

**Cour
Pénale
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**International
Criminal
Court**

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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

Public redacted version of “Observations of the Registry on the Defence’s *Requête aux fins de reconsidération de la Décision du 19 octobre 2021 (ICC-02/05-01/20-494) et mise en conformité de la procédure avec les Règles 89-1 et 94-2 du Règlement de Procédure et de Preuve*’ (ICC-02/05-01/20-717-Conf)”, 29 August 2022,
ICC-02/05-01/20-730-Conf-exp

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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 instruction conveyed by email on 27 July 2022 ("Chamber" and "Instruction", respectively),¹ the Registry hereby files its observations to the Defence's "Requête aux fins de reconsidération de la Décision du 19 octobre 2021 (ICC-02/05-01/20-494) et mise en conformité de la procédure avec les Règles 89-1 et 94-2 du Règlement de Procédure et de Preuve" ("Request"),² in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb') ("Abd-Al-Rahman Case" or "Case").

II. Procedural History

2. On 9 July 2021, Pre-Trial Chamber II issued its decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') ("Confirmation Decision").³
3. 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.⁴
4. On 1 September 2021, the Registry provided its update on victim participation.⁵
5. On 19 October 2021, the Chamber issued its "Decision on victims' participation and legal representation in trial proceedings" ("19 October 2021 Decision"),⁶ in which

¹ Email from the Chamber to the Registry on 27 July 2022 at 12:51.

² Defence, "Requête aux fins de reconsidération de la Décision du 19 octobre 2021 (ICC-02/05-01/20-494) et mise en conformité de la procédure avec les Règles 89-1 et 94-2 du Règlement de Procédure et de Preuve", 22 July 2022, ICC-02/05-01/20-717-Conf. A public redacted version was filed on the same day (ICC-02/05-01/20-717-Red).

³ 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.

⁴ Trial Chamber I, "Order scheduling first status conference", 16 August 2021, ICC-02/05-01/20-451, para. 2.

⁵ Registry, "Public redacted version of Update on Victim Applications for Participation", 1 September 2021, ICC-02/05-01/20-462-AnxII-Red ("1 September 2021 Update").

⁶ Trial Chamber I, "Decision on victims' participation and legal representation in trial proceedings", 19 October 2021, ICC-02/05-01/20-494.

it *inter alia* endorsed the victim application procedure previously adopted at the pre-trial stage of the proceedings (“Victim Application Procedure”).⁷

6. During the second status conference, on 12 November 2021, the Registry projected that it would be able to collect and receive between 600 and 800 additional victims’ applications in the course of the first semester of 2022.⁸
7. On 6 December 2021, the VPRS transmitted 142 applications in Group A,⁹ including 130 applications previously admitted at the pre-trial stage, and 12 newly received applications.
8. During the status conference held on 23 March 2022, the Registry provided *inter alia* an update on the collection of victims’ applications for participation.¹⁰ It reported delays in the previously announced expected time period for receipt, yet confirmed assumptions of the expected volume.¹¹
9. On 12 July 2022, the Registry notified the Defence of reparations requests received in the Case in accordance with rule 94(2) of the Rules of Procedure and Evidence (“RPE”)(“Registry’s Rule 94(2) Notification”).¹²
10. On 22 July 2022, the Defence submitted the Request, in which it asked the Chamber to reconsider the 19 October 2021 Decision, since the estimates communicated by the Registry in terms of potential applications for participation have not materialised, and to authorise the disclosure of the redacted versions of the Group A and C victim applications for participation/reparation registered in the Case.¹³

⁷ *Id.*, para. 15, referring in footnote 26 to the admission system established by Pre-Trial Chamber II in its “Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing”, 18 January 2021, ICC-02/05-01/20-259 (“18 January 2021 Decision”), paras 13-20 and 34.

⁸ Transcript of 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG WT, p. 18, lines 13-16.

