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No. **ICC-02/05-01/20**
Date: **29 September 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

Decision on the Defence's request for reconsideration of the Decision on victims' participation

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

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I. PROCEDURAL HISTORY

1. On 19 October 2021, Trial Chamber I (the ‘Chamber’) issued the ‘Decision on victims’ participation and legal representation in trial proceedings’, in which it instructed the Registry to assess applications for victims’ participation pursuant to the ABC approach (the ‘Decision on victims’ participation’).¹
2. On 22 October 2021, the Defence requested the Chamber to disregard the ABC approach when considering victims’ applications for participation during the trial stage.²
3. On 25 October 2021, the Chamber rejected this request.³
4. On 12 July 2022, the Registry filed its ‘Notification to the Defence of Applications for Reparations pursuant to Rule 94(2) of the Rules of Procedure and Evidence’ (the ‘Registry’s notification of reparation requests’).⁴
5. On 22 July 2022, the Defence requested the Chamber to reconsider its Decision on victims’ participation, and more specifically on the issue of access to victims’ applications from Group A (the ‘Reconsideration Request’).⁵
6. On 15 August 2022, the Common Legal Representative of Victims (the ‘CLRv’) responded to the Reconsideration Request, opposing it in its entirety (the ‘CLRv Response’).⁶
7. On 29 August 2022, upon instruction from the Chamber,⁷ the Registry provided observations on the Reconsideration Request (the ‘Registry’s Observations’).⁸

¹ ICC-02/05-01/20-494.

² Requête relative au processus d’admission des victimes à participer à la procédure, ICC-02/05-01/20-497 (notified on 25 October 2021).

³ Transcript of hearing, ICC-02/05-01/20-T-017-Red-ENG, p. 44 line 18 to p. 47, line 8.

⁴ Notification to the Defence of Applications for Reparations pursuant to Rule 94(2) of the Rules of Procedure and Evidence, ICC-02/05-01/20-712.

⁵ 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. A public redacted version was notified on the same day, ICC-02/05-01/20-717-Red.

⁶ 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”, ICC-02/05-01/20-720 (notified on 16 August 2022).

⁷ Email from the Chamber, 22 July 2022, at 12:51.

⁸ 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

8. The Prosecution did not respond.

II. ANALYSIS

A. *General framework*

9. The Chamber incorporates by reference the general framework applicable to the reconsideration of judicial decisions.⁹

B. *Submissions*

10. The Defence requests the Chamber to reconsider its Decision on victims' participation on the applicability of the ABC approach.¹⁰ The Defence submits that it has been almost eight months since the status conference of 12 November 2021, when the Registry announced its forecast of victims' applications (that an additional 600-800 applications would be received in the first half of 2022). The Defence points out that, to date, the Chamber has only admitted 142 victims for participation.¹¹

11. The Defence further argues that the discrepancy between the 600 to 800 applications announced and the 142 to, at most, 194 applications received so far,¹² constitutes a new factual element that significantly changes the factual basis on which the Decision on victims' participation was rendered and justifies its reconsideration by the Chamber. Furthermore, the Defence avers that reconsideration is necessary to end the ongoing prejudice suffered by the Defence as a result of the non-compliance with Rules 89(1) of the Rules of Procedure and Evidence (the 'Rules'), as interpreted by the

94-2 du Règlement de Procédure et de Preuve" (ICC-02/05-01/20-717-Conf), ICC-02/05-01/20-730-Conf-Exp. Confidential redacted and public redacted versions were notified on 30 August 2022, ICC-02/05-01/20-730-Conf-Red and ICC-02/05-01/20-730-Conf-Red.

⁹ Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10 (the 'Decision on the reconsideration request of the cooperation decision'). A public redacted version was notified on the same day, ICC-02/05-01/20-650-Red.

¹⁰ Reconsideration Request, ICC-02/05-01/20-717-Conf, para. 1.

¹¹ First decision on the admission of victims to participate in trial proceedings, 14 January 2022, ICC-02/05-01/20-556, para. 10.

¹² According to the Registry's notification of reparation requests, a total of 194 applications for participation and reparations have been received by the Registry in the present proceedings, *see* Registry's notification of reparation requests, ICC-02/05-01/20-712, para. 6.

