

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 November 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.* ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public

Response to the Defence’s *Requête relative au processus d’admission des victimes à participer à la procédure*

Source: The Common Legal Representatives 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 Eric MacDonald

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Nasser Amin Mohamed Abdalla

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

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 Representatives of Victims ('CLRV') in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* ("Case") hereby submit their response to the Defence's "*Requête relative au processus d'admission des victimes à participer à la procédure*".

II. Procedural History

2. On 8 October 2020, the Registry, through the Victims Participation and Reparations Section ("VPRS"), submitted a request to modify the standard application form for victim participation in the present case,¹ which was granted by the Single Judge of Pre-Trial Chamber II ("PTC II") on 4 November 2020.²
3. On 18 January 2021, the Single Judge of Pre-Trial Chamber II issued a decision on the principles applicable to victims' participation and representation during the confirmation hearing ("First Decision") and approved the Registry ABC victim application assessment process.³
4. On 5 February 2021, the Single Judge issued a decision supplementing the First Decision in which he, *inter alia*, clarified that (i) the appointment of the Office of Public Counsel for Victims ("OPCV") in the 18 January 2021 Decision was temporary and would be superseded by decisions to be taken in matters of legal representation at the stage of the determinations of the merits of the applications by the Chamber; and (ii) final decisions on individual and common legal representation would be adopted in the context of the determinations on the status of victims.⁴

¹ Registry, "Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case", ICC-02/05-01/20-178-Conf. A public redacted version was filed on 2 November 2020, ICC-02/05-01/20-178-Red.

² Pre-Trial Chamber II, "Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation", ICC-02/05-01/20-198. On 9 November 2020, the Defence submitted a request for leave to appeal this decision: "*Demande d'autorisation d'interjeter appel de la Decision ICC-02/05-01/20-198*", ICC-02/05-01/20-201, which was rejected by PTC II in its 12 January 2021 *Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198*, ICC-02/05-01/20-254.

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.

⁴ Pre-Trial Chamber II, "Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance", 5 February 2021, ICC-02/05-01/20-277.

5. On 19 March 2021, the Single Judge provisionally authorised 28 applicant victims to participate in the proceedings.⁵
6. On 21 April 2021, the Registry submitted its second assessment report and transmission of victim applications for participation in the proceedings.⁶
7. On 30 April 2021, the Defence submitted a response to the second assessment report, requesting the Chamber to reconsider and abandon the ABC approach.⁷
8. On 20 May 2021, Pre-Trial Chamber TC II authorised 151 applicant victims to participate in the confirmation decision.⁸ In that same decision, the Single Judge denied the Defence's request to reconsider its previous decision approving the ABC approach,⁹ as well as the Defence's for leave to appeal Pre-Trial Chamber II's decision authorising victims to participate following the Registry's ABC victim application process.¹⁰
9. On 9 July 2021, Pre-Trial Chamber II issued its decision on the confirmation of charges against Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ("Confirmation Decision").¹¹
10. On 1 September 2021, the Registry provided its Update on Victim Participation ("Update").¹²
11. On 19 October, Trial Chamber I ("the Chamber") issued its Decision on victims' participation and legal representation in trial proceedings,¹³ appointing the present 'CLRV'.
12. On 22 October 2021, the Defence submitted its *Requête relative au processus d'admission des victimes à participer à la procédure* (« Request »).¹⁴

⁵ Pre-Trial Chamber II, "Decision regarding the Registry's First Assessment Report, legal representation, and the victims' procedural position", dated 19 March 2021 and registered on 22 March 2021, ICC-02/05-01/20-314.

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

⁷ Corrigendum des Observations en Réponse au Rapport du Greffe ICC-02/05-01/20-358, ICC02/05-01/20-370-Corr.

⁸ 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 ("Decision on Defence requests"), para. 53, and the Annex (ICC-02/05-01/20-398-Anx-Corr).

⁹ Decision on Defence requests, para. 22.

¹⁰ Id., paras 66 et seq.

¹¹ 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.

¹² Registry, "Public redacted version of Update on Victim Applications for Participation", 1 September 2021, ICC-02/05-01/20-462-AnxII-Red.

¹³ Trial Chamber I, « Decision on victims' participation and legal representation in trial proceedings », 19 October 2021, ICC-02/05-01/20-494,

¹⁴ Defence, "Requête relative au processus d'admission des victimes à participer à la procédure", 22 October 2021, ICC-02/05-01/20-497.

