

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/05-01/20
Date: 21 September 2020

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN DARFUR, SUDAN

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

Public

**Prosecution response to “Mémoire d’appel de la décision ICC-02/05-01/20-117”
(ICC-02/05-01/20-147)**

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Court to:

The Office of the Prosecutor

Mr James Stewart, Deputy Prosecutor

Ms Helen Brady

Counsel for Mr Abd-Al-Rahman

Mr Cyril Laucci

Legal Representatives of the Victims

**Legal Representatives of the
Applicants**

Unrepresented Victims

Unrepresented Applicants

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**

I. INTRODUCTION

1. Mr Abd-Al-Rahman’s appeal against the decision of the Single Judge of Pre-Trial Chamber II (“Single Judge”) dismissing his request for the adoption of principles on reparations under article 75(1) of the Statute, before the conclusion of the Court’s proceedings under articles 61 (confirmation of charges) or 62-74 (trial) should be rejected.¹ The Single Judge correctly 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

2. Mr Abd-Al-Rahman (“the Appellant”)’s four grounds of appeal should be dismissed. The first ground of appeal misunderstands the Decision. The Single Judge correctly noted that the Request “would amount to an amendment of the Statute and the Court’s legal framework”³ because it was devoid of any legal basis; thus, in order to grant the Appellant’s Request, the Court’s legal framework would have to be amended. The second ground of appeal misunderstands the Court’s legal framework. The cumbersome reparation regime proposed by the Appellant has no basis in the Statute, which already effectively caters for the victims’ right to reparations in accordance with the Court’s mandate. Since the Court is designed to establish individual criminal responsibility for crimes under the Statute, the Court’s reparations regime reflects this context. An ICC Chamber may order reparations only after a conviction has been rendered. Further, a reparations order is directed against the convicted person(s), who must account for their acts and repair the harm that they caused. Beyond the Court-ordered reparations regime, the Trust Fund for Victims (“TFV”) may also provide assistance to victims within a situation and independently from any ongoing judicial proceedings.

3. Further, the third and fourth grounds of appeal fall beyond, and are not intrinsically linked to, the single issue for which leave to appeal was granted.⁴ Accordingly, they should

¹ ICC-02/05-01/20-117 (“[Decision](#)”), para. 13; *see* ICC-02/05-01/20-147 (“[Appeal](#)”) and ICC-02/05-01/20-98 (“[Request](#)”). The Request was 56 pages and thus exceeded the 20 pages page-limit set out in regulation 37(1) of the Regulations of the Court.

² [Decision](#), para. 13.

³ [Decision](#), para. 11.

⁴ [ICC-02/05-01/20-141](#), para. 4 (defining the proposed issue: “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 sur ces propositions en vertu de la Règle 103-1 du RPP?”).

be summarily dismissed. Finally, the Appellant's request for observations from *amici curiae* should likewise be rejected. The Court's legal framework is clear and no observations from interested participants are necessary to assist the Appeals Chamber in its determination.

4. Just as the Appeals Chamber dismissed the Appellant's direct appeal against the same Decision under article 82(1)(a),⁵ it should likewise dismiss this Appeal.

II. SUBMISSIONS

5. On 31 August 2020, the Single Judge granted the Appellant's leave to appeal the Decision with respect to a single issue:

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 vue 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?⁶

6. The Single Judge did not explain how the Appellant had demonstrated that the requirements under article 82(1)(d) were met.⁷ In any event, the Appellant's four grounds of appeal should be dismissed. The Appellant misunderstands the Decision, misapprehends the Court's legal framework and goes beyond the issue for which leave to appeal was granted:

- *First*, the Appellant submits that the Single Judge legally and factually erred in finding that the Request “would amount to an amendment of the Statute and the Court's legal framework”.⁸ This first ground should be rejected because the Appellant misunderstands the Decision; the Single Judge made this remark because “there is no legal basis for the Request”.⁹
- *Second*, the Appellant submits that the Single Judge legally erred in finding that “there is no legal basis for the Request, it does not fall within the Counsel's prerogatives and duties

⁵ [ICC-02/05-01/20-145](#), paras. 8-9.

⁶ [ICC-02/05-01/20-141](#), para. 4.

