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**International
Criminal
Court**

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

Date: 21 April 2021

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

With Annex A, confidential, Annexes 1 to 21, confidential *Ex parte*, only available to the Registry, and Annexes 22 to 33, confidential *Ex parte*, only available to the Registry and confidential redacted

Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings

Source: Registry

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

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I. Introduction

1. In paragraph 34 of the “Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing” (“First Decision”), the Single Judge authorized an admission system whereby the Victims Participation and Reparations Section (“VPRS”) shall “classify all complete applications into three categories: **Group A:** Applicants who clearly qualify as victims of this case; **Group B:** Applicants who clearly do not qualify as victims of this case; **Group C:** Applicants for whom the Registry could not make a clear determination.”¹
2. Additionally, the Single Judge ordered the VPRS to transmit only “complete” forms relating specifically to the case of the *Prosecutor v. Ali Muhammad Abd-Al-Rahman (Ali Kushayb)* (“Case”), and to accompany each transmission with a report “which categorises the applications into the aforementioned three groups” and is notified to the “Chamber, the parties, and to the legal representatives chosen to represent the victims authorised to participate.”²
3. The VPRS hereby transmits its second report which includes:
 - A brief update on the “Registry’s First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”³ (“First Assessment Report”), following the issuance of the Office of the Prosecutor’s “Document Containing the Charges”⁴ (“Prosecution” and “DCC”), in accordance with paragraph 22 of the

¹ Pre-Trial Chamber II, “Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing”, 18 January 2021, ICC-02/05-01/20-259, para. 34.

² *Id.*

³ Registry, “Registry’s First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 26 February 2021, ICC-02/05-01/20-288.

⁴ Office of the Prosecutor, “Prosecution’s submission of the Document Containing the Charges”, 29 March 2021, ICC-02/05-01/20-325.

“Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position”⁵ (“Third Decision”);

- 21 new applicants who clearly, in the Registry’s assessment, qualify as victims of this Case (Group A) alongside a brief description of the assessment criteria applied; and
 - 12 applications where the VPRS was unable to make a determination in light of the DCC (Group C) alongside a report highlighting the issues arising from those applications, for the Chamber’s guidance.⁶
4. The applications have been attached as annexes to the present submission; while Group A applications are only made available to the Chamber in accordance with paragraph 34 (bullet point 4) of the First Decision,⁷ Group C applications are also available to the parties and the legal representatives of victims and victim applicants.

II. Classification

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), (1) annexes 1 to 21 to the present report are classified confidential *ex parte*, only available to the Registry; and (2) annexes 22 to 33 are filed in confidential redacted version, both in accordance with the First Decision.⁸

⁵ Pre-Trial Chamber II, Single Judge, “Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position” 19 March 2021, ICC-02/05-01/20-314, para. 22.

⁶ These 12 applications include 3 applications from the batch of 28 applications that were assessed as part of group A in the previous transmission.

⁷ *Id.*

⁸ *Id.*

III. Procedural history

6. On 9 October 2020, the VPRS requested authorization from Pre-Trial Chamber II (“Chamber”) to use a modified standard application form to facilitate victim participation in the Case.⁹
7. On 4 November 2020, the Single Judge of the Chamber issued the “Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation”, approving the Registry’s request.¹⁰
8. On 17 November 2020, the VPRS filed the “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”.¹¹
9. On 18 December 2020, the Chamber postponed the commencement of the confirmation hearing to 24 May 2021.¹²
10. On 18 January 2021, the Single Judge issued the First Decision setting out *inter alia* the applicable procedure for the transmission of victim application forms in the proceedings and instructing the VPRS to begin filing applications “after the document containing the charges has been filed.”¹³
11. On 5 February 2021, the Single Judge issued the “Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance” (“Second Decision”).¹⁴

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

¹⁰ Pre-Trial Chamber II, Single Judge, “Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation”, 4 November 2020, ICC-02/05-01/20-198.

¹¹ Registry, “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”, 17 November 2020, ICC-02/05-01/20-203.

¹² Pre-Trial Chamber II, ‘Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits’, 18 December 2020, ICC-02/05-01/20-238.

¹³ First Decision, para 34 (bullet 2).

¹⁴ Pre-Trial Chamber II, Single Judge, “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.

12. On 24 February 2021, the Single Judge instructed the Registry to file all Group A applications currently in the possession of the VPRS.
13. On 26 February 2021, the VPRS issued its First Assessment Report ¹⁵ followed on 19 March by the Single Judge's Third Decision.¹⁶
14. On 29 March 2021, the DCC was filed.¹⁷

IV. Applicable Law

15. The Registry submits the present observations pursuant to article 68(1) and (3) of the Rome Statute ("Statute"), rules 85 to 89 and 92 of the Rules of Procedure and Evidence ("Rules"), regulation 86 of the RoC, regulations 107 to 109 of the Regulations of the Registry, and pursuant to the First Decision.

