

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 15 August 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**

**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”**

**Source:** The Common Legal Representative of Victims

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  
Mr James Stewart  
Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci  
Mr Iain Edwards

**Legal Representative 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**

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**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

Mr Pieter Vanaverbeke

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. Introduction

1. The Common Legal Representative of Victims (“CLRV”) hereby responds 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”.<sup>1</sup>
2. The Request encompasses three divisible pleas for relief. First, the Defence requests that the Trial Chamber reconsider and revoke its decision<sup>2</sup> applying the ‘ABC approach’ to the applications for participation as victims in these proceedings (“Victim Applications”) that have already been determined by the Trial Chamber. In particular, the Defence requests the Trial Chamber, pursuant to Rule 89(1) of the Rules of Procedure and Evidence (“Rules”), to order the Registry, with the assistance of the CLRV, to transmit to the parties redacted versions of the 143<sup>3</sup> Victim Applications of the individuals authorised to participate as victims in these proceedings.<sup>4</sup>
3. This avenue of relief should be dismissed as moot. Contrary to the Defence’s submissions,<sup>5</sup> the sole purpose of providing Victim Applications to the parties, as permitted under Rule 89(1), is to allow the parties to submit their views on and thereby assist the relevant Chamber in the *Chamber’s* determination of whether an applicant satisfies the criteria to participate as a victim in the proceedings. The Defence has provided no legal or factual basis on which the Chamber’s decisions confirming or authorising the participation of the 143 Group A individuals represented by the CLRV may now be reopened for further observations by the

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<sup>1</sup> 22 July 2022, ICC-02/05-01/20-717-Conf (“Request”). A public redacted version of the Request was concurrently filed ([ICC-02/05-01/20-717-Red](#)). The Trial Chamber suspended the time limits applicable to filings during the Court’s three-week summer recess, commencing on 22 July (Trial Chamber email to the parties and participants dated 13 July 2022).

<sup>2</sup> Decision on victims’ participation and legal representation in trial proceedings, 19 October 2021, [ICC-02/05-01/20-494](#), para. 15.

<sup>3</sup> The Request identifies 142 individuals who have been confirmed or authorised by the Trial Chamber to participate as victims in the proceedings pursuant to the Chamber’s decision of 14 January 2022 ([ICC-02/05-01/20-556](#)). The Chamber additionally issued an oral decision authorising the participation of dual status witness P-0877 on 1 July 2022 (Realtime Hearing Transcript of 1 July 2022, ICC-02/05-01/20-T-054-Conf-ENG RT, p. 68, lines 20-22).

<sup>4</sup> Request, para. 24 and p. 10.

<sup>5</sup> *Id.*, para. 24.

parties. The relief requested by the Defence in respect of the applications of these 143 participating victims must accordingly be dismissed.

4. Second, the Defence requests the Trial Chamber to reconsider the application of the ABC approach moving forward – namely, in respect of Victim Applications that have been received or may be received by the Victims Participation and Reparations Section (VPRS) that will be transmitted to the Chamber for determination. The Defence submits that the discrepancy between the estimates provided by the Registry in respect of the number of applications expected to be received in the first half of 2022, with the applications the Registry reported receiving thus far,<sup>6</sup> are so great as to constitute a new fact justifying reconsideration of the application of the ABC approach.<sup>7</sup>
5. The Trial Chamber has instructed the Registry to provide observations on the Defence Request by 29 August 2022.<sup>8</sup> Should the CLRV deem it necessary to do so after receipt of the Registry's observations, she will request the Chamber's leave to file additional submissions on this subject.
6. Third, the Defence submits that the Registry's Rule 94(2) Notification is insufficient as it provides only general information on reparation claims received by the Registry instead of copies of the claims themselves.<sup>9</sup> The Request's interpretation of Rule 94(2) is not supported by the text of the rule or its drafting history. Rule 94(2) is intended to provide fair notification to an accused of the fact that reparation claims have been filed in the proceedings; it does not require disclosure of the claims themselves.
7. These submissions are filed publicly. While they respond to a confidential filing, they only refer to non-confidential information.

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<sup>6</sup> See 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](#) ("Rule 94(2) Notification").

<sup>7</sup> Request, paras 2-3, 12-15.

<sup>8</sup> Trial Chamber email to the Registry of 22 July 2022 at 12h50.

<sup>9</sup> Request, para. 25.

