



**Original: English**

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

**Date: 18 August 2020**

**PRE-TRIAL CHAMBER II**

**Before: Judge Rosario Salvatore Aitala, Single Judge**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')***

**Public**

Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda  
Mr James Stewart

**Counsel for Mr Abd-Al-Rahman**  
Mr Cyril Laucci

**Legal Representatives of Victims**

**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**  
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**JUDGE ROSARIO SALVATORE AITALA**, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,<sup>1</sup> having regard to the Preamble and Articles 1, 21, 57 to 61, and 75 of the Rome Statute (‘Statute’), Rules 94 to 99 and 103 of the Rules of Procedure and Evidence (‘Rules’), and Regulation 24(5) of the Regulations of the Court (‘Regulations’), issues this Decision on the Defence request and observations about reparations pursuant to article 75(1) of the Rome Statute (the ‘Request’).<sup>2</sup>

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute<sup>3</sup> and decided<sup>4</sup> to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’),<sup>5</sup> for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004.

2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute,<sup>6</sup> by issuing a second warrant of arrest against Mr Abd-Al-Rahman,<sup>7</sup> for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004.

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Court’s Detention Centre.

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<sup>1</sup> Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

<sup>2</sup> Requête et observations sur les réparations en vertu de l’Article 75-1, 17 July 2020, ICC-02/05-01/20-98.

<sup>3</sup> Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, ICC-02/05-56).

<sup>4</sup> Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

<sup>5</sup> Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

<sup>6</sup> Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

<sup>7</sup> Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

4. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge and the date for the confirmation of charges hearing was set for 7 December 2020.<sup>8</sup>

5. On 17 July 2020, the Defence submitted the Request asking the Single Judge to (i) consider the adoption and implementation in the present case of a series of proposed additional principles in reparations, pursuant to article 75(1) of the Statute; and (ii) consider inviting the submissions of observations on the proposed additional principles on reparations by *amicus curiae* pursuant to Rule 103(1) of the Rules. The Defence submits that the suspect does not consider it normal that victims would have to wait until the end of the proceedings to receive reparations and is concerned that there is a chance that the victims may receive nothing if the accused is found innocent and acquitted, regardless of the suffering they may have endured. Accordingly, his defence lawyer submits that the suspect expresses a candid concern about the victims and a legitimate desire to offer them reparations regardless of the determination of the Judges as to his guilt or innocence.<sup>9</sup>

6. In this context, the Defence argues that the Request could be the starting point for a broad reflection about the right of victims to reparations, independent of the outcome of criminal proceedings, evolving the current practice in a way more favourable to victims in accordance with the Statute and related legal texts.<sup>10</sup> The Defence indicates that the Single Judge should consider the complementarity, as opposed to the overlap, between article 75(1) and (2) of the Statute and its interpretation in light of the general international law related to the victims' right to reparations.<sup>11</sup>

7. On 23 July 2020, the Office of the Prosecutor (the 'Prosecution') responded to the Request (the 'Response'), arguing that the proposed cumbersome reparations regime has no basis in the Statute and must be rejected. Likewise, the Prosecution submits that the Defence's request for observations from *amicus curiae* should be dismissed, as the Court's legal framework is clear and no observations are necessary to

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<sup>8</sup> Transcript of hearing, ICC-02/05-01/20-T-001-ENG.

<sup>9</sup> ICC-02/05-01/20-98, para. 4.

<sup>10</sup> ICC-02/05-01/20-98, para. 5.

<sup>11</sup> ICC-02/05-01/20-98, para. 7.

assist the Single Judge in this determination. Instead, the Prosecution submits that, “it is in the interest of the victims that the Parties focus their resources on the ongoing pre-trial proceedings”.<sup>12</sup>

8. On 27 July 2020, the Defence submitted a Request for Leave to Reply to the Prosecution’s Response.<sup>13</sup>

9. At the outset, the Single Judge notes that the Request for Leave to Reply is of such a character as to, in fact, constitute a substantive reply to the issues raised in the Prosecution’s Response. The Single Judges strongly disapproves of the practice of filing such a substantive reply prior to leave being granted and, once again, reminds the Defence that this violates and virtually defeats the purpose of the provision.<sup>14</sup> As such, and having sufficient information upon which to make a decision on the Request, the leave to reply shall be denied.