V. Report

A. Update on the VPRS's Assessments of Group A Applications from its First Assessment Report following the issuance of the DCC

16. In its First Assessment Report, the VPRS transmitted a batch of 28 applications of persons whom it had assessed to fall into Group A. In the Chamber's Third Decision, the Single Judge approved the Registry's assessment determining that all 28 applicant victims fulfil the criteria for participation in the Case as set out in paragraph 17 of the First Decision.
17. Following the issuance of the Prosecution's DCC, and in accordance with paragraph 22 of the Third Decision, the Registry has updated its assessment and reviewed these 28 applications, in order to determine if, in light of the DCC, the applicants remain in Group A or fall into Group B or C.

¹⁵ See footnote 3, *supra*.

¹⁶ See footnote 5, *supra*.

¹⁷ See footnote 4, *supra*.

18. Applying the criteria set out in paragraphs 16 and 17 of the First Decision, and in light of the DCC, the VPRS has assessed that among the 28 applications previously approved as falling into Group A, 22 applications remain in Group A, 3 applications are assessed as falling into Group C, and 3 applications are assessed as “incomplete”.¹⁸

Applications from the First Assessment Report remaining in Group A

Application Number	Legal Representative
a/15002/18	CLOONEY Amal
a/20218/20	NASSER Mohamed Amin Abdalla
a/20221/20	NASSER Mohamed Amin Abdalla
a/20222/20	NASSER Mohamed Amin Abdalla
a/20223/20	NASSER Mohamed Amin Abdalla
a/20668/20	CLOONEY Amal
a/20669/20	CLOONEY Amal
a/20670/20	CLOONEY Amal
a/20673/20	CLOONEY Amal
a/20674/20	CLOONEY Amal
a/25004/21	CLOONEY Amal
a/25005/21	CLOONEY Amal
a/25009/21	CLOONEY Amal
a/25010/21	CLOONEY Amal
a/25012/21	CLOONEY Amal
a/25018/21	CLOONEY Amal
a/25019/21	CLOONEY Amal
a/25020/21	CLOONEY Amal
a/25022/21	CLOONEY Amal
a/25023/21	CLOONEY Amal
a/25025/21	CLOONEY Amal
a/25031/21	NASSER Mohamed Amin Abdalla

¹⁸ Concerning the applications assessed as “incomplete”, the VPRS has requested additional information from the legal representatives of these victims in accordance with regulation 86.4 of the RoC, in order to conduct a new assessment upon receipt of said information.

Applications from the First Assessment Report now falling into Group C

Application Number	Legal Representative
a/25007/21	CLOONEY Amal
a/25016/21	CLOONEY Amal
a/25017/21	CLOONEY Amal

B. Details on the assessment criteria applied to new victim applications falling within Group A

19. Applying the criteria set out in paragraph 16 of the First Decision, the VPRS has assessed each of the 21 new victim applications transmitted herewith under Group A as complete. In conducting its *prima facie* assessment in accordance with paragraph 17 of the First Decision, the VPRS confirms that each of the 21 new applicants in Group A meet the following criteria in establishing:

- The victim's identity;
- The harm suffered; and
- The causal link between the harm suffered and one or more of the crimes allegedly committed during an incident falling within the temporal, geographic and material parameters of the Case as described in the DCC.

20. The VPRS also notes that all of the 21 new applicants classified under Group A have nominated a lawyer to represent them in proceedings.¹⁹ Noting the language from the Second Decision that "the choices made by each individual victim as regards their own legal representation will be duly considered [...]"²⁰, the VPRS has provided a table below that outlines each of the Group A victims' choice of counsel.

¹⁹ The VPRS notes that from the Group A transmission of 21 applications, 12 applicants have nominated Ms Amal Clooney, six have nominated the OPCV, and three have nominated both Ms Amal Clooney and Mr NASSER Mohamed Amin Abdalla.

²⁰ Clarification Decision, para. 21.

