

Annex II

Public redacted version of Update on Victim Applications for Participation

Update on Victim Applications for Participation

Table of Contents

Introduction	2
I. Update and Forecast regarding Victim Applications in the Case	3
A. <i>Update on Applications Received</i>	3
B. <i>Forecast on Potential New Applicants</i>	5
II. Other Registry Observations related to Victim Participation at Trial	7
A. <i>Languages used by Victims</i>	8
B. <i>Victim Admission Process and Deadline for Submission of Applications</i>	8
C. <i>Periodic Review of the Legal Representation Scheme</i>	11

Introduction

1. In compliance with Trial Chamber I's order scheduling the first status conference ("Chamber" and "Order", respectively), and in particular the Chamber's instruction to "[u]pdate and forecast on (additional) applications by victims to participate in the proceedings",¹ the Registry provides below: (I) an update and forecast on additional victim applications for participation in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb') ("Case"); and (II) other observations relevant to the participation of victims at trial.

¹ Trial Chamber I, "Order scheduling first status conference", 16 August 2021, ICC-02/05-01/20-451, paras. 1(j), 2.

I. Update and Forecast regarding Victim Applications in the Case

A. Update on Applications Received

2. To date, the Registry has received 810 victim applications for participation in the proceedings in relation to the Case.²
3. Out of these, 188 applications were transmitted to Pre-Trial Chamber II in accordance with the “Decision establishing the principles applicable to victims’ participation and representation during the confirmation hearing” issued on 18 January 2021 (“18 January 2021 Decision”).³ According to the ‘ABC’ admission system for victim applications approved by that Chamber, 150 forms were transmitted as part of Group A,⁴ and 26 as part of Group B.⁵ 12 applications were transmitted to the Pre-Trial Chamber and the parties as part of Group C.⁶
4. Consequently, Pre-Trial Chamber II authorized 151 victims to participate in the proceedings.⁷
5. Approximately 600 applications for participation in the proceedings were not transmitted during the pre-trial stage of the proceedings, either because they

² 785 applications have been submitted to the Registry before the commencement of the confirmation of charges hearing on 24 May 2021. 25 applications were submitted to the Registry to date subsequent to the confirmation of charges hearing. The numbers are subject to frequent adjustment as forms – and translations – continue to be received.

³ 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. The Registry was instructed to transmit only “complete” forms relating specifically to the 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.”

⁴ 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; “Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 21 April 2021, ICC- 02/05-01/20-358; “Third Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 7 May 2021, ICC-02/05-01/20.

⁵ Registry, “Third Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 7 May 2021, ICC- 02/05-01/20.

⁶ Registry, “Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 21 April 2021, ICC- 02/05-01/20-358 .

⁷ 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.

were assessed by the Registry as incomplete or as falling outside the scope of the Case.⁸

6. Lastly, the Registry took note of the clarifications provided by Pre-Trial Chamber II in the Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (“Confirmation Decision”)⁹ in relation to the “surrounding areas” of Kodoom, Bindisi, Mukjar and Deleig.¹⁰ Said surrounding areas are to be understood as i) *“the roads and fields surrounding Kodoom and Bindisi insofar as the victims were present in these locations when initially targeted”*;¹¹ and ii) *“beyond the boundaries of [Mukjar and Deleig] only insofar as some of the victims were transported from there to other locations where they were allegedly executed”*.¹²
7. The Registry is presently conducting a review of all applications authorized to participate at the pre-trial stage in order to assess whether the relevant findings in the Confirmation Decision and in particular the above clarifications could affect negatively the victim status of any of the participating victims.¹³

⁸ The vast majority of these applications have been assessed as falling outside the scope of the Case. See Registry, “Third Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 7 May 2021, ICC-02/05-01/20-383-Conf, paras. 21. and 24. Additionally, for approximately 10 applicants, the Registry has not been able to make a clear determination on whether their personal harm resulted from an incident falling within the parameters of the Case. Additional information is being sought from the persons concerned with a view to making a final determination on their applications as soon as possible.

⁹ See 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.

¹⁰ *Ibid.*, para. 25.