⁹ Registry, “First Registry Transmission of Group A Applications for Victims’ Participation in Trial Proceedings”, 6 December 2021, ICC-02/05-01/20-529.

¹⁰ Transcript of 23 March 2022, ICC-02/05-01/20-T-025-Red-ENG WT, p. 3, lines 22-25, and p. 4, lines 1-2.

¹¹ *Id.*, p. 4, lines 3-12.

¹² Registry, “Notification to the Defence of Applications for Reparations pursuant to Rule 94(2) of the Rules of Procedure and Evidence”, 12 July 2022, ICC-02/05-01/20-712.

¹³ See footnote 2 *supra*.

11. On 27 July 2022, the Chamber instructed the Registry to provide its observations on the Defence Request.¹⁴

III. Applicable Law

12. The present observations are submitted pursuant to rule 94(2) of the RPE and regulation 88(2) of the Regulations of the Court ("RoC").

IV. Classification

13. Pursuant to regulation 23*bis*(1) of the RoC, the present submission is classified as confidential *ex parte*, only available to the Registry since it contains sensitive information pertaining to victims and intermediaries. The Registry is filing a confidential and public redacted version of these observations concomitantly.

V. Submissions

A. Observations on estimates provided

14. While the Registry has not been able to proceed with the collection, processing and transmission of applications as swiftly as projected, it continues to forecast a high number of applicants seeking participation in the Case. As explained *infra*, the application process has faced challenges which the Registry endeavours to overcome. Since July 2022, the number of applications received has scaled up considerably as an effect of the Registry's more recent increased capacity to act and interact with partners in the field.

Challenges in the application process

15. The Registry wishes to provide hereafter details on the complexities pertaining to the collection of applications for participation in the Case and on its upscaling field engagement.

¹⁴ See footnote 1, *supra*.

Building a network of VPRS' intermediaries

16. In accordance with the Victim Application Procedure, the Registry's Victims Participation and Reparations Section ("VPRS") has identified a pool of intermediaries, who can assist victims to apply for participation in the proceedings. These intermediaries are selected on the basis of possessing specific qualities such as trustworthiness by – and their access to – victims, knowledge of the conflict, capacity to empathise and properly interact with vulnerable individuals and communities, and ability to work with a low profile to maintain confidentiality.¹⁵ The process of identification, training and vetting of intermediaries is a delicate exercise designed to minimise the risk of causing further harm to the victims, and aims - by virtue - to enable the victims' access to justice, in order to make well-informed decisions, while keeping their expectations at a realistic level.¹⁶ Such process cannot be fast-tracked and is highly contingent on realities in the field.¹⁷
17. [REDACTED].¹⁸ [REDACTED],¹⁹ [REDACTED]. As a result, their ability to assist victims varies and is subject to the permissiveness of their circumstances, and on the support they receive in order to carry out activities.

Security situation

18. The aftermath of the events of 25 October 2021 and its following events in the political and security arenae in Sudan have highly disturbed the groundwork the Registry had laid out [REDACTED] and was solidifying and expanding during the

¹⁵ 18 January 2021 Decision, para. 14.

¹⁶ The process entails an assessment inter alia of an individual's availability to carry out activities, and his/her capacity to : communicate with victims and act with empathy, convey complex legal concepts, abide by ethical principles, understand and maintain confidentiality and follow best practices in terms of security.

¹⁷ This assessment process commences the moment the Registry identifies a potential intermediary and is carried out throughout training activities and exercises, and through the actual completion of victim application forms.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

fall of 2021. [REDACTED]. In the months followings these events, the security situation further deteriorated in Darfur.²⁰

19. [REDACTED].²¹ [REDACTED].²²

20. Moreover, VPRS identified that supplementary information had to be sought for many of the applications that had been received in the meantime, not least due to the incomplete training the intermediaries had received. Obtaining the supplementary information requires the intermediaries to reach back to the victims, in the circumstances detailed *infra*. This time-consuming process resulted in a further delay of transmitting completed applications.

