.

³⁴ Email from Pre-Trial Chamber II Communications to the Registry of 8 July 2020 at 11.34, as referred to in the Defence Response, para. 10.

³⁵ Defence Response, para. 10.

³⁶ See, available for download in various languages, at: <https://www.icc-cpi.int/about/victims>. The Registry notes that the malfunction reported by the Defence in footnote 10 of its Response has since been rectified.

³⁷ See *supra*, para. 19. Particularly formatting and font adjustments have extended the form in length from originally two to today's three pages, while all essential questions as per regulation 86(2) RoC have remained unaltered.

elements.³⁸ This set of 'short' standard application forms is therefore used as the default set of forms for individuals and organizations who wish to participate already at the situation stage before the ICC, where it is yet uncertain whether a case may develop. In order to avoid confusion as to the appropriate application form, the ICC victim webpage first displays in large blue boxes victim information pertaining to ongoing cases and links to the relevant (long) victim application forms (such as the form presently available in the *Abd-Al-Rahman* case).³⁹ Only underneath these case-specific boxes and under a separate heading ('Participation'), the short application forms are available for download in a grey box.⁴⁰ Active Registry interaction with different victim groups and interlocutors across all situations and cases also focuses on directing victims to the appropriate forms for them to fill in.⁴¹

22. The Registry notes that the existence of two application form types presently on the ICC webpage (*ie* one with and another without reparations-related questions) may have given rise to some confusion in the present proceedings. The Registry stands ready to engage further with the Chamber and the parties to avoid any misunderstandings.

³⁸ For a more detailed explanation of the additional elements of the longer standard form see 'Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings', 6 February 2019, ICC-01/14-01/18-78, paras. 9-14.

³⁹ It is noted that the relevant victim-related information is also accessible through the relevant ICC webpages pertaining to the specific cases/accused, see *eg* the hyperlink 'Information for Victims' on the webpage of the *Abd-Al-Rahman* case, at: <https://www.icc-cpi.int/darfur/abd-al-rahman>.

⁴⁰ The ICC core texts and relevant ICC jurisprudence provide for victims' possibility to submit an application for participation in potential future proceedings at the Situation stage. When victims or victim representatives contact the VPRS in order to fill in application forms during this early procedural phase of proceedings, the VPRS provides information and training on how to fill in the 'short' standard application form for participation. As mentioned, this application form does not yet contain a reparations component, considering the early stage of proceedings during which they are filled in. Yet, any information submitted to that effect is being duly recorded by the Registry.

⁴¹ The Registry notes in passing that also when a victim submits a short standard application form in proceedings where the longer standard form is being used, the former form would be accepted and duly assessed as it conforms with regulation 86(2) RoC. Reparations-related information is in these cases sought from the victim at a later stage in the proceedings to complete the form.

(ii) *The draft amended application form subject to the Request*

23. The Registry's Request focuses on a case-specific amendment of the *Abd-Al-Rahman* standard application form in the shape of an additional form applicable in *these* proceedings that is fillable entirely electronically. The Request is made particularly owing to the circumstances of the case and the difficulties currently encountered by the Registry as a consequence of the COVID-19 pandemic.⁴² The Registry addressed its Request to the Chamber in recognition of the Chambers' general discretion to accept and authorise the use of specifically tailored forms, owing to the circumstances of each specific case. This approach was previously followed, for example, at the pre-trial stage of the case of *The Prosecutor v. Bosco Ntaganda*, where Pre-Trial Chamber II, recalling the "need to improve the victims' participation system in order to ensure 'its sustainability, effectiveness and efficiency'", instructed the Registry to use a simplified form, different than the standard Presidency-approved application form at the time.⁴³ Said simplified form was later used at the pre-trial stage of the case of *The Prosecutor v. Dominic Ongwen*, again on a case-specific basis and without a Presidency approval of the form used in that case.⁴⁴ More recently, at the pre-trial stage of the *Al Hassan* case, in light of the specific circumstances of that case in terms of security and accessibility to victim communities, the Registry sought Pre-Trial Chamber I's approval to use a new application form, which essentially contained the standard form approved by the Presidency in 2017 together with an ensuing reparations component.⁴⁵ Pre-Trial Chamber I authorized the use of the new form for the purposes of the *Al Hassan* proceedings.⁴⁶

⁴² Registry Request, paras. 5, 10.