III. Submissions

13. In its 'Motion', the Defense challenges again

- the use by the Registry of an application form allegedly different from the 'standard' one pursuant to Regulation 23(2) of the Regulations of the Court used for the procedures before this court;
- the A-B-C approach adopted by the Registry.

14. In essence, all the relevant arguments regarding the present Defence application have already been developed in numerous submissions made by the Office of Public Counsel for the Victims ("OPCV") the previous Legal Representative of victims (LRV') and the Victims Participations and Reparations Section ("VPRS").

15. In order to avoid repetition and redundancy, the 'CLRV' makes reference and adopts for the purpose of this response the submissions that have already been made and that are listed in the 'Procedural history'.

16. However, very briefly, and for further clarity the 'CLRV' addresses the two points raised by the Defence in turn.

A. The use by the Registry of an application form allegedly different from the one used for the procedures before this court

17. The Defence contends that the modified application form used by the Registry in the pre-trial phase is contrary to the Court's practice and jurisprudence and argues that any application form requires the victim's signature.

18. Already on 27 October 2020, at the time pursuant to the instruction of the Pre-Trial Chamber, the Registry submitted its detailed observations on the defence response to the "Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case".¹⁵

19. On the contention that the Registry was not using the 'standard' form, the 'CLRV' refers entirely to the discussion of the matter at the pre-trial stage; of note, the combined application form used in the present proceedings is – apart from

¹⁵ See "Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case", ICC-02/05-01/20-178, dated 8 October 2020 and notified on 9 October 2020 („Registry Request for Modified Form").

the signature which shall be addressed *infra* – the form used in all presently ongoing proceedings at pre-trial and trial before the ICC,¹⁶ and has been duly submitted and approved through the process foreseen in Regulation 23(2) of the Regulations of the Court.¹⁷ The 'CLRV' therefore submits that the Defence argument is as unmeritorious as the Single Judge found it when submitted at the pre-trial stage.

20. As regards the requirement of a physical signature on the application form, the Registry submitted in its initial request that

« (i) the Chamber has general discretion to accept and authorise the use of specifically tailored forms taking into account the circumstances of each case; (ii) none of the rules or regulations referred to by the Defence require a victim to sign an application form; and (iii) should the Chamber find that some form of signature is required, the VPRS could ask victims to sign a blank piece of paper, which could be photographed and submitted electronically together with the ID document and application form - however, the Registry considers that the victim identification document is the more legitimate source of authentication. »¹⁸ During further litigation of the matter, the Registry outlined its view that the Court's regulatory framework does not *necessitate* a physical signature for an application to be valid.¹⁹

21. In his "Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation", the Single Judge granted the Registry's request and found that an entirely electronic form may make the application more accessible to victims and facilitate the role of the VPRS in the field.

22. In summary, the Single Judge's arguments were :

- i. that electronic forms have been used in previous cases and that they tend to expedite the collection and processing of information and foster wider victim

¹⁶ See for the *Yekatom/Ngaissoua, Al Hassan* and the present case the forms hyperlinked in the blue boxes at: <https://www.icc-cpi.int/about/victims> ; and for the *Said* case see the hyperlinks in the blue box at: <https://www.icc-cpi.int/pages/victims-info-page.aspx?for=%27said%27> .

¹⁷ Registry, "Public Redacted version of "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, 29 October 2020, ICC-02/05-01/20-194-Red ("Registry Observations"), paras 19-21, as noted by PTC II in para. 7 of its "Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation" of 4 November 2020, ICC-02/05-01/20-198.

¹⁸ Registry Request for Modified Form, para. 13.

¹⁹ Registry Observations, paras. 24-33.

participation, especially when there is limited access to potential victims in the field;

