

**Cour
Pénale
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**International
Criminal
Court**

Original: **French**

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

Date: **24 August 2020**

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN

Public Document

**Application for Leave to Appeal against the
“Decision on the Defence Request and Observations on Réparations
pursuant to Article 75-1 of the Rome Statute” (ICC-02/05-01/20-117)**

Source: Mr Cyril Laucci, Lead Counsel

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

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BACKGROUND TO THE APPLICATION

1. On 17 July 2020, the Defence put before the Honourable Single Judge of Pre-Trial Chamber II its Requests and Observations pursuant to article 75(1) of the Rome Statute (“Request pursuant to Article 75(1)”, “Statute”).¹
2. The Office of the Prosecutor (OTP) responded on 23 July 2020 (“Response”).²
3. The Defence sought leave to reply on 27 July 2020 (“Request for Leave to Reply”).³
4. On 18 August 2020, the Honourable Single Judge issued his Decision on the Request pursuant to Article 75(1) (“Decision under Appeal”).⁴ The Honourable Single Judge dismissed the Request pursuant to Article 75(1) *in limine* on the grounds (i) that the Court’s system of reparations to victims rests upon the accountability of the convicted person for his or her acts, and upon his or her obligation to repair the harm caused to the victims by those acts (paragraph 10); (ii) that the adoption of the additional principles of reparations proposed by the Defence would amount to an amendment of the Statute and the Court’s legal framework, which does not lie within the powers of the Honourable Pre-Trial Chamber (paragraph 11); (iii) that the Honourable Pre-Trial Chamber does not have jurisdiction in matters of reparations (paragraph 12); and (iv) that the Request pursuant to Article 75(1) is therefore without a basis in law and exceeds the prerogatives of the Defence, and that the Honourable Pre-Trial Chamber is accordingly not competent to adjudicate it (paragraph 13).
5. Against that Decision the Defence now seeks leave to appeal pursuant to article 82(1)(d) of the Statute. This application is without prejudice to the notice of appeal under article 82(1)(a) of the Statute which the Defence files today before the Honourable Appeals Chamber in relation to certain aspects of the Decision under

¹ [ICC-02/05-01/20-98](#): “*Requête et observations en vertu de l’Article 75-1*”, 17 July 2020.

² [ICC-02/05-01/20-102](#): “Prosecution’s Response to ‘*Requête et observations en vertu de l’Article 75-1*’ (ICC-02/05-01/20-98)” (French version not available), 23 July 2020.

³ [ICC-02/05-01/20-104](#): “*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.

⁴ [ICC-02/05-01/20-117](#): “Decision on the Defence Request and Observations on Reparations pursuant to Article 75(1) of the Rome Statute”, 18 August 2020.

Appeal (“Notice of Appeal”). The Defence requests that this application for leave to appeal be decided irrespective of the Notice of Appeal, insofar as the two appeals cover different territory and are not lodged on the same legal basis.

6. The particular state of affairs which the Defence is attempting to address by way of appeal against the Decision on the Request pursuant to Article 75(1) calls for exploring all possible procedural routes by which to bring the matter before the Honourable Appeals Chamber. The extraordinarily high stakes of the Request pursuant to Article 75(1), for victims, for the fairness of the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman and for the Court itself, demand that the Defence overlook no procedural means of pressing its claim – just as, previously, the Defence for Mr Thomas Lubanga Dyilo lodged appeals against the decision on principles of reparations in his case under article 82(1)(d)⁵ and 82(4) of the Statute.⁶ In the event that the Honourable Appeals Chamber, as in *Lubanga*, should have before it two appeals against the same decision, it will be for the appellate bench, as on that previous occasion, to rule on whether those appeals may be entertained and the manner in which they are to be treated.⁷ Notwithstanding, therefore, that the applicable procedural time limits oblige the Defence to file its Notice of Appeal under article 82(1)(a) of the Statute on the same day as this Application for Leave to Appeal under article 82(1)(d) of the Statute (“Application”), the Honourable Pre-Trial Chamber is asked to ignore the Notice of Appeal and to rule on this Application as though the Notice of Appeal did not exist, so as not to make a premature determination and to preserve the jurisdiction of the Honourable Appeals Chamber to rule on its own competence and on whether any appeals that come before it in relation to the Request pursuant to Article 75(1) may be entertained. The prepossessions of the Honourable Single Judge against attempts by the Defence

⁵ [ICC-01/04-01/06-2905-tENG](#): “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation* issued on 7 August 2012”, 13 August 2012.

