



Original: **English**

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

Date: **27 August 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

Request to Dismiss *In Limine* the “Acte d’appel de la «Decision on the Defence Request and Observations on Reparations pursuant to Article 75-1 of the Rome Statute» (ICC-02/05-01/20-117)”

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 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
2. 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 This approach is misconceived, and will further distract from the fair and expeditious conduct of the proceedings concerning the criminal responsibility of Mr Abd-Al-Rahman. Consequently, the Prosecution submits that the Notice of Appeal should be promptly dismissed *in limine*.

Submissions

3. The Notice of Appeal should be dismissed *in limine* because the operative part of the Decision is not a ruling on jurisdiction, as required by article 82(1)(a) of the Statute.
4. The Prosecution also submits that the circumstances favour the exercise of discretion by the Appeals Chamber to rule on the admissibility of the appeal promptly, and at a very early stage, as it may already be minded to do.⁵ Simultaneous initiation by the same party of 'parallel proceedings' before different chambers, pertaining to the same subject matter, is procedurally burdensome, and consequently can only be justified in exceptional circumstances. This justification should be made expressly. In this case, no such showing is made and the strategy appears to be purely speculative. Mr Abd-Al-Rahman will incur no prejudice from prompt action by the Appeals Chamber, since in any event the proceedings before the Pre-Trial Chamber will take their own course, according to the merits of the Request for Certification.

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

² [Decision](#), para. 13.

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

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).

The operative part of the Decision does not constitute a ruling on jurisdiction

5. Article 82(1)(a) applies only to decisions “with respect to jurisdiction or admissibility”, in the sense that the “operative part of the decision itself must pertain directly to a question on the *jurisdiction of the Court* or the admissibility of a case.”⁶ As the Appeals Chamber has emphasised, “[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute.”⁷

6. Notwithstanding ongoing debate about the proper scope of article 82(1)(a), in certain respects,⁸ the *Kenya* Appeals Chamber specifically clarified that the term “jurisdiction” in article 82(1)(a) refers to the “jurisdiction of the Court”⁹—thus excluding matters concerning the competence of one organ of the Court *vis-à-vis* another organ of the Court.¹⁰ The Appeals Chamber held that “[a]rticle 82(1)(a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute”; in particular, “the use of identical language in articles 19(6) and 82(1)(a) of the Statute indicates that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the *jurisdiction of the Court* or the admissibility of the case.”¹¹ The jurisdiction of the Court is typically understood with reference to the four

⁶ [ICC-01/09-78 OA](#) (“*Kenya Appeal Decision*”), para. 15 (emphasis added; continuing: “It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility”).

⁷ See e.g. [ICC-01/13-51 OA](#) (“*Comoros Appeal Decision*”), para. 44; [Kenya Appeal Decision](#), para. 17.

⁸ [ICC-02/17-92 OA OA2 OA3 OA4](#), para. 21.

⁹ See above fn. 6.

¹⁰ See e.g. [ICC-02/17-T-001-ENG](#), pp. 17:20-18:2 (arguing that “jurisdiction for the purpose of Article 82(1)(a) cannot mean the competence of one organ of the Court rather than another” because *inter alia* it would render any “transition from one phase of proceedings to another”, and thus the competence of one organ or chamber to another, a “jurisdictional matter”). For example, confirmation decisions cannot be considered to be appealable under article 82(1)(a) *per se*, merely because they determine whether and to what extent the Trial Chamber will be entitled to exercise its own competence: see also [ICC-02/04-01/15-428](#), para. 4 (recalling that “the drafters of the Statute intentionally excluded decisions on the confirmation of charges from the category of decisions which may be directly appealed”). Of course, this does not preclude the possibility that a jurisdictional matter, directly appealable under article 82(1)(a), can arise in a confirmation decision on a case-by-case basis.

