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No.: ICC-02/05-01/20
Date: 22 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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN
("ALI KUSHAYB")

Public Document

Request Relating to the Process for the Admission of Victims to Participate in the Proceedings

Source: The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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Introduction

1. This request (“Request”) is filed in accordance with the submissions of the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”) in its observations regarding the first status conference¹ and during that hearing.²

2. The Defence has duly noted the instruction given to the Registry to apply the ABC Approach, – and this Request objects to its application in the instant case in re-assessment of the victims’ applications for participation,³ – but understands that the instruction, which was not preceded by the judicial debate wanted by the Honourable Trial Chamber I,⁴ is without prejudice to any ruling on the instant Request. This interpretation was confirmed by the Honourable Trial Chamber I.⁵ Therefore the Request is filed within the time limit set for that purpose by the Honourable Trial Chamber I⁶ and, considering their subject matter, after clarification of all questions on the representation of victims.⁷

3. The Request combines into a single filing the Defence’s written arguments regarding two separate matters that relate to the process of admitting victims to participate in the proceedings in the instant case: (i) the use of an application form different from that approved for proceedings before the Court and (ii) the approach which consists in dividing the applications received into three groups, namely A, B and C, and forwarding only the applications under group C to the parties for their observations (“ABC Approach”). The two topics are addressed successively while the Defence’s oral arguments have been reserved for the next status conference, in accordance with the instruction of the Honourable Trial Chamber I.⁸

¹ [ICC-02/05-01/20-461-Corr](#), para. 41, points (x) and (xi).

² [ICC-02/05-01/20-T-009-Red-FRA](#), p. 58, lines 20-23.

³ [ICC-02/05-01/20-494](#), paras. 15 and 16(viii).

⁴ [ICC-02/05-01/20-T-009-Red-FRA](#), p. 65, lines 8-9.

⁵ Email from the Honourable Trial Chamber I on 20 October 2021 at 16.04.

⁶ [ICC-02/05-01/20-T-009-Red-FRA](#), p. 74, lines 16-17.

⁷ [ICC-02/05-01/20-494](#).

⁸ Email from the Honourable Trial Chamber I on 10 September 2021 at 16.27.

Objection to the use of the modified application form for participation

4. In a request dated 8 October 2020,⁹ the Registry sought the authorization of the Honourable Pre-Trial Chamber II to use a modified version of the application form in *Abd-Al-Rahman*, which is itself a modified version of the standard application form for participation/reparations, in which the signature by the applicant victim and/or his or her representative would no longer be necessary and would be replaced by a “solemn undertaking” in the form of an additional section in which the alleged victim’s name would be entered electronically in lieu of a signature.¹⁰ The Defence objected to the proposal for the reasons set out below. The Honourable Pre-Trial Chamber II approved the modified form, stressing that its decision was valid only on account of the limited matters at stake in the participation of victims in the pre-trial phase and was “without prejudice to the prerogatives of the Trial Chamber, should the case proceed to trial”.¹¹ The restriction of the Honourable Pre-Trial Chamber II’s ruling on this matter means that it now has to be re-examined by the Honourable Trial Chamber I.

5. The Defence submits that the modified form used by the Registry to receive applications for participation from victims during the pre-trial phase contradicts the practice and case law of the Court and is in violation of the relevant texts of the Court.

6. According to the Court’s unanimous case law, victims’ applications for participation must be signed.¹² When the Honourable Appeals Chamber has been moved to rule on the authentication of a document, it has required that it be signed,¹³

⁹ [ICC-02/05-01/20-178](#).

¹⁰ [ICC-02/05-01/20-178](#), para. 8.

¹¹ [ICC-02/05-01/20-254](#), para. 7.

¹² Situation in Darfur, Sudan, 6 December 2007, [ICC-02/05-111](#), para. 26; *Katanga and Ngudjolo*, 26 February 2009, [ICC-01/04-01/07-933-tENG](#), para. 28; *Abu Garda*, 25 September 2009, [ICC-02/05-02/09-121](#), para. 7; *Abu Garda*, 9 October 2009, [ICC-02/05-02/09-147-Red](#), para. 4; *Al Bashir*, 10 December 2009, [ICC-02/05-01/09-62](#), para. 8; *Abu Garda*, 19 March 2010, [ICC-02/05-02/09-255](#), para. 4; *Banda*, 28 October 2011, [ICC-02/05-03/09-231-Corr](#), para. 21; *Banda*, 12 December 2013, [ICC-02/05-03/09-528](#), para. 32, footnote 50; *Gbagbo and Blé Goudé*, 7 January 2016, [ICC-02/11-01/15-379](#), para. 44; *Yekatom and Ngaïssona*, 5 March 2019, [ICC-01/14-01/18-141](#), para. 31(viii): “a signature or thumbprint of the applicant on the document, at least on the last page of the application”.

