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Original: **French**

No.: **ICC-02/05-01/20**
Date: **9 September 2020**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public Document

Appeal Brief against Decision 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:

Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls, Senior Trial Lawyer

Counsel for the Defence
Mr Cyril Laucci, Lead Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims
Ms Paolina Massidda, Principal Counsel

Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta, Principal Counsel
Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section
Mr Esteban Peralta-Losilla

Victims and Witnesses Section
Mr Nigel Verrill

Detention Section
Mr Paddy Craig

Victims Participation and Reparations Section
Mr Philipp Ambach

Other
Mr Pieter de Baan, Executive Director of the Trust Fund for Victims
Ms Sonia Robla, Public Information and Outreach Section

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Defence") submits this document ("Brief") in support of its appeal against decision ICC-02/05-01/20-117, issued by the Single Judge of the Honourable Pre-Trial Chamber II ("Honourable Single Judge") on 18 August 2020 ("Decision under Appeal"),[1] pursuant to article 82(1)(d) of the Rome Statute ("Statute"). This Brief follows the decision of the Honourable Single Judge of 31 August 2020 granting leave to appeal ("Decision Granting Leave to Appeal").[2]

SUMMARY OF PROCEEDINGS LEADING TO THE PRESENT APPEAL

2. By way of a *Requête et Observations sur les Réparations en vertu de l'Article 75-1* of 17 July 2020 ("Request"),[3] the Defence placed before the Honourable Single Judge its observations on the principles of reparations to victims in the case at bar under article 75(1) of the Statute and set out proposals for additional principles of reparations to victims ("Additional Principles"),[4] which it put to the consideration of the Honourable Single Judge for possible adoption following consultation with organizations and/or individuals having expertise in victims' rights, as amici curiae on the basis of rule 103(1) of the Rules of Procedure and Evidence ("Rules").[5]

3. To the Defence's surprise, the Office of the Prosecutor (OTP) sought the dismissal of the Request *in limine* without prior consultation of the victims or amici curiae,[6] on the principal ground that the Additional Principles were without legal basis in the Statute and that the parties' resources could not be directed towards considering the observations that might be received from amici curiae.[7] The position taken by the OTP ran counter to the Prosecutor's repeatedly stated views on reparations to victims and was put forward in the absence of prior consultation with

[1] ICC-02/05-01/20-117: "Decision on the Defence Request and Observations on Réparations pursuant to Article 75-1 of the Rome Statute" (French version not available), 18 August 2020.
[2] ICC-02/05-01/20-141: "Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75(1) of the Rome Statute" (French version not available), 31 August 2020.
[3] ICC-02/05-01/20-98: "*Requête et observations sur les réparations en vertu de l'article 75-1*", 17 July 2020.
[4] ICC-02/05-01/20-98: *op. cit.*, para. 100.
[5] ICC-02/05-01/20-98: *op. cit.*, para. 101.
[6] ICC-02/05-01/20-102: "Prosecution Reponse to '*Requête et observations sur les réparations en vertu de l'article 75-1*' (ICC-02/05-01/20-102)" (French version not available), 23 July 2020.
[7] ICC-02/05-01/20-102: *op. cit.*, para. 19.

the victims, in violation of regulation 16 of the Regulations of the OTP. The suggestion that the Request be dismissed without hearing the views and concerns of victims appeared, furthermore, incompatible with the letter and spirit of article 68(3) of the Statute.

4. By a request under regulation 24(5) of the Regulations of the Court (RoC) of 27 July 2020 ("Request for Leave to Reply"),[8] the Defence sought leave to reply to the OTP's submissions. The Defence expressed its surprise and explained that it could not reasonably have anticipated the OTP's position, not least for the reasons stated above.

5. The Honourable Single Judge dismissed the Request *in limine* by way of the Decision under Appeal, issued on 18 August 2020, on the principal ground that it was without legal basis and that it fell outside the prerogatives of the Defence and the Chamber's sphere of competence.[9] The Decision under Appeal also rejected the Request for Leave to Reply.[10]

6. On 24 August 2020, the Defence made an application under article 82(1)(d) of the Statute for leave to appeal against the Decision under Appeal ("Application for Leave to Appeal").[11]

7. On 27 August 2020, the OTP sought the dismissal of the Application for Leave to Appeal.[12]

8. On 31 August 2020, the Defence sought leave to reply to the OTP's submissions on the same basis as in the preceding Request for Leave to Reply.[13]

