

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/05-01/20
Date: 1 October 2021

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

Public

Registry Report on Common Legal Representation

Source: The Registrar

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

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I. Introduction

1. In compliance with Trial Chamber I's order conveyed by email on 22 September 2021 ("Chamber" and "Order"),¹ the Registry hereby submits a report on common legal representation in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Case"). This includes an update on the legal representation status of victims in the Case and observations relevant to the appointment of (a) common legal representative(s) in the Case.

II. Procedural History

2. On 18 January 2021, the Single Judge of Pre-Trial Chamber II issued a decision on the principles applicable to victims' participation and representation during the confirmation hearing, in which it appointed the Office of Public Counsel for Victims ("OPCV") to represent the collective interests of the victims during the confirmation hearing ("Single Judge", "PTC II" and "First Decision").²
3. On 5 February 2021, the Single Judge issued a decision supplementing the First Decision in which he, *inter alia*, clarified that (i) the appointment of OPCV in the 18 January 2021 Decision was temporary and would be superseded by decisions to be taken in matters of legal representation at the stage of the determinations of the merits of the applications by the Chamber; and (ii) final decisions on individual and common legal representation would be adopted in the context of the determinations on the status of victims.³
4. On 19 March 2021, the Single Judge provisionally authorised 28 applicant victims to participate in the proceedings and appointed Mr Nasser Mohamed Amin

¹ Email of Trial Chamber I to the parties, participants and the Registry of 22 September 2021, at 10:17h.

² 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.

³ Pre-Trial Chamber II, "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.

Abdalla and Ms Amal Clooney as their joint legal representatives (“Joint Legal Representatives”).⁴

5. On 20 May 2021, PTC II authorised 151 applicant victims to participate in the confirmation decision and appointed the Joint Legal Representatives and the OPCV as their legal representatives, in line with the victims’ choices (“LRVs”).⁵
6. On 9 July 2021, PTC II issued its decision on the confirmation of charges against Mr Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb” and “Confirmation Decision” respectively).⁶
7. On 16 August 2021, the Chamber issued an order scheduling the first status conference, in which it *inter alia* requested the Registry to provide an update and forecast on victim applications to participate in the proceedings.⁷
8. On 1 September 2021, the Registry provided its Update on Victim Participation (“Update”).⁸
9. On 21 September 2021, Ms Amal Clooney, acting in her capacity as legal representative of the victims, filed submissions on the issue of legal representation of victims, indicating amongst other items that “she does not seek appointment in the team of common legal representatives for victims during the trial or any other phase of this case.”⁹
10. On 22 September 2021, the Chamber issued the Order.

⁴ Pre-Trial Chamber II, “Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position”, dated 19 March 2021 and registered on 22 March 2021, ICC-02/05-01/20-314.

⁵ Pre-Trial Chamber II, “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests, 20 May 2021, ICC-02/05-01/20-398 (“Decision on Representation”), para. 53, and the Annex (ICC-02/05-01/20-398-Anx-Corr).

⁶ Pre-Trial Chamber II, “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)”, 9 July 2021, ICC-02/05-01/20-433.

⁷ Trial Chamber I, “Order scheduling first status conference”, 16 August 2021, ICC-02/05-01/20-451.

⁸ Registry, “Public redacted version of Update on Victim Applications for Participation”, 1 September 2021, ICC-02/05-01/20-462-AnxII-Red.

⁹ Legal Representative of the Victims, “Submissions on the issue of legal representation of victims”, 21 September 2021, ICC-02/05-01/20-474, para. 6.

III. Applicable Law

11. The present report is submitted on the basis of article 68(1) and (3) of the Rome Statute, rules 16(1) and 90 of the Rules of procedure and Evidence (“Rules”), regulation 79 of the Regulations of the Court, regulations 112 and 113 of the Regulations of the Registry, and the Registry’s single policy document on the Court’s legal aid system.¹⁰

IV. Submissions

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A. Current status of victims’ legal representation

12. During pre-trial proceedings, 151 victims were admitted by PTC II to participate in the Case.¹¹ Honoring the victims’ choice, the Single Judge appointed two legal teams to represent them at the pre-trial stage: the OPCV and the Joint Legal Representatives.¹² In addition, the Single Judge instructed the OPCV to represent victim applicant a/2747/10 who had not recorded a choice of counsel.¹³

¹⁰ ICC-ASP/12/3, 4 June 2013.