Appeals Chamber in the *Said* case,¹³ as well as Rule 94(2) of the Rules.¹⁴ According to the Defence, the Registry's notification of reparation requests does not meet the requirements of Rule 94(2) of the Rules as it merely discloses general information on reparations, without transmitting the requests themselves, contrary to what is mandated by Rule 94(2) of the Rules.¹⁵

12. The CLRV submits that 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 [...] may now be reopened for further observations by the parties.'¹⁶ With respect to victims' applications that are yet to be considered by the Chamber, the CLRV contends that the Registry is best placed to advise the Chamber on the reconsideration of the ABC approach in respect of these new victims' applications.¹⁷

13. The CLRV further argues that the Defence's interpretation of Rule 94(2) of the Rules '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.'¹⁸

14. In its observations, the Registry submits that while it '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.'¹⁹ The Registry further provides explanations about the challenges it has faced in collecting victims' application²⁰ and the solutions it identified to address these challenges.²¹

¹³ Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, 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 (OA2), paras. 5, 82.

¹⁴ Reconsideration Request, ICC-02/05-01/20-717-Conf, para. 3.

¹⁵ Reconsideration Request, ICC-02/05-01/20-717-Conf, para. 25.

¹⁶ CLRV Response, ICC-02/05-01/20-720, para. 3.

¹⁷ CLRV Response, ICC-02/05-01/20-720, paras 4-5, 13.

¹⁸ CLRV Response, ICC-02/05-01/20-720, para. 6.

¹⁹ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 14.

²⁰ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, paras 15-26.

²¹ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, paras 27-35.

15. Furthermore, the Registry states that it has received additional information in relation to approximately 40 incomplete applications and 140 new victims' applications.²² The Registry expects to transmit these applications to the Chamber in October 2022.²³ Finally, the Registry states that '[t]he VPRS plans to collect and transmit at least a few additional hundreds of applications in two transmissions, planned for October and December 2022, respectively.'²⁴

16. In relation to the notification of reparation requests pursuant to Rule 94(2) of the Rules, the Registry argues 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. The Registry submits that 'Notification' of a fact entails first and foremost to inform the recipient of the *existence* of said fact.'²⁵

C. Reconsideration of the ABC Approach

17. For reconsideration to take place, there must be a clear error of reasoning, or a necessity to prevent an injustice. A Trial Chamber must assess whether new facts and arguments have arisen since the impugned decision was rendered.²⁶

18. The Chamber is not persuaded that the Defence's submissions, summarised in paragraphs 10 and 11 *supra*, have merit.

19. The Chamber recalls that the Defence has previously argued that the low number of participating victims in the present case would justify departing from the ABC approach.²⁷ This argument has previously been rejected by the Chamber.²⁸ The

²² Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 37.

²³ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 38.

²⁴ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 41.

²⁵ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 50.

²⁶ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table', 22 February 2018, ICC01/04-02/06-2241, para. 4; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4.

²⁷ Requête relative au processus d'admission des victimes à participer à la procédure, 22 October 2021, ICC-02/05-01/20-497.

²⁸ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, p. 45, line 12 to p. 47, line 8.

Chamber recalls in this regard that a request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber.²⁹ Furthermore, the Chamber reiterates its finding that ‘although the number of participating victims is a factor to consider, it is not the sole determinative factor favouring the adoption of the ABC Approach.’³⁰

20. As regards the Defence’s reliance on a recent decision in the *Said* case, in which the ABC approach was modified, ‘[i]n light of the expected low number of applications’,³¹ the Chamber finds this reference inapposite. The *Said* case is to be distinguished from the present case given the material difference in the nature of the crimes and facts between the two cases.³²

21. The Chamber accepts the Registry’s observation that ‘[t]he forecast provided by the Registry in the *Said* Case however differs from the forecast it has provided [...] in the *Abd-Al-Rahman* Case, namely that the expected number of victims of the alleged crimes and thus potentially eligible to participate as victims in the trial proceedings in the latter case will be significantly higher than in the former.’³³

22. The Defence therefore misconstrues the Chamber’s decision, which was not based on the Registry’s projections, but on the widespread nature of the crimes alleged against Mr Abd-Al-Rahman, which resulted, on the evidence, in large numbers of victims. The fact that the estimates made by the Registry have not materialised does not affect the nature of the alleged crimes, nor does it alter the number of potential victims. In its observations, the Registry has provided comprehensive explanations as

²⁹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions, 1 October 2019, ICC-01/04-02/06-2426 (A A2), para. 6.

