

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 8 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

Observations on the Registry Report on Common Legal Representation

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel agrees with the Registry preliminary assessment in its Report,¹ and submits that the representation scheme selected by Pre-Trial Chamber II would be appropriate for the trial proceedings. The scheme will ensure continuity in the legal representation, respect of the victim's choice and effectiveness of the proceedings.

2. In addition, pursuant to rule 90 of the Rules of Procedure and Evidence (the "Rules") and regulation 81 of the Regulations of the Court (the "Regulations"), Counsel remains available to be appointed as common legal representative in the case should the Chamber consider that this course of event is more appropriate in the present circumstances.

II. PROCEDURAL BACKGROUND

3. On 20 May 2021, Pre-Trial Chamber II issued the "Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests", authorising 151 victims to participate in the proceedings and appointing, on the one hand, Counsel from the Office of Public Counsel for Victims (the "OPCV" or the "Office") as one of the legal representatives and, on the other hand, Mr Abdalla and Ms Clooney jointly, as a distinct team of legal representatives in the case (the "Joint Legal Representatives").² The Chamber indicated that "*all the victims that are hereby authorised to participate in these proceedings, have appointed either the OPCV or the joint legal representatives, there is no reason not to honour the victims' choice. Accordingly, the Single Judge appoints the OPCV and the joint legal representatives in line with the victims' choices*".³

¹ See the "Registry Report on Common Legal Representation", [No. ICC-02/05-01/20-477](#), 1 October 2021, paras. 16 and 35 (the "Registry's Report").

² See the "Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests" (Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-398](#), 20 May 2021.

³ *Idem*, para. 53.

4. On 9 July 2021, Pre-Trial Chamber II issued the Decision confirming the charges against Mr Abd-Al-Rahman and committing him for trial.⁴
5. On 21 July 2021, the Presidency assigned the case to Trial Chamber I (the “Chamber”).⁵
6. On 21 September 2021, Ms Clooney filed a submission on legal representation of victims,⁶ informing the Chamber that she wishes to discontinue her mandate as one of the Joint Legal Representatives and proposing as a replacement Ms von Wistinghausen.⁷
7. On 22 September 2021, the Chamber issued by e-mail an Order instructing the Registry to submit a report on common legal representation by 1 October 2021, and the parties and participants to file observations thereon by 8 October 2021.⁸
8. On 1 October 2021, the Registry filed the Report.⁹
9. On 4 October 2021, the Chamber instructed by e-mail the Joint Legal Representatives to inform the Chamber “(a) whether all victims (presently participating and future victims) could be represented by Ms Wistinghausen and Mr Nasser acting as one single team; and (b) whether Ms Wistinghausen and Mr Nasser wish to continue representing victims participating in this case on a *pro bono* basis”.¹⁰
10. On 5 October 2021, the Defence filed its Response to the Registry’s Report.¹¹

⁴ See the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-433](#), 9 July 2021 (the “Decision confirming the charges”).

⁵ See the “Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’)” (Presidency), [No. ICC-02/05-01/20-440](#), 21 July 2021.

⁶ See the “Submissions on the issue of legal representation of victims”, [No. ICC-02/05-01/20-474](#), 21 September 2021.

⁷ *Idem*, paras. 6 and 7.

⁸ See the e-mail the Chamber’s email on 22 September 2021 at 10:17 hours.

⁹ See the Registry’s Report, *supra* note 1.

¹⁰ See the Chamber’s email on 4 October 2021 at 14:07 hours.

¹¹ See the “Réponse aux Observations du Greffe ICC-02/05-01/20-477”, [No. ICC-02/05-01/20-479](#), 5 October 2021.

III. SUBMISSIONS

1. The Court's legal framework of victims' legal representation and the free choice of counsel

11. At the outset, Counsel recalls the legal framework of the legal representation of victims in the proceedings before the Court, including the right of victims to freely choose their lawyer.