¹³ *Lubanga*, 21 February 2007, [ICC-01/04-01/06-834 OA8](#), para. 6; Situation in Darfur, Sudan, 18 June 2008, [ICC-02/05-138 OA2-OA3](#), para. 30.

as has the Presidency of the Court.¹⁴ The Registry's proposal, which is nevertheless informed by this case law, implies relegating that case law to pre-COVID 19-age oblivion and embracing an era of "more intelligent use of modern means of communication",¹⁵ which disregards the applicable texts of the Court.

7. Indeed, use of the modified application form violates the texts of the Court, in particular rule 102 of the Rules of Procedure and Evidence ("RPE") and regulations 23(2), 26(2) and 86 of the Regulations of the Court ("RoC"). Although under regulations 86 and 88 of the RoC there is no explicit requirement for the forms to be signed, both regulations expressly refer to the form to be approved by the Presidency of the Court under regulation 23(2) of the RoC, which does make signing the form a requirement. Regulation 86(2)(b) of the RoC also makes "evidence of the consent of the victim" a specific requirement and, according to the case law of the Court mentioned above, that evidence is provided by the victim's signature, or fingerprint in the case of illiterate victims. Under regulation 26(2) of the RoC, the Registry is also responsible for ensuring the authenticity of documents filed before the Court. Although not specifically stated by the regulation, the signature on a document is the primary means by which it is authenticated, as confirmed by the above-mentioned case law of the Honourable Appeals Chamber and that of the Presidency. The texts of the Court also provide alternative solutions for ensuring the authenticity of documents "[w]here a person is unable, due to a disability or illiteracy," to authenticate them in the habitual way: under rule 102 of the RPE "communication in audio, video or other electronic form" may be used to do so, without putting into question or diminishing the need for authentication under regulation 26(2) of the RoC. However, these alternative solutions are reserved for the exceptional cases under rule 102 of the RPE; they cannot become the standard solution applicable by default. The standard for applications to participate in proceedings before the Court continues to be and must remain the written application that the victim applicant authenticates

¹⁴ Presidency, 18 February 2009, [ICC-01/04-559](#), para. 24.

¹⁵ [ICC-02/05-01/20-178](#), para. 11.

by his or her signature or fingerprint. By suggesting that the exception should become the rule, the Registry's Request thereby violates the applicable texts.

8. The need for proceedings to be conducted using documents authenticated by their author's signature is neither fanciful nor atavistic. It constitutes one of the pillars of the right to a fair trial. Both the Presidency of the Court¹⁶ and the Honourable Appeals Chamber¹⁷ have emphasized this in their decisions cited above. Without this guarantee, it is fully conceivable that unscrupulous intermediaries could generate applications for participation/reparations unrelated to any real victim, to the detriment of real victims. The need to ensure fairness in the proceedings for both Mr Ali Muhammad Ali Abd-Al-Rahman and the victims therefore makes it necessary to obtain the victims' signatures or fingerprints authenticating their applications.

9. The Defence is well aware of the difficulty, at this stage, of returning to victims who filled in their application for participation using the modified forms to have them complete another application form. The Defence warned of this situation in its submissions before the Honourable Pre-Trial Chamber II.¹⁸ The fait accompli of endorsing the form that was modified for the limited needs of the pre-trial phase should however not now imply confirmation of the violation of the Court's case law and texts, which undermines the fairness of the proceedings.

10. The Defence therefore prays the Honourable Trial Chamber I to disallow the use of the modified application form for participation proposed by the Registry and to admit victims to participate only on the basis of the application forms duly approved by the Presidency of the Court and available online on the Court's website,¹⁹ bearing the signatures of the applicants.

Objection to use of the ABC Approach

11. On 17 November 2020, the Registry filed observations on the admission of victims for participation in the case.²⁰ The Registry's filing included a proposal to use

¹⁶ [ICC-01/04-559](#), para. 24.

¹⁷ [ICC-02/05-138](#), para. 30.

¹⁸ [ICC-02/05-01/20-182-Red](#), paras. 28-30.

¹⁹ [Individual application form](#); [Application form for organizations](#).