Application Number	Legal Representative
a/15000/18	CLOONEY Amal
a/25035/21	OPCV
a/25038/21	OPCV
a/25041/21	OPCV
a/25042/21	OPCV
a/25043/21	OPCV
a/25047/21	CLOONEY Amal and NASSER Mohamed Amin Abdalla
a/25049/21	CLOONEY Amal and NASSER Mohamed Amin Abdalla
a/25050/21	CLOONEY Amal and NASSER Mohamed Amin Abdalla
a/25053/21	OPCV
a/25062/21	CLOONEY Amal
a/25063/21	CLOONEY Amal
a/25084/21	CLOONEY Amal
a/25085/21	CLOONEY Amal
a/25086/21	CLOONEY Amal
a/25087/21	CLOONEY Amal
a/25088/21	CLOONEY Amal
a/25089/21	CLOONEY Amal
a/25090/21	CLOONEY Amal
a/25095/21	CLOONEY Amal
a/25096/21	CLOONEY Amal

C. Issues arising from applications where the VPRS was unable to make a determination in light of the DCC (Group C)

21. The VPRS notes that 12 applications, including three applications from the 28 that were assessed as part of group A in the previous transmission²¹, are listed in Group C and each satisfy the first two criteria set out by the Single Judge in paragraph 17 of the First Decision. The reason why the VPRS was not in a position to make a clear determination arises from whether or not the personal harm reported by the applicants resulted from “one or more of the crimes allegedly committed during an

²¹ Applications n°a/25007/21, a/25016/21 and a/25017/21

incident falling within the temporal, geographic and material parameters of the case, as defined in the document containing the charges.”²² Confidential redacted versions of all these applications available to the parties and participants are submitted as Annexes 22 to 33 to the present filing.

22. The issues raised by these applications can broadly be categorized into three main themes: 1) the temporal scope of the Case; 2) the geographic scope of the Case; and 3) the material scope of the Case pertaining to witnessing crimes.
23. Clear guidance on the three issues presented in greater detail below will greatly facilitate the legal processing of the victim application forms and the training of intermediaries and victims’ legal representatives in the field.

Temporal Scope

Issue 1: Temporal Scope - Broad Descriptors

24. The VPRS considers that it is unable to make a clear determination in relation to certain applications where the precise date of the alleged crime(s) is missing and only inferable from the circumstances. The VPRS takes note of the First Decision where the Single Judge considered applications to be complete when they, *inter alia*, contain “the date of the alleged crime(s)”.²³ Based on its experience assisting victims to complete application forms in other situations before the Court, the VPRS notes that in many instances it is difficult for victims to recall the precise dates of crimes allegedly committed and relevant harm suffered. The reasons for this include (but are not limited to): the time elapsed from the alleged commission of crimes to the start of ICC proceedings (over 17 years in the present Case); a lack of familiarity or use of the Western calendar system; or a lack of recollection due to the traumatic nature of the events experienced by the victims.

²² First Decision, para. 17.

²³ First Decision, para. 16.

25. When victims are unable to recall the precise dates of the events in question, as a matter of standard practice, the VPRS requests victim applicants (and trains its intermediaries to that effect) to provide descriptions of the event that may, in considering the totality of the circumstances, assist the Court in determining whether the victims have indeed suffered harm within the temporal confines of the Case.
26. In the examples identified by the Registry, in lieu of precise dates, victim applicants have cited contextual elements in various combinations such as “2003”, “during the rainy season” and “during the harvest season”. The following application is an example identified as “unclear” in relation to this issue:

Application Number	Legal Representative
a/25061/21	CLOONEY Amal

27. In light of the criteria set by the Single Judge and for ease of reference, the VPRS has provided a table in Annex A with an extract from the aforementioned application that falls under this category.
28. It is respectfully requested that the VPRS may apply a contextual approach and consider an application as Category A where in a wholistical view, the geographical and material information submitted provides sufficient certainty that the victim’s reported harm is indeed within the scope of the Case.

Issue 2: Temporal Scope - Mistaken Dates

29. The VPRS is presently unable to make a clear determination in relation to applications where the applicant describes events and locations that correspond to the allegations contained in the DCC but where the dates cited for those events do not correspond. Again, there are many reasons why a victim applicant may not recall the precise dates of the events in question (as outlined above), and may even recall them inaccurately, due *inter alia* to the considerable passage of time in the present Case and the traumatic nature of events.

30. Rather than requesting these applicants to reconsider the dates they indicated during their respective interviews, the VPRS respectfully seeks the Chamber's guidance as to whether a more contextual approach may be applicable in these circumstances. Namely, when an applicant provides a detailed description of the relevant events in question, including locations and alleged crimes that fit squarely within the events described in the DCC, and provides a date that is within the relevant period (2003-2004), it is respectfully requested that these applications be treated as Group A if it is clear from a wholistic view of the application that the applicant erred as to the date indicated.
31. Hereafter is a list of applications identified as unclear in relation to this issue. The VPRS has also provided a table in Annex A with an extract from these unclear applications for further illustration.