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[8] 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.
[9] ICC-02/05-01/20-117: *op. cit.*, para. 13.
[10] ICC-02/05-01/20-117: *op. cit.*, para. 9.
[11] ICC-02/05-01/20-129: "*Demande d'autorisation d'interjeter appel de la* 'Decision on the Defence Request and Observations on Réparations pursuant to Article 75-1 of the Rome Statute' *(ICC-02/05-01/20-117)*", 24 August 2020.
[12] ICC-02/05-01/20-138: "Prosecution Response to Request for Leave to Appeal 'Decision on the Defence Request and Observations on Réparations pursuant to Article 75-1 of the Rome Statute'" (French version not available), 27 August 2020.
[13] ICC-02/05-01/20-140: "*Requête en vertu de la norme 24-5 (Réplique à ICC-02/05-01/20-138)*", 31 August 2020.

9. On the same day, the Honourable Single Judge granted leave to appeal against the Decision under Appeal pursuant to article 82(1)(d) of the Statute, but did not grant leave to reply ("Decision Granting Leave to Appeal").[14]

10. This Brief under article 82(1)(d) of the Statute is filed within the time limit, set by regulation 65(4) of the RoC, of 10 days from notification of the Decision Granting Leave to Appeal.

ISSUE PUT TO THE APPEALS CHAMBER FOR CONSIDERATION

11. In its Application for Leave to Appeal, the Defence identified the following issue as being involved in the Decision under Appeal for the purposes of the determination on leave to appeal pursuant to article 82(1)(d) of the Statute:

> 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.[15]

12. By his decision of 31 August 2020, the Honourable Single Judge granted leave to appeal, without varying the issue raised by the Defence.[16]

13. Article 75(1) of the Statute provides in its first sentence that "[t]he Court shall establish principles relating to reparations". The essential issue raised by the present appeal, therefore, is which authority of "the Court" is empowered by article 75(1) of the Statute to develop such principles, and specifically whether a Pre-Trial Chamber having before it a request to lay down new principles relating to reparations is competent to adjudicate that request. The Decision under Appeal answered this question in the negative, holding, *inter alia,* that the issues raised by the Request fell outside its "sphere of competence".[17] The present appeal contests such a holding of lack of jurisdiction and seeks confirmation, by the Honourable Appeals Chamber, of the Honourable Pre-Trial Chamber II's competence to adjudicate the Request and to consider the adoption of the proposed Additional Principles of reparations after

[14] ICC-02/05-01/20-141: "Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75(1) of the Rome Statute" (French version not available), 31 August 2020.
[15] ICC-02/05-01/20-129: *op. cit.*, para. 15.
[16] ICC-02/05-01/20-141: *op. cit.*
[17] ICC-02/05-01/20-117: *op. cit.*, para. 13.

allowing amicus curiae submissions under rule 103(1) of the Rules. The errors of fact and/or law engendered by the restrictive view of the Honourable Pre-Trial Chamber II's jurisdiction form the subject matter of the four grounds of appeal set out below.

GROUNDS OF APPEAL AND SUPPORTING ARGUMENTS

14. By way of the Decision under Appeal, the Honourable Single Judge determined (i) that the adoption and implementation 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 would fall outside the powers and duties of the Honourable Pre-Trial Chamber;[18] and (ii) that the Request was without legal basis and fell outside the prerogatives and duties of the Defence and the Chamber's sphere of competence.[19] In support of its appeal, the Defence contests each of those two determinations (first and second grounds of appeal), the authority of the Honourable Single Judge to enter them (third ground of appeal) and the dismissal of the Request *in limine* without consideration of the views, concerns and interests of the victims (fourth ground of appeal). These four grounds of appeal are raised in the alternative, insofar as granting any one of them on its own merits clears the way for consideration of the relief sought.

First ground of appeal – error of fact and law: the adoption and implementation of the proposed Additional Principles of reparations required no amendment of the Statute or the Court's legal framework

15. Paragraph 11 of the Decision under Appeal states that

> the adoption 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, which falls outside the powers and duties of the Pre-Trial Chamber. [French version not available].[20]

[18] ICC-02/05-01/20-117: *op. cit.*, para. 11.
[19] ICC-02/05-01/20-117: *op. cit.*, para. 13.
[20] ICC-02/05-01/20-117: *op. cit.*, para. 11.