⁶ [ICC-01/04-01/06-2914-tENG](#): “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012”, 3 September 2012.

⁷ [ICC-01/04-01/06-2953 A A1 A2 A3 OA 21](#): “Decision on the Admissibility of the Appeals against Trial Chamber I’s ‘Decision Establishing the Principles and Procedures to be applied to Reparations’ and Directions on the further Conduct of Proceedings” (French version not available), 14 December 2012, paras. 10, 14, 50, 64.

to pursue various procedural routes to the same result⁸ – in this instance the bringing of the appeal against the Decision on the Request pursuant to Article 75(1) before the Honourable Appeals Chamber – cannot be an impediment to the Defence’s course of action in these proceedings inasmuch as the Defence is taking an approach equivalent to that previously taken in *Lubanga* and approved by the Honourable Appeals Chamber.

APPLICATION TO THE FULL HONOURABLE PRE-TRIAL CHAMBER II

7. Pursuant to rule 7(3) of the Rules of Procedure and Evidence (“Rules”), the Defence requests that this Application be decided by the full Honourable Pre-Trial Chamber II, rather than by the Honourable Single Judge sitting alone.

8. The Honourable Single Judge declared that the Honourable Pre-Trial Chamber did not have jurisdiction to consider issues relating to the principles of reparations to victims.⁹ He cannot therefore sit in deliberation on this application for leave to appeal against the decision concerning those principles.

9. The Defence further submits that the Honourable Single Judge acted beyond his remit as laid down by article 57(2)(b) of the Statute. The Defence brought its Request pursuant to Article 75(1) before the Honourable Single Judge on the footing that it had not identified any issues going to his competence to adjudicate it. From the Defence’s viewpoint, article 75(1) of the Statute and the decision to entrust the development of the principles of reparations to Chambers acting within the context of judicial proceedings¹⁰ were sufficient to vest jurisdiction in the Honourable Pre-Trial Chamber II,¹¹ and the Request was not among the class of applications requiring a decision *en banc* pursuant to article 57(2)(a) of the Statute. However, once the Honourable Single Judge determined *proprio motu* that the Request pursuant to Article 75(1) involved an issue going to the jurisdiction of the Chamber or

⁸ [ICC-02/05-01/20-112](#): “Decision on the Defence Request pursuant to Rule 20 of the Rules of Procedure and Evidence” (French version not available), 13 August 2020, para. 12.

⁹ [ICC-02/05-01/20-117](#): *op. cit.*, paras. 11-13.

¹⁰ ICC-ASP/12/39: “Report of the Court on principles relating to victims’ reparations”, 8 October 2013, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-39-ENG.pdf, para. 3.

¹¹ [ICC-02/05-01/20-98](#): *op. cit.*, para. 49.

the Court, the power to rule alone on the Request no longer lay with him insofar as article 57(2)(a) of the Statute requires decisions as to jurisdiction to be taken *en banc*.

To quote the Honourable Pre-Trial Chamber II, as it was then composed:

It is a well-known and fundamental principle that any judicial body, including an international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. [...] **The principle is enshrined in article 19, paragraph 1, of the Statute**, pursuant to which “the Court shall satisfy itself that it has jurisdiction in any case brought before it” [...] As a result, it is not for the Prosecutor, nor for the Registrar [...] to determine whether a particular matter falls within the scope of the powers of the Pre-Trial Chamber: such determination lies exclusively **with the relevant Chamber itself**. [Emphasis added]. [French version not available].¹²

The power of the Honourable Pre-Trial Chamber to pass upon its own jurisdiction – which is what the Honourable Single Judge did in the Decision under Appeal – therefore constitutes a particular aspect of the exercise of the authority conferred on the Honourable Pre-Trial Chamber in accordance with article 19(1) of the Statute. Pursuant to article 57(2)(a) of the Statute, that authority rests with the Chamber ruling *en banc* and cannot be exercised solitarily by the Honourable Single Judge sitting alone.