Other logistical constraints

21. The security deterioration prevailing in Darfur has been coupled with a rise of additional logistical constraints.

Unreliable communication channels

22. Relying on efficient means of communication to engage with intermediaries on the ground has been increasingly challenging after the 25 october 2021 events. [REDACTED].

Rising costs incurred by intermediaries

23. The deterioration of the security situation in Darfur also converged with a significant deterioration of the IDPs' socio-economic situation. Since 25 October

²⁰ See for instance, Office of the High Commissioner for Human Rights, "Sudan: Bachelet appalled by Darfur Killings, warns against escalation", press release dated 27 April 2022" at [Sudan: Bachelet appalled by Darfur killings, warns against escalation | OHCHR](#) (accessed on 25 August 2022); ACAPS, "ACAPS Briefing Note - Sudan: Increased violence in Darfur region", 12 August 2022, at [20220812_acaps_briefing_note_rapid_analysis_team_sudan_darfur_0.pdf](#) (accessed on 25 August 2022).

²¹ [REDACTED].

²² [REDACTED].

2021, prices of many basic supplies increased significantly in the camps, including food and fuel.²³ [REDACTED].²⁴ [REDACTED].

Rainy/agricultural season

24. The rainy season in Darfur and [REDACTED] Chad started in June 2022, and is expected to last until September 2022. VPRS' intermediaries have reported that during this season, most people are working in the farms to prepare them for cropping, which means that many victims are not available or easily accessible.
25. The seasonal floods represent additional hurdles faced by intermediaries. [REDACTED],²⁵ [REDACTED],²⁶ [REDACTED].
26. These peaks of rains and flooding have the following consequences:
 - Access to and movement within camps becomes difficult and unpredictable. Travel takes more time and intermediaries are sometimes blocked for days due to the impossibility of crossing flooded rivers.²⁷
 - Many victims are farming outside the camps during and after this period, [REDACTED].
 - IDPs/Refugees' houses have been damaged and destroyed [REDACTED].²⁸

Steps undertaken

Recruitment of field staff – April 2022

27. On 23 March 2022, the Registry indicated that it was in the process of enhancing its internal resources to permit better interactions with intermediaries and

²³ Famine Early Warning System Network, "Sudan Key Message Update: Rapid devaluation of currency and below-average harvest drive high food costs, March 2022", at <https://reliefweb.int/report/sudan/sudan-key-message-update-rapid-devaluation-currency-and-below-average-harvest-drive> (accessed on 26 August 2022).

²⁴ [REDACTED].

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ Intermediaries collecting forms have to wait for the level of rivers to decrease in order to travel back from locations where they have assisted victims to apply for participation.

²⁸ [REDACTED] and Radio Dabanga, "Torrential rains in Sudan leave 79 dead, more than 50,000 homes damaged", 19 August 2022, at <https://www.dabangasudan.org/en/all-news/article/torrential-rains-in-sudan-kill-79-about-50-000-homes-damaged> (accessed on 26 August 2022).

coordination of field activities particular to Darfur.²⁹ Indeed, a staff has been recruited and became fully operational in May 2022. He is assigned mainly to the Abd-Al-Rahman Case. Owing to his Arabic language skills and the specialised expertise in dealing with victims' related activities, particularly in the field of victims' participation at international tribunals, VPRS has since been able to carry out quality communication with its intermediaries, and to better appreciate their realities and how to support their activities. [REDACTED], the newly recruited staff has significantly improved the process of the identification of new intermediaries with the required profile.³⁰ It has also improved the Section's access to victims' communities and its capacity to interact with them directly.

[REDACTED]

28. [REDACTED].³¹

29. [REDACTED].³² [REDACTED],³³ [REDACTED].³⁴

30. [REDACTED].