²⁰ [ICC-02/05-01/20-203](#).

the ABC Approach which consists in categorizing the victims' applications for participation into three distinct groups: A, B and C, and providing only the applications falling under Group C for the parties to make observations pursuant to rule 89(1) of the RPE. The Defence objected to the adoption of the ABC Approach in the request filed on 19 November 2020 under rule 89 of the RPE.²¹ The Honourable Pre-Trial Chamber II endorsed the ABC Approach by decision of 18 January 2021.²² As it was previously with the modified form, the Honourable Pre-Trial Chamber II's endorsement of the Registry's proposals was based essentially on the limited stakes of the participation of the victims for the needs of the confirmation of charges²³ and was contingent on subsequent reconsideration by the Trial Chamber.²⁴ The restriction of the ruling of the Honourable Pre-Trial Chamber II on this matter therefore also calls for its reconsideration by the Honourable Trial Chamber I. That reconsideration will be fully informed by the judgment of the Honourable Appeals Chamber of 14 September 2021 on application of the ABC Approach in *Said* ("*Said Judgment*").²⁵

12. In the *Said Judgment*, the Honourable Appeals Chamber clarified that the duty to provide applications to participate to the parties under rule 89(1) of the RPE remains the principle²⁶ although it allows for exceptions for the protection of victims and/or the expeditiousness of proceedings,²⁷ on condition that such exceptions are not prejudicial to the rights of the suspect or accused or to the guarantees of a fair trial.²⁸ The Honourable Appeals Chamber applied these principles to the ABC Approach and considered that, depending on the circumstances of the case, the ABC Approach could

²¹ [ICC-02/05-01/20-206](#).

²² [ICC-02/05-01/20-259](#).

²³ "The victim application process under consideration has the sole purpose to determine which persons are entitled to be represented as victims in confirmation hearings", [ICC-02/05-01/20-259](#), para. 26.

²⁴ "[E]ven if it were determined that the Chamber erred in this regard, this would not constitute a 'setback to the proceedings that [has the potential to] cloud or unravel the judicial process'. Indeed, the prejudice claimed by the Defence is entirely speculative and, even it came to pass, could always be remedied relatively easily", [ICC-02/05-01/20-281](#), para. 21.

²⁵ [ICC-01/14-01/21-171 OA2](#).

²⁶ [ICC-01/14-01/21-171 OA2](#), para. 2.

²⁷ [ICC-01/14-01/21-171 OA2](#), paras. 59-64.

²⁸ [ICC-01/14-01/21-171 OA2](#), paras. 2, 53, 65-67.

qualify as an exception to the principle of providing applications to participate to the parties under rule 89(1) of the RPE, but that

in cases where the number of victims' applications is expected to remain low, the interest of the suspect or accused in receiving copies thereof and replying thereto may outweigh the benefits gained by the implementation of the A-B-C Approach. In such cases, the safety and well-being of the victims may be more appropriately safeguarded by implementing necessary redactions to the victims' applications prior to their transmission to the parties.²⁹

13. In compliance with the criteria set out by the Honourable Appeals Chamber in the *Said* Judgment, the Defence respectfully submits that the ABC Approach cannot be applied in the instant case because, owing to several distinct events that have occurred in the instant case, the admission of victims to participate without their applications for participation having been provided to the Defence has become irremediably incompatible with the ability to maintain the guarantees of a fair trial. There are four such circumstances: (i) the use of victims' statements as incriminating evidence at the confirmation hearing ("CH"); (ii) the appointment of Ms Clooney as Special Adviser to the Prosecutor on Darfur; (iii) the absence and/or disregard of the rules indispensable for ensuring the confidentiality of applications for participation from the time they are collected until they are recorded in the case record; and (iv) the small number of applications for participation received by the Court in the instant case. The Defence summarizes those circumstances below, reserving a more comprehensive statement of its arguments for the next status conference, in accordance with the instruction of the Honourable Trial Chamber I.³⁰

14. Firstly, according to the case law of the Court, information from victims, apart from those who are called to appear as witnesses and fall under the dual status of victim witness, cannot be used as evidence.³¹ Nevertheless, at the CH, the distinguished LRVs [Legal Representative of Victims] did not hesitate to rely on statements received by them alone from victims as evidence in support of the contentious fact that the alias "Ali Kushayb" referred to Mr Abd-Al-Rahman.³² In

²⁹ [ICC-01/14-01/21-171 OA2](#), para. 82.

