



**Original: English**

No. **ICC-02/05-01/20**  
Date: **24 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**

**Decision on the Defence's request for leave to appeal the 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:

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Philipp Ambach

**Other**

1. On 19 October 2021, Trial Chamber I (the ‘Chamber’) issued its ‘Decision on victims’ participation and legal representation in trial proceedings’, in which it adopted the ABC approach.<sup>1</sup>
2. On 22 October 2021, the Defence filed a submission requesting the Chamber to depart from the ABC approach.<sup>2</sup>
3. On 12 November 2021, the Chamber issued an oral decision rejecting the Defence’s request to depart from the ABC approach.<sup>3</sup>
4. On 18 November 2021, the Defence filed a request for leave to appeal the Chamber’s oral decision.<sup>4</sup>
5. On 2 December 2021, the Chamber rejected the Defence’s request for leave to appeal.<sup>5</sup>
6. On 22 July 2022, the Defence requested the Chamber to reconsider its decision on victim participation of 19 October 2021.<sup>6</sup>
7. On 29 September 2022, the Chamber rejected the Defence’s request for reconsideration (the ‘Impugned Decision’).<sup>7</sup>
8. On 3 October 2022, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).<sup>8</sup>

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<sup>1</sup> ICC-02/05-01/20-494.

<sup>2</sup> Requête relative au processus d’admission des victimes à participer à la procédure, ICC-02/05-01/20-497.

<sup>3</sup> Transcript of hearing, ICC-02/05-01/20-T-017-CONF-ENG, p. 44, line 16 to p. 47, line 11.

<sup>4</sup> Requête aux fins d’autorisation d’interjeter appel de la décision orale de rejet la Requête ICC-02/05-01/20-497, ICC-02/05-01/20-520.

<sup>5</sup> Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, ICC-02/05-01/20-525.

<sup>6</sup> 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.

<sup>7</sup> Decision on the Defence’s request for reconsideration of the Decision on victims’ participation, ICC-02/05-01/20-759.

<sup>8</sup> Demande d’autorisation d’interjeter appel de la décision ICC ICC-02/05-01/20-759, ICC-02/05-01/20-762.

9. On 7 October 2022, the Common Legal Representatives for Victims (the ‘CLRv’) responded to the Request (the ‘Response’).<sup>9</sup>

10. The Prosecution did not file any response.

11. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,<sup>10</sup> and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Rome Statute (the ‘Statute’) in relation to its Request.

12. The Defence requests leave to appeal the Impugned Decision on the following issues:

- a. *‘Le critère applicable dans le choix de recourir, ou non, à l’approche A-B-C en tant que dérogation à la Règle 89-1 du RPP est-il, ainsi que la Défense le soumet en s’appuyant sur la jurisprudence précitée de l’Honorable Chambre d’Appel dans l’affaire Saïd, un critère lié au nombre de demandes de participation, ou, comme le dit la Décision, à un faisceau de critères incluant celui de la nature des charges de l’affaire ?’ (the ‘First Issue’)*<sup>11</sup>
- b. *‘La Règle 94-2 du RPP, telle qu’interprétée par l’Honorable Chambre d’Appel dans l’arrêt Ntaganda précité, rend-elle obligatoire la transmission des demandes de réparation à la Défense ?’ (the ‘Second Issue’)*<sup>12</sup>

13. The Defence submits that both issues significantly affect the fair conduct of proceedings. It argues that its right to receive victims’ applications for participation is one aspect of the right to a fair trial, to which no exception can be made unless their

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<sup>9</sup> Response on behalf of Victims to the Defence “Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-759”, ICC-02/05-01/20-765.

<sup>10</sup> Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; Decision on the Defence’s request for leave to appeal the Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3), 23 February 2022, ICC-02/05-01/20-605; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

<sup>11</sup> Request, ICC-02/05-01/20-762, para 4. The Chamber has unofficially translated the First Issue as follows: Is the criterion for deciding whether or not to use the ABC Approach as a derogation from Rule 89(1) of the Rules, as the Defence submits relying on the case law of the Appeals Chamber in the Saïd case, a criterion linked to the number of applications for participation, or, as held in the Impugned Decision, a set of criteria including the nature of the charges in the case?

<sup>12</sup> Request, ICC-02/05-01/20-762, para 4. The Chamber has unofficially translated the Second Issue as follows: Does Rule 94(2) of the Rules, as interpreted by the Appeal Chambers in the *Ntaganda* judgment, mandate the transmission of applications for reparations to the Defence?

number justifies it.<sup>13</sup> The Defence submits that procedural fairness also requires that requests for reparations be transmitted to the Defence.<sup>14</sup>

14. The Defence further avers that the immediate resolution of both issues by the Appeals Chamber will materially advance the proceedings. It argues that it is essential to end the continuing prejudice suffered by the Defence due to the non-disclosure of the applications for participation and reparations.<sup>15</sup>