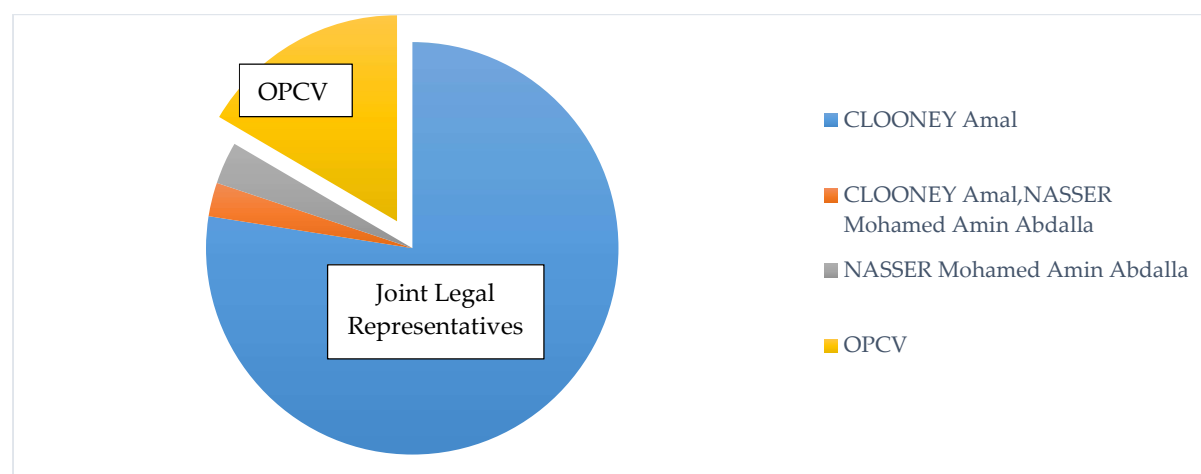
¹¹ The Registry notes however that the decisions accepting these 151 victims as participants in the proceedings is subject to the powers of the Chamber to modify the previous rulings of Pre-Trial Chamber II.

¹² See footnote 5, *supra*. See also Pre-Trial Chamber II, Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, para. 6(v).

¹³ Decision on Representation, para. 54.

13. The numbers of participating victims represented by each of the two teams are shown in the following table and chart, including the victims' choice of counsel expressed in their applications.¹⁴

Legal representative	Participating victims	
	Number	Percentage
Total	151	
Joint Legal Representatives <i>Designation in the application forms:</i>	126	83%
- Ms Clooney	- 117	- 77%
- Mr Nasser	- 5	- 3%
- Ms Clooney and Mr Nasser	- 4	- 3%
Ms Massidda (OPCV) <i>Designation in the application forms:</i>	25	17%
- OPCV	- 24	- 16%
<i>Appointment by PTC II</i>	- 1	- 1%



¹⁴ The Registry has in addition received two applications from the OPCV which were not transmitted as group A applications at pre-trial stage due to an inadvertent error. Since the confirmation of charges hearing, the Registry has received a small number of additional applications for participation in proceedings: approximately 13 from OPCV and 11 from Mr Nasser; these applications are presently being assessed by the Registry. Further applications are expected soon, particularly as a result of imminent Registry missions in the field.

14. On 21 September 2021, Ms. Clooney informed the Chamber that she has been appointed as Special Adviser to the Prosecutor and does not seek appointment as legal representative in the subsequent proceedings.¹⁵ She further indicated that:

- [she] “intends to begin her duties on 15 October, after consultations with the victims have been completed”;¹⁶ and
- she has started a consultation process with her clients which she expected to be completed by the end of September, and “[all] victims who have been consulted so far have indicated that they would like to appoint Ms von Wistinghausen as replacement counsel.”¹⁷ The latter is on the ICC List of Counsel and “has indicated her availability to represent victims going forward in this case”.¹⁸