³⁰ Email from the Honourable Trial Chamber I on 10 September 2021 at 16.27.

³¹ *Katanga and Ngudjolo*, 30 September 2008, [ICC-01/04-01/07-717](#), paras. 229-232.

³² [ICC-02/05-01/20-T-009-Red-FRA](#), p. 43, lines 19-23 (Ms Paolina Massidda); p. 45, lines 8-10 (Ms Paolina Massidda); p. 51, lines 16-21, 24-26 (Ms Clooney); p. 55, lines 4-5 (Ms Clooney).

doing so, they crossed a red line, shifting the statements of victims, in their applications to participate, into the realm of evidence. In the Honourable Pre-Trial Chamber II's decision on the confirmation of charges it relies on these "victims' statements" and admits them, for lack of anything better, as evidence of the alias.³³ This is one of the issues in the application for leave to appeal pending before the Honourable Pre-Trial Chamber II.³⁴ Irrespective of the ruling to be made by the Honourable Pre-Trial Chamber II on the application for leave to appeal, the inclusion of victims' statements as evidence of the alias in the decision on the confirmation of charges is a special circumstance similar to those referred to by the Honourable Appeals Chamber in the *Said* Judgment, which renders non-disclosure to the Defence of all the victims' applications for participation irremediably irreconcilable with the fairness of proceedings, as it would deprive the Defence of the opportunity to examine and challenge information presented and admitted as incriminating evidence. According to the criteria set out by the Appeals Chamber, therefore, no exception should be made here to the principle of providing all applications to participate to the Defence, in compliance with rule 89(1) of the RPE. It follows that the ABC Approach cannot be applied.

15. Secondly, one of the Distinguished LRVs, Ms Clooney, announced her recent appointment by the OTP as Special Adviser to the Prosecutor on Darfur³⁵ while she was still acting as an LRV in the present case. Ms Clooney was representing 117 victims, amounting to 77% of the 151 victims admitted to participate in the pre-trial phase.³⁶ With the appointment of Ms Clooney, the OTP now has at least one special adviser on Darfur, which includes the present case, who has had access to – at least – 77% of the applications for participation. The appointment therefore creates a

³³ "[T]here is evidence suggesting that ['Kushayb'] meant to evoke strength and courage, as opposed to a dangerous addiction", [ICC-02/05-01/20-433](#), para. 57. No evidence is adduced in support of this claim. None appears on the record. This claim entered the record of the case solely on the basis of the assertions of the Distinguished LRV, Ms Paolina Massidda, who referred to the victims' statements at the CH, [ICC-02/05-01/20-T-009-Red-FRA](#), p. 43, lines 19-23.

³⁴ [ICC-02/05-01/20-465](#), para. 36.

³⁵ [ICC-02/05-01/20-474](#), para. 6.

³⁶ [ICC-02/05-01/20-477](#), para. 13. Although this is a public document, it is not available on the Court's website or in Legal Tools at the time of writing.

bizarre situation in which, except for the Defence, all participants in the proceedings and the Honourable Trial Chamber I have access to at least three quarters of the victim applications for participation. This situation is, naturally, incompatible with the fairness of the proceedings and must be remedied as soon as possible. Compliance with the letter of rule 89(1) of the RPE is sufficient to redress the inequity of the situation. It must therefore be complied with, which means setting aside the ABC Approach as an exception to rule 89(1) of the RPE, as prescribed by the Honourable Appeals Chamber in the *Said* Judgment whenever such an exception becomes incompatible with respect for the right of the accused to fair proceedings.

16. Thirdly, the absence of an appropriate legal framework for the conduct of the Court's field activities in Sudan, including the collection of applications for participation from victims, is not conducive to the protection of victims or the confidentiality of their applications to participate.³⁷ The Defence also notes that the application form for participation used by the Registry to collect applications for participation from victims is not marked "Confidential", and this mark was only added when it was stamped for registration in the case record³⁸ whereas the Court's Information Protection Policy requires that all confidential documents be marked as such.³⁹ Without such a marking, between the time the application forms for participation are completed by victims and the time of their registration in the case record, which is several months,⁴⁰ they are not identified as confidential, thereby increasing the risk of their accidental or malicious dissemination. If this risk is added to the aforementioned absence of an appropriate legal framework for the protection of

³⁷ Regarding this point, the Defence refers to its urgent application for suspension of all field activities in Sudan ([ICC-02/05-01/20-490](#)), which is pending before the Honourable Trial Chamber I while it awaits the Registry's report on the matter, which was due by 16.00 on 22 October 2021 but was registered at 17.16.