31. [REDACTED],³⁵ [REDACTED],³⁶ [REDACTED].

[REDACTED]

32. [REDACTED],³⁷ [REDACTED],³⁸ [REDACTED].

33. [REDACTED].

[REDACTED]

34. [REDACTED].³⁹ [REDACTED].

²⁹ Transcript of 23 March 2022, ICC-02/05-01/20-T-025-Red-ENG WT, p. 9, lines 3-11.

³⁰ See *supra*, paras 16-17.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

35. [REDACTED].

Update on applications received

36. As explained during the 23 March 2022 status conference, the Registry makes progress in small steps, owing in particular to the aforementioned challenges. While it has taken more time than it initially projected, the Registry reports a recent significant increase in the number of victims' applications received in the Case since July 2022, and it foresees this upturn to continue until the end of the year and beyond. Through the activities undertaken in the last months,⁴⁰ the VPRS was able to re-activate its intermediaries' network [REDACTED], and provide them with the support needed to carry out relevant activities [REDACTED].

37. As a result, the VPRS has received: i) additional information in relation to approximately 40 incomplete applications (such as identity documents or clarifications on the events described by victims in their application forms); as well as ii) 140 new application forms for participation in the Case.

38. These applications are currently being translated from Arabic to English, following which they will be assessed by the Registry for transmission to the Chamber. The VPRS plans to transmit a third batch of applications in the course of October 2022.

Forecast on potential new applicants

39. The VPRS has to date successfully established a network of intermediaries in various relevant locations, although at varying levels of engagement. While the operational context remains volatile, the VPRS remains confident that the trend observed this summer, of an incremental receipt of application forms, will continue during the fall of 2022. In particular, it is expected that the end of the rainy season may alleviate some of the movement restrictions intermediaries currently face; it is also the time when the farmers in Darfur and Chad are back from the farms, and are thus more available and accessible.

⁴⁰ See *supra*, paras 27-35.

40. [REDACTED].

41. The VPRS plans to collect and transmit at least a few additional hundreds of applications in two transmissions, planned for October and December 2022, respectively. It will provide, as part of the reports accompanying these transmissions, an update to the Chamber on the progress made. The Registry therefore respectfully suggests that the Chamber would have a more realistic view of the amounts of applications to be actually received during the Trial stage by the end of the year.

B. Observations on the compliance of the ABC approach with the Court's legal framework

42. The Registry submits that the Victim Application Procedure applicable in the Case remains appropriate and in compliance with the Court's legal framework in light of the size of this case and the amount of affected victims. It is submitted that similarly, the Registry's Rule 94(2) Notification complies with the wording of the applicable law.

43. The Registry also notes on an operational level that a reconsideration of the ABC approach as requested by the Defence would significantly affect the Registry's limited resources dedicated for the facilitation of the admission process of victims in the Case.

Applicability of the Victim Application Procedure

44. The Defence contends that the reconsideration of the ABC approach is warranted in order to comply with the interpretation of rule 89(1) of the RPE adopted by the Appeals Chamber in the Case *The Prosecutor v. Mahamat Said Abdel Kani* ("*Said Case*").⁴¹ To substantiate its Request, the Defence assumes that the number of applications in the Case is expected to remain low and refers to the decision of

⁴¹ Request, para. 25.

Trial Chamber II to adopt an amended version of the ABC approach in the *Said* Case.⁴²

45. As highlighted by the CLRV,⁴³ the decision in the *Said* Case to deviate from the ABC approach as considered in the Chambers Practice Manual was issued in light of the factual circumstances in that case and, in particular, the limited forecast of participating victims due to the charges in that case. The forecast provided by the Registry in the *Said* Case however differs from the forecast it has provided and further updated *supra*⁴⁴ in the Abd-Al-Rahman Case, namely that the expected number of victims participating in the latter case will be significantly higher than in the former. The Registry therefore considers that the “interest balancing test” identified by the Appeals Chamber still warrants the applicability of the Victim Application Procedure in the present case.⁴⁵
46. The Registry wishes to further stress that, if the Request were granted, the transmission of Group A applications to the parties would imply a heavier redaction process than in other cases.⁴⁶ As most of the applications currently received are in Arabic and are being translated before transmission, redactions would have to be applied to both versions of the forms.
47. The Registry also notes that, should transmission of redacted versions be ordered for applications already admitted, the redactions exercise would have to be performed in consultation with the CLRV, as per standard practice, the latter being best placed to assess the security of her clients and their personal situation.