10. As to the Request, the Single Judge stresses that the Court’s reparation regime indisputably reflects that it is logically conceived as a result of and addressed against individual perpetrators convicted by the Court. The Statute’s drafting history and the commentaries on the Statute,<sup>15</sup> as well as the Court’s consistent jurisprudence,<sup>16</sup> indicate that that the Court’s statutory reparations regime, although remedial and not punitive in nature,<sup>17</sup> relates to the convicted person’s accountability for his/her acts and to the person’s obligation to repair the harm and/or damages caused by his/her actions.

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<sup>12</sup> Prosecution’s Response to “Requête et observations sur les reparations en vertu de l’Article 75-1” (ICC-02/05-01/20-98), 23 July 2020, ICC-02/05-01/20-102.

<sup>13</sup> Requête en vertu de la norme 24-5 du Règlement de la Cour (autorisation de Réplique à ICC-02/05-01/20-102), 27 July 2020, ICC-02/05-01/20-104.

<sup>14</sup> Decision on the Defence request to amend the name of the case, 26 June 2020, ICC-02/05-01/20-8, paras 11-12.

<sup>15</sup> See, *inter alia*, Donat-Cattin D. (2015) Article 75. Reparations to Victims, in Triffterer O. and Ambos K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Third Edition, C.H.BECH-Hart-Nomos, pp. 1853-1870; Peter Lewis and Håkan Friman, Reparations to Victims, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), pp. 474-491; William A Schabas, Part 6 The Trial: Le Procès, Art.75 Reparations to victims/Réparation en faveur des victimes, in *The International Criminal Court: A Commentary on the Rome Statute* (Second Edition, Oxford University Press, 2016), pp. 1136-1146.

<sup>16</sup> See, *inter alia*, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Amended Order for Reparations, 3 March 2015, ICC-01/04-01/06-3129-AnxA, paras 2, 11, 20-21, 60-63; Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Requests regarding Reparations, 01 July 2016, ICC-01/09-01/11-2038, para. 6; Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 3 August 2018, ICC-01/05-01/08-3653, para. 3.

<sup>17</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, 8 March 2018, ICC-01/04-01/07-3778-Red, para. 185

Accordingly, the Court's proceedings on reparations can only commence once a person has been convicted by the Court.

11. In light of the above, the adoption and implementation of the additional principles of reparations proposed by the Defence, at this stage of the proceedings, would amount to an amendment of the Statute and the Court's legal framework, which falls outside the powers and duties of the Pre-Trial Chamber.

12. The role of the Pre-Trial Chamber during the pre-trial stage of the case leading to the confirmation of charges before trial is clearly determined in articles 57 to 61 of the Statute and the related rules and regulations. Nowhere in the Court's legal framework has a role been conceived for the Pre-Trial Chamber to deal with issues related to reparations for victims. Indeed, as the Prosecutor rightly points out, it is in the interest of the parties and the victims that the parties and the Chamber focus their limited resources in dealing with the ongoing pre-trial proceedings in the most expeditious and fair possible manner.

13. In the view of the Single Judge, the Request is based on a misunderstanding of the Court's reparation system and the role of the Pre-Trial Chamber during the pre-trial proceedings. In light of the above, the Single Judge considers that there is no legal basis for the Request, it does not fall within the Counsel's prerogatives and duties nor within the Chamber's sphere of competence, and, accordingly, should be dismissed *in limine*.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY  
REJECTS** the Request for Leave to Reply; and  
**DISMISSES** the Request, *in limine*.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of loops and a long horizontal stroke extending to the right.

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**Judge Rosario Salvatore Aitala**  
**Single Judge**

Dated this Tuesday, 18 August 2020

At The Hague, The Netherlands