⁷ [ICC-02/05-01/20-141](#), para. 11 (noting that “[u]pon 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”).

⁸ [Appeal](#), paras. 15-19, citing [Decision](#), para. 11.

⁹ [Decision](#), para. 13.

nor within the Chamber's sphere of competence".¹⁰ This second ground should be rejected because the Appellant misunderstands the Court's legal framework. As found by the Single Judge, an ICC Chamber may not implement a reparations regime before a conviction is rendered.

- *Third*, the Appellant submits that the Single Judge erred in not allowing the Pre-Trial Chamber to rule on the Request once he had found that the Request raised a jurisdictional issue.¹¹ This third ground should be summarily dismissed because it falls beyond, and is not intrinsically linked to, the issue for which leave to appeal was granted.¹² In any event, the Appellant misunderstands the Decision: the Single Judge did not find that the Request raised an issue of jurisdiction, nor was the Decision a ruling on jurisdiction within the terms of article 19(1) of the Statute.
- *Fourth*, the Appellant submits that the Single Judge erred in not seeking the views of the victims (or non-governmental organisations instead of the victims) under article 68(3) before issuing the Decision.¹³ Likewise, this fourth ground should be summarily dismissed because it falls beyond, and is not intrinsically linked to, the issue for which leave to appeal was granted. In any event, the Appellant misunderstands the Court's legal framework. Since the Request has no legal basis, the Single Judge correctly rejected it without requesting further observations.

A. First Ground: the Single Judge did not err in finding that the Request would amount to an amendment of the Statute and the Court's legal framework

7. In his first ground of appeal, the Appellant disputes the Single Judge's finding that "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*".¹⁴ The Appellant is unclear on whether the Single Judge considered that he (the Appellant) had effectively asked for an amendment of the Statute, or whether the Single Judge had simply stated his opinion.¹⁵ On the former, the Appellant

¹⁰ [Appeal](#), paras. 20-32, citing [Decision](#), para. 13.

¹¹ [Appeal](#), paras. 33-38.

¹² [Gbagbo Confirmation AD](#), para. 64; ICC-01/13-98 OA2 ("[Comoros AD](#)"), para. 56.

¹³ [Appeal](#), paras. 39-43.

¹⁴ [Appeal](#), paras. 15-19, referring to [Decision](#), para. 11 (emphasis added).

¹⁵ [Appeal](#), para. 15.

explains that he did not ask for an amendment;¹⁶ and on the latter, he submits that the Single Judge erred if he considered that an amendment was necessary to grant the Request.¹⁷ To the contrary, he insists that his Request is consistent with provisions of the Statute and the Rules of Procedure and Evidence.¹⁸

8. The Appellant misunderstands the Decision. The Single Judge understood his Request and correctly concluded that it “would amount to an amendment of the Statute and the Court’s legal framework”¹⁹ *because* “there is no legal basis for the Request”.²⁰ In other words, that in order to grant the Request, the Court’s legal framework (in particular article 75) would need to be modified.²¹

9. Accordingly, since the Appellant misunderstands the Decision, the first ground of appeal should be dismissed.²²

B. Second Ground: the Single Judge correctly found that the Request had no legal basis

10. The Appellant argues that the Single Judge erred in finding that his Request had no legal basis.²³ He submits that the Statute allows for different reparation regimes: (i) the regime applied by the Court so far—based on article 75(2), and triggered after a conviction; and (ii) the ‘novel’ regime that he advocates for—based on article 75(1), and which may operate anytime and independently from a conviction.²⁴ According to the Appellant, the latter regime is possible because article 75(1) refers to the “Court”,²⁵ and certain rules do not expressly refer to any stage of the proceedings.²⁶ The Appellant suggests that the former regime—the only one applied at the Court until now—is contrary to the presumption of

¹⁶ [Appeal](#), para. 16.

¹⁷ [Appeal](#), paras. 17-18.

¹⁸ [Appeal](#), para. 17.

¹⁹ [Decision](#), para. 11.

²⁰ [Decision](#), para. 13.