12. Rule 90(1) of the Rules indicates that victims shall be free to choose a legal representative. Paragraph (2) of the same provision, however, clarifies that, “[w]here there are a number of victims” and “for the purposes of ensuring the effectiveness of the proceedings”, the Chamber “may” request victims or particular groups of victims to choose a common legal representative or representatives.¹² In turn, paragraph (3) provides that, if victims are unable to choose a common legal representative or representatives within a time limit set out for this purpose, the Chamber “may” request the Registrar to choose one or more common legal representatives.¹³ The Chamber has thus full discretion in deciding whether a common legal representative shall be appointed, delegating to the Registry the responsibility to identify one or more common legal representatives when victims are unable to express a choice or cannot reach an agreement. While paragraph (4) of rule 90 does not establish a right for each victim to choose their own legal representative in all circumstances, it nonetheless imposes on the Registry the obligation to ensure that in the selection of common legal representatives “the distinct interests of the victims [...] are represented”.

13. In this regard, Trial Chamber II stressed that “although victims are free to choose a legal representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court”.¹⁴ It further noted that “[c]ommon legal representation is the primary procedural mechanism for reconciling the conflicting

¹² See rule 90(2) of the [Rules of Procedure and Evidence](#).

¹³ See rule 90(3) of the [Rules of Procedure and Evidence](#).

¹⁴ See in the *Katanga* case, the “Order on the organisation of common legal representation of victims” (Trial Chamber II), [No. ICC-01/04-01/07-1328](#), 22 July 2009, para. 11.

requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible” and concluded that “the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require”.¹⁵ Trial Chamber IV clarified that rule 90 has to be read in “a sequential manner”¹⁶ and that such provision “does not guarantee to victims an absolute right to be represented by a legal representative of their choosing”.¹⁷ In fact, the Chamber’s duty to ensure the effectiveness of the proceedings necessarily implies a limitation to the victims’ freedom to choose a legal representative.¹⁸ Such liberty is even more reduced when the Chamber requests the Registrar to identify a common legal representative pursuant to rule 90(3) and (4) of the Rules.¹⁹

14. In turn, rule 90(5) of the Rules provides that a victim or a group of victims who lack the necessary means to pay for a common legal representative *chosen by the Court* may receive assistance from the Registry, including, as appropriate, financial assistance. A literal and contextual interpretation of rule 90 makes clear that access to the Court legal aid is only provided for victims who would have accepted to be represented by a common legal representative chosen by the Court. In this regard, the Registry noted that “while the language of rule 90(5) may be permissive rather than mandatory, the rights afforded to victims by the Statute can only be exercised effectively if financial assistance is made available for legal representation of victims by the Court through the legal aid scheme”.²⁰

¹⁵ *Ibid.*

¹⁶ See in the *Banda and Jerbo* case, the “Decision on common legal representation” (Trial Chamber IV), [No. ICC-02/05-03/09-337](#), 25 May 2012, para. 12.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Idem*, paras. 12 and 13.

²⁰ See the Report of the Court on legal aid: Legal and financial aspects of funding victims’ legal representation before the Court”, [ASP/8/25, 5 October 2009](#), para. 6. See also, BITTI (G.) and FRIMAN (H.), “Participation of victims in the proceedings”, in LEE (R.S.) (ed.) *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc., 2001, p. 465.

15. Lastly, rule 90(6) of the Rules requires that a legal representative of a victim or victims shall have the qualifications set forth in rule 22(1) – *i.e.* necessary relevant experience and excellent knowledge of and be fluent in at least one of the working languages of the Court. The right of victims to freely choose a legal representative needs thus to be balanced with the Chamber’s duty to ensure the effectiveness of the proceedings in the interests of justice. In this regard, Chambers have a broad discretion in deciding when the need arises to appoint a common legal representative and when the victims’ choice may thus be restricted. On the one hand, lack of necessary means to pay for a common legal representative is likely to prevent victims from enjoying their right to freely choose a legal representative, as far as financial assistance from the Court is only envisaged for common legal representative chosen by the Court. On the other hand, the ability of a victim to cover the costs of the legal representation is not *per se* sufficient to be represented by a counsel of his or her choice, in so far as the Chamber has to be satisfied that the proposed common legal representative has the necessary qualifications and his appointment is conducive to effective proceedings.

