

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **27 August 2020**

PRE-TRIAL CHAMBER II

Before: Judge Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Salvatore Aitala

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public

Prosecution Response to Request for Leave to Appeal “Decision on the Defence Request and Observations on Reparations pursuant to Article 75-1 of the Rome Statute”

Source: Office of the Prosecutor

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

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Introduction

1. The Single Judge of Pre-Trial Chamber II dismissed *in limine* the request by counsel for Mr Abd-Al-Rahman for the adoption of principles on reparations, in the meaning of article 75(1) of the Statute, prior to the conclusion of the Court's proceedings under articles 61 (confirmation of charges) or 62-74 (trial).¹
2. The Single Judge found that the Request lacked any legal basis (since it was "based on a misunderstanding of the Court's reparation system and the role of the Pre-Trial Chamber during the pre-trial proceedings"), and fell outside both "the Chamber's sphere of competence" and "Counsel's prerogatives and duties".²
3. Defence counsel has now simultaneously sought leave to appeal this decision from Pre-Trial Chamber II, under article 82(1)(d) of the Statute,³ and directly filed a notice of appeal with the Appeals Chamber, under article 82(1)(a).⁴ The Prosecution has today also responded to the Appeals Chamber's order for submissions on the admissibility of the Notice of Appeal.⁵
4. While the Request should indeed be addressed on its own merits,⁶ the Prosecution submits that it should be promptly dismissed.

Submissions

5. The Request fails to satisfy any of the requirements of article 82(1)(d) of the Statute, which are a necessary condition for granting leave to appeal the Decision.⁷ The single issue proposed for certification is no more than a disagreement with the Decision, which it misconstrues, and does not constitute an 'appealable' issue. Nor would the proposed issue significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, because it concerns a proposed course of action which is fundamentally irrelevant to the determination of the criminal responsibility of Mr Abd-Al-Rahman at the present stage of proceedings. The supposed advantages described in the Request are no more than speculation.

¹ [ICC-02/05-01/20-117](#) ("Decision"), para. 13.

² [Decision](#), para. 13.

³ [ICC-02/05-01/20-129](#) ("Request").

⁴ [ICC-02/05-01/20-128](#) ("Notice of Appeal").

⁵ See [ICC-02/05-01/20-135 OA3](#) (inviting submissions on the admissibility of the Notice of Appeal).

⁶ [Request](#), paras. 5-6.

⁷ *Contra* [Request](#), paras. 13-18.

For similar reasons, the immediate intervention of the Appeals Chamber on the proposed issue would not—and, indeed, could not—materially advance the proceedings.

6. While the Prosecution agrees that the Pre-Trial Chamber has discretion under article 57(2)(b) of the Statute and rule 7(3) to decide to rule on the Request in its plenary format (*en banc*), the Prosecution submits that it need not do so in this case.⁸ Since the Decision did not rule on the jurisdiction of the Court, in the meaning of article 19(1), the Single Judge did not enter into a matter reserved for the Pre-Trial Chamber *en banc* by article 57(2)(a).⁹ Consequently, neither does the Request under article 82(1)(d). Moreover, there is no proper basis to suggest that the Single Judge should seek to recuse himself pursuant to article 41(1) of the Statute.¹⁰

The proposed issue should not be certified for appeal under article 82(1)(d) of the Statute

7. The Request proposes one issue for certification under article 82(1)(d) of the Statute:

L'Honorable Chambre préliminaire II était-elle compétente pour considérer les propositions de la Défense contenues dans la Requête en vertu de l'Article 75-1 en vues de l'adoption des Principes Additionnels de la Réparation dans l'affaire ICC-02/05-01/20 et ouvrir le débat à la soumission d'observations sue ces propositions en vertu de le Règle 103-1 du RPP ?¹¹

8. However, this issue does not satisfy the requirements of article 82(1)(d). As the following paragraphs explain, it represents no more than a disagreement with the Decision, and would neither significantly affect the fair and expeditious conduct of the proceedings nor the outcome of the trial. The immediate intervention of the Appeals Chamber on this issue would not materially advance the proceedings in any way.

The proposed issue is not 'appealable', and represents no more than a disagreement with the Decision

9. As the Court has constantly required, “an appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there

⁸ *Contra* [Request](#), para. 7.

⁹ *Contra* [Request](#), paras. 9-11.