15. On 30 September 2021, Ms Clooney informed the Registry that consultations have been undertaken with the victims who selected her as their legal representative and were admitted to participate in the case at the pre-trial stage.¹⁹ Consultations have included updates about the case (including the trial date) as well as information about Ms Clooney’s future mandate as a Special Adviser to the Prosecutor with a continued focus on accountability in the Darfur Situation, and proposed replacement counsel. Ms Clooney indicated that all victims’ groups representatives as well as all individual victims who have been consulted have expressed support for her new role and the termination of her mandate as legal representative for victims on this basis. She has confirmed to the Registry that of the 117 victims who had appointed her and were admitted to participate in the case at the pre-trial stage, 116 have terminated her mandate and confirmed Ms von Wistinghausen as

¹⁵ Legal Representative of the Victims, “Submissions on the issue of legal representation of victims”, 21 September 2021, ICC-02/05-01/20-474, (“Representation Submission”), para. 6.

¹⁶ *Ibid*, footnote 9.

¹⁷ *Ibid*, footnote 12.

¹⁸ Representation Submission, para. 7.

¹⁹ She informs that these consultations have included representatives from victims’ groups and interviewers in both Chad and Darfur, as well as the individual victims themselves, over several weeks.

their choice of counsel going forward, and consultation with the final victim is expected to conclude within the next 2-3 days. Ms Clooney states that the relevant files for these victims have been transferred to Ms von Wistinghausen.

B. Preliminary observations on the organization of common legal representation

16. At the time of filing its Update, the Registry saw no indication that the representation scheme selected by PTC II would be inappropriate for the continuation of proceedings. However, it noted that only a relatively small number of victims had been reached out to and were subsequently admitted to participate in the proceedings.²⁰
17. The Registry highlighted that it only had very limited opportunity to explore the potential for victims to organize their own legal representation in application of rule 90(2) of the Rules. This includes the conducting of meaningful consultations on the choice of potential common legal representatives, due to limited travel options to the field and/or other means of direct communication.²¹ Under the presently more favorable travel and health-related circumstances, the Registry is currently preparing a number of activities in the field in the immediate future in order to expand interactions with victims and collect their views and concerns to the extent possible. This will include informing victims about legal representation before the Court and collecting their views on the topic.
18. Moreover the Registry is mindful of the need for the proceedings to be conducted in an efficient and timely fashion. It notes in particular that:
 - the provisional date for the start of trial is 5 April 2022;²²
 - Ms Clooney intends to begin her new duties by 15 October 2021;²³

²⁰ Update, paras. 29-30.

²¹ Update, paras 11 and 12.

²² Transcript of 8 September 2021, ICC-02/05-01/20-T-013-ENG (ET WT), p. 16, lines 24-25.

²³ Representation Submission, para. 6.

- the next status conference in which victims can participate through their legal representative(s) is scheduled for 12 November 2021;²⁴ and
- the Chamber has authorised the LRVs to file a trial brief by 7 February 2022.²⁵

19. Accordingly, the Registry submits the following observations for the Chamber's consideration, bearing in mind *inter alia* the current scheme of victims' legal representation, the aforementioned timelines, the current operational constraints in the field, the legal aid budget and the importance of meaningful and effective representation of victims in keeping with the tenets of rule 90 of the Rules.

Legal aid budget

20. It is expected that victims in the Case cannot afford the cost of their legal representation before the Court and will rely either on continued *pro-bono* services of legal representatives or the financial assistance that may be provided by the Court under its legal aid budget.

21. In this respect, the Registry notes that during the pre-trial stage the Joint Legal Representatives did not request funds from the ICC's legal aid scheme. It is not known at this time whether Ms Clooney's proposed replacement as legal representative – Ms von Wistinghausen²⁶ - and/or Mr Nasser intend to seek any funding from the Court if they were to have a mandate as legal representatives of victims at trial.

22. The Registry further notes that the resources allocated to the legal representation of victims in a case pursuant to the Registry's Single Policy Document on the Court's Legal Aid System of 4 June 2013 ("Legal Aid Policy") by way of common legal representation should be one counsel assisted by one case manager²⁷

²⁴ Transcript of 8 September 2021, ICC-02/05-01/20-T-013-ENG (ET WT), p. 73, lines 11-17.

²⁵ *Ibid*, p. 80, line 1.

²⁶ Representation Submission, para. 7.