¹¹ *Idem.*

¹² *Idem.*

¹³ The Registry further notes that the Confirmation Decision can be appealed by the parties with the leave of Pre-Trial Chamber II. The time limit for filing an application for leave to appeal this decision will start after its translation into Arabic is notified by the Registry. Accordingly, the parameters for this (re)assessment may evolve according to potential further decisions issued in relation to the scope of the Case.

B. Forecast on Potential New Applicants

8. For the purpose of this forecast, the Registry makes a distinction between (i) the overall number of victims who may have suffered personal harm as a result of the crimes charged (“Potentially Eligible Victims”); and (ii), among the aforesaid group, those victims who will ultimately be in a position to submit applications for participation (“Potential New Applicants”). While the first number provides an approximate picture of the overall victimization at the time when the relevant conduct occurred, the second number serves as a numeric indicator of the (expected) participation of victims in the proceedings in the Case.

Potentially Eligible Victims

9. Considering the scope of the Case, the Registry estimates that thousands of individuals can be considered Potentially Eligible Victims, based on the following information:
 - The Prosecutor indicates that the attacks on Kodoom and Bindisi were carried out against the predominantly Fur civilian population,¹⁴ resulting in the alleged crimes of mass murder,¹⁵ rape,¹⁶ pillaging,¹⁷ destruction of property,¹⁸ and the forced transfer of the Fur. He specifies that around 1,600 families resided in Kodoom;¹⁹ around 1,800 families resided in Bindisi;²⁰

¹⁴ Prosecutor, “Public Redacted Version of ‘Prosecution’s submission of the Pre-Confirmation Brief and the List of Evidence’, 16 April 2021, ICC-02/05-01/20-346-Conf-AnxA”, dated 21 May 2021 and registered 22 May 2021, ICC-02/05-01/20-346-AnxA-Red (“Prosecution’s Pre-Confirmation Brief”), para.150.

¹⁵ *Ibid.*, para. 156. At least 100 persons were killed.

¹⁶ *Ibid.*, paras 187-192,

¹⁷ *Ibid.*, paras. 169-175.

¹⁸ *Ibid.*, paras 175-179.

¹⁹ *Idem.*

²⁰ *Idem.*

and “prior to the attack on Bindisi, about 20,000 civilians from nearby villages flooded into Bindisi seeking shelter”;²¹ and

- In relation to the attacks on Mukjar and Deleig, the Prosecutor reports that the victims were handpicked,²² as hundreds of Fur males were arrested, detained, tortured and eventually executed.²³

Potential New Applicants

10. [REDACTED],²⁴ [REDACTED].

11. The Registry faces a number of operational challenges in reaching out to victims in Darfur and Chad. These include a volatile security environment, travel restrictions, and communication challenges (mainly technical connectivity issues).²⁵ These obstacles are now coupled with the start of the rainy and harvest season, which significantly hinders access to several locations [REDACTED].²⁶ [REDACTED]. To date, the Victims Participation and Reparations Section of the Registry (“VPRS”) has conducted only one mission to Sudan ahead of the confirmation of charges hearing in the Case. [REDACTED].

12. The described context, and in particular the difficulties in physically reaching out to victims, impacts the Registry’s ability to conduct activities in a timely manner, namely to reach out to Potential New Applicants; as a consequence, it also causes delays in the receipt of application forms from victims for transmission to the Chamber.

²¹ Prosecution’s Pre-Confirmation Brief, para. 195.

²² *Ibid.*, para. 127.

²³ *Ibid.*, paras. 231 and 300

²⁴ [REDACTED]

²⁵ See Registry, “Third Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings”, 7 May 2021, ICC-02/05-01/20-383-Conf 10-05-2021, para. 27; see also “Registry Observations on the Defence’s “Réponse à la Requête ICC-02/05-01/20-178” (ICC-02/05-01/20-182-Conf)”, 26 October 2020, ICC-02/05-01/20-194-Conf, para. 39.

²⁶ [REDACTED]

13. [REDACTED].

14. [REDACTED],²⁷[REDACTED].²⁸

15. In light of the foregoing, the Registry estimates that, given the time that has elapsed since the relevant crimes have occurred, a minimum of several hundred Potential New Applicants can realistically be reached out to in the next 12 months. Current security and health challenges make a conclusive coverage of relevant victim communities before the end of 2022 highly unlikely.