¹¹ [Kenya Appeal Decision](#), para. 16 (emphasis added). Article 19 is sub-titled “Challenges to the jurisdiction of the Court or the admissibility of a case” (emphasis added), and article 19(6) prefaces the reference to the Appeals Chamber by referring to “challenges to the jurisdiction of the Court” (emphasis added). This does not, however, mean that only decisions rendered under article 18 or 19 are appealable under article 82(1)(a)—rather, the Appeals Chamber will look objectively to the substance of the reasoning in the impugned decision, rather than its form, to determine whether it is jurisdictional in nature: see e.g. [ICC-01/04-169 OA](#) (concerning a decision under article 58); [ICC-01/11-01/11-74 OA](#), para. 11 (concerning a decision under rule 103); [ICC-01/11-01/11-126 OA2](#), paras. 14-16 (concerning a decision under article 95); [ICC-01/04-01/07-3424 OA14](#) (“*Katanga Appeal Decision*”) (concerning a decision under article 93); [Comoros Appeal Decision](#), paras. 38-39, 66 (concerning a decision under article 53).

dimensions which constrain the Court's ability to hear or to determine a particular matter,¹² but also encompasses the powers that the Court may properly exercise in that regard.

7. The Decision is not a ruling on the jurisdiction of the Court in this sense. It did not conclude that *the Court* is *unable* to establish principles relating to reparations, in the sense that it is beyond the scope of the powers that the Court is entitled to exercise—indeed, article 75(1) of the Statute directly establishes the contrary, and nothing in the Decision puts this in issue. Rather, the Decision held that the exercise of the function in article 75(1), at the *present stage of proceedings*, is not “within the Chamber’s sphere of competence”.¹³ While a convenient form of words, the reference to “competence” does not make the Decision jurisdictional in nature. To the contrary, the Chamber’s meaning could equally have been expressed by simply saying that the request under article 75(1) was premature and untimely—terminology which has no jurisdictional connotation at all. Indeed, the Decision emphasised that: the Court’s reparation regime is applied to “individual perpetrators convicted by the Court”;¹⁴ adopting principles on reparations “at this stage of the proceedings” would be inconsistent with that regime;¹⁵ and, the Pre-Trial Chamber’s role “during the pre-trial stage of the case” is set out in articles 57 to 61 of the Statute.¹⁶

8. The gravamen of the reasoning in the Decision was thus not whether the Court was permitted to establish principles on reparations, but simply whether the procedural conditions were *currently* satisfied for this to occur. The absence of any statutory indication that the Pre-Trial Chamber was intended to deal with reparations was merely one factor taken into account to confirm that decisions under article 75(1) cannot be properly made at this stage.¹⁷

9. Cursory reference by counsel for Mr Abd-Al-Rahman to the Court’s power and duty to determine its own jurisdiction is irrelevant, and adds nothing to this understanding.¹⁸ Nothing in the Decision contradicts the principle, recognised in article 19(1) of the Statute. Nor can this principle mean that any decision in which a chamber does not take the course of action requested by a party—no matter how scant the legal basis—must necessarily be a

¹² See e.g. [ICC-01/04-01/06-772 OA4](#), para. 21 (“jurisdiction has four different facets: subject-matter jurisdiction [...], jurisdiction over persons [...], territorial jurisdiction [...] and lastly [temporal] jurisdiction”); [Katanga Appeal Decision](#), para. 32; [ICC-01/04-02/06-1225 OA2](#), para. 39.

¹³ [Decision](#), para. 13.

¹⁴ [Decision](#), para. 10 (concluding: “the Court’s proceedings on reparations can only commence once a person has been convicted by the Court”).

¹⁵ [Decision](#), para. 11.

¹⁶ [Decision](#), para. 12.

¹⁷ [Decision](#), para. 12.

¹⁸ *Contra* [Notice of Appeal](#), para. 1(d).

jurisdictional decision, which can be appealed as of right. Such an interpretation would be contrary to the Court's legal framework and judicial economy, and establish an inappropriate procedural burden both on the Appeals Chamber and on the parties.