²⁷ According to paras. 85 and 92 of the Legal Aid Policy, Counsel receive a net base salary of €8,221 per month plus expenses (up to €3,000). Legal representatives of victims are remunerated per hour and not on a lump sum basis. Pursuant to para. 103 of the Legal Aid Policy, legal representatives appointed to simultaneously represent victims in a second case before the Court are only entitled to a maximum

following the commencement of the confirmation of charges hearing and until the conclusion of trial, should it reach that stage. Moreover, the legal representative's team would *inter alia* be entitled to a one-time investigation budget, with the possibility to use this budget to recruit (a) field assistant(s).²⁸

23. In addition or as an alternative to external legal representation, the OPCV (funded through the Court's annual budget) may be vested by the Chamber with a mandate to represent victims also at the trial stage²⁹ – as in the present Case.

Grouping for the purpose of victims' common legal representation

24. In recent years, the Registry has consistently recommended to Chambers that in the absence of any specific reasons that would justify their separate representation, such as adverse and thus potentially conflicting interests between (groups of) participating victims, it may be appropriate that all participating victims are represented by one common legal representative ("CLR").³⁰

25. Based on the crimes confirmed in the Confirmation Decision and the preliminary information collected during pre-trial stage, the Registry is of the view that to date and on its face no adverse interests arise amongst the victim population in the present Case. However, the Registry notes that this is a *prima facie* assessment and subject to further direct consultation with victims.

additional 50% remuneration for counsel fees in the second case (i.e., €4,110 per month) https://asp.court-cpi.int/Courtdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf (accessed on 30 September 2021). The net base salary of Case Managers is at €3,974 per month.

²⁸ According to para. 64 of the Legal Aid Policy, the budget allocated for investigations for victims' teams is €43,752 for the duration of proceedings of the case, including the reparations phase. According to paras. 62 and 63 of the Legal Aid Policy, the post of field assistant is specifically created to assist the legal representative of victims, on an *ad hoc* basis to facilitate the communication of the views and preoccupations of victims and assist a counsel to fully represent the views and concerns of victims before the Chamber. The field assistant post is remunerated on an hourly basis up to a maximum of € 4,047 per month and deducted from the investigation budget allocated to the team.

²⁹ This is in accordance with Regulation 81.4(e) of the Regulations. The Registry can provide an overview over key jurisprudence on the OPCV's different victim representation mandates across cases upon request.

³⁰ See, for example, Registry, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of "Annex I to the Registry's Second Report on Legal Representation of Victims", 28 January 2019, ICC-01/12-01/18-209-AnxI-Red, para. 13. The term CLR may comprise a team of counsel, as is for instance the case in the *Al Hassan* and *Yekatom/Ngaissona* proceedings.

26. While at this juncture the Registry does not see any reason why victims should not be all represented within one single group under a common legal representation,³¹ it also acknowledges that identifying conflicting or divergent interests among victims should be an ongoing process taking into account the developing subject matter of the litigation and the interests and views of the various victims in relation to those matters. The Registry will therefore update the Chamber should it become aware of any element that would justify the need for separate legal representation amongst the participating victims.

C. Applicability of Rule 90(2)

27. As referenced by the Chamber in its Order, the Registry notes that in keeping with rule 90(2) of the Rules, victims themselves should first have the opportunity to agree on an arrangement for their common legal representation, with the assistance of the Registry. The jurisprudence of the Court reflects the importance of respecting victims' views regarding legal representation to the extent possible.³²

28. Two main ways are envisaged for that purpose in rule 90(2): i) the victims have identified legal representatives and agree on a common choice ("option A"), or ii) the Registry assists victims in their choice by providing them with information on qualified counsel - for instance either by presenting them "a list of Counsel maintained by the Registry" or by "suggesting one or more common legal representatives" ("option B").

Option A

³¹ This would be particularly so if legal aid funds had to be provided for victims' representation due to the Court's limited financial resources.

³² See for instance, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on victims' participation", 18 January 2008, ICC-01/04-01/06-1119, para. 126; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims", 16 December 200, ICC-01/05-01/08-322, para. 9; or Pre-Trial Chamber II, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, paras. 64-66.

