

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 7 May 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 Redacted

**With Annex 1, confidential, and Annexes 2 to 128 confidential *Ex parte*, only
available to the Registry**

**Third 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’ participation and representation during the Confirmation Hearing” (“First Decision”), the Single Judge of Pre-Trial Chamber II (“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 third report which includes:
 - 101 new applications³ that clearly, in the Registry’s assessment, belong to persons who qualify as victims of this Case (Group A), together with a brief description of the assessment criteria applied;
 - 26 new applications which have been classified by the Registry as Group B,⁴ together with a brief description of the assessment criteria applied, and;

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 VPRS had set a transmission deadline on 30 April to all interlocutors for victim applications to be received and assessed in time for the confirmation of charges hearing. The vast majority of applications transmitted in this report (A and B) were received on, and some even after said deadline.

⁴ The Registry is mindful in this regard of the Chamber’s guidance to date, the parties’ and participants’ submissions and the forthcoming decision on the Group C issues filed in the Registry’s “Second

- A brief summary of the VPRS's recent mission to Sudan and an update on the security situation⁵ facing most of the victim applicants seeking to participate.
4. The applications have been attached as annexes 2 to 128 to the present submission and only made available to the Chamber in accordance with paragraph 34 (bullet point 4) of the First Decision. The Registry notes that in accordance with the deadlines set for the submission of applications for participation at the pre-trial stage, the present report and transmission will be the final transmission of applications ahead of the confirmation hearing.⁶

II. Classification

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("RoC") and in accordance with the First Decision,⁷ annex 1 to the present report is classified as confidential and annexes 2 to 128 are classified confidential *ex parte*, only available to the Registry.

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.⁸

Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings", 22 April 2021, ICC-02/05-01/20-358 ("Second Assessment Report").

⁵ The security update is based on information provided by the VPRS's interlocutors in consultations during the mission.

⁶ First Decision, para. 34.

⁷ *Id.*

⁸ 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").

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.⁹
8. On 17 November 2020, the VPRS filed the “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”.¹⁰
9. On 18 December 2020, the Chamber postponed the commencement of the confirmation hearing to 24 May 2021.¹¹
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”.¹²
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”).¹³
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 the “Registry’s First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”¹⁴ (“First Assessment Report”) followed on 19 March by the Single Judge’s “Decision

⁹ 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.

¹⁰ Registry, “Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings”, 17 November 2020, ICC-02/05-01/20-203.

¹¹ 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.

¹² First Decision, para 34 (bullet 2).

¹³ 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.

¹⁴ 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.

regarding the Registry's First Assessment Report, legal representation, and the victims' procedural position"¹⁵ ("Third Decision").

14. On 29 March 2021, the Office of the Prosecutor's "Document Containing the Charges"¹⁶ ("Prosecution" and "DCC") was filed.
15. On 21 April 2021, the VPRS filed the Second Assessment Report, which included, *inter alia*, 12 applications where the Registry could not make a clear determination (Group C).¹⁷
16. On 30 April 2021, the Defence filed their "Observations en Réponse au Rapport du Greffe ICC-02/05-01/20-358" ("Defence Observations").¹⁸
17. On 3 May 2021, the Prosecution¹⁹ [redacted] submitted their observations on the Registry's Second Assessment Report.

IV. Applicable Law

18. 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.

¹⁵ 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.

¹⁶ Office of the Prosecutor, "Prosecution's submission of the Document Containing the Charges", 29 March 2021, ICC-02/05-01/20-325.

¹⁷ Second Assessment Report.

¹⁸ Defence, "Corrigendum des Observations en Réponse au Rapport du Greffe ICC-02/05-01/20-358 " 30 April 2021, ICC-02/05-01/20-370-Corr ("Defence Observations").

¹⁹ Office of the Prosecutor, "Prosecution's Observations on the Victim Applications for Participation transmitted by the Registry on 21 April 2021", 3 May 2021, ICC-02/05-01/20-373.

V. Report

A. 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 101 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 101 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 101 new applicants classified under Group A have nominated a lawyer to represent them in proceedings. 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 the victims' choice of counsel for each application in Annex 1.

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

21. The Registry recalls the Chamber's instruction that “[f]or those applications which the Registry determines to fall into Group B, the Registry shall transmit only

²⁰ Clarification Decision, para. 21.

applications which refer to crimes allegedly committed in 2003-2004 in Western Darfur. Applications referring only to crimes that were allegedly committed outside this temporal and geographical scope must not be transmitted to the Chamber.”²¹ The overall number of victim applications presently falling into category B is 611. This contains an overwhelming number of applications that are clearly by a margin outside the temporal and geographical scope. Those applications which are *prima facie* within scope²² but upon detailed assessment do not allow the VPRS to link the specific harm suffered to the parameters of the Prosecution’s DCC, are transmitted to the Chamber also in Annex 1.