²¹ Other Chambers have likewise rejected applications on the basis that the relief requested is not provided for in the Court’s legal framework and that, accordingly, an amendment would be necessary in order to grant the relief: *see e.g. Katanga Article 108 AD*, para. 16 (“The Appeals Chamber further notes that, where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place. The Appeals Chamber therefore considers that there is merit in the Assembly of States Parties addressing whether the Court’s underlying legal texts should be amended so as to permit appellate review in relation to the decision taken under article 108 of the Statute.”)

²² The Prosecution addresses the Appellant’s legal arguments regarding the consistency of his Request with the Court’s legal framework ([Request](#), para. 17) in responding to the second ground of appeal, where the same arguments are made.

²³ [Appeal](#), paras. 20-32; *see also* para. 17.

²⁴ [Appeal](#), paras. 17, 22, 25.

²⁵ [Statute](#), art. 75(1): (“The Court shall establish principles relating to reparations [...]”).

²⁶ [Appeal](#), paras. 17-24.

innocence of the suspect or accused person under article 66.²⁷ The Appellant further submits that he had the prerogative to file the Request²⁸ and that the Pre-Trial Chamber had the competence (or jurisdiction) to rule on it.²⁹

11. The Appellant’s arguments are incorrect. As the Single Judge correctly found, the Request has no statutory basis.³⁰ It misunderstands the Court’s legal framework and disregards the Court’s consistent jurisprudence.³¹ It misrepresents the drafting history and ignores the commentaries.³² All of this indicates that the Court’s reparations regime “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”.³³

12. *First*, an ICC Chamber may only award reparations pursuant to article 75 *after* a conviction decision. Once the criminal responsibility of a person is established, the convicted person shall be responsible for repairing the harm and/or damages caused by his or her crime.³⁴ *Second*, principles under the first sentence of article 75(1) are general concepts formulated in light of the circumstances of a specific case and on the basis of which the order for reparations may be rendered; they do not allow for a self-standing reparations regime detached from a conviction and a reparations order. *Third*, the TFV’s assistance mandate already permits the TFV (an administrative body) to provide assistance to victims independently from a conviction. Their activities are subject to oversight by the TFV’s Board of Directors and not to judicial direction or decision. Conversely, the TFV’s reparations mandate, that is when the TFV implements a reparations order made by a Chamber following a conviction, is subject to judicial oversight. *Fourth*, Counsel cannot request—and much less expect to be granted—something that the Court’s legal framework does not provide for. *Finally*, and for the same reasons, the Pre-Trial Chamber (or the Single Judge) cannot award a remedy which is not regulated in the Statute.

²⁷ [Appeal](#), para. 17.

²⁸ [Appeal](#), paras. 27-30.

²⁹ [Appeal](#), para. 31.

³⁰ [Decision](#), para. 13.

³¹ [Decision](#), para. 10.

³² [Decision](#), para. 10.

³³ [Decision](#), para. 10.

³⁴ The Appellant erroneously submits that this argument was disallowed by the Single Judge: [Appeal](#), para. 25.

(a) The Court’s reparations regime depends on a conviction

13. The Appellant suggests that a Pre-Trial Chamber may award reparations detached from judicial proceedings.³⁵ He submits that a Chamber may do so even in the absence of a conviction and without a reparations order having been made under article 75(2).³⁶ According to the Appellant, a Chamber may award reparations to any victim of an article 5 crime within a situation, even if no person has yet been arrested (let alone convicted).³⁷

14. This is not possible under the Statute. Under the Court’s regime, reparations proceedings are triggered—and reparations may be ordered—*after* a conviction and *against the convicted person*. This is because the Court’s reparations regime seeks to “oblige those responsible for serious crimes to repair the harm they caused to the victims and [...] enable the Court to ensure that offenders account for their acts”.³⁸

15. *First*, an ICC Chamber may order reparations only when a person has been convicted. The Rome Statute is clear; the jurisprudence is consistent³⁹ and so is the commentary⁴⁰ and drafting history.⁴¹ Accordingly, reparations proceedings under article 75 are only triggered

³⁵ [Request](#), para. 81.

³⁶ [Request](#), para. 49;

³⁷ [Request](#), paras. 74, 76 (asking the Single Judge to set out “principes séparant la procédure de réparation de la procédure pénale”), 81, 93. Although the Defence requests the Single Judge to adopt and implement “additional principles”, these principles entail a new reparations proceeding culminating in a reparation order: *see* pp. 50-56.