¹⁰ *Contra* [Request](#), para. 12.

¹¹ [Request](#), para. 15.

is disagreement or conflicting opinion’.”¹² Identifying such an issue is a precondition for the application of the requirements expressly set out in article 82(1)(d) of the Statute, and failure to meet this requirement warrants dismissal *in limine* of a request for certification.

10. The proposed issue fails this requirement. In essence, the proposed issue simply asks whether the Single Judge was correct in dismissing the Request—and consequently, if certified for appeal, will pave the way for counsel merely to repeat his unsuccessful submissions before the Appeals Chamber. This is incompatible with the corrective function of appellate proceedings, which are concerned with the merits of the reasoning adopted by the first instance chamber in its decision, rather than merely offering the parties a ‘second bite at the cherry’.¹³

11. Further, the Request fundamentally misunderstands the Decision. While the Decision did refer to the “competence” of the Pre-Trial Chamber,¹⁴ this was in the context of its reasoning that it was premature and untimely at the current stage of proceedings to consider matters under article 75(1) of the Statute, which permits the Court to establish principles for reparations only after the conviction of an accused person.¹⁵ Thus, the *ratio decidendi* of the Decision was simply that the conditions precedent to the application of article 75(1) were yet to occur. The absence of any statutory reference to the role of the Pre-Trial Chamber in matters to do with reparations was merely an aspect of the Single Judge’s reasoning concerning the proper timing of an article 75(1) decision.

12. By misunderstanding and failing to engage with the substance of the reasoning in the Decision, the Request fails to identify an appealable issue which was genuinely decisive in its disposition. Instead, it merely disputes the overall correctness of the Decision. On this basis alone, the Request may be dismissed.

¹² See e.g. [ICC-01/04-168 OA3](#), para. 9. See also [ICC-01/04-01/10-443](#), p. 4; [ICC-01/09-02/11-275](#), para. 11; [ICC-01/09-02/11-211](#), para. 12; [ICC-01/04-01/10-288](#), p. 6.

¹³ See e.g. [ICC-01/04-02/06-604](#), para. 17 (observing that an issue which “is framed in a broad manner which appears to implicate the entirety of the Impugned Decision [...] consequently failed to adequately specify the alleged legal or factual in a manner which could constitute an appealable issue”, and that an issue which “appears to merely challenge the entirety of the reasoning in the Impugned Decision and to seek a *de novo* review of the matter by the Appeals Chamber” likewise “does not constitute an appealable issue”). See also [ICC-02/11-01/11-307](#), para. 70 (“Leave to appeal cannot be granted if the party seeking to appeal [...] seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision”); [ICC-02/11-01/11-350](#), para. 40 (“mere reiteration of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber are not sufficient”).

¹⁴ [Decision](#), para. 13. See also para. 12 (referring to the “role” of the Pre-Trial Chamber).

¹⁵ [Decision](#), paras. 10-12.

The proposed issue would not significantly affect the fair and expeditious conduct of the proceedings

13. Claims that the proposed issue would significantly affect the fair and expeditious conduct of the proceedings are impermissibly speculative, and mistake the relevant considerations under article 82(1)(d).¹⁶

14. In particular, the Request overlooks that “the proceedings” which are relevant for the purpose of article 82(1)(d) are the proceedings in the case against Mr Abd-Al-Rahman, and not hypothetical proceedings in the situation in Darfur more generally. This misconception is important—and fatal—because it means that the arguments in the Request generally fail to relate the proposed issue to considerations relevant to the proceedings to determine the criminal responsibility of Mr Abd-Al-Rahman. In this context, it is immaterial whether counsel’s proposed course of action will (in the view of counsel for Mr Abd-Al-Rahman) advance the cause of reparations for victims in the situation,¹⁷ or indeed constitute a desirable innovation for the “the Court” as an institution.¹⁸ In the first respect, this encroaches on the independent assistance mandate of the Trust Fund for Victims, which exists precisely to help victims in ICC situations but in a way which is *not* associated with the Court’s findings of criminal responsibility.¹⁹ In the second respect, this is a matter for the Assembly of States Parties, or the organs of the Court in their non-judicial capacity, but is not a relevant consideration in judicial proceedings. Consequently, while both considerations are important, they need not be—and should not be—seen as relevant to the advancement of pre-trial and trial proceedings to determine criminal responsibility.