29. Regarding option A, the Registry notes that the great majority of victims so far admitted to participate in the proceedings have already chosen legal representatives in the Case.³³ The latter have been appointed accordingly by the Single Judge at the pre-trial stage.
30. At the same time, the Registry reiterates that so far only a relatively small number of victims have been admitted to participate in the proceedings. While the expressed views of these victims (predominantly in their application forms) are extremely helpful, the victim community affected by the crimes subject to the Case is expected to be(come) much bigger in the coming months. In this light, the Registry believes that consultations with potential further victims in the Case and other relevant stakeholders³⁴ (which the Registry intends to conduct in the field imminently) are necessary to verify whether an agreement across victim groups concerning their legal representation exists.

Option B

31. Regarding option B, the Registry notes that merely providing the List of Counsel to all potential victims seems more of a theoretical exercise than a realistic option when dealing with potentially thousands of victims in environments of extremely low infrastructure and relatively low literacy, as is the reality of the current Case.
32. More concretely, this approach would require the Registry to i) establish a representative sample of victims in the Case; ii) constitute a shortlist of qualified lawyers to represent victims from the Court's List of Counsel including OPCV counsel (through a transparent and open process); and iii) consult the representative sample of victims in order to obtain their preference/agreement for a legal representative from the shortlist. The choice of legal representative of the surveyed group would then apply for the legal representation of all victims admitted to participate in the proceedings.

³³ See *supra*, para. 13.

³⁴ This includes civil society organisations in contact with victims and victim community leaders.

33. The Registry fears however that due to the specific circumstances of the Case, including the security situation of victims and the challenges in terms of infrastructure on the ground, such a process would be lengthy, resource-intense and difficult to put in place within the judicial timeframe. In addition, the three counsel assigned by PTC II to represent victims' interests were in the overwhelming majority these victims' choice.

Potential way forward

34. In light of the current operational challenges and the procedural time constraints, a potential way forward most approximate to the spirit of rule 90(2) of the Rules as far as victims' choice is concerned could be a combination of options A and B, as shall be outlined in the following.

35. A first option on the immediate arrangement of counsel would be most akin to the situation at pre-trial, with an external team of counsel alongside Ms Massidda of the OPCV. The Registry notes Ms Clooney's imminent termination of mandate vis-à-vis the victims that had chosen her to represent them; it also notes Ms Clooney's suggestion that Ms von Wistinghausen replace her, for whom in her submission the support by the overwhelming majority of her clients has been confirmed. If the Chamber were to accept Ms Clooney's suggestion of her replacement, the new team of external legal representatives would operate with one lead counsel³⁵ alongside Ms Massidda as counsel of the OPCV.

36. One possible alternative could be for the Registry to ask the above-mentioned counsel whether they might be willing to act as a team of common legal representatives in the Case, within the parameters set by the Chamber, and in particular that there shall be only one lead counsel in a team.³⁶

37. The Registry recalls that should external counsel require legal aid funds for the representation of victims in the proceedings, rule 90(5) of the Rules provides that

³⁵ As per the Presiding Judge's indication during the status conference, Transcript of 8 September 2021, ICC-02/05-01/20-T-013-ENG (ET WT), p. 73, line 17; *see also* Representation Submission, para. 8.

³⁶ Transcript of 8 September 2021, ICC-02/05-01/20-T-013-ENG (ET WT), p. 73, line 17. The Registry stands ready to assist with relevant submissions should the choice of lead counsel be in question.

“a common legal representative chosen by the Court” could be funded through the Court’s budget.³⁷

38. If the Chamber were to consider a counsel arrangement as outlined in paras 35 and 36 *supra* sensible, the Registry would conduct further consultations with relevant stakeholders during its upcoming missions to Sudan and Chad,³⁸ including in particular with potential further victims in the Case, on the common legal representative(s) scheme agreed upon by the participating victims. The Registry will collect any views and concerns victims might have in this regard for the Chamber’s continued consideration.

D. Organization of a Rule 90(3) selection process

39. Alternatively and as provided for by the Rules, the Registry could organize the common legal representation of victims in the Case in accordance with rule 90(3). In doing this, the Registry would implement an open, transparent and objective selection process according to pre-defined selection criteria.³⁹ This process would include consideration of both the current legal representatives, as well as potential other interested and qualified counsel. Such recruitment process would be organised following the steps and within the timeline described further below.