The words "would amount" may suggest either a finding that the Request was, in concrete terms, seeking an amendment of the Statute or instruments of the Court, or a statement of opinion by the Honourable Single Judge, who authored the Decision under Appeal, that the adoption of the proposed Additional Principles of reparations would require such an amendment. Considering this ambiguity, the Defence will look at both options in turn.

16. If the Decision under Appeal found that the Request was, in concrete terms, seeking an amendment of the Statute or instruments of the Court, it is wrong in fact, insofar as the Request seeks no such thing. At paragraphs 46-74 of the Request,[21] the Defence instead canvasses the various provisions of the Court's instruments on which it "[TRANSLATION] intends to rely in support" of the statement of its Additional Principles of reparations.[22] The provisions of articles 21, 68(3), 75(1), 75(2), 75(3), 75(6), 79 and 82(4) of the Statute, rules 85, 86, 94(2), 95, 97(1), 97(2), 97(3), 98 and 148 of the Rules and regulations 20, 21(a), 21(d), 27, 42, 48, 49, 50(a), 52 and 75 of the Regulations of the Trust Fund for Victims (TFV) are analysed in turn, and no amendments are proposed. The analysis concludes as follows:

> [TRANSLATION] In the light of the foregoing analysis, Lead Counsel prays the Honourable Single Judge to hold that none of the rules cited stands in the way of conducting reparations proceedings – and implementing reparations to victims in a situation – on a stand-alone basis and with no requirement as to the outcome of the criminal prosecution[,][23]

in accordance with the Additional Principles of reparations proposed. Since it is the Defence's submission that no current provision of the Court's instruments stands in the way of those proposals, there is no reason for it to seek, and it does not seek, amendment of those instruments. If, therefore, the Decision under Appeal considered that the Request sought amendment of the Court's instruments, it clearly erred in fact.

17. If the reference to amendment of the Court's instruments merely reflected the Honourable Single Judge's opinion that the proposed Additional Principles of

[21] ICC-02/05-01/20-98: *op. cit.*, paras. 46-74.
[22] ICC-02/05-01/20-98: *op. cit.*, paras. 46-74.
[23] ICC-02/05-01/20-98: *op. cit.*, para. 74.

reparations could not be adopted without amending the instruments, the Decision under Appeal erred in law. The Request argued, rather, that the interpretation which it attached to certain provisions of the Court's instruments, in particular rules 94(2), 95, 97(2), 97(3) and 148 of the Rules, relating to "various stages of the proceedings", was the only interpretation capable of reconciling them with the other relevant provisions of the Court's instruments, in particular article 66 of the Statute, which concerns the presumption of innocence enjoyed by persons charged, and article 75(2) of the Statute, which contemplates specific reparations proceedings only after a person charged is convicted. Whereas the apparent contradictions between those and other provisions governing reparations before the Court, in particular articles 66 and 75(2) of the Statute, had often before been put down to the vicissitudes of the negotiation of the Statute and diplomatic compromises extracted at the last minute in Rome without the opportunity to revisit the overall coherence of the text, the Request proposed an interpretation which restores coherence to the diverse provisions of the instruments and shows that the Statute's overall approach to reparations to victims, as it was laid down in Rome, is the approach taken by the proposals for Additional Principles of reparations set out in the Request. Far from requiring an amendment of the Statute or other instruments of the Court, the Request attempted instead to shed fresh light on the overall coherence of those instruments. The Defence so submitted at paragraph 74 of the Request:

> [TRANSLATION] Lead Counsel invites the Honourable Single Judge to hold, conversely, that the solution proposed is the only one capable of affirming the consistency of all the Court's existing instruments relating to reparations – in particular rules 94-99 of the Rules – with the other provisions of the Rome Statute and the Regulations of the TFV.[24]

18. Rather than so holding, the Decision under Appeal asserts to the contrary that the adoption of the proposed Additional Principles of reparations would require amendment of the Court's instruments, although it does not specify which ones or state which particular provision or provisions of the Statute and/or other instruments of the Court are incompatible with the proposed Additional Principles of reparations. This conclusion is entirely empty of substance insofar as it identifies no specific

[24] ICC-02/05-01/20-98: *op. cit.*, para. 74.

amendment which the adoption of the proposed Additional Principles of reparations would require. By not mustering a single specific, concrete example to substantiate the assertion that the adoption of the proposed Additional Principles of reparations would require amendment of the instruments, the Decision under Appeal not only erred in law – no amendment is necessary – but also failed in the duty, imposed by article 74(5) of the Statute, to state reasons for decisions.