15. The further implication in the Request—that creating an alternative means of reparation for victims in the situation, which does not depend on a determination of Mr Abd-Al-Rahman’s criminal responsibility, will reduce the number of victims participating in this case—is both speculative and misconceived.²⁰ It wrongly presupposes that victims only participate in the criminal proceedings at this Court with a view to reparations, and overlooks that indeed it is not required for victims to participate in the trial in order to be potentially eligible for reparations.²¹ Not only is there no proper basis for the supposition in the Request,

¹⁶ *Contra* [Request](#), para. 16. *See also* para. 18.

¹⁷ *Contra* [Request](#), para. 16.

¹⁸ *Contra* [Request](#), para. 18.

¹⁹ *See e.g.* [ICC-01/04-01/06-3129 A A2 A3](#), paras. 107-114, 199, 215.

²⁰ *Contra* [Request](#), para. 16.

²¹ *See e.g.* [ICC-01/04-02/06-2366](#), paras. 3-4 (distinguishing between the 2,129 victims authorised to participate in the case pursuant to article 68(3), and additional victims who may be identified as eligible for reparations).

but it is fundamentally inconsistent with the premise of article 68(3) of the Statute—which expressly anticipates the presentation and consideration of the views and concerns of victims, by appropriate modalities—and therefore cannot be entertained by the Pre-Trial Chamber. The participation of victims in trials at this Court is not an encumbrance to be minimised, as the Request tends to suggest,²² but a strength of the Statute which is to be embraced. Any fear that participating victims might act as a ‘second prosecutor’ is adequately answered by the judicial supervision of the chambers of the Court, in accordance with the Court’s legal texts.²³

16. It follows that the proposed issue cannot be said to affect the fair and expeditious conduct of the proceedings at all, let alone to “significantly” affect it. On this basis alone, again, the Request must be dismissed.

The proposed issue would not significantly affect the outcome of the trial

17. The Request does not even attempt to claim that the proposed issue would significantly affect the outcome of the trial.²⁴ Consequently, the Request cannot be sustained on this basis.

Immediate resolution of the proposed issue by the Appeals Chamber would not materially advance the proceedings

18. The intervention of the Appeals Chamber on the proposed issue cannot materially advance the proceedings.²⁵ Again, there is simply no basis to suggest that the Appeals Chamber’s intervention on the proposed issue will “liberate” the pre-trial and trial proceedings from the “weight” of victim participation,²⁶ nor—even if there were—could this be a proper consideration to take into account, insofar as it is contrary to article 68(3) of the Statute.

19. Rather than advancing the proceedings, an appeal on the proposed issue would delay their expeditious resolution, by creating litigation on a subject of no immediate relevance or benefit for the hearing of this case. It would constitute no more than an academic exercise with little benefit for Mr Abd-Al-Rahman, even if it were to be successful.

²² See also [Request](#), para. 17.

²³ *Contra* [Request](#), para. 16.

²⁴ See [Request](#), paras. 16-18.

²⁵ *Contra* [Request](#), para. 17.

²⁶ [Request](#), para. 17.

The Pre-Trial Chamber need not exercise its discretion, under rule 7(3), to decide the Request *en banc*

20. Article 57(2) of the Statute provides that a single judge of the Pre-Trial Chamber may exercise any of the functions provided in the Statute, other than those in articles 15, 18, 19, 54(2), 61(7), or 72, or unless a majority of the Pre-Trial Chamber or any provision of the Rules otherwise provides. Correspondingly, rule 7(3) provides that the Pre-Trial Chamber, either of its own motion or at the request of a party, may decide that the functions of the Single Judge should be exercised by the full Pre-Trial Chamber, sitting *en banc*.

21. In this case, contrary to the Request, the Pre-Trial Chamber need not exercise its discretion under rule 7(3) to decide the current matter *en banc*.²⁷ It suffices for the Single Judge to rule on the Request, consistent with the constant practice of the Court by which the original decision-maker will generally hear and rule upon applications under article 82(1)(d) with respect to their own decision.²⁸ Since the Decision did not entail the exercise of any function reserved to the Pre-Trial Chamber *en banc*,²⁹ nothing in the Request can do so either.³⁰ Nor is there any proper basis in these circumstances to suggest that the Single Judge should recuse himself.³¹

The Decision did not address a reserved matter under article 57(2)(a) of the Statute

22. The Request fails to establish that the Decision entailed the exercise of a function reserved to the full Pre-Trial Chamber.³² Specifically, the Decision did not amount to a ruling under article 19(1) of the Statute³³ because it did not constitute a ruling on the “jurisdiction of the Court”.³⁴ Rather, it was no more than a ruling on the untimeliness of an article 75(1) decision, and a reflection that this was procedurally inapposite at the current stage of proceedings. It did not find that the Court was unable to rule under article 75(1), but merely

²⁷ *Contra* [Request](#), para. 7.