³⁸ ICC-01/04-01/06-3129-AnxA (“[Lubanga Amended Order](#)”), para. 2.

³⁹ ICC-01/05-01/08-3653 (“[Bemba Final Reparations Decision](#)”), para. 3 (“no reparations order can be made against Mr Bemba under Article 75 of the Statute. The Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial for his or her participation in those crimes has been found guilty”); *see also* ICC-01/09-01/11-2038 (“[Ruto and Sang Reparations Decision](#)”), paras. 6-7 (“a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.”). *But see* ICC-01/09-01/11-2038-Anx (“[Judge Eboe-Osuji’s Dissenting Opinion Ruto and Sang Reparations Decision](#)”), para. 12. *See also* Judge Fremr’s Reasons in ICC-01/09-01/11-2027-Red-Corr (“[Ruto and Sang Judgment of Acquittal](#)”), para. 149 (“As a result of the case ending without a conviction, no reparations order can be made by this Court pursuant to article 75 for the benefit of victims of the post-election violence. While I recognise that this must be dissatisfactory to the victims, a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.”). *But see* [Judge Eboe-Osuji’s Reasons](#), paras. 195-210.

⁴⁰ Muttukumaro C., “Reparation to Victims”, in Lee, R. (ed.), *The International Criminal Court: the Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer: The Hague, 1999) (“Muttukumaro”), p. 262-263 (“Article 75 of the Rome Statute provides a framework within which the Court may award reparations to, or in respect of, victims against convicted defendants”); *see also* Donat-Cattin D., “Article 75”, in Triffterer, O. and Ambos, K. (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (C.H. Beck/Hart/Nomos: München/Oxford/Baden Baden, 2016) (“Donat-Cattin”), p. 1853, mn. 5, 1857, mn. 10 and 1863, mn. 19-20.

⁴¹ Pellet, S., “Article 75”, in Fernandez, Pacreau and Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale : commentaire article par article*, 2nd Ed. (Éditions A. Pedone: Paris, 2019) (“Pellet”), p. 1989

once the criminal responsibility of the person has been established in a conviction decision under article 74(2).⁴² As Judge Ibáñez Carranza has noted, a conviction is followed by two proceedings: (i) sentencing proceedings under article 76 “which aim [...] to punish perpetrators for their criminal conduct”, and (ii) reparations proceedings under article 75 which “have the ultimate goal of awarding reparations to redress the harm that victims suffered as a consequence of the atrocious crimes that form the basis of the conviction”.⁴³

16. *Second*, an order for reparations must be issued in *all* circumstances *against the convicted person*.⁴⁴ Reparations orders are intrinsically linked to the *individual* whose criminal liability has been established in a conviction and whose culpability for those criminal acts has been reflected in a sentence.⁴⁵ Since the Court is designed to establish *individual* criminal liability for crimes under the Statute, reparations orders must equally reflect this context⁴⁶—they must reflect the “principle of accountability” and “ensure that offenders account for their acts”.⁴⁷ The Statute’s drafting history reflects this principle.⁴⁸ So do commentary⁴⁹ and other decisions of this Court,⁵⁰ which have already rejected proposals similar to the regime put forward by the Defence.⁵¹

(“lors des débats ayant présidé à l’adoption du Statut, la possibilité pour la Cour d’ordonner des réparations à la charge d’une personne déclarée coupable a été largement partagée par les délégations”).

⁴² ICC-01/04-01/06-3466-AnxII (“[Judge Ibáñez Carranza Separate Opinion](#)”), para. 25.

⁴³ [Judge Ibáñez Carranza Separate Opinion](#), para. 25.

⁴⁴ [Lubanga First Reparations AD](#), para. 76. Reparation orders must contain, *at a minimum*, five essential elements: [Lubanga First Reparations AD](#), paras. 1, 32 (“1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted”).

⁴⁵ [Lubanga First Reparations AD](#), para. 65.

⁴⁶ [Lubanga First Reparations AD](#), para. 65.

⁴⁷ [Lubanga First Reparations AD](#), paras. 65, 69-70; [Lubanga Amended Order](#), para. 2 (noting the two goals of the Court’s reparation regime: to oblige those responsible for serious crimes to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts).

