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Original: **English**

No.: **ICC-02/05-01/20**
Date: **7 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

Response on behalf of Victims to the Defence "Demande d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-759"

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

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

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I. Introduction

1. The Common Legal Representative of Victims ("CLRV") hereby responds to the Defence for Mr Ali Abd-Al-Rahman's ("Defence") "Demande d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-759".[1]

2. In the Application, the Defence seeks the Trial Chamber's leave pursuant to Article 82(1)(d) of the Rome Statute ("Statute") to appeal the Chamber's Decision of 29 September 2022,[2] which dismissed 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 94-2 du Règlement de Procédure et de Preuve".[3]

3. The Application should be dismissed. The first question identified in the Application does not constitute an appealable issue arising from the Decision. The second question identified in the Application likewise does not constitute an appealable issue, and otherwise does not satisfy the cumulative criteria for grant of leave to appeal a Chamber's decision under Article 82(1)(d) of the Statute.

II. Applicable Law

4. Article 82(1) of the Statute provides in relevant part that: "*Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: […] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*"

[1] Demande d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-759, 3 October 2022, ICC-02/05-01/20-762 ("Application").
[2] Decision on the Defence's request for reconsideration of the Decision on victims' participation, 29 September 2022, ICC-02/05-01/20-759.
[3] 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, 22 July 2022, ICC-02/05-01/20-717-Conf ("Reconsideration Request"). A public redacted version was filed on the same day: ICC-02/05-01/20-717-Red.

III. Submissions

a. Question 1 does not constitute an appeal issue arising from the Decision

5. The first question identified in the Application as purportedly arising from the Decision is as follows: "*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 ?*"[4]

6. This question does not arise from the Decision, and accordingly is not an appealable issue. The question is premised on a supposed shift or slippage[5] between the Decision, and the Chamber's earlier determination on the Defence's previous challenge to the continued application of the ABC Approach.[6] As the Chamber underlined in the Decision: "The Defence […] misconstrues the Chamber's [earlier] 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."[7]

7. The Trial Chamber's oral decision of 12 November 2021, rejecting the Defence's earlier challenge to the ABC Approach, was clear.[8] While the Chamber's oral decision referenced the Legal Representative of Victims' submission "that more victims are expected to submit application forms in the upcoming months",[9] the Chamber then highlighted and quoted from the oral submissions of the Registry, which had advised that the nature of the charges in the case, especially the allegations concerning intentionally directing attacks against the civilian

[4] Application, para. 4.
[5] Application, para. 2 ("La Défense soumet respectueusement que le glissement du critère du nombre de demandes de participation anticipées à celui de la nature des charges est contraire à la jurisprudence de l'Honorable Chambre d'Appel qui avait consacré le premier dans l'affaire Saïd" […]).
[6] Trial Chamber's Oral Decision of 12 November 2021, Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 46, lines 15-23.
[7] Decision, para. 22.
[8] Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 46, lines 15-23.
[9] *Id.*, p. 46, lines 15-16.

population and forceful transfer in relation to Kodoom and Bindisi, place "the number of potential victims affected by the alleged crimes […] in the thousands".[10]

8. The Chamber's Decision of 29 September 2022 is entirely consistent with the Chamber's oral decision of 12 November 2021. There has been no 'shift' or 'slippage' in the Chamber's reasoning. The Chamber's finding in the Decision that "a request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber",[11] should equally apply in the context of Question 1 of the Application.

9. Furthermore, and notwithstanding the Reconsideration Request's misconstruing the Trial Chamber's 12 November 2021 oral decision, the Chamber nonetheless engaged with the purported new fact identified by the Defence – namely, the Defence's "assumption that the number of victims will remain low".[12] The Chamber found this assumption unconvincing in view of "the Registry's assessment that 'at least a few additional hundreds of applications' 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'".[13] While the Defence does not share the Chamber's trust in the Registry assessment,[14] this constitutes mere disagreement with the Chamber, and accordingly provides no support for the qualification of Question 1 as an appealable issue.[15]

