

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-02/05-01/20
Date: 28 January 2021

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public

**Prosecution Response to “Request for appointment, or in the alternative,
reconsideration or leave to appeal”**

Source: Office of the Prosecutor

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

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**Victims Participation and Reparations Other
Section**

Mr Philipp Ambach

Introduction

1. The Prosecution agrees with the Applicant that the Single Judge should reconsider his decision with respect to the legal representation of victims for the purpose of the confirmation proceedings. The Prosecution respectfully submits that Pre-Trial Chamber II should receive and consider the victims' views and concerns through the Registry before appointing the legal representatives.

Background

2. On 17 November 2020 the Registry submitted observations regarding the admission process for victims seeking to participate in the proceedings.¹ With respect to legal representation of victims, the Registry indicated that:

in line with prior practice in pre-trial proceedings, [it stood] ready to submit, in a timely, observations on how an approach that prioritizes victims' choice of counsel may proceed, in accordance with rule 90 of the Rules. These observations would include a description of the steps necessary for the Registry to facilitate the coordination of victim representation before the confirmation of charges hearing.²

The Registry's foreshadowed observations were consistent with its role in assisting victims to organise their legal representation pursuant to article 16(1)(b) of the Statute.³

3. On 11 January 2021, Ms. Amal Clooney, the legal representative of 102 potential victims (the "Applicant") requested the Chamber to clarify the temporal and geographical scope of the charges and to be provided with guidance regarding the modalities for legal representation.⁴

4. On 18 January 2021 the Single Judge of Pre-Trial Chamber II set up the system for the transmission and admission of victim applications following the Registry Observations.⁵

¹ ICC-02/05-01/20-203 ("[Registry Observations](#)").

² [Registry Observations](#), para. 11 (footnotes omitted).

³ [Statute](#), article 16(1)(b) (1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:[...] (b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;).

⁴ [ICC-02/05-01/20-251](#). The Applicant noted that out of the 102, she has submitted applications on behalf of 30 of the Applicants and the remaining applications will be submitted shortly.

⁵ ICC-02/05-01/20-259 ("[Decision](#)"), para. 34.

However and with respect to victims' legal representation, the Single Judge did not request the Registry's observations and instead he directly appointed the Office of Public Counsel for Victims (the "OPCV") to represent the collective interests of the victims during the confirmation hearing.⁶ The Single Judge noted that pursuant to rule 90(1) "[a] victim shall be free to choose a legal representative" but that "this right is subject to important practical, financial, and logistical constraints", and that "it is unlikely that it will be possible for the [Victims Participation and Reparations Section] VPRS to conduct the necessary consultation with all the victims, once they have been authorised to participate, and to identify suitable common legal representatives in time for the confirmation hearing".⁷

5. On 25 January 2021 the Applicant requested Pre-Trial Chamber II to recognise her appointment as legal representative under rule 90(1) or to activate the process for appointing one or more common legal representatives under rule 90(2) ("First Request"). In the alternative the Applicant requested leave to appeal and/ or reconsideration of the Decision ("Second Request").⁸ The First Request is premised on an interpretation of the Decision whereby the OPCV's appointment does not exclude the appointment of other legal representatives for the confirmation proceedings. Conversely, the Second Request is premised on an interpretation of the Decision whereby the OPCV's appointment excludes the appointment of other legal representatives for the confirmation proceedings.

Submissions

6. The Prosecutor understands that the Single Judge appointed the OPCV to represent all the victims during the confirmation proceedings thus excluding the possibility of appointing other legal representatives. Since the Applicant's First Request is premised on a misunderstanding of the Decision, the Prosecution will only address the Applicant's Second Request.

The Applicant's request for reconsideration

7. The Prosecution agrees with the Applicant that the Single Judge should reconsider his Decision.⁹ However, the Prosecution respectfully requests that the Single Judge postpone his

⁶ [Decision](#), para. 37.

⁷ [Decision](#), paras. 35-36.

⁸ ICC-02/05-01/20-268 ("[Request](#)"). The Applicant claims that she represents 112 individuals who are victims of crimes within the jurisdiction of the Court, and that some of them have submitted applications to the VPRS.

