



Original: English

**No. ICC-02/05-01/20 OA4
Date: 18 December 2020**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
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 document

Judgment

**on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of
Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence
request and observations on reparations pursuant to article 75(1) of the Rome
Statute'**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Cyril Laucci

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled ‘Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute’ of 18 August 2020 (ICC-02/05-01/20-117),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The ‘Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute’ of 18 August 2020 (ICC-02/05-01/20-117) is confirmed.

REASONS

I. INTRODUCTION

1. Following Mr Abd-Al-Rahman’s first appearance before this Court, he seized the Pre-Trial Chamber of a proposal, submitted with reference to article 75(1) of the Statute, concerning the procedure by which applications for reparations would be submitted and assessed in this case. According to the proposed procedure, which differed significantly from the reparations procedure adopted in other cases before the Court, the Pre-Trial Chamber would supervise the assessment and award of reparations, irrespective of whether a conviction against the suspect was eventually entered. The Pre-Trial Chamber rejected the proposal and explained that it lacked the competence to even consider the proposal on its merits. Mr Abd-Al-Rahman comes before the Appeals Chamber presenting legal arguments as to why, in his view, the Pre-Trial Chamber erred. The Appeals Chamber must decide, now, whether there was a sufficient legal basis for the Pre-Trial Chamber to dispose of the proposal as it did at this stage.

II. PROCEDURAL HISTORY

2. On 17 July 2020, Mr Abd-Al-Rahman submitted a request in respect of ‘additional principles’ on reparations for victims (the ‘Request’).¹ In the Request, he invited the Single Judge on behalf of Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) to adopt and apply, pursuant to article 75(1) of the Statute, a number of additional reparations principles and to consider inviting submissions under rule 103(1) of the Rules of Procedure and Evidence (the ‘Rules’) on such principles.² The Prosecutor opposed the Request.³

3. In its decision on the Request (the ‘Impugned Decision’),⁴ the Pre-Trial Chamber summarised the Request and then recalled that, according to the Statute’s drafting history and the relevant jurisprudence of the Court, ‘the Court’s proceedings on reparations can only commence once a person has been convicted by the Court’.⁵ The Pre-Trial Chamber concluded that, at that particular procedural phase, the adoption and implementation of the additional principles proposed in the Request ‘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’.⁶

4. The Pre-Trial Chamber noted that its powers arise from articles 57 to 61 of the Statute, and that ‘[n]owhere 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’.⁷ The Pre-Trial Chamber found that there was no legal basis for the Request, as the Request did not ‘fall within [Mr Abd-Al-Rahman’s legal counsel’s] prerogatives and duties nor within the [Pre-Trial Chamber’s] sphere of competence’.⁸ Accordingly, the Pre-Trial Chamber dismissed the Request *in limine*.⁹

¹ [Request and Observations on Reparations Pursuant to Article 75\(1\)](#), ICC-02/05-01/20-98-tENG.

² [Request](#), paras 100-101.

³ [Prosecution’s Response to “Rêquete et observations sur les réparations en vertu de l’Article 75-1” \(ICC-02/05-01/20-98\)](#), 23 July 2020, ICC-02/05-01/20-102.

⁴ [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.

⁵ [Impugned Decision](#), para. 10.

⁶ [Impugned Decision](#), para. 11.

⁷ [Impugned Decision](#), para. 12.

⁸ [Impugned Decision](#), para. 13.

⁹ [Impugned Decision](#), para. 13.

5. In his request for leave to appeal (the ‘Request for Leave to Appeal’),¹⁰ Mr Abd-Al-Rahman sought leave to appeal in respect of the question of whether the Pre-Trial Chamber is competent to consider his proposal for the adoption of additional principles on reparations under article 75(1) of the Statute, and to invite the observations of *amici curiae* on his proposal.¹¹

6. In the decision granting leave, the Pre-Trial Chamber referred to the issue included in Mr Abd-Al-Rahman’s Request for Leave to Appeal, and granted the request without modifying the issue as defined by Mr Abd-Al-Rahman.¹²

7. In the present appeal,¹³ Mr Abd-Al-Rahman raises four grounds challenging the Pre-Trial Chamber’s decision to dismiss the Request *in limine*. First, he argues that the Pre-Trial Chamber erred in finding that the adoption and implementation of the proposed additional principles on reparations required an amendment of the Statute or the Court’s legal framework.¹⁴ Second, he argues that the Pre-Trial Chamber erred in finding that Pre-Trial Chamber II had no jurisdiction to adjudicate the Request.¹⁵ Third, he argues that the Pre-Trial Chamber did not have the authority to hold that it lacked jurisdiction to adjudicate the Request.¹⁶ And fourth, he argues that the Pre-Trial Chamber erred by ruling on the Request without first seeking submissions from victims, thus violating article 68(3) of the Statute.¹⁷

8. The Prosecutor responds that Mr Abd-Al-Rahman’s arguments under his second ground of appeal have no basis in the Statute and disregard the Court’s jurisprudence and should be dismissed on that basis.¹⁸ The Prosecutor further responds that the first ground of appeal misunderstands the Impugned Decision,¹⁹ and the third and fourth

¹⁰ [Application for Leave to Appeal against the “Decision on the Defence Request and Observations on Reparations pursuant to Article 75-1 of the Rome Statute”](#), 24 August 2020, ICC-02/05-01/20-129-tENG.

