



Original: English

No. ICC-02/05-01/20

Date: 31 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 for Leave to Appeal the Decision 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, Prosecutor
Mr James Stewart
Mr Julian Nicholls

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

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,¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ('*Ali Kushayb*') (the '*Abd-Al-Rahman* case'), having regard to Article 82(1)(d) of the Rome Statute (the 'Statute') and Rule 155 of the Rules of Procedure and Evidence (the 'Rules'), issues this 'Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75(1) of the Rome Statute'.

1. The Single Judge recalls the procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.²
2. On 17 July 2020, the Defence submitted a 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 'Article 75 Request').³
3. On 18 August 2020, the Single Judge issued the 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute', in which the Single Judge found, *inter alia*, that the Article 75 Request 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 that there was no legal basis for the request, it did not fall within the Counsel's prerogatives and duties nor within the Chamber's sphere of competence, and, accordingly, dismissed it *in limine* (the 'Decision').⁴

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

² *See, for example*, Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute, 18 August 2020, ICC-02/05-01/20-117, paras 1-4.

³ Requête et observations sur les réparations en vertu de l'Article 75-1, ICC-02/05-01/20-98.

⁴ ICC-02/05-01/20-117, para. 13.

4. On 24 August 2020, the Defence submitted a request for leave to appeal the Decision (the ‘Request’),⁵ on the following proposed issue:

« l’Honorable Chambre préliminaire II était-elle compétente pour considérer les propositions de la Défense continues 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 sur ces propositions en vertu de la Règle 103-1 du RPP? » (the ‘Issue’).⁶

5. The Defence submits that the Issue will have a significant impact on the fair and expeditious conduct of the proceedings, insofar as it will impact on the time and extent of victims’ participation in the case, considerably accelerating the proceedings and putting an end to the current system which, by making reparations conditional upon a conviction, results in victims having an interest in supporting the Prosecutor’s case.⁷ The Defence further submits that the resolution of this matter by the Appeals Chamber would significantly advance the proceedings against Mr Abd-Al-Rahman, insofar as, if the proposed additional principles on reparations were to be adopted, the criminal aspect of this case would be freed from most of the burden of victim participation, as they may choose to participate only in the parallel reparation procedures.⁸

6. On 27 August 2020, the Prosecutor submitted a response, opposing the Request (the ‘Response’).⁹ The Prosecutor argues that the Request should be dismissed, as it constitutes no more than a disagreement with the Decision, and does not satisfy any of the requirements of article 82(1)(d) of the Statute.¹⁰

7. The Prosecutor further submits that the Issue essentially asks whether the Single Judge was correct in dismissing the Request, and if certified for appeal, ‘will pave the way for counsel merely to repeat his unsuccessful submissions before the Appeals

⁵ Demande d’autorisation d’interjeter appel de la «*Decision on the Defence Request and Observations on Reparations pursuant to Article 75-1 of the Rome Statute*» (ICC-02/05-01/20-118), ICC-02/05-01/20-129.

⁶ ICC-02/05-01/20-129, para. 15.

⁷ ICC-02/05-01/20-129, para. 16.

⁸ ICC-02/05-01/20-129, para. 17.

⁹ 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”, ICC-02/05-01/20-138.

¹⁰ ICC-02/05-01/20-138, para. 5.

Chamber’.¹¹ Further, in the view of the Prosecutor, the arguments in the Request ‘fail to relate the proposed issue to considerations relevant to the proceedings’, noting that the relevant proceedings are those against Mr Abd-Al-Rahman, and ‘not hypothetical proceedings in the situation in Darfur more generally’.¹²

8. On 31 August 2020, the Defence submitted a Request for Leave to Reply the Prosecutor’s Response.¹³

9. At the outset, the Single Judge notes that the Request for Leave to Reply is, once again, of such a character as to, in fact, constitute a substantive reply to the issues raised in the Prosecutor’s Response. The Single Judge reiterates his strong disapproval for the practice, reminding the Defence that this violates and virtually defeats the purpose of the provision,¹⁴ and instructing the Defence to, in the future, refrain from filing such substantive replies prior to leave being granted. As such, and having sufficient information upon which to make a decision on the Request, the leave to reply shall be denied.

10. The Chamber recalls that pursuant to article 82(1)(d) of the Statute, either party may appeal “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”.

11. Upon consideration of the arguments presented by the Defence, and having considered the criteria set out under article 82(1)(d) of the Statute, the Single Judge hereby grants the Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

INSTRUCTS the Defence to refrain from filing substantive replies prior to leave being granted;

¹¹ ICC-02/05-01/20-138, para. 10.

¹² ICC-02/05-01/20-138, para. 14.

¹³ Requête en vertu de la norme 24-5 (Réplique à ICC-02/05-01/20-138), ICC-02/05-01/20-140.

¹⁴ Decision on the Defence request to amend the name of the case, 26 June 2020, ICC-02/05-01/20-8, paras 11-12; ICC-02/05-01/20-117, para. 9.

REJECTS the Request for Leave to Reply; and

GRANTS the Request for Leave to Appeal.

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.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Monday, 31 August 2020

At The Hague, The Netherlands