⁹ See [ICC-01/12-01/18-1160](#), paras. 7 ("recalling that a Chamber "has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the [Statute](#). Nevertheless,

decision on the appointment of the victims' legal representatives until after the Pre-Trial Chamber receives and considers the victims' views and concerns. Since the Registry collects information relevant to the victims' legal representation alongside the application process,¹⁰ it may expeditiously report on this matter *before* its reporting on the different categories of victims applications and within a reasonable time before the confirmation hearing. This approach is consistent with the Court's legal framework and the Chambers' previous practice.

8. *First*, the Court's legal framework requires a Chamber to consider the victims' views and concerns regarding their legal representation, even if it is for the limited purpose of the confirmation proceedings. Pursuant to article 68(3) of the Statute "[w]here the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".¹¹ It cannot be denied that the choice of the victims' legal representatives, including for the purpose of the confirmation proceedings, touches upon their personal interests. Nor is receiving the Registry observations on this matter inappropriate at this stage, or inconsistent with the rights of the accused and the fairness and impartiality of the trial.

9. Further, a textual, contextual and purposive interpretation of the relevant provisions requires that victims are heard in deciding on matters related to their legal representation. Rule 90, as well as regulations 79 and 80 of the Regulations of the Court and regulation 112 of the Regulations of the Registry expressly require, or necessarily imply, that victims are consulted on questions related to their legal representation before the Court. Although their choices and preferences cannot always be satisfied and may be subjected to financial and logistical constraints,¹² the victims must *at a minimum* be heard before a decision on their legal representation is made.

reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment") and 9 (reconsidering a prior decision on the procedure under article 69(7) in light of the Prosecution's arguments that the new procedure "would allow for a more comprehensive and consolidated discussion and determination regarding the admissibility of the totality of the record of the accused's interview and related material, and would be in the interests of clarity and the fair and expeditious conduct of the proceedings").

¹⁰ See [ICC-02/05-01/20-178-Conf-Anx](#), section 15.

¹¹ Emphasis added. See e.g. [ICC-01/19-38-Corr](#), para. 23.

¹² [Decision](#), para. 35.

10. *Second*, victims have consistently been heard before Chambers have decided on their legal representation, including for the purpose of the confirmation proceedings. Accordingly, Single Judges or Pre-Trial Chambers have routinely sought the victims' views on this question through the Registry.¹³ This process was not a mere formality; instead it provided Chambers with key information which informed their decisions on the victims' legal representation.¹⁴ For example, in *Ongwen* (where both the OPCV and legal representatives were appointed for the purpose of confirmation) the Single Judge instructed the OPCV to include in the team at least one assistant based in Uganda with very good knowledge of the social context of the case after receiving the victims' views. The Single Judge emphasised that "[i]f this measure is taken, [...] counsel from the OPCV will be able to satisfy the expectations of the victims".¹⁵ In addition, when victims have divergent or conflicted interests, Chambers have appointed different groups of legal representatives. This is why victims of former child soldiers have been represented by different legal representatives from victims of other crimes in the *Ntaganda* and *Yekatom & Ngaïssona* cases.¹⁶ Chambers have also reconsidered prior decisions on legal representation after receiving the victims' views.¹⁷

11. Further, in previous cases the Registry has asked victim applicants about their preferences regarding legal representation in the context of the victim application process and *before* the Chambers recognised their status as victims' participants.¹⁸ The Registry appears

¹³ [ICC-01/14-01/18-141](#) (*Yekatom & Ngaïssona*), paras. 50- 52; [ICC-01/12-01/18-37-tENG](#) (*Al Hassan*), paras. 64-71; [ICC-02/04-01/15-350](#) (*Ongwen*), para. 23; [ICC-01/04-02/06-67](#) (*Ntaganda*), para. 46 and p. 22 (g).

¹⁴ See e.g. [ICC-01/04-02/06-141-Red2](#) (*Ntaganda*), paras. 10-11, 15-16; [ICC-01/14-01/18-178-AnxI-Red](#) (*Yekatom & Ngaïssona*), paras. 96-98, 107; see also [ICC-01/05-01/08-322](#) (*Bemba*), paras. 9 (noting that "[i]n order to appoint a common legal representative, criteria adapted to the circumstances of the case in question may be envisaged, such as (i) the language spoken by victims, (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions") to 10 ("[...] Under these circumstances the Single Judge holds that one common legal representative, preferably from the CAR, should be chosen by all victims recognised as participants in the present case with the assistance of the Registry pursuant to rule 90(2) of the Rules").