10. The Honourable Single Judge should, therefore, have referred the Request pursuant to Article 75(1) to the full Honourable Pre-Trial Chamber, which had sole authority to rule on an issue as to its jurisdiction. Instead, the Honourable Single Judge ruled *ultra vires* on the jurisdiction of the Honourable Pre-Trial Chamber II over the Request pursuant to Article 75(1) of the Statute. With this abuse of his authority the Honourable Single Judge also deprived the other two Honourable Judges of Pre-Trial Chamber II, including its Honourable Presiding Judge, of their authority to rule on their competence to adjudicate the Request pursuant to Article 75(1).

11. *A fortiori*, this Application for Leave to Appeal, which concerns, *inter alia*, an issue as to the Honourable Pre-Trial Chamber II’s competence to rule on the Request pursuant to Article 75(1), falls therefore to be decided by the full Pre-Trial Chamber pursuant to article 57(2)(a) of the Statute. A decision on this Application for

¹² <https://www.legal-tools.org/doc/0568f7/pdf>: “Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission filed by the Registry on 5 December 2005” (French version not available), 9 March 2006, paras. 22-23.

Leave to Appeal by the Honourable Single Judge ruling alone would be nothing but a second abuse of his authority, limited as it is by article 57(2)(b) of the Statute. The Defence therefore prays the other two Honourable Judges of Pre-Trial Chamber II to reinstate their authority under article 57(2)(a) of the Statute by ruling *en banc* on this Application for Leave to Appeal.

12. The Defence, moreover, calls again upon the Honourable Single Judge in his wisdom to exercise his right under article 41(1) of the Statute for the limited purposes of this Application for Leave to Appeal, insofar as he held that he was not competent to adjudicate the Request which was dismissed by way of the Decision under Appeal, and acted *ultra vires* by ruling alone on the competence of the Honourable Pre-Trial Chamber to adjudicate it, whereas decisions going to the determination of its jurisdiction pursuant to article 19(1) of the Statute fall under article 57(2)(a) of the Statute and therefore transcend the delegation conferred on him by the Chamber. It is not open to the Honourable Single Judge, after that, to take part in deliberating on this Application for Leave to Appeal, the high stakes of which – for the fairness of the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman, for victims and for the success of the Court in the crucial area of its system of reparations¹³ – require the dispassionate and impartial consideration of the Honourable Pre-Trial Chamber. He is, therefore, kindly asked to recuse himself for the purposes of deliberation on this Application.

SUBJECT MATTER OF THE APPLICATION

13. Lead Counsel hereby respectfully moves the Honourable Pre-Trial Chamber II to grant leave to appeal, pursuant to article 82(1)(d) of the Statute, against the Honourable Single Judge's Decision of 18 August 2020.

14. Under article 82(1)(d) of the Statute, leave to appeal against a decision may be granted where both of the conditions laid down by that provision are satisfied, namely where (1) the impugned decision involves “an issue that would significantly

¹³ [ICC-01/04-01/06-8-Corr](#), “Public Redacted Version of Corrigendum of Decision on the Prosecution's Application for Warrants of Arrest, Article 58”, 20 February 2006, para. 136, footnotes omitted; [ICC-01/04-01/06-3129-AnxA A A2 A3](#), “Order for Reparations (Amended)”, 1 August 2016, para. 3.

affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and (2) “in the opinion of the Pre-Trial or Trial Chamber, immediate resolution by the Appeals Chamber may materially advance the proceedings”.¹⁴ Lead Counsel confines this Application to an exposition of the reasons for which he regards those two requirements as satisfied, without entering into the grounds of appeal which he intends to raise before the Honourable Appeals Chamber if granted leave.

15. Lead Counsel seeks leave to appeal against the Decision of 18 August 2020 insofar as it involves the issue as to whether the Honourable Pre-Trial Chamber II was competent to entertain the Defence’s proposals contained in the Request pursuant to Article 75(1) for the adoption of the Additional Principles of Reparations in case ICC-02/05-01/20, and to invite the submission of observations on those proposals under rule 103(1) of the Rules.

16. Resolution of this issue by the Honourable Appeals Chamber would significantly affect the fair and expeditious conduct of the proceedings in case ICC-02/05-01/20 insofar as the proposed Additional Principles would have a direct and substantial impact on the time frame (before the conclusion of the penal proceedings and irrespective of their outcome) and procedure (without the participation of the OTP or the Defence and conducted at the level of situation ICC-02/05) for reparations to victims,¹⁵ and on the extent of victim participation in the case *sub judice*.¹⁶ The Defence further submits that resolution of the issue by the Honourable Appeals Chamber would have a significant impact on the fairness of the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman in that it would operate to stem a perverse effect of the current reparations regime whereby reparations depend on a conviction and victims are placed *de facto* in the position of having an objective interest in supporting the OTP’s case, in hopes of a conviction, regardless of the content and merits of that case or its consonance with their actual victimization.¹⁷

¹⁴ ICC-01/04/168: “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006 (“Appeal Judgment of 13 July 2006”), para. 8, <https://www.legal-tools.org/doc/a60023/pdf>.