[10] *Id.*, p. 46, lines 17-23 (emphasis added).
[11] Decision, para. 19.
[12] *Id.*, para. 22.
[13] *Id.*, paras 22-23 (citing 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 94-2 du Règlement de Procédure et de Preuve" (ICC-02/05-01/20-717-Conf), 29 August 2022, ICC-02/05-01/20-730-Conf-Exp. A public redacted version of the Registry Observations was registered on 30 August 2022: ICC-02/05-01/20-730-Red.).
[14] Application, para. 2 ("jusque-là non vérifiées et pour lesquelles il n'existe aucun motif raisonnable de croire qu'elles puissent l'être dans un avenir prévisible").
[15] *See* Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA 3, 13 July 2016, para. 9 ("Only an 'issue' may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.").

b. Question 2 does not constitute an appealable issue, and otherwise does not satisfy the applicable test for leave to appeal

10. The Application identifies a second question purportedly arising from the Decision, as follows: "*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 réparations à la Défense ?*"

11. Once again, the Application misconstrues the Decision, and fails to identify an appealable issue. The primary basis for the Trial Chamber's rejection of the Defence's position that Rule 94(2) of the Rules of Procedure and Evidence ("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.[16] Instead, the Trial Chamber determined that Rule 94(2) requires only notification of the existence of reparations requests at the trial stage on the basis of its assessment of the Court's legal texts – most importantly the wording of Rule 94(2) itself – and the Court's jurisprudence as a whole.[17]

12. While the Decision found confirmation for the propriety of its interpretation of Rule 94(2) in the *Ntaganda* Judgment,[18] the Appeals Chamber Judgment was not the primary basis on which the Trial Chamber rendered its interpretation of Rule 94(2). As Question 2 does not engage with the primary basis of the Decision's determination on Rule 94(2) of the Rules, the question does not constitute an appealable issue arising from the Decision.

[16] *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) ("*Ntaganda* Judgment").
[17] Decision, para. 24 ("The Chamber accepts as correct, the submission made by the CLRV that the Defence's interpretation of Rule 94(2) of the Rules 38 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, 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.") (citing 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", 15 August 2022, ICC-02/05-01/20-720, para. 6).
[18] Decision, para. 25 (citing *Ntaganda* Judgment, para. 340 and fn. 724).

13. Furthermore, the Application's claim that the Decision manifestly erred in its reading of the *Ntaganda* Judgment is incorrect.[19] The paragraph of the Judgment relied on in the Application[20] pertains to the defence's ability to assess and make representations on reparations claims at the *reparations stage* of the proceedings under Article 75(3) of the Statute – *i.e.* after a decision convicting an accused is issued under Article 74 – in conformity with Rule 94(2) of the Rules.[21]

14. Lastly, even presuming Question 2 constitutes an appealable issue, it fails to satisfy the cumulative prongs of the leave to appeal test under Article 82(1)(d) of the Statute. Given 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. Should there be a conviction of the accused under Article 74 at the end of the trial stage, the matter of the accused's access to reparation requests may properly be dealt with at the Article 75 reparations stage, with no cognizable harm (let alone significant harm) attaching to the fair and expeditious conduct of the concluded trial proceedings. Nor can it be said that the outcome of the trial would be significantly impacted by the non-transmission of reparations requests to the Defence at the trial stage. Similarly, an immediate resolution by the Appeals Chamber of this matter would not materially advance the proceedings; as submitted above, the Defence's access to reparations requests may properly be addressed at the reparations stage.

IV. Relief requested

15. For the reasons above, the CLRV respectfully requests that the Trial Chamber dismiss the Defence Application for leave to appeal the Chamber's Decision of 29 September 2022.

[19] Application, para. 9 ("La Décision commet également une erreur manifeste de lecture de l'Arrêt Ntaganda en prétendant qu'il ne requiert pas la transmission des demandes de réparations à la Défense, alors qu'il le requiert expressément") (citing *Ntaganda* Judgment, para. 363).
[20] *Ibid*.
[21] Rule 94(2) states in relevant part: "Those notified shall file with the Registry any representation made under article 75, paragraph 3." (emphasis added).

Respectfully submitted,

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 7th of October 2022

At Berlin, Germany