¹¹ [Request for Leave to Appeal](#), para. 15.

¹² [Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75\(1\) of the Rome Statute](#), 31 August 2020, ICC-02/05-01/20-141, para. 11.

¹³ [Appeal Brief against Decision ICC-02/05-01/20-117](#), 9 September 2020, ICC-02/05-01/20-147-tENG (the ‘Appeal Brief’).

¹⁴ [Appeal Brief](#), paras 15-19.

¹⁵ [Appeal Brief](#), paras 20-32.

¹⁶ [Appeal Brief](#), paras 33-38.

¹⁷ [Appeal Brief](#), paras 39-43.

¹⁸ [Prosecution response to “Mémoire d’appel de la décision ICC-02/05-01/20-117” \(ICC-02/05-01/20-147\)](#), 21 September 2020, ICC-02/05-01/20-161 (‘Prosecutor’s Response’), paras 10-24.

¹⁹ [Prosecutor’s Response](#), paras 7-9.

grounds should be summarily dismissed because they fall outside the scope of the issue for which leave to appeal was granted.²⁰

III. PRELIMINARY ISSUES

9. The Prosecutor argues that Mr Abd-Al-Rahman's third ground of appeal should be summarily dismissed.²¹ The Appeals Chamber notes that the issue on appeal relates to the Pre-Trial Chamber's determination of its role in dealing with reparations for victims during pre-trial proceedings. However, on appeal, Mr Abd-Al-Rahman argues that the Single Judge did not have the authority to make a ruling in respect of the jurisdiction of the Court, with reference to articles 19(1) and 57(2)(a) of the Statute.²² The Appeals Chamber notes that there is a fundamental difference between a question regarding the procedural competence of a chamber to make a particular ruling and that regarding the jurisdiction of the Court over a case. The latter question was not posed in Mr Abd-Al-Rahman's Request for Leave to Appeal, nor was it included in the Pre-Trial Chamber's decision granting leave. Therefore, Mr Abd-Al-Rahman's third ground falls outside the scope of this appeal and it is dismissed *in limine*.

10. In his fourth ground of appeal, Mr Abd-Al-Rahman calls into question the Pre-Trial Chamber's decision to rule on the Request without first hearing the views and concerns of victims pursuant to article 68(3) of the Statute. The Prosecutor argues that this argument falls outside the scope of the issue for which leave was granted and should be summarily dismissed.²³

11. The Appeals Chamber recalls that Mr Abd-Al-Rahman sought leave to appeal in respect of the narrow issue of whether the Pre-Trial Chamber is competent to consider his Request and to invite submissions of *amici curiae*. Nowhere in his Request for Leave to Appeal did he argue that the Impugned Decision was made in violation of article 68(3) of the Statute. Thus, the Appeals Chamber finds that this latter issue was not before the Pre-Trial Chamber in granting leave and it is not sufficiently connected to the issue for which leave was granted so as to bring it within the scope of the present

²⁰ [Prosecutor's Response](#), paras 25-30.

²¹ [Prosecutor's Response](#), para. 26.

²² [Appeal Brief](#), paras 33-38.

²³ [Prosecutor's Response](#), para. 29.

appeal. Accordingly, Mr Abd-Al-Rahman's fourth ground of appeal is dismissed *in limine*.

12. Also in his fourth ground of appeal, Mr Abd-Al-Rahman invites the Appeals Chamber to consider granting applications of *amici curiae* under rule 103(1) of the Rules to 'remedy the violation of article 68(3)'.²⁴ As the issue of whether there was a violation of article 68(3) of the Statute is not properly before the Appeals Chamber, this 'invitation' is rejected.