The Appeals Chamber should exercise its discretion to rule promptly on the admissibility of the appeal

10. The Appeals Chamber exercises discretion in determining whether it is necessary to determine the admissibility of an appeal prior to its judgment on the merits, and when it will render that determination. This discretion should be exercised to favour a prompt and early determination of admissibility when parallel proceedings are pursued before the Appeals Chamber, under article 82(1)(a), and a first instance chamber, under article 82(1)(d), without a showing of exceptional circumstances justifying this course of action. This is just such a case. This early scrutiny is warranted in order to avoid the procedural complexities—and the waste of judicial and other resources—that inevitably ensues in such circumstances.

11. For example, as the Notice of Appeal states, counsel for Mr Abd-Al-Rahman intends to file an appeal brief by 8 September 2020.¹⁹ Absent prompt determination by the Appeals Chamber, this means either that counsel will spend his limited resources in preparing a brief which may not be used, or that Pre-Trial Chamber II will spend its limited resources in hearing the parties and ruling on a Request for Certification which is unnecessary. Either way, time is wasted on superfluous litigation.

12. Counsel for Mr Abd-Al-Rahman has made no attempt to justify to the Appeals Chamber why the pursuit of parallel proceedings is appropriate in this case.²⁰ Most significantly, the procedural harms caused by this exceptional manner of proceeding are excessive in relation to the very limited forensic interest that Mr Abd-Al-Rahman may have in pursuing the appeal. Even if he were to prevail, Mr Abd-Al-Rahman's immediate interests in preparing for the confirmation of charges hearing would not be materially advanced.²¹

¹⁹ [Notice of Appeal](#), para. 2.

²⁰ In the Request for Certification—not filed before the Appeals Chamber—counsel submits that the Request for Certification and Notice of Appeal address different aspects of the Decision: [Request for Certification](#), para. 5. However, this does not justify the pursuit of parallel proceedings since it is well established that the procedural basis for an appeal does not limit the grounds of appeal which can be raised therein.

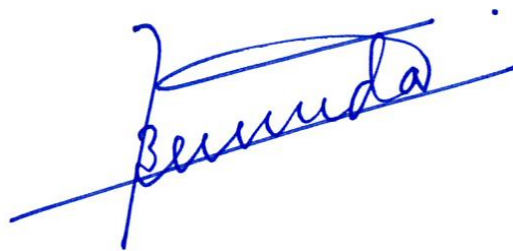
²¹ In his filing before the Pre-Trial Chamber (but not the Appeals Chamber), counsel has suggested that this appeal may reduce the scope of victim participation in his trial: [Request for Certification](#), paras. 16-17. As the Prosecution has argued in response, this objective is inconsistent with the spirit of article 68(3) of the Statute, and should not be cognisable by the Court.

13. The current case contrasts with the recent *Afghanistan* situation, which also saw the Appeals Chamber and Pre-Trial Chamber II simultaneously seized of an appeal under article 82(1)(a) and a request for leave to appeal under article 82(1)(d), but at the instance of different participants. In that situation, the Appeals Chamber merely suspended its own proceedings until Pre-Trial Chamber II determined whether it would certify the impugned decision for appeal.²² More decisive action is appropriate in this case, since these parallel proceedings are pursued by a single party as a deliberate strategy, and the forensic interests at stake for the appellant are comparatively much less significant than in *Afghanistan*.

14. Finally, a prompt determination of the inadmissibility of the Notice of Appeal risks no injustice to Mr Abd-Al-Rahman. The test for certification in article 82(1)(d), when properly applied, functions precisely to identify issues requiring appellate intervention to preserve a fair and expeditious trial, even in the absence of a direct right of appeal. Pre-Trial Chamber II will consider precisely this question in this case, safeguarding Mr Abd-Al-Rahman's rights.

Conclusion

15. For all these reasons, the Appeals Chamber should promptly dismiss the Notice of Appeal *in limine*.



Fatou Bensouda, Prosecutor

Dated this 27th day of August 2020

At The Hague, The Netherlands

²² [ICC-02/17-54 OA OA2 OA3](#), para. 7.