¹⁵ [ICC-02/04-01/15-350](#) (*Ongwen*), para. 23.

¹⁶ [ICC-01/14-01/18-205](#) (*Yekatom & Ngaïssona*), para. 14 ("The Chamber is further in agreement with the Registry that the victims should be divided into two groups, namely the Former Child Soldiers and the Victims of Other Crimes. Considering that the persons belonging to these groups were, in general, on opposing sides during the events occurring at the relevant time in the CAR and that the Former Child Soldiers could have been implicated in crimes against Victims of Other Crimes, their interests diverge to such an extent that it is not appropriate to require them to be represented by the same common legal representative"); [ICC-01/04-02/06-160](#) (*Ntaganda*), paras. 10 and 23.

¹⁷ [ICC-02/04-01/15-369](#) (*Ongwen*), paras. 9-10 (the appointment of the OPCV was revoked in favour of the legal representatives; the Single Judge noted that "it most appropriate to respect the choice of the victims and revoke, in their respect, the appointment of the common legal representative").

¹⁸ See e.g. [ICC-01/14-01/18-178-AnxI-Red](#) (*Yekatom & Ngaïssona*), paras. 8 (explaining that "the Registry directly consulted with potential victims applicants [] in the context of the victim application process"); [ICC-01/04-02/06-141-Red2](#) (*Ntaganda*), para. 3; see also [ICC-01/09-01/11-243](#) (*Ruto, Kosgey & Sang*), para. 6 (where the Registry consulted with members of various victims communities in order to establish an understanding on the victims' preferences on legal representation).

to have followed the same approach in this case.¹⁹ The Registry could therefore report on this matter expeditiously and well before the confirmation hearing. For many reasons it is preferable to have continuity of legal representation throughout the proceedings:²⁰ the victims develop a relation of trust with their counsel, and counsel becomes well acquainted with the case. Because of this, most ICC legal representatives appointed for the purpose of the confirmation proceedings have continued to represent the victims at trial.²¹ It is thus important that the Pre-Trial Chamber is provided with all available relevant information before deciding on the victims' legal representatives at this stage.

The Applicant's request for leave to appeal under article 82(1)(d)

12. Alternatively the Applicant seeks leave to appeal the Decision.²² The Decision raises the issue of *whether a Chamber may appoint a legal representative of victims for the purpose of the confirmation proceedings without having considered the victims' views and concerns*.²³ This issue would significantly affect the fair and expeditious conduct of the proceedings, its outcome, and the resolution of this matter by the Appeals Chamber would materially advance the proceedings.

13. The appointment of a person's counsel is a crucial decision, even more for a victim of a crime under the jurisdiction of the Court. As noted above the victims can provide the Chamber with essential information to inform its decision on the victims' legal representation. Further, and considering that there is a high likelihood that the legal representatives appointed for the confirmation proceedings would continue to represent the victims at trial, the impact of the issue goes beyond the confirmation proceedings.

14. The Prosecution however notes that the Applicant's standing to file an application for leave to appeal against the Decision is unclear. In the recent judgment in the situation in

¹⁹ See [ICC-02/05-01/20-178-Conf-Anx](#), section 15.

²⁰ [ICC-01/09-01/11-243-Anx3](#), para. 3. The Registry noted that "[t]his document is intended to set out general basic criteria which would be applicable in most proceedings before the Court": see para. 1; see also [ICC-02/05-01/20-198](#) (where the Single Judge "consider[ed] the Registry's submission that victims and their counsel maintain a relationship throughout the duration of the proceedings").

²¹ See e.g. [ICC-01/04-01/06-803-tEN](#) (Lubanga Confirmation Decision) and [ICC-01/04-01/06-2842](#) (Lubanga TJ); [ICC-01/04-02/06-309](#) (Ntaganda Confirmation Decision) [ICC-01/04-02/06-2359](#) (Ntaganda TJ); [ICC-01/05-01/08-424](#) (Bemba Confirmation Decision) and [ICC-01/05-01/08-3343](#) (Bemba TJ). See also in Ongwen: [ICC-02/04-01/15-422](#) (Ongwen Confirmation Decision) and the latest filing in the case: [ICC-02/04-01/15-1761](#); in Al Hassan: [ICC-01/12-01/18-461-Corr-Red](#) (Al Hassan Confirmation Decision) and the latest filing in the case: [ICC-01/12-01/18-1265](#).