22. To explain the criteria and methodology applied, the VPRS has filed as Group B any application falling outside the remit of the DCC. This includes for instance applications that indicate as geographic scope solely (one of) the locations listed by the Prosecutor in paragraph 5 of the DCC or applications that fail to mention any of the relevant crime locations as per the DCC; in terms of the temporal scope, applications would be considered as outside the scope of the case that explicitly mention a date of relevant events clearly outside of scope of the DCC without providing any contextual elements that clearly indicate that the victim must have erred as to the time of events, eg. where the DCC describes specific incidents of crimes in detail but places them into a different time.²³ Similarly, the Registry has considered that vague time indications are detrimental to an application where the context provided by the application does not provide clear indicators linking the reported harm with specific incidents of crimes described in the DCC.²⁴ Finally, the

²¹ First Decision, para. 34, second bullet point.

²² *I.e.* referring to crimes committed in Wadi Saleh and/or the Mukjar locality in 2003/2004 as per the DCC.

²³ An example would be events described in the DCC at paras. 85 *et seq.* or at paras. 119 *et seq.*

²⁴ An example would be the incident of interrogation and beating of victims over a period of two days at Mukjar police station, *see* DCC, paras. 77 *et seq.*

Registry is guided by present discussions before the Chamber on the scope of the case for the purpose of victim participation and the Chamber's jurisprudence.

C. Incomplete applications

23. As general practice, the VPRS may preliminarily assess certain applications as "incomplete" where it is considered that to ask for additional information from the relevant victim, if available, could assist in making a determination on eligibility.²⁵ It is standard practice for the VPRS to request supplementary information from victims to ensure that they have fully expressed their narratives in the forms received. Following the issuance of the DCC, it was determined that certain applications, including some that were filed in the First Assessment Report as Group A, could benefit from additional information if possible in light of the revised scope of the Case provided in the DCC. It was for this reason that these applications were labelled "incomplete" in the Registry's Second Assessment Report.
24. The number of these "incomplete" applications (which had been filed as belonging to Group A in the First Assessment Report) was mistakenly reported as three,²⁶ when in fact it was only two applications (applications a/25015/21 and a/25024/21). The VPRS has requested but to date not received additional information from the Legal Representatives. In view of the time-lapse since the VPRS requested additional information, and since these two applications were already previously submitted to the Chamber, the VPRS respectfully leaves it to

²⁵ The VPRS notes that while requests were made for supplementary information where appropriate, not all requests were satisfied ahead of the 7 May 2021 deadline due *inter alia* to the difficulties faced in communicating with victims in a timely manner in either Chad or Sudan. Some of those applications have nevertheless been included in the present report as Group B because they allege having suffered harm in one (or more) of the surrounding villages of Kodoom, Bindisi, Mukjar or Deleig and are therefore complete with respect to those allegations.

²⁶ Second Assessment Report, para. 3.

the Chamber's discretion whether to issue a ruling on these applications at this point.

25. Now that the deadline for submitting applications for participation has arrived, all technically complete applications in the possession of the VPRS have been transmitted through the present report as either Group A or B.
26. In accordance with paragraph 34 of the First Decision, applications missing formal technical requirements such as an ID document, proof of kinship (where relevant), the solemn declaration or other key constitutive elements to their completeness were not transmitted.²⁷

C. Brief Summary of the VPRS's latest mission to Sudan and an update on the security situation of victims

27. The VPRS recently conducted a mission to Sudan and was able to hold in-person meetings with relevant [redacted] working in and on the topic of Darfur. Through these discussions, the VPRS was able to contextualize and frame the information it had received through its various remote information and training sessions held with an array of interlocutors over the preceding ten months. The key findings as they relate to these pre-trial proceedings were as follows:

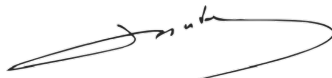
- The security situation for victims that continue [redacted] remains live and volatile with victims and intermediaries expressing deep concern about their safety *vis-a-vis* armed militia groups that are perceived to be aligned with the former regime. Questions and concerns were raised about the ICC's limited capacity to protect victims should victims' – and other interlocutors' – cooperation or participation in ICC-related activities become known to those armed militias;

²⁷ The VPRS notes that this includes ID documents that are illegible.

- While security concerns are significant, interest in engaging with the ICC process is reportedly extremely high amongst the affected community. For many, the ICC is truly a “court of last resort” in the sense that after more than 17 years, the affected community is placing great stock in the ICC process to bring about lasting and significant change on the ground. While only a small fraction of the victim community has so far had the opportunity to engage in the Case, with access gradually opening up to the relevant areas [redacted], the Court can anticipate that members of the affected community, [redacted], will have the expectation of a more proactive and inclusive engagement in Darfur-related proceedings going forward.
- In a context of protracted conflict allegedly between the former regime in Sudan (together with militia proxies in Darfur) and a number of “rebel” militias and their supporters in the central and western Darfur regions, it was reported to VPRS that trust between all sides is at a historic low. Practically for the Court, this atmosphere of mistrust results in difficulties engaging intermediaries [redacted] to assist in reaching out to victims on the Court’s behalf. Equally, access to basic forms of communication, including telephone, is extremely limited in certain areas. This, in effect, has resulted in certain key ICC/VPRS stakeholder communities being isolated from the process [redacted].

Conclusion

28. The VPRS respectfully submits the present report and transmission to the Chamber and stands ready to implement any further instruction that may arise on the topic of victim participation ahead of and subsequent to the confirmation hearing.



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

Dated this 7 May 2021
At The Hague, The Netherlands