## II. Submissions

- a. The applications of participating victims are not subject to Rule 89(1) disclosure

8. The Defence request for “access”<sup>10</sup> to the Victim Applications of the 143 participating victims in these proceedings should be dismissed as moot and without legal basis. As confirmed by the Appeals Chamber in the *Said* case,<sup>11</sup> the content and context of Rule 89(1) make clear that the sole purpose of providing Victim Applications to the parties under this provision is so that they may submit observations on the applications to assist the relevant Chamber in its determination of whether the applicant meets the criteria to participate as a victim in the proceedings.
9. The Defence has presented no legal or factual basis on which these settled applications may now be reopened for further observations by the parties. The Defence, very properly, has not alleged that either the Pre-Trial Chamber or the Trial Chamber failed to meet their “heightened duty to exercise judicial oversight over the assessments made by the Registry” when the ABC approach is utilised.<sup>12</sup> As such, there is no basis on which the applications of the 143 participating victims may now be provided to the parties under Rule 89(1).
10. The Defence claims of the ongoing “prejudice”<sup>13</sup> it has suffered as a result of the non-provision of the Victim Applications of the participating victims and its “indisputable interest” in knowing the details of the facts of these applications because they tell the stories of these victims in relation to their victimization,<sup>14</sup> are misplaced. The Appeals Chamber’s *Said* Judgment was unequivocal in rejecting

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<sup>10</sup> Request, para. 1.

<sup>11</sup> *Prosecutor v. Said*, 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](#), para. 50 (“The purpose of transmitting the applications to the parties, pursuant to rule 89(1) of the Rules, is to allow the parties to make observations thereon and in this way assist the relevant chamber to determine whether or not the applicant qualifies as a victim for the purposes of participation.”).

<sup>12</sup> *Said* Judgment, para. 74.

<sup>13</sup> Request, para. 3.

<sup>14</sup> *Id.*, para. 24.

the validity of the mooted interests of the parties in the content of Victim Applications when such interests fall outside of the purpose of Rule 89(1):

[U]nder rule 89(1) of the Rules, victims' applications are, in principle, not provided for the purpose of allowing the defence to gather information that may be important for the preparation of its case. Instead, the Statute and the Rules primarily establish for that purpose disclosure obligations on the Prosecutor, which remain unaffected by rule 89(1) of the Rules.<sup>15</sup>

The Defence's submissions in this respect were properly dismissed by the Pre-Trial Chamber,<sup>16</sup> and should not be entertained again by the Trial Chamber. Further, pursuant to the procedure established by the Trial Chamber,<sup>17</sup> the Defence has received redacted versions of the Victim Applications of all dual status witness-victims.

11. The CLRV also wishes to correct for the record the Defence's misunderstanding of the role of the CLRV in the event the Trial Chamber were to order the provision of redacted versions of the Victim Applications of participating victims and/or future victim applicants to the parties. Contrary to the Defence's suggestion,<sup>18</sup> it is the Registry alone that is responsible for the redaction and provision of Victim Applications to the parties in the context of Rule 89(1). While the CLRV should be *consulted* in respect of any proposed redactions to the applications of her clients (commensurate with the procedure applicable when the Prosecution discloses

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<sup>15</sup> *Said Judgment*, para. 52 (internal citations omitted).

<sup>16</sup> Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing, 18 January 2021, [ICC-02/05-01/20-259](#), para. 31 ("The Defence's argument that it needs to review all applications because they might contain relevant information, including potentially exonerating elements has no merits. The factual statements made by the applicants in the application forms do not constitute evidence, neither against nor in favour of the accused and cannot be relied upon outside of the limited scope of the admission process. As mentioned, the application for participation of victims is only aimed at allowing the Chamber to evaluate if a person qualifies as a potential victim of one or more of the crimes charged in this case. The Chamber's evaluation is limited to ascertaining whether or not applicants have demonstrated that the conditions established by rule 85 of the Rules are met *prima facie* on the basis of their intrinsic coherence, as well as of other available information.").

<sup>17</sup> Per the Trial Chamber's decision issued by email on 30 March 2022 ([ICC-02/05-01/20-692-Conf-Anx25](#)).

<sup>18</sup> Request, para. 24 ("[T]he workload relating to the redaction of a maximum of 194 requests, which will be effectively shared between the Registry and the Legal Representatives of the Victims, cannot constitute a valid objection" to non-provision of Victim Applications to the parties).

redacted Victim Applications of dual status witnesses<sup>19</sup>), it is improper to impose a shared responsibility on the CLRV to review and redact such applications.<sup>20</sup> The limited resources of the CLRV team, dedicated to representing the rights and interests of the participating victims, should not be diverted to undertaking a task that is solely the responsibility of the Registry of the Court.