²² [Request](#), paras. 24-34.

²³ [Decision](#), para. 36; see [Request](#), paras. 28-34.

Afghanistan the Appeals Chamber (by Majority) held that the term “party” in article 82(1) “refers, in the first place, to the prosecution and the defence”.²⁴ It held that departures from this presumption “depend[] on the procedural context”²⁵ or, put another way, the “type of decision”.²⁶ The Appeals Chamber then referred to decisions rendered under specific procedures defined in the Court’s legal texts—such as those under articles 15, 18(4), 19(2), 19(3), and 56(3)—as departures from this presumption, whereby different entities are afforded with the status of “party”.²⁷ The *Afghanistan* approach is consistent with other ICC Chambers who granted leave to appeal to participants other than Prosecution and Defence.²⁸ However, the decision in *Gicheru* (which is relied upon by the Appellant) is currently on appeal, and the Appeals Chamber has yet to rule on OPCD’s standing to lodge an appeal under article 82(1)(d).²⁹

15. Nevertheless, even if the Applicant were to have standing to appeal the Decision, it is unlikely that the Appeals Chamber will resolve the appeal within a reasonable time before the confirmation proceedings, due to the deadlines set out for this case. Because of this, amending the Decision with respect to this confined matter appears to be the most appropriate course of action.

²⁴ [ICC-02/17-137 OA OA2 OA3 OA4](#) (“*Afghanistan* Standing Decision”), para. 15 (emphasis added). See also e.g. K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (Oxford: OUP, 2016), pp. 570-571 (text accompanying fns. 178-179). But see [ICC-02/17-137-Anx-Corr](#) (“Dissenting Opinion of Judge Ibáñez Carranza”).

²⁵ [Afghanistan Standing Decision](#), para. 12.

²⁶ [Afghanistan Standing Decision](#), para. 14 (emphasis added). See also para. 16.

²⁷ [Afghanistan Standing Decision](#), paras. 16-18, 21.

²⁸ OPCD was permitted to seek leave to appeal virtually simultaneous decisions in the *Darfur* and *DRC* situations, concerning the procedural status of victims during investigations by the Prosecution, which the Appeals Chamber addressed as a single conjoined matter: see e.g. [ICC-02/05-118](#) (“*Darfur* Certification Decision (Victim Participation)”), [ICC-02/05-177 OA OA2 OA3](#) (“*Darfur* Appeal Judgment (Victim Participation)”), [ICC-01/04-438](#) (“*DRC* Certification Decision (Victim Participation)”), [ICC-01/04-556 OA4 OA5 OA6](#) (“*DRC* Appeal Judgment (Victim Participation)”). In this unusual context, and in the absence of any accused or Defence counsel, and where it had in any event also filed its own appeal, the Prosecution had not opposed OPCD’s standing to seek leave to appeal after the Pre-Trial Chamber had granted OPCD leave to participate in the first-instance proceedings: see e.g. [ICC-02/05-115](#) (“*Darfur* Prosecution Response to OPCD”), para. 6. In addition, Jordan was granted leave to appeal the Pre-Trial Chamber’s decision that it had not complied with its obligation to cooperate with the Court: [ICC-02/05-01/09-319](#) (“*Bashir* Certification Decision (Non-Compliance by Jordan)”), [ICC-02/05-01/09-397-Corr OA2](#) (“*Bashir* Appeal Judgment (Non-Compliance by Jordan)”). Similar to the reasoning in *Afghanistan*, non-compliance proceedings under article 87(7) are a specific collateral procedure in which the respondent State must be treated as a party.

²⁹ [Request](#), para. 26, fn. 46. See [ICC-01/09-01/20-83](#) (“Prosecution Response OPCD Appeal”), paras. 4-15.

Conclusion

16. For all the above reasons, the Prosecution respectfully requests the Single Judge to reconsider his Decision and postpone the appointment of the legal representatives of victims until the Pre-Trial Chamber has received the victims' views and concerns on this matter.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 28th day of January 2021

At The Hague, The Netherlands