⁴³ Pre-Trial Chamber II, "Decision Establishing Principles on the Victims' Application Process", 28 May 2013, ICC-01/04-02/06-67, paras. 17-25.

⁴⁴ Pre-Trial Chamber II, "Decision Establishing Principles on the Victims' Application Process", 4 March 2015, ICC-02/04-01/15-205, paras. 14-22.

⁴⁵ Registry, "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings", 9 May 2018, ICC-01/12-01/18-28, paras. 5-11. This form resembled, with very

24. The Registry also notes that whilst regulation 86 RoC prescribes the Registrar's crafting of standard forms, it does recognize that the forms shall be used by victims 'to the extent possible',⁴⁷ but cannot be the exclusive vehicle for victims' applications to be submitted to the Registry. Pre-Trial Chamber III, in the context of the *Afghanistan* situation, held that "with regard to the participation of victims in proceedings before this Court, victims are generally not under an obligation to use the standard form developed by the Court. [...] [I]f victims submit their representations in a manner other than by standard form, this should also be accepted."⁴⁸ This finding was reiterated by Pre-Trial Chamber III during the Article 15(3) process in the Bangladesh situation.⁴⁹ In other words, the Pre-Trial Chamber considered that there can be other vehicles than a Presidency-approved standard form to collect victims' views and concerns.
25. The above leads the Registry to consider that while the standard form pursuant to regulation 86(1) RoC 'shall' be used by victims – and accepted by Chambers – as a general yardstick, a number of case-specific additions to the rule are within the Chamber's discretion and competence to manage the victim application process.

minor differences, the current form approved by the Presidency in 2019 in the *Yekatom and Ngaïssona* case.

⁴⁶ Pre-Trial Chamber I, « Décision fixant les principes applicables aux demandes de participation des victimes », 24 May 2018, ICC-01/12-01/18-37, paras. 25, 29 and page 28. The Registry notes that at the trial stage of the *Al Hassan* case, the Registry sought Trial Chamber X's approval to use of the most recent template application form approved by the Presidency and subsequently tested in the *Yekatom and Ngaïssona* case; see Registry, "Public redacted version of "Annex to the Registry Report on the implementation of Trial Chamber X's Decision of 20 December 2019 (ICC-01/12-01/18-536)", 27 January 2020, ICC-01/12-01/18-563-Anx-Red2, paras. 22- 26. Trial Chamber X granted the Registry's request, see Trial Chamber X, "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, paras. 36-37 and page 20.

⁴⁷ Regulation 86(1) RoC, last sentence. See also Trial Chamber II, 'Décision sur la demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve et étapes ultérieures de la procédure', 8 May 2015, ICC-01/04-01/07-3546, para. 16.

⁴⁸ Pre-Trial Chamber III, "Order to the Victims Participation and Reparation Section Concerning Victims' Representations", 9 November 2016, ICC-02/17-6, para. 10.

⁴⁹ Pre-Trial Chamber III, "Decision on the 'Registry's Request for Extension of Notice Period and Submissions on the Article15(3) Process'", 28 June 2019, ICC-01/19-6, para. 18.

This entails the acceptance of victim applications in any other format than the standard form,⁵⁰ including an additional, case-specific application form. In light of this, the Registry contends that the Chamber is the competent authority to rule on the Request.

Registry observations 'on the merits'

26. In the subsection of the Response “on the merits”,⁵¹ the Defence suggests that the Registry’s proposal is: (1) contrary to the established case-law of the Court, and (2) contrary to the relevant statutory texts that govern the functions of the Registry.⁵²
27. With respect to the first issue, as set out above in the context of the legal basis of the Request,⁵³ context-specific Registry proposals to effectuate victim participation may well be contrary to established practice in other cases, which however does not make such proposals unlawful *ipso facto*. Even an often-repeated jurisprudential finding, such as the signature requirement of a victim application, has to be open for judicial review as long as there are good reasons for this. In bringing such matters before the Chamber and the parties for discussion, the Registry fulfils its duty to complement, within its administrative mandate, to fair, transparent and efficient proceedings before the ICC.⁵⁴
28. With respect to a suggested contravention of the Request to applicable statutory texts,⁵⁵ the Registry respectfully submits that the central legal issue presently before the Chamber is whether or not a signature is required by the ICC legal texts in order for a victim application to be considered complete. The Registry

⁵⁰ *Ibid*; Pre-Trial Chamber III, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17-6, para. 10. Also, Rule 102 RPE is instructive in this regard.