Information received from the Legal Representatives of Victims

16. The Registry has inquired with the legal representatives of victims whether they have received information on potential victim applicants in the Case.²⁹ It is recalled that the Pre-Trial Chamber had appointed the Office of Public Counsel for Victims (“OPCV”), Ms Amal Clooney and Mr Nasser Mohamed Amin Abdalla as victims’ legal representatives (the latter two are jointly the “LRVs”) during the pre-trial stage.³⁰

17. [REDACTED].³¹

18. [REDACTED].³²

19. [REDACTED].³³

II. Other Registry Observations related to Victim Participation at Trial

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Email from VPRS to Ms. Amal Clooney and Mr. Amin Nasser, 17 August 2021, at 15:53, and to Ms. Paolina Massidda, 17 August 2021, at 15:29.

³⁰ See 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) with relevant references.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

A. Languages used by Victims

20. The predominant language used by victims of the Case is Fur. While many victims speak and understand Darfuri Arabic (the more widely used Arabic dialect in the region), most of the internally displaced victims in Darfur feel more comfortable using their native language and some - especially elderly or female members of households - may not speak or communicate in Arabic.
21. The Registry already received at the pre-trial stage a large number of applications in Arabic³⁴ and anticipates a similar trend at the trial (preparation) stage. These application forms will have to be translated before they are assessed and transmitted in the record of the Case. This in turn impacts the pace of the Registry's legal processing.

B. Victim Admission Process and Deadline for Submission of Applications

Confirmation of the existing procedures

22. The Registry notes that the Order does not address the procedure for the admission of victim applications at the trial stage. It is submitted that the present 'ABC' procedure for the admission of victim applications - as it has been in place in the present Case since the pre-trial proceedings³⁵ and in all other judicial proceedings presently before ICC Chambers - be maintained. The Registry's reasons for maintaining the 'ABC' application admission procedure are identical to those advanced at the confirmation stage in this Case; consequently, the Registry refers to its submissions made at that time.³⁶ Of note, trial chambers in the presently ongoing *Al Hassan* and *Yekatom/Ngaiissona* cases

³⁴ See, Registry, "Registry's First Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings", dated 26 February 2021 and registered 1 March 2021, ICC-02/05-01/20-288, para.15,

³⁵ 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.

³⁶ Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, 17 November 2020, ICC-02/05-01/20-203.

have found the continuation of the ‘ABC’ application admission procedure at the trial phase in both cases appropriate, efficient and compatible with the statutory framework.³⁷

23. The Registry therefore respectfully requests that the existing procedures adopted by Pre-Trial Chamber II remain in place with regard to the use of a modified standard application form,³⁸ the collection of victim applications,³⁹ the parameters of their legal processing⁴⁰ and the ‘ABC’ procedure for the admission of applications.⁴¹ According to the latter procedure, the Registry would only transmit to the parties those applications for which it could not make a clear determination.⁴²

Deadline for submitting victim applications

24. The Registry recommends that, independent of the transmission procedure considered most suitable by the Chamber, the transmission of applications be done in batches, on a rolling basis with a “cut-off” date set at the end of trial, or alternatively the end of the Prosecution case at least.

³⁷ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial, 12 March 2020, ICC-01/12-01/18-661, paras. 17 *et seq.*; Trial Chamber V, *The Prosecutor v. Yekatom and Ngaïssona*, Order Scheduling First Status Conference, ICC-01/14-01/18-459, para. 8 (iv), referring to Pre-Trial Chamber II in the same case, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, ICC-01/14-01/18-141, para. 43; *see also* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, 6 February 2015, ICC-01/04-02/06-449, paras. 29-30, 37. It is noted that in the pre-trial proceedings in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, the appropriateness of the ‘ABC’ victim application admission procedure in *that* case is before the Appeals Chamber as per Pre-Trial Chamber II’s “Decision on the Defence’s request for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’”, 21 May 2021, ICC-01/14-01/21-79.

³⁸ 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, p. 8.

³⁹ 18 January 2021 Decision, ICC-02/05-01/20-259, paras 13, 14.

⁴⁰ *Ibid.*, paras 15-20.

⁴¹ *Ibid.*, para. 34.

