

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-01/20**
Date: **31 October 2022**

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
With Confidential Annex**

**Third Registry Assessment Report on Victim Applications for Participation in
Trial Proceedings**

Source: The Registrar

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction

1. On 19 October 2021, Trial Chamber I (“Chamber”) issued its “Decision on victims’ participation and legal representation in trial proceedings” (“Decision”),¹ in which it *inter alia* endorsed the victim application procedure previously adopted at the pre-trial stage of the proceedings (“Victim Application Procedure”).²
2. In compliance with the Decision, the Victims Participation and Reparations Section of the Registry (“VPRS”) shall:
 - A. classify victim applicants into three categories: (a) applicants who clearly qualify as victims (“Group A”); (b) applicants who clearly do not qualify as victims (“Group B”); and (c) applicants for whom the Registry could not make a clear determination for any reason (“Group C”) (“A-B-C Approach”),³ and
 - B. transmit complete applications to the Chamber and produce assessment reports periodically and on a rolling basis.⁴
3. The Registry hereby submits its third assessment report on a total of 101 complete applications to participate in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)* (“Applications” and “Case”). The Registry has assessed all of these Applications to fall in Group A.
4. The Applications are listed in the annex to the present submission (“Annex”) and are being transmitted separately to the Chamber in accordance with the Victim Application Procedure.⁵

¹ Trial Chamber I, “Decision on victims’ participation and legal representation in trial proceedings”, 19 October 2021, ICC-02/05-01/20-494.

² *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.

³ 18 January 2021 Decision, para. 34.

⁴ Decision, paras 15 and 16 (ix).

⁵ 18 January 2021 Decision, para. 34.

II. Procedural History

5. On 20 May 2021, Pre-Trial Chamber II (“PTC”) authorised 151 applicant victims to participate in the confirmation proceedings (“20 May 2021 Decision”).⁶
6. On 9 July 2021, PTC issued its decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’) (“Confirmation Decision”).⁷
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.⁸
8. On 1 September 2021, the Registry provided its update on victim participation.⁹
9. On 8 September 2021, the Chamber held the first status conference and set the start of the trial on 5 April 2022.¹⁰
10. On 19 October 2021, the Chamber issued the Decision, in which it adopted the Victim Application Procedure.¹¹
11. On 6 December 2021, the VPRS transmitted 142 Applications in Group A,¹² and submitted an assessment report thereon.¹³
12. On 5 January 2022, the Prosecution filed its Trial Brief.¹⁴

⁶ 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. 50.

⁷ 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.

⁸ Trial Chamber I, “Order scheduling first status conference”, 16 August 2021, ICC-02/05-01/20-451, para. 2.

⁹ Registry, “Public redacted version of Update on Victim Applications for Participation”, 1 September 2021, ICC-02/05-01/20-462-AnxII-Red.

¹⁰ Transcript of 8 September 2021, ICC-02/05-01/20-T-013. See Trial Chamber I, “Directions on the conduct of proceedings”, 4 October 2021, ICC-02/05-01/20-478, para. 4.

¹¹ Trial Chamber I, “Decision on victims’ participation and legal representation in trial proceedings”, 19 October 2021, ICC-02/05-01/20/494, para. 15.

¹² Registry, “First Registry Transmission of Group A Applications for Victims’ Participation in Trial Proceedings”, 6 December 2021, ICC-02/05-01/20-529.

¹³ Registry, “First Registry Assessment Report on Victim Applications for Participation in Trial Proceedings”, 6 December 2021, ICC-02/05-01/20-528.

¹⁴ Prosecution, “Corrected Version of ‘Prosecution’s Trial Brief’”, 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr (“Trial Brief”). A public redacted version was filed on 4 February 2022 (ICC-02/05-01/20-550-Corr-Red2).

13. On 14 January 2022, the Chamber authorised the 142 applicants to participate as victims in the trial proceedings.¹⁵ It further instructed the Registry to report on its reassessment of 21 pre-trial applications, which contained narratives that needed to be verified with the Common Legal Representative of Victims (“CLR”) for clarity.¹⁶
14. On 25 August 2022, the VPRS further transmitted 31 Applications in Group A,¹⁷ and submitted an assessment report thereon.¹⁸
15. On 3 October 2022, the Chamber admitted the additional 31 applicants to participate as victims in the trial proceedings.¹⁹

III. Classification

16. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”) and in accordance with the Victim Application Procedure,²⁰ the Annex to the present report is classified as confidential.