⁴⁸ [Lubanga First Reparations AD](#), para. 66 (noting references in the drafting history to the statement in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power that “[o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants”). See also [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (A/RES/40/34, General Assembly resolution 40/34 of 29 November 1985, annex), para. 8.

⁴⁹ Donat-Cattin, p. 1857, mn. 10.

⁵⁰ See above fn.39; see also [Lubanga First Reparations AD](#), paras. 67-68.

⁵¹ [Bemba Final Reparations Decision](#), para. 16; see [Request](#), para. 76 (erroneously distinguishing the Defence Request from the LRVs request in Bemba because Mr Bemba was acquitted; however, since according to the Defence no conviction is necessary to award reparations, Trial Chamber III could still have ordered reparations through the TFV).

17. The Appellant speculates⁵² and selectively reads the Statute⁵³ and the Rules.⁵⁴ He improperly disregards the import of the Court’s consistent jurisprudence, and ignores commentary and drafting history.⁵⁵ All of these clearly show that an ICC Chamber may only order reparations after a conviction and against the convicted person.

(b) The principles on reparations inform a Trial Chamber’s order for reparations

18. The Appellant misunderstands article 75(1) of the Statute. Pursuant to the first sentence of article 75(1) “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”. Yet this means that the Court is obliged to establish principles relating to reparations in each case before it that results in a conviction.⁵⁶ The order for reparations (issued after a conviction and against a convicted person under article 75(2)) will be informed by, and based on, these principles. In *Lubanga*, the Appeals Chamber explained the distinction, and interaction, between the principles and the reparations order:

[P]rinciples relevant to the circumstances of a case must be distinguished from the order for reparations, i.e. the Trial Chamber’s holdings, determinations and findings based on those principles. Accordingly, principles should be *general concepts that*,

⁵² [Appeal](#), para. 44; *see also* [Request](#), paras. 93-94 (speculating that victims only participate in trial proceedings because they consider it necessary to receive reparations).

⁵³ [Appeal](#), paras. 17, 22-23, 25; *see also* [Request](#), paras. 49-52.

⁵⁴ [Appeal](#), para. 17. The Appellant ignores that rules 97(2) and (3) do refer to the “convicted person”, which additionally supports that the provision applies once there is a conviction; *see also* [Request](#), paras. 57-64 (misinterpreting *inter alia* rules 94, 97 and 98); *compare with* Lewis, P. and Friman, H., “Reparations to Victims” in Lee, R. *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: Ardsley, 2001), p. 479-488.

⁵⁵ *Contra* [Appeal](#), para. 17 (pointing to inconsistencies in the text due to “des compromis diplomatiques arrachés à la dernière minute à Rome sans possibilité de revoir la cohérence globale du texte”). The Defence’s proposed regime was not even discussed by the drafters; what was discussed was the possibility of the Court being able to order a State to provide reparations to victims but after a conviction had been rendered by the ICC. This proposal was not adopted. *See* Pellet p. 1988-1990.

⁵⁶ Donat-Cattin, p. 1857, mn. 10; *see also* Friman in [Case Matrix](#) (“The Court has settled for a case specific approach to the stipulation of the Court’s reparation principles. The question of pre-established general principles has been discussed but rejected by the plenary of judges in 2006 and 2008 [...]. The case-by-case approach was also underlined by the Trial Chamber in the Lubanga decision on reparations (Prosecutor v. Lubanga, ICC T.Ch., ICC-01/04-01/06-2904, 7 August 2012, para. 181) and approved by the Appeals Chamber (Lubanga, ICC A. Ch., ICC-01/04-01/06-3129, 3 March 2015, para. 55”); *see also* Pellet, p. 1991 (“il revenait aux chambres de première instance d’établir les principes sur lesquelles elles se fonderont, le cas échéant”); [Report of the Court on principles relating to victims’ reparations](#), 8 October 2013, paras. 3 (“the issue of development of principles relating to reparations prior to any reparations proceedings before Chambers had been discussed by the plenary of Judges on two occasions in 2006 and 2008. [A]s a result of those discussions, it was left to the competent Chambers to establish principles relating to reparations within the context of specific cases, where the question would naturally arise subsequent to a conviction of an accused by the Court”) and 17, and [Report of the Bureau on the Study Group on Governance](#), 22 November 2011, paras. 26-28.

while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.⁵⁷

19. Accordingly, a Trial Chamber must establish general principles on reparations in the context of the case before it. Such principles will inform any reparations order in the case and can be applied to other cases, subject to necessary amendment and development.⁵⁸

20. In conclusion, the Court must establish principles on reparations pursuant to article 75(1) in order to inform an order for reparations under article 75(2). There is no self-standing reparations regime arising from article 75(1) of the Statute.

