



Original: English

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

Date: 25 January 2021

PRE-TRIAL CHAMBER II

Before: Judge Antoine 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

**Request on behalf of the Victims with regard to any agreement reached
pursuant to rule 69 of the Rules of Procedure and Evidence**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Mr James Stewart
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Sarah Pellet
Ms Anna Bonini

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**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims in the confirmation proceedings concerning Mr Ali Muhammad Ali Abd-Al-Rahman (the “Common Legal Representative”) respectfully asks the Pre-Trial Chamber II (the “Chamber”):

- (i) to order the Prosecutor and the Defence (jointly, the “Parties”) to timely provide her with any list of facts on which they may have reached an agreement pursuant to rule 69 of the Rules of Procedure and Evidence (the “Rules”); and
- (ii) to authorise her to submit observations on any such agreement before a final decision is made by the Chamber in this respect, within a reasonable deadline set by the latter, in order for her to be able to properly consult with the Victims.

II. PROCEDURAL HISTORY

2. On 8 December 2020, the Single Judge, acting for the Chamber, issued the “Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence” (the “Order”).¹ Pursuant to the Order, the Parties were required to “*liaise without delay with a view to reaching agreements about non-contentious issues and facts relevant to the charges, within the meaning and for the purposes of rule 69 of the Rules*”.²

3. On 18 January 2021, the Single Judge issued the “Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing”, *inter alia* appointing Counsel from the Office of Public Counsel for Victims

¹ See the “Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-226](#), 8 December 2020.

² *Idem*, para. 8.

(the “OPCV”) as Common Legal Representative of the Victims for the purposes of the confirmation proceedings.³

4. On the same date, the Parties submitted the “First Joint Report regarding the ‘Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence’”.⁴ The Parties reported on their progress and noted that *“the Prosecution has been working on a list of detailed facts relating to contextual elements of war crimes for submission to the Defence for their review [...] [and] aims to provide the Defence with the first list of facts by 29 January 2021”*.⁵ In parallel, the Prosecution is also *“working on identifying other topics for potential agreement, in particular the factual aspects of the contextual elements for crimes against humanity”*.⁶

III. SUBMISSIONS

5. The Common Legal Representative welcomes the Parties’ efforts to reach agreement(s) as to facts and evidence pursuant to rule 69 of the Rules. Since said process has a clear impact on the interests of the Victims, she asks the Chamber to order the Parties to provide her with any list of agreed fact and to establish a reasonable deadline for the submission of observations on any such agreement on behalf of the Victims she represents before a final decision is made by the Chamber in this respect.

6. Rule 69 of the Rules expressly indicates that the interests of the victims must be taken into account when considering agreements between the Defence and the

³ See the “Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-259](#), 18 January 2021.

⁴ See the “First Joint Report regarding the ‘Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence’”, [No. ICC-02/05-01/20-260](#), 18 January 2021.

⁵ *Idem*, para. 6.

⁶ *Idem*, para. 7.

Prosecutor as to facts or evidence in a given case.⁷ Said rule provides that “*a Chamber may consider [alleged facts agreed upon by the parties] as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interest of justice, in particular the interests of the victims*”.⁸ Accordingly, the relevant chamber may refuse to treat an agreed fact as proven where this would conflict with the interests of the victims,⁹ and Victims must therefore be given a meaningful opportunity to make submissions in relation to agreements on facts or evidence.

7. This reading of rule 69 of the Rules is in line with the jurisprudence of the Court. In the *Lubanga* case, the Trial Chamber ordered the parties to “*prepare a draft schedule of agreed facts*” and indicated that the schedule was to “*be served on participating victims*”.¹⁰ Following notification of their legal representatives, Victims were authorised to provide observations on the agreed facts within a specified timeframe.¹¹ Since then, chambers of this Court have consistently afforded Victims an opportunity to make observations on agreed facts proposed by the parties and have ascertained the absence of objections on the Victims’ part prior to deciding to treat an agreed fact as proven.¹²

⁷ As recently noted by the Presiding Judge of Trial Chamber V in the context of the *Yekatom and Ngaïssona* case, “[w]hen deciding if it consider[s] agreed facts as being proven, the Chamber will take into account the views of the representatives of the victims”. See Transcript of Status Conference Hearing (Trial Chamber V), [No. ICC-01/14-01/18-T-012-ENG](#), 9 July 2020, p. 50, lines 11-13.

⁸ See Rule 69 of the Rules (emphasis added).

⁹ See also, in this respect, *mutatis mutandis*, the general power of a Trial Chamber under article 69(3) of the Rome Statute “to request the submission of all evidence that it considers necessary for the determination of the truth”.

¹⁰ See the “Decision on agreements between the parties” (Trial Chamber I), [No. ICC-01/04-01/06-1179](#), 20 February 2008, para. 11.

¹¹ *Idem*, para. 13.

¹² See e.g. the “Decision on the Joint Submission on Agreed Facts” (Trial Chamber V), [No. ICC-01/14-01/18-835](#), 19 January 2021, para. 3; the “Decision on Joint Agreed Facts Submission” (Trial Chamber IX), [No. ICC-02/04-01/15-500](#), 19 July 2016, para. 2; the “Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims’ participation at trial” (Trial Chamber VI), [No. ICC-01/04-02/06-507](#), 12 March 2015, para. 14(ii); the “Decision on Prosecution and Defence joint submission on agreed facts” (Trial Chamber VI), [No. ICC-01/04-02/06-662](#), 22 June 2015, para. 4; and the “Order setting deadlines for agreements as to facts and evidence and for the filing of expert reports” (Trial Chamber III), [No. ICC-01/05-01/08-872](#), 6 September 2010, para. 20.

8. The Common Legal Representative respectfully requests the Chamber to maintain this approach, which is fully consistent with the Court's legal framework. First, it enables Victims to comprehend issues covered by any agreement pursuant to rule 69 of the Rules and assess the potential impact these could have on their interests, as well as on the proceedings as a whole. Second, the notification of any agreement(s) to the Victims prior to a decision on the merits by the Chamber contributes to the effectiveness and meaningfulness of their participation in the relevant proceedings, by providing their legal representatives with an opportunity to consult with her clients and make specific submissions on how their interests might be affected by the proposed agreement.

9. Accordingly, the Common Legal Representative requests the Chamber to order the Parties to provide her with any list of facts on which they may have reached an agreement and to establish a reasonable deadline for her to consult with the Victims and subsequently file observations on the proposed agreed facts before a final decision is made on whether they should be considered as being proven.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 25th of January 2021

At The Hague, The Netherlands