IV. Applicable Law

17. The Registry submits the present observations pursuant to article 68(1) and (3) of the Rome Statute, rules 85 to 89 and 92 of the Rules of Procedure and Evidence, regulation 86 of the RoC, and regulations 107 to 109 of the Regulations of the Registry.

V. Submissions

¹⁵ Trial Chamber I, “First decision on the admission of victims to participate in trial proceedings”, 14 January 2022, ICC-02/05-01/20-556, para. 10.

¹⁶ *Id.* para. 6.

¹⁷ Registry, “Second Registry Transmission of Group A Applications for Victims’ Participation in Trial Proceedings”, 25 August 2022, ICC-02/05-01/20-727.

¹⁸ Registry, “Second Registry Assessment Report on Victim Applications for Participation in Trial Proceedings”, 25 August 2022, ICC-02/05-01/20-728.

¹⁹ Trial Chamber I, “Second decision on the admission of victims to participate in trial proceedings”, 3 October 2022, ICC-02/05-01/20-761.

²⁰ 18 January 2021 Decision, para. 34.

a. Reassessment of victim applications admitted at the confirmation of charges stage

18. The VPRS received information from the CLRV pertaining to three applications that were authorised by Pre-Trial Chamber II to participate in the confirmation proceedings,²¹ but needed clarifications as to whether they captured the full account of its respective applicants before re-assessing, in light of the confirmed charges, whether they remain within Group A. Upon assessment of the information received, the VPRS confirms that each of the three applications remain in Group A.

b. Details on the assessment criteria applied to New Applications falling within Group A

19. Applying the criteria set out in paragraph 16 of the 18 January 2021 Decision,²² the VPRS has assessed each of the 98 new victim applications transmitted herewith under Group A as complete. In conducting its *prima facie* assessment in accordance with the Victim Application Procedure,²³ the VPRS confirms that each of the 98 applicants in Group A meet the following criteria in establishing:

- i. The victim's identity;
- ii. The harm suffered; and
- iii. The causal link between the harm suffered and one or more of the crimes allegedly committed during an incident falling within the temporal, geographic and material parameters of the Case as described in the Confirmation Decision.²⁴

Observations in relation to criterion (i):

²¹ a/25025/21, a/25091/21 and a/25100/21.

²² 18 January 2021 Decision, para. 16.

²³ *Id.*, para. 17.

²⁴ In accordance with the 20 May 2021 Decision (para. 47), the VPRS has categorised within Group A applicants who allege to have suffered personal harm by virtue of witnessing atrocities committed against other individuals in their community. This includes a/10055/22, a/10150/22, a/10155/22, a/10157/22, a/10159/22, a/10161/22, a/10164/22, a/10166/22, a/10169/22, a/10170/22, a/10171/22, a/10172/22, a/10173/22, a/10192/22 and a/10195/22.

20. Certain applications falling under Group A contain minor discrepancies,²⁵ pertaining to *inter alia*: the applicant's date of birth, an inversion of the applicant's first and last name or the spelling of the applicant's name, or other minor inconsistencies in the information provided which appear to be the result of inadvertent errors. In line with the Court's jurisprudence,²⁶ the VPRS applied in those instances a certain degree of flexibility and considered that the discrepancies presented in these applications do not call into question the overall credibility of the information provided by the applicant.

Observations in relation to criterion (iii):

21. Some applications appear to provide an inaccurate date of the alleged events,²⁷ do not explicitly state specific dates²⁸ (omitting to specify either the day, the month or the year of the crimes,²⁹ and/or using expressions such as "during the harvest"³⁰), or do not provide any date at all.³¹

²⁵ This includes: a/25091/21, a/10013/22, a/10025/22, a/10034/22, a/10046/22, a/10055/22, a/10061/22, a/10063/22, a/10064/22, a/10093/22, a/10097/22, a/10099/22, a/10104/22, a/10105/22, a/10112/22, a/10113/22, a/10137/22, a/10142/22, a/10143/22, a/10175/22, a/10199/22, a/10200/22, a/10220/22, a/10222/22, a/10224/22, a/10237/22 and a/10241/22.