2. The Legal Representation scheme in the present case

16. As a preliminary remark, Counsel recalls that victims may choose a lawyer from the OPCV as their legal representative – as it occurred in the present case. Moreover, regulation 81(4)(e) of the Regulations includes, amongst the mandate of the Office, the direct legal representation in court proceedings.²¹ In this regard, the Chambers’ constant practice has been to appoint a Counsel from the OPCV as legal representative for unrepresented applicants or victims in specific proceedings (*e.g.* jurisdiction and admissibility proceedings),²² as well as common legal representative of victims

²¹ See regulation 81 of the [Regulations of the Court](#), as amended on 2 November 2011 and entered into force on 29 June 2012.

²² See *e.g.* in the *Simone Gbagbo* case, the “Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” (Pre-Trial Chamber I), [No. ICC-02/11-01/12-15](#), 15 November 2013, para. 10. See also in the situation of the *Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, the “Decision on the Victims’ Participation in the Situation” (Pre-Trial Chamber I), [No. ICC-01/13-18](#), 24 April 2015, para. 17; and the “Decision on the Requests for Withdrawal of the Legal Representative of Victims pursuant to Regulation 82 of the Regulations of the Court” (Pre-Trial Chamber I), [No. ICC-01/13-54](#), 26 September 2016.

participating at different procedural stages, including at the pre-trial, trial, and reparations phases.²³ When appointed as legal (or common legal) representatives, the mandate of Counsel from the OPCV does not differ from the one of externally appointed legal representatives. Therefore, in fulfilling their mandate, Counsel of the OPCV enjoy the same rights and prerogatives as any other legal representative and they are bound by the same obligations.

17. In the present case, the Pre-Trial Chamber considered the choice of victims and appointed for the confirmation of charges purposes three legal representatives, forming two distinct teams. The system in place has demonstrated to be effective so far, as the two teams have been cooperating closely to present the views and concerns of the participating victims, including by submitting joint filings.

18. A meaningful involvement of victims in the proceedings before the Court necessarily implies taking into account the realities of each country, respecting local traditions as well as the social specificities of the affected communities. The challenges to an effective participation and representation of victims are numerous. Proceedings before the Court are complex, lengthy and removed from the locations where the crimes occurred and the victims still reside. Hundreds, oftentimes thousands, of victims are likely to participate and need to be kept constantly informed in a language they fully understand.

²³ See *e.g.*, in the *Gbagbo* case, the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), [No. ICC-02/11-01/11-138](#), 4 June 2012, paras. 44-45; in the *Blé Goudé* case, the “Decision on victims’ participation in the pre-trial proceedings and related issues” (Pre-Trial Chamber I), [No. ICC-02/11-02/11-83](#), 11 June 2014, paras. 24-25; and in the *Gbagbo and Blé Goudé* case, the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, para. 69 and p. 24. See also in the *Ntaganda* case, the “Decision Concerning the Organisation of Common Legal Representation of Victims” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-160](#), 2 December 2013, p. 11 and the “Second decision on victims’ participation in trial proceedings” (Trial Chamber VI), [No. ICC-01/04-02/06-650](#), 16 June 2015, paras. 28-30. See also in the *Ongwen* case, the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-350](#), 27 November 2015, paras. 19-24. See in the *Katanga* case, the “Decision on the Application made by the Common Legal Representative of Victims on 2 March 2017” (Trial Chamber II), [No. ICC-01/04-01/07-3727-tENG](#), 15 March 2017, paras. 12-14.

19. To face these challenges – and as soon as she was appointed at the pre-trial stage to represent the general interests of applicant victims – Counsel identified the resources needed to adequately fulfil her mandate.²⁴ In particular, Counsel considered essential to integrate in the team an Assistant to Counsel on a full time basis with extensive experience in the field, knowledge of the case and also - and more importantly - of the local languages, the victims' cultural and ethnic background and the specific type of victimisation suffered. A dual Dutch-Sudanese national, fluent in the Darfuri dialects, with extensive experience in supporting legal proceedings and deep knowledge of the relevant victims' communities, both in Darfur and within the diaspora, has been selected and joined the legal team as of 1st March 2021. In addition, a Sudanese national based in Darfur is in the process of being recruited as Field Counsel. Both appointments are included in and covered by the OPCV's budget for next year.