(c) The Appellant misunderstands the TFV’s mandate and legal framework

21. The Appellant disregards the TFV’s mandate and its regulations. He assumes that the TFV can cover his “novel” reparations regime but fails to engage with the TFV’s legal framework.⁵⁹ He misunderstands the two separate mandates of the TFV (reparations and assistance).⁶⁰ In implementing Court-ordered reparations, the TFV (acting under regulation 50(b) of the TFV Regulations) is subject to “oversight and a certain degree of intervention by the Trial Chamber”.⁶¹ For example, the Trial Chamber will approve the Draft Implementation Plan⁶² and will review the TFV’s assessment of potentially eligible victims.⁶³ Moreover, the

⁵⁷ [Lubanga First Reparations AD](#), para. 55(emphasis added).

⁵⁸ Thus, the principles developed by the Trial and Appeals Chambers in *Lubanga* ([Lubanga Amended Order](#), paras. 1-52) informed the reparations order in that case ([Lubanga Amended Order](#), para. 53 et seq.) and also influenced the reparations orders made against Mr Katanga and Mr Al Mahdi, where the Trial Chamber endorsed the principles established in *Lubanga*: ICC-01/04-01/07-3728-tENG (“[Katanga Reparations Order](#)”), para. 30 (“The Chamber takes the view that the principles established by the Appeals Chamber in *Lubanga* find application, mutatis mutandis, in the case at bar”); ICC-01/12-01/15-236 (“[Al Mahdi Reparations Order](#)”), para. 26 (“The Chamber finds that reparations of crimes against cultural heritage are adequately addressed under the same framework and thus sees no reason to deviate from the relevant principles formulated by the Appeals Chamber in *Lubanga*”); see Pellet, p. 1992.

⁵⁹ See e.g. [Request](#), p. 50-54 (*principes* 1 to 7: arguing that the Single Judge or the Pre-Trial Chamber would direct and supervise the TFV which—in the context of its assistance mandate—would collect reparations applications, obtain funding and submit a report on the reparations requested by the victims. The Single Judge or the Pre-Trial Chamber would approve (or not) the report and order reparations not exceeding the funds collected).

⁶⁰ See e.g. [Request](#), paras. 71 and p. 52 (*principe* 4), 53 (*principe* 6), 54 (*principe* 7).

⁶¹ [Lubanga Admissibility AD](#), para. 56 (further recalling “regulations 54, 55, 57 and 58 of the Regulations of the Trust Fund, which are part of Chapter II, Section III entitled ‘If the activities and projects of the Trust Fund are triggered by a decision of the Court’, and regulation 69 of the Regulations of the Trust Fund which is part of Chapter IV entitled ‘Collective awards to victims pursuant to rule 98(3)’”). See also see De Baan, P. and Saabel E., “Article 79”, in Fernandez, Pacreau and Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale : commentaire article par article*, 2nd Ed. (Éditions A. Pedone: Paris, 2019) (“De Baan and Saabel”), p. 2053-2054.

⁶² [Lubanga Admissibility AD](#), para. 56 (referring to regulations 57 and 69 of the [TFV Regulations](#)).