- ii. that the Registry' request to replace the signature box with a solemn undertaking box was intended to overcome certain limitations with the previous electronic template as the previous electronic form required a steady internet connection and that the PDF version had to be printed out, signed, and scanned prior to submission.
- iii. that an entirely electronic form would facilitate victim applications in areas where there is limited or no internet connectivity, by enabling an intermediary to collect numerous applications offline on a single personal handheld device;
- iv. that applications could then be sent to the ICC, along with the photos taken and stored of the applicants' relevant ID documents, once a secure internet connection became available;
- v. that none of the relevant provisions in the statutory framework, including regulations 23(2), 26(2), and 86 of the Regulations, contained the requirement of a signature or a mark on the application;
- vi. that the concept of a signature didn't exist in certain countries with low levels of literacy or without a formal written tradition and as a result, a mark on the page tended to be used in lieu of a signature but that VPRS didn't have the capacity to verify the authenticity of such marks, short of reaching out to the victim in question directly if the legitimacy of the application were called into question;
- vii. that victims's counsel maintained a relationship throughout the duration of the proceedings, and that this served as an additional method of verifying the legitimacy of applicants.
- viii. that it was appropriate to incorporate amendments that made use of modern technology and facilitate the application process for victims, while at the same time ensuring that measures are in place to ensure the authenticity of applications. The Single Judge considers that the use of an entirely electronic form;
- ix. that a solemn undertaking field in lieu of a signature field, would facilitate the victim
- x. application process and the proof of identity document submitted along with an application, served as a strong form of authentication.²⁰

²⁰ Pre-Trial Chamber II, "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, paras. 9-13.

23. The 'CLRV' submits that the above considerations remain entirely valid, and consequently sees no reason to depart from Pre-Trial Chamber II's ruling and approach concerning the application form to be used in the present case.²¹ If anything, the security concerns for victims brought forward by 'VPRS' at the time motivating a fully electronic form apply in a much more poignant fashion today. The situation on the ground is highly volatile, necessitating the highest amount of caution of anyone interacting with victims on behalf of the ICC. The absence of any ICC victim documentation on paper circulating is greatly assisting in the protection of victims' privacy and safety pursuant to article 68(1) of the Statute.
24. Also, the Defence has not brought forward any new and valuable arguments that were not already part of their submissions at the pre-trial stage.
25. The approach chosen by 'VPRS' allows for the handling of victims' applications in an efficient manner and expedites the proceedings. Finally, also considering the potential high number of victims and the difficult security situation on the ground, the 'CLRV' favours the continued use of the application form already used at the pre-trial stage which does not require the signature of the applicant.²² As noted by the Registry, the 'CLRV' will be able to verify and attest to the victims' submissions to the 'VPRS' in relevant forms.

B. The A-B-C approach

26. According to the A-B-C Approach proposed by the Registry and adopted by the Pre-Trial Chamber in this case, the 'VPRS' is responsible for dividing complete application forms in three categories: applicants who clearly qualify as victims of this case (Group A), applicants who clearly do not qualify as victims of this case (Group B) and applicants for whom the VPRS could not make a clear determination (Group C).
27. All completed applications are transmitted to the Chamber, that certifies the Registry's proposed decision for Group A and B applicants, therefore excluding errors in the 'VPRS's assessment. Applications falling into Group C are

²¹ See the "Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing" (Pre-Trial Chamber II), No. ICC-02/05-01/20-259, 18 January 2021, paras 8-13

²² See the "Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation" (Pre-Trial Chamber II), No. ICC-02/05-01/20-198, 4 November 2020.

transmitted to the parties with appropriate redactions and, following their observations, the Chamber rules on whether each applicant from said group meets the applicable requirements.²³

28. The A-B-C Approach has been adopted, with minor variations, in all recent cases before the Court, including Ntaganda²⁴, Al Hassan²⁵, Yekatom & Ngaïssona²⁶ and Said. The A-B-C Approach amounts, in essence, to an internal procedure implemented by the Registry to assess whether applicants fulfil the requirements for the status of victim and should thus be admitted to participate in the proceedings in a given case.²⁷

29. The ‘CLR’V’ submits that Rule 89(1) of the Rules, properly interpreted, does not entail any absolute right for the Defence to receive all application forms in a given case²⁸ and no question of deviating or derogating from said obligation therefore arises. This conclusion is fully in line with the Court’s jurisprudence. Indeed, since 2015, chambers of this Court have consistently adopted the A-B-C Approach, excluding the transmission of application forms falling in Groups A and B to the parties and confirmed that this procedure is fully compatible with the Court’s statutory framework and the defendant’s rights.

30. Only very lately, the Appeals Chamber in the case against Mahamat Said Abdel Kani confirmed that the “A-B-C approach is in principle compatible with Rule 89(1) of the Rules and Statute legal framework. The concrete assessment of its

²³ See the “Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-259](#), 18 January 2021, para 34.