⁴² The Registry recalls that the compliance of this procedure with the Court’s legal framework has been challenged by Defence in case of *The Prosecutor v. Mahamat Said Abdel Kani* before the Appeals Chamber (see fn. 37 *supra*). Depending on the outcome and the Chamber’s conclusions for the *present* Case, the Registry stands ready to modify the procedure accordingly and/or propose any adjustment necessary for the Chamber’s consideration.

25. Owing to the challenging overall situation as mentioned *supra*, it is currently very difficult for the Registry to reach out to a number of victim communities, let alone collect any relevant information from groups or individuals that could participate in the trial proceedings of the Case. [REDACTED],⁴³ [REDACTED]. The challenging - and as yet unforeseeable - health situation in Darfur and Chad regarding COVID-19 as well as prevailing security concerns add to a rather difficult environment for the months and potentially years to come. At the same time, the proposed victim admission system puts a minimal burden on the parties during trial proceedings, while ensuring that victims' access to participation in the proceedings under article 68(3) of the Statute is provided in the most comprehensive fashion.
26. In light of the foregoing, the Registry recommends extending the deadline until the end of trial proceedings, or alternatively at least until the end of the Prosecution case, to provide victims with the appropriate time and opportunity to apply for participation. The Registry notes that the latter extension would be consistent with the approach adopted recently by trial chambers in the *Al Hassan* and *Yekatom / Ngaïssona* cases. In both cases, the trial chambers, after giving due consideration to the circumstances caused by the COVID-19 pandemic as well as [REDACTED], set the cut-off date to the end of the Prosecution's presentation of evidence.⁴⁴ Of note, Trial Chamber X added a very helpful ruling that "[a]fter the expiry of the deadline, the Registry is

⁴³ [REDACTED].

⁴⁴ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, "Decision Setting the Commencement Date of the Trial", 16 July 2020, ICC-01/14-01/18-589, para. 20; see also Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, "Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial", 12 June 2020, ICC-01/12-01/18-880, para. 13.

encouraged to continue collecting (but not to file or transmit) application forms for the purposes of any future reparations proceedings.”⁴⁵

C. Periodic Review of the Legal Representation Scheme

27. At the pre-trial stage of the Case, Pre-Trial Chamber II - honoring victim applicants’ choices - appointed as legal representatives of victims in the Case :

- i) Ms Amal Clooney and Mr Nasser Mohamed Amin Abdalla, acting as joint legal representatives;⁴⁶ and
- ii) the OPCV.⁴⁷

28. The Single Judge further appointed the OPCV in the interests of justice:

- i) to provide “general support and assistance to all applicant victims within the meaning of regulations 81(4) of the Regulations” and to preserve “their interests throughout the stage between the collection of the applications by the Registry and their transmission to and adjudication by the Chamber”,⁴⁸ and
- ii) to represent one unrepresented participating victim during the confirmation hearing.⁴⁹

29. The Registry presently sees no indication that the representation scheme selected by the Pre-Trial Chamber may be inappropriate for the continuation of proceedings. However, the Registry stresses that, so far, only a relatively small number of victims has been reached out to and subsequently admitted to

⁴⁵ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, “Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial”, 12 June 2020, ICC-01/12-01/18-880, para. 15.

⁴⁶ Pre-Trial Chamber II, “Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position”, March 2021, ICC-02/05-01/20-314, para.26; “Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests”; 20 May 2021, ICC-02/05-01/20-398, para. 53.

⁴⁷ 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, para. 53.

⁴⁸ Pre-Trial Chamber II, “Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position”, March 2021, ICC-02/05-01/20-314, para. 26; “Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests”; 20 May 2021, ICC-02/05-01/20-398, para. 54.

⁴⁹ 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, para. 54.

participate in the proceedings. During its upcoming activities, the Registry will provide information to Potential New Applicants on legal representation before the ICC and collect their views.

30. Regardless of the arrangement the Chamber may wish to adopt for participation of victims in the Case, the Registry deems important to keep the legal representation of victims under review in order to best attend to victims' needs and their counsels' concerns.

31. Given the new stage of proceedings as well as the operational and security challenges existing to reach victims in the Case, the Registry therefore proposes to assess on a continuous basis whether any adjustments may be advisable for the present phase of proceedings and report to the Chamber as appropriate.