³⁸ For example, ICC-02/05-01/20-58-Conf-Exp-Anx2 and ICC-02/05-01/20-358-Conf-Anx22. These two forms are not marked confidential anywhere. "Confidential" only appears in the stamp for registration in the record of the case.

³⁹ [ICC Information Protection Policy](#), 19 June 2007, [Administrative Instruction ICC/AI/2007/001](#), section 7.

⁴⁰ For example, form ICC-02/05-01/20-58-Conf-Exp-Anx2 was collected in August 2009 and registered in the record of the case on 29 April 2010; the collection date of form ICC-02/05-01/20-358-Conf-Anx22 is redacted except for the year 2020, and the form was registered on 22 April 2021.

victims, and of the Court's documents and premises in Sudan, it would appear, therefore, that the confidentiality of victims' application forms for participation has not been assured sufficiently and in accordance with the texts governing the Court's activities. Mr Abd-Al-Rahman can neither be held responsible for this unfortunate situation nor be required to bear its consequences when preparing the defence. His Defence has repeatedly demonstrated the utmost care in maintaining confidentiality. Keeping the applications confidential solely from the Defence for Mr Abd-Al-Rahman would amount to a blatant violation of the guarantees of a fair trial; it would defy logic and be inconsistent with the Honourable Appeals Chamber's judgment in *Said*, in particular paragraphs 2, 53 and 65-67.⁴¹ The ABC Approach must therefore be discarded.

17. Fourthly and lastly, the total number of application forms for victim participation entered in the case record thus far is 151.⁴² Compared to other cases where the number of participating victims is in the thousands,⁴³ this number is particularly low. In the view of the Defence, this number is not expected to rise, given the unresolved difficulties regarding access to victims on the territory of Sudan.⁴⁴ In any event, the admission of applications for participation collected under those conditions, which constitutes a risk to the safety of victims, would be challenged by the Defence. Unless these difficulties are miraculously overcome, a matter on which the Court should not speculate, this is therefore clearly one of the cases to which the Honourable Appeals Chamber refers in paragraph 82 of the *Said* Judgment,⁴⁵ where the low number of victims makes it possible to strike a balance between the provisions of rule 89 of the RPE and the protection of victims pursuant to article 68(3) of the Statute without jeopardizing the expeditiousness of proceedings, by redacting victims' identifying information from the application forms for participation that are

⁴¹ [ICC-01/14-01/21-171 OA2](#), paras. 2, 53, 65-67.

⁴² ICC-02/05-01/20-477, para. 13.

⁴³ *Said*, 22 June 2021, [ICC-01/14-01/21-106 OA2](#), paras. 30-35: 5,708 applications for participation in *Bemba*; 2,093 in *Ongwen*; over 2,000 in *Ntaganda*; 1,085 in *Yekatom* and *Ngaïssona* (at the pre-trial phase only).

⁴⁴ [ICC-02/05-01/20-485-Red.](#)

⁴⁵ [ICC-01/14-01/21-171 OA2](#), para. 82

received.⁴⁶ The distinguished LRVs appointed will be able to provide valuable assistance to speed up the redaction of those applications. Owing to the small number of participating victims, redactions could be carried out within a reasonable time, thereby rendering use of the exception to rule 89 represented by the application of the ABC Approach not only unjustified in this instance but irreconcilable – for the other reasons mentioned above – with the fairness of proceedings.

FOR THESE REASONS, THE DEFENCE PRAYS THE HONOURABLE TRIAL CHAMBER I, to:

- **REJECT** any application for participation submitted on the modified application form for participation and/or any other application for participation not authenticated by the signature of the victim applicant;
- **ORDER** that future applications for participation be completed using the standard forms approved by the Presidency online on the Court’s website;⁴⁷ and **DISMISS** any application submitted using another form;
- **DISMISS** the ABC Approach for examining victims’ applications for participation in the trial phase in the instant case; **AND**
- **ORDER** the Registry to transmit as soon as possible the 151 applications for participation and all new applications received by the Court duly redacted, where necessary with the assistance of the distinguished LRVs, for the observations of the OTP and the Defence, pursuant to rule 89(1) of the RPE.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 22 October 2021

At The Hague, Netherlands

⁴⁶ [ICC-01/14-01/21-171 OA2](#), para. 59

⁴⁷ [Application form for individuals](#); [Application form for organizations](#).