²⁶ See for instance *Pre-Trial Chamber I, Prosecutor v. Al Hassan*, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, para. 50 and references cited, *Pre-Trial Chamber II, The Prosecutor v. Yekatom and Ngaïssona*, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 5 March 2019, ICC-01/14-01/18-141, para. 34 and references cited, *Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on 270 applications by victims to participate in the proceedings", 25 October 2011, ICC-01/05-01/08-1862, para. 28, and *Trial Chamber VI, The Prosecutor vs. Bosco Ntaganda*, "Decision on victims' participation in trial proceedings", 6 February 2015, ICC-01/04-02/06-449, para. 46 and references cited.

²⁷ See a/10224/22. .

²⁸ This includes: a/10025/22, a/10034/22, a/10035/22, a/10063/22, a/10064/22, a/10080/22, a/10093/22, a/10097/22, a/10101/22, a/10102/22, a/10105/22, a/10106/22, a/10107/22, a/10110/22, a/10112/22, a/10113/22, a/10114/22, a/10115/22, a/10116/22, a/10117/22, a/10118/22, a/10120/22, a/10121/22, a/10122/22, a/10123/22, a/10124/22, a/10125/22, a/10127/22, a/10128/22, a/10130/22, a/10131/22, a/10132/22, a/10133/22, a/10134/22, a/10135/22, a/10175/22, a/10182/22, a/10222/22.

²⁹ See for example a/25025/21 or a/25091/21.

³⁰ See for example a/10035/22.

³¹ See a/10152/22. .

22. As the Registry previously highlighted,³² some victims face difficulties recalling the precise dates of the crimes allegedly committed due to the passage of time. In accordance with the 20 May 2021 Decision³³ and the Court's established jurisprudence,³⁴ the VPRS assessed these applications mindful of the specific circumstances around every individual application, as well as the general context of the events at the time at issue. Specifically, it considered the relevant applications' internal coherence in the overall context of the alleged acts. In each of these applications, the applicants described specific events that corresponded with the case record, such as the arrests or killings of community leaders listed in the Prosecution's Trial Brief,³⁵ or provided any other sufficiently detailed contextual descriptions that sufficiently date the events.³⁶ In instances where the applicant provided specific dates that are entirely incompatible with the dates of the charged incidents, the VPRS sought clear reasons indicating that the victim's reported harm nevertheless falls within the time frame of the Case,³⁷ in line with the 20 May 2021 Decision.³⁸

³² 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, paras 24-31. The issues with retrospective memory is compounded for victims who have suffered from a series of events, at different times and locations, over a long period of time.

³³ 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. 44.

³⁴ See for instance, Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, "Second Decision on the Principles Applicable to Victims' Applications for Participation", dated 8 October 2018, ICC-01/12-01/18-146-tENG, paras. 18-22, and reference cited, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on 270 applications by victims to participate in the proceedings", 25 October 2011, ICC-01/05-01/08-1862, para. 24, and "Public redacted version of 'Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings'", ICC-01/05-01/08-2247-Red, 19 July 2012, para. 36, and Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Decision on victims' participation status", 7 January 2016, ICC-02/11-01/15-379, para. 45 and references cited.

³⁵ See Trial Brief, annexes 11, 17 and 23.

³⁶ In these cases the applicants provide contextual elements, which match with the Prosecution's Trial Brief. For instance, in relation to the Mukjar charges, applicants would describe the arrests of Fur males at checkpoints and during house to house searches (Trial Brief, paras 195, 341, and 345), the presence of Mr. Abd-Al-Rahman or other alleged perpetrators (Trial Brief, para. 345), the torture and inhumane conditions (Trial Brief, para. 196), as well as, the execution of Fur men outside of Mukjar (Trial Brief, paras 198, 342, 346 and 36).

³⁷ E.g. where the victim describes the arrests or killings of community leaders listed in the Prosecution Trial Brief. See *supra*, fn. 30.

³⁸ 20 May 2021 Decision, para. 45.

23. The Registry will continue to assess all applications in its possession according to the criteria established by the Chamber and will transmit all complete applications on a rolling basis.



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

Dated this 31 October 2022

At The Hague, the Netherlands