15. In its response, The CLRV argue that the First Issue misconstrues the Impugned Decision<sup>16</sup> and merely disagrees with the Chamber's conclusion.<sup>17</sup> The CLRV aver that '[t]he question is premised on a supposed shift or slippage between the Decision, and the Chamber's earlier determination on the Defence's previous challenge to the continued application of the ABC Approach'.<sup>18</sup> They argue that no 'shift' or 'slippage' has taken place in the reasoning of the Chamber.<sup>19</sup>

16. The CLRV submit that the Second Issue misconstrues the Impugned Decision as the issue does not engage with the primary basis of the Impugned Decision's determination on Rule 94(2) of the Rules of Procedure and Evidence (the 'Rules') and that therefore the request should be dismissed as neither issue constitute an appealable one.<sup>20</sup>

17. The CLRV submit that the Second Issue also does not satisfy the cumulative criteria under Article 82(1)(d) of the Statute<sup>21</sup> arguing that the Second Issue does not affect the fair and expeditious conduct of proceedings as reparations requests play no role in assessing the criteria for participation as a victim in trial proceedings. Moreover, the immediate resolution of the issue will not materially advance the proceedings, as the Defence's access to reparations requests may properly be addressed at the reparations stage.<sup>22</sup> They further argue that, '[t]he primary basis

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<sup>13</sup> Request, ICC-02/05-01/20-762, para. 7.

<sup>14</sup> Request, ICC-02/05-01/20-762, para. 8.

<sup>15</sup> Request, ICC-02/05-01/20-762, para. 9.

<sup>16</sup> Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p.46, lines 15-23.

<sup>17</sup> Response, ICC-02/05-01/20-765, paras 8-9.

<sup>18</sup> Response, ICC-02/05-01/20-765, para. 6.

<sup>19</sup> Response, ICC-02/05-01/20-765, para. 6.

<sup>20</sup> Response, ICC-02/05-01/20-765, paras 11-12.

<sup>21</sup> Response, ICC-02/05-01/20-765, para. 2.

<sup>22</sup> Response, ICC-02/05-01/20-765, para. 14.

for the Trial Chamber's rejection of the Defence's position that Rule 94(2) of the Rules [...] requires transmission of reparations requests to the accused at the trial stage, was not the Appeals Chamber's Judgment in the *Ntaganda* case of 12 March 2022.<sup>23</sup>

18. The Chamber finds that with regard to the First Issue, the submissions of the CLRV have merit. The Defence yet again criticises the Chamber's application of the ABC approach (and thus the Chamber's original decision adopting this approach and its oral decision confirming it). However, the Defence fails to identify a specific factual and/or legal error in the Impugned Decision not to reconsider the ABC approach. In the Impugned Decision, the Chamber recalled that 'a request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber'.<sup>24</sup> Notwithstanding this finding, the Defence tries to re-litigate once more the application of the ABC approach in its Request. At no point, does the Defence argue that the legal requirements for reconsideration were fulfilled or that the Chamber erred in its interpretation of those legal requirements. As such, the First Issue does not arise out of the Impugned Decision.

19. In relation to the Second Issue, the Chamber accepts the CLRV's argument that '[g]iven that requests for reparations play no role in the assessment of whether an individual satisfies the criteria to participate as a victim in trial proceedings, Question 2 is not an issue that could significantly affect the fair and expeditious conduct of the proceedings.'<sup>25</sup> The Chamber recalls in this regard that reparations requests can only be entertained if and when a conviction against the accused is rendered.<sup>26</sup> It is thus evident that the transmission of reparations requests referred to in the Appeals Chamber's judgement in the *Ntaganda* case<sup>27</sup> applies to the reparations stage, and not to this stage of the trial proceedings. Accordingly, the Chamber finds that the Defence has failed to

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<sup>23</sup> Response, ICC-02/05-01/20-765, para. 11.

<sup>24</sup> Impugned Decision, ICC-02/05-01/20-759, para. 19.

<sup>25</sup> Response, ICC-02/05-01/20-765, para. 14.

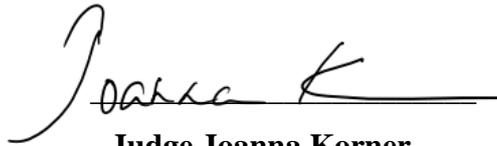
<sup>26</sup> Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Requests regarding Reparations, 1 July 2016, ICC-01/09-01/11-2038, para. 7.

<sup>27</sup> Appeals Chamber, *The Prosecutor c. 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. 363.

demonstrate that an immediate resolution by the Appeals Chamber of this matter may materially advance the proceedings.

20. Considering the cumulative nature of the requirement under Article 82(1)(d) of the Statute,<sup>28</sup> the Chamber will not consider the remaining criteria.

21. Considering the above, the Chamber rejects the Request in its entirety.

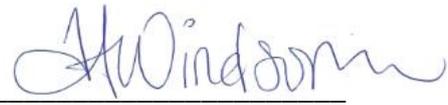


**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 24 October 2022

At The Hague, The Netherlands

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<sup>28</sup> Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, para. 21.