IV. MERITS

13. The Appeals Chamber recalls that the central issue to be determined, as defined by the Pre-Trial Chamber in its decision granting leave to appeal, is whether the Pre-Trial Chamber has the competence to adopt Mr Abd-Al-Rahman's proposed 'additional principles' on reparations. Mr Abd-Al-Rahman addresses this issue under his first and second grounds of appeal. Indeed, the Pre-Trial Chamber not only found that the adoption of the proposed additional reparations principles falls 'outside the powers and duties of the Pre-Trial Chamber',²⁵ but also that, more broadly, '[n]owhere 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'.²⁶ Only once a person has been convicted, explained the Pre-Trial Chamber, does the Court's proceedings on reparations begin.²⁷

14. The Appeals Chamber finds that the Pre-Trial Chamber's interpretation of its competence to deal with issues related to reparations for victims is not consistent with the Court's overall statutory scheme. A chamber of the Court, whether pre-trial, trial, or appeal, must permit victims whose personal interests are affected to present their views and concerns at any stage of the proceedings determined to be appropriate by the Court.²⁸ This duty may, in some cases, compel a pre-trial chamber to hear submissions related to reparations. Depending on the circumstances, there may also be a role for a chamber to make interim orders and decisions in relation to reparations proceedings. In particular, a pre-trial chamber is vested with the authority to seek States' cooperation

²⁴ [Appeal Brief](#), para. 43.

²⁵ [Impugned Decision](#), para. 11. *See also* para. 13, holding that 'there is no legal basis for the Request, it does not fall within [...] the Chamber's sphere of competence'.

²⁶ [Impugned Decision](#), para. 12.

²⁷ [Impugned Decision](#), para. 10.

²⁸ Article 68(3) of the Statute. *See also* rule 86 of the Rules.

to effect forfeiture for the benefit of victims and then to hear the observations of any persons interested in the protective measures and to make orders where appropriate.²⁹ Moreover, a pre-trial chamber may make orders for the protection and privacy of victims and the preservation of evidence.³⁰ All of these functions can and should be engaged, where necessary, to secure victims' opportunity to benefit from reparations, should a conviction be handed down at a later stage.

15. Accordingly, the majority of the Appeals Chamber finds that the Pre-Trial Chamber erred in holding that it was not the role of a chamber to rule in respect of reparations for victims at the pre-trial stage. It should be emphasised that it is in the interest of both victims and the person suspected or accused of crimes under the Court's jurisdiction that procedural issues relevant to reparations receive judicial supervision as early in the life of a case as possible.³¹ In this regard, the Court is empowered to hear the evidence of victims and permit questioning by their legal representative in respect of reparations during trial proceedings.³² Thus, it is not necessarily the case that the reparations proceeding begins only after a person has been convicted, as stated in the Impugned Decision.

16. Judge Ibáñez wishes to separately emphasise that, in her view, the Pre-Trial Chamber did not err in so far as it declined to rule on the Request. In Judge Ibáñez's view, although all chambers must involve themselves in issues related to victims, including some preliminary issues related to reparations, each chamber has a specific function. While a pre-trial chamber can address issues relating to victim participation and protection, among others, and preliminary issues related to reparations such as screening of victims, cooperation, seizures, and so forth, what it cannot do is settle principles that entail concrete aspects of the reparations itself or its implementation. The latter are the domain of trial chambers. Judge Ibáñez emphasises in this regard that the reparations proceeding at the Court commences only after a person is convicted, and reparations principles under article 75(1) of the Statute must only be issued

²⁹ Article 57(3)(e) of the Statute; rule 99 of the Rules.

³⁰ Article 57(3)(c) of the Statute.

³¹ The ASP has urged the chambers of the Court to adopt measures for the identification and freezing of assets and for the presentation of evidence relevant to reparations at an early stage so as not to result in a delay of the criminal trial (*see* Resolution ICC-ASP/10/Res.3, [Reparations](#) (Adopted at the 7th plenary meeting, on 20 December 2011, by consensus), paras 3-4).

³² Rule 91(4) of the Rules; regulation 56 of the Regulations of the Court.

thereafter by the trial chamber. Therefore, in her view, these reasons must compel the Appeals Chamber to confirm the Impugned Decision.

17. However, returning to the majority's view that the Pre-Trial Chamber erred, this is only to say that the Pre-Trial Chamber lacked a basis for dismissing the Request *in limine*. It is another question entirely as to whether it would have been appropriate for the Pre-Trial Chamber to act on the Request and to adopt any or all of the proposed 'additional principles' on reparations. In addition to taking issue with the legal basis for the Impugned Decision, Mr Abd-Al-Rahman has requested that the Appeals Chamber reverse the Impugned Decision and direct the Pre-Trial Chamber to rule on the merits of the Request after inviting submissions of *amici curiae*.³³ Given the nature of the Request itself, the Appeals Chamber (unanimously, Judge Ibáñez concurring) finds, for the following reasons, that it would be inappropriate to grant this relief under the circumstances.