³⁰ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 46, lines 10-12.

³¹ Trial Chamber VI, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on matters relating to the participation of victims during the trial, 13 April 2022, ICC-01/14-01/21-278, para. 16.

³² The Pre-Trial Chamber in the *Said* case confirmed charges for crimes allegedly committed at the *Office Central de Répression du Banditisme*, which occurred in a time frame of approximately 140 days (from at least 12 April to 30 August 2013), see Pre-Trial Chamber I, *The Prosecutor v. Mahamat Said Abdel Kani*, Public redacted version of ‘Decision on the confirmation of charges against Mahamat Said Abdel Kani’, 9 December 2021, ICC-01/14-01/21-218-Red, para. 156. In contrast, the case against Mr Abd-Al-Rahman is concerned with crimes committed between at least August 2003 and at least April 2004, and across multiple localities, see Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, p. 50-70.

³³ Registry’s Observations, ICC-02/05-01/20-730-Conf-Exp, para. 45.

to why it has not been able to collect and transmit victims' applications as swiftly as projected.³⁴ Moreover, the Chamber finds that the Defence's assumption that the number of victims will remain low is contradicted by the Registry's assessment that 'at least a few additional hundreds of applications'³⁵ will be transmitted to the Chamber by the end of 2022, and that 'it continues to forecast a high number of applicants seeking participation in the Case.'³⁶

23. The deadline for the submission of applications for participation in the present case has been set as the end of the presentation of the Prosecution's case.³⁷ In the circumstances, outlined *supra*, it is premature to draw the conclusion that the number of victims admitted to participate will remain at the presently existing level.

24. The Chamber accepts as correct, the submission made by the CLRV that the Defence's interpretation of Rule 94(2) of the Rules³⁸ finds no support in the Court's jurisprudence or legal texts. Contrary to the Defence's argument, Rule 94(2) of the Rules does not prescribe the disclosure of reparation requests. As submitted by the CLRV,³⁹ Rule 94(2) of the Rules is intended to provide fair notification to an accused of the fact that reparation claims have been filed in the proceedings but does not require disclosure of the claims themselves.

25. Moreover, the Appeals Chamber in its recent judgment on reparations in the *Ntaganda* case, dealt with the Registry's notification of reparation requests.⁴⁰ It did not impose any obligation to disclose these applications to the accused. The Chamber is thus satisfied that the Registry's notification of reparation requests is in full compliance with Rule 94(2) of the Rules.

³⁴ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, paras 15-26.

³⁵ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 41.

³⁶ Registry's Observations, ICC-02/05-01/20-730-Conf-Exp, para. 14.

³⁷ Transcript of hearing, 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 70, line 2 to p. 71 line 6. However, victims' applications transmitted between the end of the Prosecution's case and the end of the evidence in the case will not be automatically rejected, but considered on a case-by-case basis, *see* Transcript of hearing, 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 70, p. 8, lines 8-12.

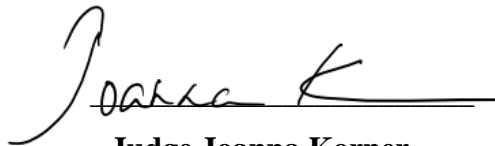

³⁸ Reconsideration Request, ICC-02/05-01/20-717-Conf, para. 25.

³⁹ CLRV Response, ICC-02/05-01/20-720, para. 6.

⁴⁰ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, ICC-01/04-02/06-2782 (A4 A5), para. 340 and fn. 724.

D. Conclusion

26. For the reasons set out above, the Chamber is satisfied that the Defence has failed to demonstrate that the fact that the number of victims admitted to participate has not reached, at this stage, the forecasted level, is not a “new factual element” which materially changes the basis of the earlier decision. The Chamber finds that the Defence’s arguments do not demonstrate any error of reasoning, nor do they indicate any issue which makes it necessary for the Chamber to reconsider its decision in order to prevent an injustice. For these reasons, the Chamber denies the Reconsideration Request in its entirety.

**Judge Joanna Korner****Presiding Judge****Judge Reine Alapini-Gansou****Judge Althea Violet Alexis-Windsor**

Dated this 29 September 2022

At The Hague, The Netherlands