⁵¹ Defence Response, paras. 15 *et seq.*

⁵² Defence Response, paras. 17-25.

⁵³ See paras. 11-16.

⁵⁴ It is understood that should a Registry suggestion be considered suitable across cases (*ie* as a potential new standard), relevant consultations with the Presidency have to be undertaken.

⁵⁵ Defence Response, paras. 21-25.

notes that regardless of whether the proposed modified form is considered a standard form or not,⁵⁶ for the purpose of textual interpretation, none of the rules or regulations discussed by the Defence require the victim to sign the application form, nor is there any ICC provision imposing such a requirement contrary to the Defence's assertion.⁵⁷ The Registry will address each of the underlying arguments raised by the Defence in turn.

29. In paragraph 21 of the Response, the Defence argues that regulation 23(2) of the RoC requires a signature. The Registry notes that the word "signature" is not used in regulation 23(2) of the RoC, nor are there indicators in the text of the provision that would reasonably imply a signature requirement.
30. The Defence further argues that regulation 86(2)(b) of the RoC requires proof of a victim's consent for a person to act on their behalf, and that this is usually established through the victim's signature.⁵⁸ The Registry notes that also in regulation 86 of the RoC, a signature is not explicitly required with respect to victims or persons acting on their behalf. The Registry notes that the "evidence of consent" is in practice collected through a grey box on the application form collecting the personal details of the person acting on behalf of the victim, alongside a copy of proof of identity of that person. While the standard application form requires the signature of that person, this requirement is likewise not explicit in the applicable legal texts. It cannot therefore be used to imply that there is a signature requirement on victims applying on their own right because persons acting on their behalf must demonstrate evidence of consent.
31. In paragraph 23 of the Response, the Defence refers to regulation 26(2) RoC and the Registry's task to "ensure authenticity [...] of judicial records and material".

⁵⁶ It is noted in passing that the Request does *not* propose the issuance of a standard form in the sense of regulations 23(2), 86 RoC; it could thus be considered that for this reason, said legal provisions do not apply to the Registry's proposed modifications in the present Case.

⁵⁷ Defence Response, para. 19.

⁵⁸ Defence Response, para. 21.

Still, the provision entails no reference to a signature of the victim being required to satisfy this requirement in the context of the victim application process.

32. In paragraph 24 of the Response, the Defence cites rule 102 RPE as an exception to regulation 26(2) of the RoC which in turn would certify the alleged general rule that a victim's signature or thumbprint is required. Again, the Registry notes that rule 102 RPE makes no reference to a signature requirement either as a general rule or an exception.⁵⁹
33. Finally, the Registry notes that Trial Chamber II held, albeit with regard to a victim's request for reparations under rule 94 of the RPE, that while said rule "requires a certain number of particulars to be submitted" (akin to regulation 86(2)(a) RoC⁶⁰), it "does not require the applicant's signature".⁶¹

Fair trial guarantees

34. In paragraph 27 of the Response, the Defence contends that without a signature on the application form no one could exclude that unscrupulous Registry intermediaries generate requests for participation/reparations that do not correspond to real victims in order to inflate their numbers and/or obtain reparations fraudulently for the benefit of false victims. The Defence adds that a signature may later be required by a trial chamber, thereby necessitating a collection exercise that could re-traumatize the victims.⁶²
35. In the current context, the Registry anticipates, due to poor socio-economic conditions and access to education, that nearly all victims seeking to participate will need to be assisted by a trained VPRS intermediary before doing so. This is

⁵⁹ The title of rule 102 RPE indicates that the exceptions envisaged pertain to 'communications in writing'; the issue of authenticity and/or signature is not addressed by this provision.

⁶⁰ Rule 94(1)(a) of the RPE requires "[t]he identity and address of the claimant"; regulation 86(2)(a) similarly requires "[t]he identity and address of the victim".

⁶¹ Trial Chamber II, 'Décision sur la demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve et étapes ultérieures de la procédure', 8 May 2015, ICC-01/04-01/07-3546, para. 16.