12. For the reasons above, the CLRV submits that the Defence request for reconsideration of the ABC approach in respect of the Victim Applications of the 143 participating victims must be dismissed as moot and without legal basis.

b. The Registrar is best placed to advise the Trial Chamber on the reconsideration of the ABC approach in respect of new Victim Applications

13. The Registrar is best placed to advise the Trial Chamber on the Defence's request for reconsideration of the application of the ABC approach in respect of Victim Applications that have not yet been submitted to the Trial Chamber. In particular, the Registry is best situated to respond to the Defence's submissions in respect of the discrepancy between the estimates provided by the Registry regarding the number of applications expected to be received in the first half of 2022, with the applications the Registry reported receiving thus far.<sup>21</sup> Should the CLRV deem it necessary to do so, after receipt of the Registry's observations<sup>22</sup> on the Defence Request, she will seek the Trial Chamber's leave to file additional submissions on this subject.

14. At this juncture, the CLRV simply notes the Trial Chamber's previous proper finding, in answer to a previous Defence reconsideration request, that while "the number of participating victims is a factor to consider, it is not the sole

<sup>19</sup> See Trial Chamber's decision issued by email on 30 March 2022, governing the transmission and disclosure of the Victim Applications of dual status witnesses ([ICC-02/05-01/20-692-Conf-Anx25](#), adopting the procedure established in the *Yekatom and Ngaïssona* case ([ICC-01/14-01/18-339](#))).

<sup>20</sup> In respect of the applications of victim applicants that have not yet been transmitted to the Trial Chamber, and should the Trial Chamber grant the Defence's reconsideration request in regard to such new applications, the CLRV should only be consulted by the Registry in respect of proposed redactions to the Victim Applications of applicants whom the CLRV represents.

<sup>21</sup> See Request, paras 2-3, 12-15.

<sup>22</sup> The Trial Chamber has instructed the Registry to provide observations on the Defence Request by 29 August 2022 (Trial Chamber email to the Registry of 22 July 2022 at 12h50).

determinative factor favouring the adoption of the ABC Approach”.<sup>23</sup> Another important factor is the effective and efficient reduction in risks “to the safety, physical and psychological well-being, dignity and privacy of the victims”, pursuant to Article 68(1) of the Statute.<sup>24</sup> In the CLRV’s view, the fundamentals of the precarious security and safety situation of victim applicants and potential victim applicants in these proceedings remains the same as when the Chamber made this assessment in November of last year.

15. The CLRV also observes that certain factual circumstances in the *Said* case, which the Defence places much stock in,<sup>25</sup> appear markedly different to those in the present proceedings. A total of 49 applications for participation were received by the Registry at the pre-trial stage in the *Said* case.<sup>26</sup> Of these, 42 applications were transmitted to the Pre-Trial Chamber, and only 27 were determined to fall into Group A and granted the status of participating victims.<sup>27</sup> Following the non-confirmation of certain charges, the Registry determined that none of the 27 individuals who had been granted the status of participating victim fell within the parameters of the confirmed case.<sup>28</sup> The Registry has additionally advised that its expectations for receipt of new applications in the first half of 2022 are comparable to the low number of applications received at the pre-trial stage.<sup>29</sup> The Prosecution has likewise assessed that the “number of applications to be treated will be more limited than in other cases before the Court”,<sup>30</sup> and also advised that “the vast majority of the potential applicants are likely to have provided statements to the Prosecution which have already been disclosed to the Defence”.<sup>31</sup>

<sup>23</sup> Hearing Transcript of 12 November 2021, [ICC-02/05-01/20-T-017-Red-ENG](#), p. 46, lines 7-9.

<sup>24</sup> *Id.*, p. 46, lines 10-14.

<sup>25</sup> Request, para. 22.

<sup>26</sup> *Prosecutor v. Said*, Annex II to the Registry Submissions in view of the 28 January 2022 Status Conference, 21 January 2022, [ICC-01/14-01/21-229-AnxII-Red](#), para. 1.

<sup>27</sup> *Id.*, paras 2-4 (seven applications were not transmitted by the VPRS to the Pre-Trial Chamber as they were assessed as incomplete or unclear).