²⁴ See the “Decision on victims’ participation in trial proceedings” (Trial Chamber VI), [No. ICC-01/04-02/06-449](#), 6 February 2015 (the “Ntaganda Participation Decision”), para. 24(iv), (vi) and (vii).

²⁵ See the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation” (Pre-Trial Chamber I), [No. ICC-01/12-01/18-37-tENG](#), 24 May 2018 (the “Al Hassan Pre-Trial Participation Decision”), pp. 28-30; and the “Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial” (Trial Chamber X), [No. ICC-01/12-01/18-661](#), 12 March 2020 (the “Al Hassan Trial Participation Decision”).

²⁶ See the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-141](#), 5 March 2019 (the “Yekatom & Ngaïssona Participation Decision”), paras. 39-45.

²⁷ See a very detailed explanation of the A-B-C system in: the „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’ application participation“, para 21, 81, 83.

²⁸ See e.g. the Ntaganda Participation Decision, *supra* note 2, para 29, 30, 37; the Al Hassan Pre-Trial Participation Decision, *supra* note 3, para 60; and the Yekatom & Ngaïssona Participation Decision, *supra* note 4, para 43.

(in)compatibility will always depend on the specific circumstances of the each case”– and in particular the size of affected victim communities.²⁹

31. The Appeals Chamber held 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” and that, 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”.³⁰ The Defence seems to suggest that this reasoning applies to the present case. The ‘CLRv’ submits that this is inaccurate. While the amount of presently participating victims is relatively limited, the specifics of the charges confirmed in the present case and the amount of victims affected by said alleged crimes forebode much higher numbers. Discussions with collaborators in the field, the previous legal representatives in the case and the Registry led to surmise that victim numbers will rise notably in the coming months, communication and accessibility providing. The Registry’s as well as legal representatives’ capacities to reach out to victim communities in Sudan, often in remote places with low infrastructure, have produced a relatively small number of participating victims to date. Yet, it has only been very recently that the Registry has been able to reach out physically to relevant communities in said locations due to the many obstacles previously reported.
32. Furthermore, the Chamber must take into account the challenges presented by the difficult situation in Sudan that has considerably worsened since the coup under way in Sudan, where the military has dissolved civilian rule, arrested political leaders and declared a state of emergency, with communication as well as movement practically paralyzed.
33. The ‘CLRv’ thus submits that there is a substantive number of victims still expected to participate in the proceedings. Regarding the latter, the CLRv expects that the Chamber will be assisted by the report that will be submitted by VPRS on

²⁹ See the „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’ application participation“, para 21, 81, 83.

³⁰ *Ibid.*

6 December 2021. Adding to the 157 victims who are already participating in the proceedings, it is to anticipate that (many) hundreds more will join.

34. Were the Chamber minded to still order full disclosure of all victim forms despite the expected large number of further participating victims, extensive redactions would be required to protect victims in accordance with article 68(1) of the Statute, which would prove resource-intensive for all parties and participants in the proceedings.
35. In conclusion, the 'CLRV' considers that the Defence Request should therefore be dismissed, as it already was on both issues at the pre-trial stage, as the present circumstances do not lend themselves to any other legal conclusion than those made by Pre-Trial Chamber II. The application of the A-B-C approach in the present case enables the Registry to process the highest number of victim applications with a view to their timely participation in the proceedings – an objective of the Court as a whole enshrined in article 68(3) of the Statute. A time- and resource-effective approach to the application assessment embodied in the A-B-C approach alongside the continued use of the standard application form in use since pre-trial is particularly relevant in the present circumstances, due to (1) security and health-related concerns faced in the present case;³¹ (2) the resulting likelihood for the administration of heavy redactions; and (3) the potentially high number of victim applicants due to the broad scope of the Case alongside the approaching date of the commencement of the trial currently scheduled for the 5th of April 2022.



Natalie v. Wistinghausen Nasser Mohamed Amin Abdalla
Common Legal Representatives of Victims

Dated this 5 November 2021

At The Hague, the Netherlands

³¹ See Registry's Request to Use Modified Form, para. 5; Registry, "Registry Observations on the Defence's „Réponse à la Requête ICC-02/05-01/20-178' (ICC-02/05-01/20-182-Conf)", ICC-02/05-01/20-194-Conf, para. 39.