TFV does not decide or directly control the reparations award.⁶⁴ Conversely, the TFV's assistance activities (under regulations 48 and 50(a) of the TFV Regulations) are not subject to judicial oversight; instead the Board of Directors administers them and makes the necessary determinations.⁶⁵ These activities assist victims who have suffered harm as a result of crimes within the Court's jurisdiction⁶⁶ and are independent from the Court's judicial proceedings and are not contingent on a reparations order.⁶⁷ These activities are funded by voluntary contributions,⁶⁸ including "[o]ther resources" under regulation 47 of the TFV Regulations.⁶⁹

(d) The Court's legal framework does not legally support the Counsel's Request

22. The Appellant further argues that the Single Judge erred in concluding that the Request goes beyond the Counsel's prerogatives and duties.⁷⁰ He submits that he exercised his prerogatives and functions, and used the procedural avenues, set out in the Court's legal texts.⁷¹ The Appellant is incorrect. The Court's legal texts do not permit a Chamber to order reparations before there is a conviction. Accordingly, Counsel is not entitled to request a remedy which is not foreseen in the Statute. Further, while it is absolutely correct that "Counsel shall not [p]ermit his or her independence, integrity or freedom to be compromised by external pressure",⁷² the Decision did not place any undue pressure on Counsel, nor did it compromise his independence. To the contrary, it reminded him of the Court's legal texts that

⁶³ ICC-01/04-01/06-3466-Red ("[Lubanga Second Reparations AD](#)"), paras. 163-171 and [Judge Ibáñez Carranza Separate Opinion](#), para. 82.

⁶⁴ De Baan and Saabel, p. 2045; see [TFV Regulations](#), regulation 43 ("When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the [Rules of Procedure and Evidence](#), the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s)"); see also regulations 44-45.

⁶⁵ [Judge Ibáñez Carranza Separate Opinion](#), para. 83 (referring to [TFV Regulations](#), regulation 50(a)); see also Statute, article 79(3) ("The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties"); the ASP approved the TFV regulation which set up the Board of Directors; see also [Lubanga First Reparations AD](#), para. 111 and De Baan and Saabel, p. 2052.

⁶⁶ Statute, article 79(1) and Rules, rule 85. See [TFV Assistance Mandate](#). See De Baan and Saabel, p. 2040-2042 (explaining that under article 79(1) and the TFV's assistance mandate, the definition of victim beneficiaries is broader since no link with the crimes pursued before the Court is required; however, although the texts do not contain such limitation it is likely that the beneficiaries are victims of crimes committed within the context of a situation before the Court).

⁶⁷ See [TFV Assistance Mandate](#).

⁶⁸ [Lubanga First Reparations AD](#), paras. 107-108; see regulations 22-30 (Chapter II, Voluntary Contributions).

⁶⁹ [TFV Regulations](#), regulation 47 ("For the purpose of these regulations, "other resources of the Trust Fund" set out in of rule 98, paragraph 5, of the [Rules of Procedure and Evidence](#) refers to resources other than those collected from awards for reparations, fines and forfeitures."); see De Baan and Saabel, p. 2047-2048.

⁷⁰ [Appeal](#), para. 27.

⁷¹ [Appeal](#), paras. 27-30.

⁷² [Code of Professional Conduct for Counsel](#), art. 6(2)(a).

he is supposed to know and abide by. This is fully consistent with the Code of Professional Conduct for Counsel which requires Counsel to “maintain a high level of competence in the law applicable before the Court” and “comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court [...]”.⁷³

(e) A Chamber cannot award a remedy which is not regulated in the Statute

23. The Appellant further argues that the Request falls within the Single Judge’s or Pre-Trial Chamber’s competence.⁷⁴ He misunderstands the Single Judge’s remark that because “there is no legal basis for the Request, it does not fall [...] within the Chamber’s sphere of competence”.⁷⁵ What the Single Judge meant was that the Request (that is, the novel reparations regime requested) could not be granted because it is not provided for in the Statute. The Appellant also misrepresents the import of the statutory provisions that he cites.⁷⁶ These provisions do not require that the Request be granted. Moreover, the Single Judge decided on his Request, and correctly rejected it—in application of the law.

24. In conclusion, because the Appellant’s proposed reparations regime has no basis in the Statute, the second ground of appeal should be dismissed.

C. Third Ground: the Single Judge did not err in ruling on the Request

25. The Appellant argues that the Single Judge erred by deciding on the Request himself.⁷⁷ He submits that since the Request raised a jurisdictional issue, the full Pre-Trial Chamber should have collegially or *en banc* decided pursuant to article 57(2)(a).⁷⁸ Although the Appellant does not consider that the Request raises an issue of jurisdiction, he considers that the Single Judge found that it did.⁷⁹

26. The Appellant’s third ground of appeal should be summarily dismissed because it falls beyond, and is not intrinsically linked to, the issue for which leave to appeal was granted.⁸⁰ Moreover, the Appellant is incorrect. The Single Judge never found that the Request raised an

⁷³ [Code of Professional Conduct for Counsel](#), arts. 7(2) and (3).