⁴² Trial Chamber VI, “Decision on matters relating to the participation of victims during the trial”, 13 April 2022, ICC-01/14-01/21-278, paras. 16-18 (“Decision”).

⁴³ Common Legal Representative for Victims, “Response on behalf of Victims to the Defence ‘Requête aux fins de reconsidération de la Décision du 19 octobre 2021 (ICC-02/05-01/20-494) et mise en conformité de la procédure avec les Règles 89-1 et 94-2 du Règlement de Procédure et de Preuve’”, 15 August 2022, ICC-02/05-01/20-720, para. 15.

⁴⁴ See above paras 40-42.

⁴⁵ Appeals Chamber, “Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled ‘Decision establishing the principles applicable to victims’ applications for participation’”, 14 September 2021, ICC-01/14-01/21-171, paras 67, and 81-83.

⁴⁶ Each application requires three rounds of redactions/verification by different staff members before transmission to the parties.

48. The Registry therefore respectfully submits that the ABC approach remains appropriate in the context of the Case. A more extensive submission regime as contemplated by the Defence would also negatively impact the VPRS' capacity to collect and process the highest number of applications with a view to their timely participation in the proceedings.⁴⁷

Registry's Rule 94(2) Notification

49. The Defence submits that the Registry's Rule 94(2) Notification is insufficient, as it only provides general information on reparation claims instead of providing redacted copies of the claims themselves.⁴⁸

50. The Registry observes that rule 94(2) of the RPE speaks of the provision of "notification of the request" by a victim for reparations as per rule 94(1), and not of the transmission of the request itself.⁴⁹ The Registry submits that 'Notification' of a fact entails first and foremost to inform the recipient of the *existence* of said fact. In its Rule 94(2) Notification, the Registry provided the Defence with:

- the number of applications for reparation it considers might fall within the scope of the case (this includes the applications it has assessed as clearly falling within the scope of case (group A) as well as those for which additional information is being sought),
- an overview of the age and gender of the applicants,
- an overview of the type of charged incidents the applications relate to (*i.e.* whether they suffered from the charged crimes in Bindisi, Kodoom, Mukjar and Deleig), and
- an overview of the types of reparation claims made by the applicants.

⁴⁷ Such exercise would imply that the Registry resources currently tasked with enhancing the capacities in the field are at least partially redirected towards the redaction of applications for participation.

⁴⁸ Request, para. 25.

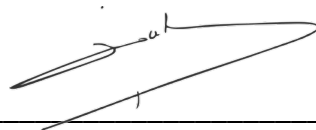
⁴⁹ The Registry notes that rule 89(1) of the RPE, in the same Section (Section III. Victims and Witnesses) clearly spells out the transmission of the application to the relevant Chamber; such language is absent in rule 94(2) of the RPE.

51. The Registry submits that this satisfies the 'notification' requirement of rule 94(2) of the RPE.

VI. Conclusion

52. For the above reasons, the Registry respectfully submits (i) that the Victim Application Procedure in the present case remains appropriate, also in light of the presently submitted additional observations and estimates; and (ii) that with its Rule 94(2) Notification, the Registry complied with the letter of rule 94(2) of the RPE.

53. The Registry stands ready to provide any further information as the Chamber may deem necessary.



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

Dated this 29 August 2022

At The Hague, The Netherlands