⁶² Defence Response, paras. 28-29.

due to high levels of reported illiteracy and the intrinsic complication surrounding submitting formal documentation before a Court. In addition, the Registry wishes to recall the *prima facie* standard that is to apply on victim application forms, including the identity of the applicant and particularly the proof thereof.⁶³

36. With respect to the stated risk of unprofessional intermediaries, the Registry respectfully submits that its interaction with relevant actors in the field should be considered as due diligence to prevent any fraudulent acts. Usually, the identification of potentially untrustworthy or otherwise unsuitable actors takes place in the training exercises and/or field activities carried out by the VPRS. In a hands-on approach, references of potential key interlocutors are cross-checked within the Registry's network of contact points on the ground.
37. It has been the VPRS' experience that the signature box in an application form has often provided little value as a guarantee function that the form is genuine. In contexts where literacy is low, the signature tends to be a mark and the VPRS does not have the capacity to verify the veracity of such marks short of reaching out to the victim in question directly if the legitimacy of the application form were to be called into question. Historically, when legitimacy issues arose, the most reliable piece of information has been the identification document attached.⁶⁴ A further check on the legitimacy of victim applicants comes when a legal representative is appointed to represent the victims. The proceedings-long relationship that ensues between victims and their counsel serves as a further

⁶³ Pre-Trial Chamber I, 'Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, [...]', 4 July 2008, ICC-01/04-505, para. 21.

⁶⁴ The identification documents attached to application forms tend to be issued by some form of authorized authority and the name and identity of the victim tends to be clearly discernible, even though in most cases the individual's signature is not a part of these documents.

(and more reliable) verification point on the legitimacy of participating victims and the intermediaries that assist them.⁶⁵

The online form currently available on the website and its application in Darfur

38. The Defence argues that the Registry failed to justify why the forms available on the website (including the online form) could not be used instead of the modified form proposed by the Registry.⁶⁶
39. The Registry recalls that the downloadable form requires printing and scanning capacity that will be very scarce in the relevant areas in Darfur. The online form available on the Court's website does indeed provide an online solution for those with a stable internet connection⁶⁷ and who are skilled in the ways of internet technology to complete the process unassisted and upload the necessary supplementary information. Unfortunately, in [Redacted] Darfur such a stable internet connection is reportedly available in only the bigger cities with random power outages and attendant connectivity issues limiting access even in those areas. In addition, as stated above, low literacy levels in [Redacted] villages dotted around [Redacted] Darfur will also inhibit the application of unassisted tools like the online form for those who continue to reside in Darfur. Finally, the standard paper form is also unsuitable in the current context owing to the security and logistical concerns involved for intermediaries who may have hundreds of pieces of confidential material on their person that would need to somehow be safely transported out of the Region and to the seat of the Court in The Hague.

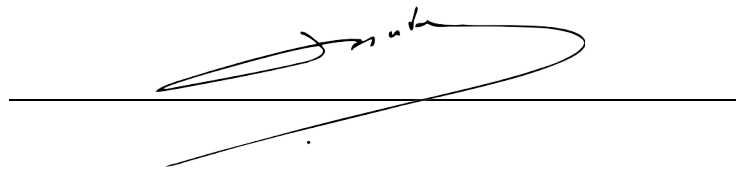
⁶⁵ See also Pre-Trial Chamber I, 'Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, [..]', 4 July 2008, ICC-01/04-505, para. 21.

⁶⁶ Defence Response, para. 32.

⁶⁷ Since the process of filling in an application form may require hours, a sufficiently stable internet connection is an important requirement in order not to lose data.

40. [Redacted]⁶⁸

41. Should the Chamber find that some form of signature be required, the VPRS could build into its intermediary training on the form that the victims sign a blank piece of paper which could be photographed and submitted electronically together with the ID document and the application form.⁶⁹ The Registry respectfully considers, however, that the more legitimate source of authentication in the present circumstances would still be the victim identification document.⁷⁰



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

Dated this 29 October 2020

At The Hague, The Netherlands

⁶⁸ This is all the more necessary during the Covid-19 pandemic [Redacted].

⁶⁹ Yet, the Registry acknowledges that this solution would still not cater for the victim's signature *on* the application form. In addition, The Registry stresses that this solution is less than ideal in that again, the signatures are likely to be illegible marks or symbols and the likelihood that the signature photos get mixed up and attached to non-corresponding forms is high.

⁷⁰ The Registry notes that, in the event of a mix up during the electronic transmission of the forms, the issue of attaching these documents to the correct application will be easier to resolve since the name on the ID document is legible and can be matched with the relevant application form.