¹⁵ ICC-02/05-01/20-98: *op. cit.*, paras. 61, 100: Additional Principles of Reparations nos. 6 and 8.

¹⁶ ICC-02/05-01/20-98: *op. cit.*, para. 94.

¹⁷ ICC-02/05-01/20-104: *op. cit.*, para. 8.

This is the perverse effect described in analyses which say that victims, in fact, act as a “second Prosecutor”. Indeed, if their right to reparations depends on a conviction, they unfortunately have no other choice. Resolution of the issue raised may, therefore, operate to relieve victims of the obligation to support the OTP’s case, regardless of what they think of its content or merits, for the sole purpose of securing a conviction as the prerequisite to reparations. The Defence submits that, were its proposed Additional Principles of Reparations to be adopted and implemented in the case *sub judice*, the proceedings would be considerably expedited insofar as a substantial number of victims might opt for the reparations proceedings thus instituted rather than applying to participate in the penal proceedings. The proceedings would also be rendered fairer in that the victims would recover their dignity and would be able to claim and obtain reparations without having to await the outcome of the criminal trial and without feeling obligated to support the OTP’s case regardless of its content and merits, or lack thereof, for the sole purpose of satisfying the prerequisite of a conviction for an award of reparations.

17. Resolution of this issue by the Honourable Appeals Chamber, furthermore, may materially advance the penal proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman since, were the Additional Principles of Reparations to be adopted, the criminal limb of this case would be relieved of most of the burden of victim participation, with victims having the option of concurrent reparations proceedings. The resources of the Honourable Pre-Trial, Trial and Appeals Chambers dealing in turn with the case, and those of the OTP and the Defence throughout the proceedings, would no longer be burdened with the processing of victims’ applications for reparations, which in other cases have numbered in the thousands and whose impact on the resources of the Court – first and foremost those of the Honourable Chambers – is described at paragraphs 91-94 of the Request pursuant to Article 75(1) with reference to the Honourable Appeals Chamber’s judgment on

reparations in *Katanga*.¹⁸ The overwhelming majority of victims seeking reparations would be afforded the opportunity to elect the concurrent reparations proceedings before the Pre-Trial Chamber in charge of situation ICC-02/05, in which the OTP and the Defence would not participate.

18. In addition to merely furthering the proceedings in case ICC-02/05-01/20, consideration and – were it to occur – adoption of the Additional Principles of Reparations would represent such progress in terms of respect for the right of victims to reparations before the Court that it would amount to a major step in the direction of the “success of the Court” in the crucial area of its system of reparations, which is one of its key features.¹⁹ That progress could subsequently be expanded to other situations and cases before the Court, as and when judicial decisions are taken by Chambers guided by the Honourable Appeals Chamber’s judgment on this appeal. The right of victims to reparations in all proceedings before the Court would thus benefit from the judgment which the appellate bench might render on this appeal. The aim of the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman in seeking leave of the Honourable Pre-Trial Chamber II by way of this application pursuant to article 82(1)(d) of the Statute is none other than to further the proceedings of this Court in respect of the exercise of the internationally recognized right of victims to reparations.

¹⁸ [ICC-01/04-01/07-3778-Red A3 A4 A5](#), “Public Redacted Version of 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’” (French version not available), 8 March 2018, para. 147.

¹⁹ [ICC-01/04-01/06-8-Corr](#), “Public Redacted Version of Corrigendum of Decision on the Prosecution’s Application for Warrants of Arrest, Article 58”, 20 February 2006, para. 136, footnotes omitted; [ICC-01/04-01/06-3129-AnxA A A2 A3](#), “Order for Reparations (Amended)”, 1 August 2016, para. 3.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE FULL HONOURABLE PRE-TRIAL CHAMBER II TO GRANT LEAVE to the Defence to appeal against the Decision of 18 August 2020 on the Request pursuant to Article 75(1).

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 24 August 2020

At The Hague, Netherlands