⁷⁴ [Appeal](#), para. 31.

⁷⁵ [Decision](#), para. 13.

⁷⁶ [Appeal](#), para. 31 (citing arts. 1, 39(2), 57(2) and rule 4(2)).

⁷⁷ [Appeal](#), paras. 33-38.

⁷⁸ [Appeal](#), paras. 36-37.

⁷⁹ [Appeal](#), paras. 33, 36.

⁸⁰ [Gbagbo Confirmation AD](#), para. 64; ICC-01/13-98 OA2 (“[Comoros AD](#)”), para. 56.

issue of jurisdiction under article 19(1) of the Statute, nor did the Decision constitute a ruling on the “jurisdiction of the Court” – as already found by the Appeals Chamber.⁸¹ The Decision did not find that the Court was unable to rule under article 75(1), but merely that it was improper for it to do so at the request of Counsel for Mr Abd-Al-Rahman and at the present time. Thus, since the Decision did not constitute a ruling on the “jurisdiction of the Court” in the meaning of article 19(1), the Single Judge did not decide on a matter reserved for the Pre-Trial Chamber *en banc* by article 57(2)(a). Nor did Mr Abd-Al-Rahman invoke article 19(1) in his Request.

27. Accordingly, the third ground of appeal should be dismissed.

D. Fourth Ground: the Decision did not violate article 68(3) of the Statute

28. The Appellant argues that the Request raises issues that affect the personal interests of the victims and therefore their views should have been considered by the Single Judge in accordance with article 68(3).⁸² However, he also notes that, since there are no represented victims participating in the proceedings, the Single Judge should have permitted non-governmental organisations to provide observations as *amici curiae*.⁸³ Likewise, he argues that the Prosecutor should have sought the victims’ views before responding pursuant to regulation 16 of the Regulations of the Prosecutor.⁸⁴

29. Like the third ground, the fourth ground should be summarily dismissed because it falls beyond, and is not intrinsically linked to, the issue for which leave to appeal was granted. In addition, the Appellant is incorrect. Since the Request lacks legal basis, the Single Judge correctly dismissed it without seeking the views of victims. That the Appellant requests the implementation of a legally unfounded reparation regime does not mean that the conditions

⁸¹ [ICC-02/05-01/20-145](#), paras. 8-9.

⁸² [Appeal](#), paras. 39, 41; see Statute, art. 68(3) (“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the [Rules of Procedure and Evidence](#)”).

⁸³ [Appeal](#), para. 40.

⁸⁴ [Appeal](#), para. 42. See [Regulations of the Office of the Prosecutor](#), regulation 16 (“The Office shall, in coordination with the Victims Participation and Reparations Section of the Registry, as appropriate, seek and receive the views of the victims at all stages of its work in order to be mindful of and to take into account their interests”).

under article 68(3) are met.⁸⁵ Further, the Prosecutor did consider the victims' interests in responding, and encouraged Defence counsel to focus his resources on the ongoing pre-trial proceedings—and likewise permit the Prosecution and the Pre-Trial Chamber to do the same.⁸⁶

30. In sum, the fourth ground of appeal should be dismissed.

31. Finally, the Appellant's request for observations from *amici curiae* in the appeal proceedings should be dismissed.⁸⁷ Since the Court's legal framework is clear, the Prosecution respectfully submits that no observations from interested participants are necessary to assist the Appeals Chamber in its determination.

III. RELIEF SOUGHT

32. For all these reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss Mr Abd-Al-Rahman's Appeal.



James Stewart, Deputy Prosecutor

Dated this 21st day of September 2020

At The Hague, The Netherlands

⁸⁵ [ICC-01/04-556](#), para. 57 (“participatory rights can only be granted under article 68(3) of the Statute once the requirements of that provision have been fulfilled.”).

⁸⁶ [ICC-02/05-01/20-138](#) (“Prosecution Response”), para. 19.

⁸⁷ *Contra* [Appeal](#), para. 43.