²⁸ This has been the constant practice of the Court under article 82(1)(d), consistent with the approach generally adopted by other international criminal tribunals. While some *ad hoc* tribunals initially adopted a different approach, this model was soon rejected. For example, the most recent formulation of rule 73(B) of the ICTY Rules of Procedure and Evidence provides for the grant of leave to appeal interlocutory decisions by the Trial Chamber (the only first-instance chamber of the ICTY), and is thus materially similar to article 82(1)(d) of the Statute of this Court. This formulation was introduced on 23 April 2002, and replaced a system by which an ICTY Trial Chamber could self-certify on some limited matters (former rule 73(C)), or otherwise leave was required from a bench of the ICTY Appeals Chamber (former rule 73(D)).

²⁹ *Contra* [Request](#), para. 9.

³⁰ *Contra* [Request](#), para. 11.

³¹ *Contra* [Request](#), para. 12.

³² *Contra* [Request](#), para. 9.

³³ *Contra* [Request](#), para. 9.

³⁴ See [Statute](#), art. 19(1). See further e.g. [ICC-01/09-78 OA](#) (“Kenya Appeal Decision”), paras. 15-16.

that it was improper for it to do so at the request of counsel for Mr Abd-Al-Rahman and at the present time.³⁵ Such a decision is not jurisdictional in nature, in the meaning of article 19(1).

23. Furthermore, the Pre-Trial Chamber may take comfort from the Notice of Appeal which has separately been filed by counsel for Mr Abd-Al-Rahman with the Appeals Chamber, under article 82(1)(a) of the Statute.³⁶ If the Decision was in any sense jurisdictional in nature, then the Appeals Chamber will independently consider the direct appeal admissible,³⁷ and the Request is entirely moot. But, correspondingly, if the Appeals Chamber determines that the direct appeal is *inadmissible* because it is not jurisdictional in nature, then necessarily the Decision *cannot* have been taken under article 19(1), and hence the matter was not reserved to the Pre-Trial Chamber *en banc*. Accordingly, in any circumstances where it is necessary for the Request to be decided, it cannot be the case that the Decision was based on ruling on a reserved matter.

24. The Prosecution further notes that, beyond the strict purpose of seeking the Pre-Trial Chamber's exercise of its discretion under rule 7(3), the submissions in the Request which purport to show that the Single Judge exceeded his authority must be discounted.³⁸ It is well established that applications under article 82(1)(d) of the Statute are not concerned with the substantive correctness of the impugned decision, but only whether the conditions in article 82(1)(d) are satisfied with regard to the issue proposed.

There is no basis to suggest that the Single Judge should recuse himself

25. The Request is wrong to suggest that the Single Judge should seek to recuse himself from the Pre-Trial Chamber for the purpose of resolving the present matter, under article 41(1) of the Statute.³⁹ Nothing in his ruling in the Decision suggests that he would be unable to properly discharge his functions as a Judge, in accordance with his obligations under the Statute, in ruling on a request for certification of that decision under article 82(1)(d) of the Statute. Furthermore, since article 57(2)(b) of the Statute requires only a majority of the Pre-Trial Chamber to determine that a matter should be heard by the Pre-Trial Chamber *en banc*, nothing in counsel's further request under rule 7(3) necessarily requires the assent of the

³⁵ See above para. 11.

³⁶ See above para. 3.

³⁷ The Appeals Chamber has already indicated its intention to examine the admissibility of the Notice of Appeal: see above fn. 5.

³⁸ Cf. [Request](#), para. 10.

³⁹ Contra [Request](#), para. 12.

Single Judge. To the contrary, it is anticipated in this provision that a single judge may not always concur in the decision of the Pre-Trial Chamber to hear a matter *en banc*.

Conclusion

26. For all the reasons above, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 27th day of August 2020

At The Hague, The Netherlands