Application Number	Legal Representative
a/25011/21	CLOONEY Amal
a/25013/21	CLOONEY Amal
a/25014/21	CLOONEY Amal
a/25016/21	CLOONEY Amal
a/25017/21	CLOONEY Amal
a/25026/21	CLOONEY Amal

Geographic Scope

Issue 3: Geographic Scope - Surrounding villages

32. In assessing applications received thus far, the VPRS has encountered difficulties on an issue pertaining to the territorial scope of the Case, namely, how to interpret the notion of "surrounding areas".²⁴ In consulting with its intermediaries on the ground in Darfur, the VPRS has noted the relatively close territorial proximity

²⁴ DCC, pp. 11 (Kodoom and Bindisi), pp. 21 (Mukjar), pp. 32 (Deleig).

between Kodoom, Bindisi and Deleig (for example) and numerous other surrounding villages in the Wadi Salih locality. The same applies for Mukjar and various surrounding villages in the Mukjar locality.²⁵ The VPRS also notes that the alleged acts and alleged perpetrators in said surrounding villages appear to be substantially similar to those applications received from the towns of Kodoom, Bindisi, Deleig or Mukjar.

33. Therefore, the VPRS respectfully seeks the Chamber's guidance on whether, in the DCC, "surrounding areas" can be interpreted as any village in the Wadi Salih or Mukjar localities so long as the rest of the contextual elements (such as material and temporal scope requirements) are met.
34. Hereunder is a list of examples of applications received and identified as unclear in relation to this issue. The VPRS has also provided a table in the Annex to the present submission with an extract from these applications.

Application Number	Legal Representative
a/20684/20	NASSER Mohamed Amin Abdalla
a/25006/21	CLOONEY Amal
a/25007/21	CLOONEY Amal
a/25011/21	CLOONEY Amal
a/25021/21	CLOONEY Amal
a/25026/21	CLOONEY Amal
a/25044/21	CLOONEY Amal and NASSER Mohamed Amin Abdalla

²⁵ See also DCC, para. 31.

Material Scope

Issue 4: Material Scope - Witnessing Crimes

35. The VPRS is currently unable to make a clear determination on a number of applications received thus far where the victims claim to have suffered harm as a result of crimes perpetrated against neighbours and other members of the Fur community.
36. On the determination of the term 'indirect victim', various Pre-Trial Chambers, including this one, have held that "for an indirect victim to be admitted to participate in the proceedings, the identity of the direct victim and the indirect victim must be duly established, as must their family relationship [...]".²⁶
37. However, in the examples provided in Annex A, victims allege to have suffered personal harm by virtue of witnessing crimes allegedly perpetrated against neighbours and other members of the Fur community, albeit without mentioning any family relationship. However, it may also be argued that persons witnessing atrocities committed in their community may sustain direct psychological harm, particularly in an environment where these individuals have to fear that similar physical harm may befall them imminently.²⁷
38. The VPRS raised a similar issue at the pre-trial stage in the case of the *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed*; the Single Judge in that case, after considering the arguments raised by the parties, "authorize[d] the VPRS to consider as victims who have sustained psychological harm those applicants who witnessed

²⁶ Pre-Trial Chamber II, *Yekatom et.al.*, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 5 March 2019, ICC-01/14-01/18-141, para. 35. *See also*, Pre-Trial Chamber I, *Al Hassan*, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, para. 51.

²⁷ The DCC makes multiple references of crimes being committed against victims in full view/presence of other (detained) persons subject to relevant attacks, *see, e.g.*, paras. 45, 49, 53.

crimes perpetrated against other members of the population of Timbuktu [...]”²⁸ so long as the victims show “that they were present in Timbuktu and that they witnessed a crime committed against someone else.”²⁹

39. The VPRS therefore respectfully requests the Chamber’s guidance on whether individuals that allege to have witnessed atrocities committed against other individuals in their community may be considered direct victims that sustained psychological harm.
40. Hereunder is a list of examples of applications identified as unclear in relation to this issue. The VPRS has provided a table in Annex A with an extract from these applications for ease of reference.

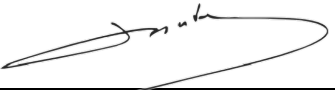
Application Number	Legal Representative
a/25011/21	NASSER Mohamed Amin Abdalla
a/25044/21	CLOONEY Amal and NASSER Mohamed Amin Abdalla

²⁸ Pre-Trial Chamber I, *Al Hassan*, “Second Decision on the Principles Applicable to Victims’ Applications for Participation”, 8 October 2018, ICC-01/12-01/18-146-tENG, para. 37.

²⁹ *Id.* at para. 35.

Conclusion

41. The VPRS respectfully seeks the Chamber's endorsement of its assessment of those application forms (re-)submitted as Category A, as well as the Chamber's guidance on the issues outlined above and as a result of which a number of victim applications have been considered to fall in Category C.
42. The VPRS will continue to assess all applications it receives according to the criteria established by the Single Judge and will transmit all complete applications on a rolling basis in accordance with the deadlines set out in the First Decision.



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

Dated this 21 April 2021
At The Hague, The Netherlands