20. This approach is in line with the model successfully put in place in all instances when Counsel from the OPCV have been appointed as legal (or common legal) representative. The presence of a Field Counsel in the situation country facilitates the collection of relevant information and ensures the proximity to and the regular and continuous communication with victims in the field in a language they fully understand.

21. This team configuration guarantees a high standard of legal representation of victims and meets the numerous challenges linked to international criminal proceedings discussed *supra*.²⁵ In this regard, Counsel recalls that said approach has also been the object of a specific Registry's evaluation and found to be satisfactory in

²⁴ In this regard, Counsel refers to the "Report on the Activities of the Office of Public Counsel for Victims pursuant to the "Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing (ICC-02/05-01/20-259)" and the "Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance (ICC-02/05-01/20-277)", [No. ICC-02/05-01/20-297-Conf-Exp](#), 12 March 2021 (filed on an *ex parte* OPCV only basis because it contains information concerning the working methods and internal organisation of the Office).

²⁵ See *supra* para. 1819.

previous cases. At the request of the relevant trial chamber, in the *Gbagbo and Blé Goudé* and *Ntaganda* cases, the Registry undertook an assessment of the system – asking the victims directly whether they were satisfied with their legal representation. The vast majority of the victims expressed their full satisfaction with their legal representation and the system put in place.²⁶

22. In relation to the issue of the number of victims represented by the two teams of legal representatives appointed in the case,²⁷ Pre-Trial Chamber II considered appropriate “as a matter of principle for the OPCV to receive all the applications received by the VPRS, also with a view to allowing the OPCV, in close consultation with VPRS as appropriate, to discharge its responsibilities to bring to the attention of the Chamber any potential issue of conflict of interest prior to the Chamber making its final determinations in the matter of representation”.²⁸

23. Accordingly, Counsel was privy to the applications transmitted to the Registry by Mr Abdalla and Ms Clooney before the decision on their appointment, but has refrained from contacting the victims concerned in line with her obligations under the Code of Professional Conduct for Counsel.²⁹

24. In this regard, in addition to the 13 new applications transmitted after the confirmation of charges,³⁰ Counsel will transmit 15 new applications in the coming weeks – pending revision of the Arabic translation of documents by the Language Services Section of the Registry. Counsel is also in the process of reviewing 50 new applications already received to verify their completeness and whether they fall within the confirmed charges.

²⁶ See in the *Ntaganda* case, the “Report on Consultations with victims pursuant to Decision ICC-01/04-02/06-449”, [No. ICC-01/04-02/06-513](#), 16 March 2015; and in the *Laurent Gbagbo* case, see the “Registry’s Report on the Legal Representation of Victims for the Purpose of the Trial pursuant to Decision ICC-02/11-01/11-800”, [No. ICC-02/11-01/15-49-Red](#), 15 May 2015.

²⁷ See the Registry’s Report, *supra* note 1, para. 13.

²⁸ See the “Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-277](#), 5 February 2021, para. 19 (emphasis added).

²⁹ See article 28 of the [Code of Professional Conduct for counsel](#).

³⁰ See the Registry’s Report, *supra* note 1, footnote 13.

3. Organisation of the legal representation at trial

25. Counsel agrees with the Registry preliminary assessment,³¹ and submits that the representation scheme selected by Pre-Trial Chamber II would be appropriate for the trial proceedings. The scheme would ensure continuity in the legal representation, respect of the victim's choice and effectiveness of the proceedings. Counsel also notes that such configuration - including two teams, one of Counsel from the OPCV and one of two external legal representatives – has been already implemented in the *Ongwen* case and proved to be efficient.

26. Finally, in accordance with rule 90 of the Rules, regulation 81 of the Regulations³² and one of the Registry's suggested scenarios,³³ Counsel remains available to be appointed as common legal representative in the case should the Chamber decide that this course of event is more appropriate in the circumstances.

Respectfully submitted,



Paolina Massidda
Principal Counsel

Dated this 8th day of October 2021.

At The Hague, The Netherlands

³¹ *Idem*, paras. 16 and 35.

³² See *supra* paras. 12-15 and 16.

³³ See the Registry's Report, *supra* note 1, para. 23.