<sup>28</sup> *Id.*, paras 5-6.

<sup>29</sup> *Id.*, para. 15.

<sup>30</sup> Prosecution’s Response to Defence’s Request Seeking Updated Information on Victims Participation ([ICC-01/14-01/21-255](#)), 18 March 2022, ICC-01/14-01/21-261, para. 3.

<sup>31</sup> *Id.*, para. 4.



16. The CLRV submits that above factual circumstances of the *Said* case may be relevant considerations for the Trial Chamber should the Chamber proceed in assessing the Defence Request under the interest balancing test identified by the Appeals Chamber.<sup>32</sup>

c. The Registry's Rule 94(2) Notification satisfies the text and spirit of the provision

17. Lastly, the Defence submits that the Registry's Rule 94(2) Notification is insufficient, as it provides only general information on reparation claims received by the Registry instead of providing redacted copies of the claims themselves.<sup>33</sup> The Defence position should be rejected.

18. The text of Rule 94(2), as confirmed by the drafting history of the provision,<sup>34</sup> strongly suggests that the purpose of the rule is to provide an accused with fair notice of the *existence* of reparations claims filed in the proceedings, not provision of the claims themselves. While Rule 89(1) speaks of the Registrar's provision of "a copy of the application" for participation to the parties, Rule 94(2) states that the Registrar, further to the request of the Court, should "provide notification of the request" for reparations. Rule 94(2) accordingly does not envision or require provision of a copy of reparations requests to an accused; it is limited to notification of the existence of such claims.

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<sup>32</sup> *Said* Judgment, paras 67, 81-83.

<sup>33</sup> Request, para. 25.

<sup>34</sup> P. Lewis & H. Friman, "Reparations to Victims", in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee, ed. (2001), p. 480 ("Sub-rule 2 [of Rule 94] appears to be a simple provision about notification. Notification of the claim is in fact a very important guide as to how the whole scheme of reparations will operate. There was some debate as to when the Court could receive claims for reparations. Some argued that the Court should only encourage claims where there was a known defendant against whom reparations could (potentially) be claimed. Others argued that the Court should encourage victims to put forward their claims at the earliest opportunity. The onus would then be put upon the Court to determine if the claim could subsequently be linked to an identified person or persons prosecuted before the Court. This argument prevailed, and the rule has been drafted to encourage early claims. The question then arose as to when the Court had a duty to notify an accused person of the fact that a claim had been made, which is one of the responsibilities of the Court under article 75 paragraph 3. Some delegates argued that as soon as an accused has been arrested and brought before a court he or she should be told whether there are any claims for compensation. Others argued that until charges had been confirmed it would be unclear whether a person would face any claims. Because of these uncertainties it was decided that the appropriate point for notifying an accused was at the start of the trial; at that stage the accused would know that the charges had been confirmed and that there were claims for reparations associated with that charge.") (emphasis added).

19. A ‘notification’ – as opposed to ‘provision’ – interpretation of Rule 94(2) would also be commensurate with the ABC approach that the Appeals Chamber determined to be valid under the Court’s legal framework as an appropriate exercise of a Chamber’s discretion under Rule 89(1) of the Rules.<sup>35</sup> Were a ‘provision’ interpretation of Rule 94(2) adopted at the Court, the utility and purpose of the ABC approach might be significantly undermined if, at the commencement of Trial, the Registry would nonetheless have to undertake the same type of time and resource-intensive review and redaction of potentially hundreds or even thousands of reparation claims filed in a particular proceeding.
20. The Registry’s Rule 94(2) Notification meets the requirements for reparation claim notification under the Rules. The Defence’s submissions asserting the contrary should be rejected.

### **III. Relief requested**

21. For the reasons above, the CLRV respectfully requests that the Trial Chamber:
- i. dismiss the Defence request for reconsideration of the ABC approach in respect of the settled Victim Applications of the 143 participating victims;
  - ii. take into account the CLRV’s above submissions under Section II(b) in respect of the Defence request to reconsider the application of the ABC approach to new Victim Applications submitted before the Trial Chamber; and
  - iii. reject the Defence’s proposed interpretation of the notification provision under Rule 94(2) of the Rules and confirm the propriety of the Registry Rule 94(2) Notification.

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<sup>35</sup> See *Said Judgment*.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized, cursive script.

Natalie v. Wistinghausen

Common Legal Representative of Victims

Dated this 15th of August 2022

At Berlin, Germany