³⁷ See also regulation 80 of the Regulations of the Court.

³⁸ The consultations would be held during the second half of October 2021, if security permits.

³⁹ This approach has been applied in the case of *The Prosecutor vs. William Samoei Ruto and Joshua Arap Sang* case (Registry, “Proposal for the common legal representation of 2 August 2012, ICC-01/09-01/11-243; and “Recommendation for the position of Common Legal Representative of victims, 6 November 2012, ICC-01/09-01/11-467) the case of *The Prosecutor vs. Uhuru Muigai Kenyatta* (Registry, “Proposal for the common legal representation of victims”, 5 August 2011, ICC-01/09-02/11-214 and “Recommendation for the position of Common Legal Representative of victims”, 5 November 2012, ICC-01/09-02/11-517), the case of *The Prosecutor vs. Abdallah Banda Abakaer Nourain* (“Proposal for the common legal representation of victims”, date 25 August 2011 and registered on 26 August 2011) ICC-02/05-03/09-203) case of *The Prosecutor v. Laurent Gbagbo* (Registry, “Proposal for the common legal representation of victims”, 16 May 2012, ICC-02/11-01/11-120).

i. Launch of a call for expression of interest addressed to the lawyers on the Court list of Counsel

40. A call for expression of interest (“EOI”) would be published on the Court’s website.

It would set out the procedure and criteria to be used in the identification of a CLR as well as information relating to the role of CLR of victims and remuneration.⁴⁰ Beyond the core criteria identified and proposed in other cases by the Registry,⁴¹ the EOI would include any additional requirement included in the Chamber’s decision and/or drawn from the Registry’s experience in the Case.

41. Interested Counsel would be asked to provide their CV as well as a written statement setting out their motivations for representing victims in the Case, and explaining how their involvement would meet the identified criteria. Lawyers should have a minimum period of 2 weeks to apply.

ii. Selection of CLR

42. For the selection process, written questions would be sent to pre-selected candidates, in order to give the panel members an opportunity to evaluate the candidates’ experience and skills that are relevant for representing victims in the Case, taking into consideration the particularities of the Case.

43. The panel members would agree on a shortlist of candidates who would have scored the highest to convene to an interview. As for the written test, the aim of the questions posed in the interviews would be to allow the panel members to evaluate the motivations and capacities of the candidate to represent victims in the Case.

⁴⁰ See for example the EOI launched by the Registry in relation to the case of *The Prosecutor v. Laurent Gbagbo*, “Annex 2 to Proposal for the common legal representation of victims”, ICC-02/11-01/11-120-Anx2.

⁴¹ Beyond the minimum set requirements for counsel set out in rule 22 of the Rules and regulation 67 of the Regulations of the Court, the Registry considers the additional following criteria in all common legal representation selection processes: (1) Pre-established relationship of trust with victims eligible to participate in the case, or factors demonstrating a capacity for such a relationship; (2) Demonstrated commitment and ability to work with vulnerable persons; (3) Familiarity/connection with the situation country; (4) Relevant litigation expertise/experience (this can include: experience representing groups of victims, experience in international criminal litigation, etc.); (5) Sufficient availability; and (6) Information technology skills.

iii. Final recommendation to the Chamber

44. Based on the results of the selection process, the Registry would submit its final recommendations on the organization of common legal representation in the Case.
45. The Registry estimates that these recommendations could be submitted within ten weeks after the issuance of the Chamber's order.

V. Conclusion

46. The Registry stands ready to implement any instructions the Chamber wishes to issue in order to arrange common legal representation with the assistance of the Registry as suggested in the present submission,⁴² or in the alternative for the Registry to prepare a proposal on common legal representation through a selection process under rule 90(3) of the Rules.⁴³
47. Irrespective of the arrangement the Chamber may wish to adopt for the common legal representation of victims in the Case, the Registry reiterates the importance to keep it under review in order to best attend to victims' needs and their (counsels') concerns. It maintains its proposal to assess on a continuous basis whether any adjustments would be advisable and report to the Chamber as appropriate.



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

Dated this 1 October 2021

At The Hague, the Netherlands

⁴² See *supra*, paras 35-37.

⁴³ See *supra*, paras 38-44.