18. Despite characterising his Request as a proposal for the adoption of 'additional principles', ostensibly submitted with reference to article 75(1) of the Statute, a plain reading of Mr Abd-Al-Rahman's Request reveals that he proposed something very different. Mr Abd-Al-Rahman's Request outlined a modified procedure for the submission and assessment of applications for reparations in nine separate stages, by which nearly the entire proceeding concerning reparations would occur before and largely independent of an eventual conviction of Mr Abd-Al-Rahman in the criminal proceedings against him, under the supervision of the Pre-Trial Chamber. Under his proposal, the Registry would complete the submission of applications to the Court during the pre-trial phase, presenting any information and recommendations about the modalities of reparations, the implementation of awards, or other matters to the Pre-Trial Chamber.³⁴ At that time, the Pre-Trial Chamber would order the Registry to disclose the applications to the Trust Fund for Victims (the 'TFV'), and after receiving the applications it would make public calls for voluntary contributions.³⁵ The Pre-Trial Chamber would then close the period for applications for reparations, and the TFV would assess the amount necessary to finance the remedies sought.³⁶ Based on a report

³³ [Appeal Brief](#), paras 47-49.

³⁴ [Request](#), para. 100: 'additional principles 1 & 2'.

³⁵ [Request](#), para. 100: 'additional principles 3 & 4'.

³⁶ [Request](#), para. 100: 'additional principles 5 & 6'.

from the TFV, the Pre-Trial Chamber would then make an order for implementation of the modalities of reparations.³⁷

19. Under Mr Abd-Al-Rahman's proposal, the Pre-Trial Chamber's order would not be against a person. Following the trial, in the case of a conviction against a person named in the applications for reparations, the trial chamber could issue an order against that person under article 75(2) of the Statute. This order against a convicted person would somehow run parallel to the plan already in the implementation stage, and any victims who already received reparations under the latter plan would not be eligible to receive benefits under the order made against the convicted person.³⁸ In the result, Mr Abd-Al-Rahman would have the Pre-Trial Chamber determine the appropriate reparations and oversee implementation of an order for reparations that comes well in advance of an eventual second order for reparations made by the trial chamber under article 75(2) of the Statute.

20. Although the legal framework governing reparations leaves a considerable amount of discretion to judges as to how to conduct reparations proceedings, there is no room to order a bifurcation of the proceeding as suggested in Mr Abd-Al-Rahman's Request.³⁹ The Appeals Chamber notes, in particular, that one aspect of the procedure for reparations at the Court provides that the final decision on the scope of damage and the determination of modalities for reparations take place after the trial has concluded. This is most evident in rule 97 of the Rules, entitled 'Assessment of reparations', in which there are numerous references to the 'convicted person', indicating that the final assessment of reparations should take place after the close of the criminal trial. Moreover, the Appeals Chamber notes that the only 'order' that may be issued concerning reparations under article 75 of the Statute, entitled 'Reparations to victims', is the one mentioned in subparagraphs (2), (3), and (4), made 'directly against a convicted person'.⁴⁰

³⁷ [Request](#), para. 100: 'additional principle 7'.

³⁸ [Request](#), para. 100: 'additional principles 8 & 9'.

³⁹ In this regard, the Appeals Chamber notes that the TFV may, on its own initiative, provide support to victims through its assistance mandate under regulation 50(a) of the Regulations of the TFV prior to any reparations order.

⁴⁰ See also article 82(4) of the Statute, providing that a convicted person may appeal against the order for reparations under article 75 of the Statute; *Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations"](#) of

21. Rather than advancing ‘additional principles’ that fit within this framework, Mr Abd-Al-Rahman has essentially suggested that the existing procedures be thrown out. Therefore, whether dismissed *in limine* or assessed on its merits the outcome is the same: there is no basis in the Court’s reparations regime for the adoption of a proposal such as the one presented in Mr Abd-Al-Rahman’s Request. The Appeals Chamber recalls that in order to justify interference with the decision under appeal, an appellant must demonstrate that the alleged error materially affected the decision.⁴¹ Here, the Appeals Chamber is not satisfied that granting the relief requested is appropriate, as any error inherent in the Pre-Trial Chamber’s assessment of its competence to deal with reparations, generally, would have no material impact on the result.

22. Therefore, Mr Abd-Al-Rahman’s first and second grounds of appeal are dismissed.

V. APPROPRIATE RELIEF

23. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case, it is appropriate to confirm the Impugned Decision.

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



Judge Piotr Hofmański
Presiding

Dated this 18th day of December 2020

At The Hague, The Netherlands

[7 August 2012](#), 3 March 2015, ICC-01/04-01/06-3129 (A A2 A3), paras 64-76, holding that even an order made through the TFV under article 75(2) of the Statute, second sentence, must still be made against a convicted person.

⁴¹ *Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 22.