19. Irrespective of the meaning given to the words "would amount", the Decision under Appeal therefore erred in fact and/or law by holding that the adoption of the proposed Additional Principles of reparations required amendment of the Court's instruments. That determination prejudiced the Defence insofar as it precluded consideration of the merits of the Request. The Defence therefore prays the Honourable Appeals Chamber to set it aside on this first ground and to award the relief sought at paragraphs 47-49, below.

Second ground of appeal – errors of law: the Honourable Pre-Trial Chamber II or its Honourable Single Judge was competent to adjudicate the Request

20. Paragraph 13 of the Decision under Appeal concludes:

> In light of the above, the Single Judge considers that there is no legal basis for the Request, it does not fall within the Counsel's prerogatives and duties nor within the Chamber's sphere of competence, and, accordingly, should be dismissed *in limine*.[25]

By way of a second ground of appeal, the Defence contests each of those three aspects on the basis of error of law.

Second ground of appeal – first aspect: article 75(1) of the Statute afforded an appropriate legal basis for the Request

21. The Defence respectfully submits that the Decision under Appeal erred in law, first, by holding that the Request was without legal basis.

22. As stated directly in its title, and in the submissions it contained,[26] the Request was brought on the principal basis of the Court's authority to determine the principles of reparations under article 75(1) of the Statute. The Request clearly stated

[25] ICC-02/05-01/20-117: *op. cit.*, para. 13.
[26] ICC-02/05-01/20-98: *op. cit.*, title and paras. 49, 99, 100.

at paragraph 49: "[TRANSLATION] **Article 75(1) of the Statute** is the principal article pursuant to which the present Request and observations are submitted." [Emphasis in original].[27] Were it the case that the conclusion reached at paragraph 13 rested on a mere oversight of the fact that the legal basis afforded by article 75(1) of the Statute was clearly stated in the title and content of the Request, the Decision under Appeal would, therefore, be wrong in fact. Considering that the basis afforded by article 75(1) of the Statute is recited in the title of the Decision under Appeal and in the summary which it gives of the Defence's submissions, at paragraph 5,[28] the Defence excludes that interpretation from the outset and inclines to the view that the conclusion reached in the Decision under Appeal means that, as the Honourable Single Judge saw it, article 75(1) of the Statute did not afford an appropriate legal basis for the Request. The Defence respectfully submits that that conclusion is wrong in law.

23. In the light of the various relevant elements of article 75(1), which provides that "[t]he Court shall establish principles relating to reparations", the conclusion that this provision does not afford an appropriate legal basis on which to entertain the Request may be interpreted in one of two ways: either (i) this conclusion disputes that the Request was addressed to the proper authority of "the Court"; or (ii) it disputes that the Request was submitted at the appropriate juncture to establish principles of reparations. Since the Decision under Appeal lacks detailed reasons – in violation of article 74(5) of the Statute – the Defence has no choice but to consider both options in turn.

24. The first option, that the Request was not addressed to the proper authority of "the Court" tasked with establishing the principles of reparations, has no legal basis. The only instrument of the Court that specifies which authority of "the Court" is tasked with determining the principles of reparations was specifically referred to at paragraph 49 of the Request:

> [TRANSLATION] After the Court's founding, the issue of development of principles relating to reparations prior to any reparations proceedings before Chambers was discussed by

[27] ICC-02/05-01/20-98: *op. cit.*, title and para. 49.
[28] ICC-02/05-01/20-117: *op. cit.*, title and para. 5.

> the plenary of judges of the Court in 2006 and 2008, but those discussions resulted in the decision to leave it to the competent Chambers to establish such principles in the context of judicial proceedings in specific cases.[29] [Footnote in original].[30]

That instrument said that the establishment of the principles of reparations was a matter for the exercise of the Court's judicial functions, which falls within the exclusive jurisdiction of its Chambers pursuant to articles 1 and 39(2)(a) of the Statute. No instrument specified which Chamber or Chambers were authorized to exercise such jurisdiction, nor debarred Pre-Trial Chambers from exercising it. Article 57(2) of the Statute expressly vests Pre-Trial Chambers with authority to render decisions on applications from the parties. Inasmuch as the Request was put before it by a party, therefore, the Honourable Pre-Trial Chamber II or its Honourable Single Judge was competent to adjudicate it. On its first interpretation, therefore, as to designation of the appropriate authority of "the Court", the Decision under Appeal erred in law by holding that the Honourable Pre-Trial Chamber II or its Single Judge was not the authority empowered to adjudicate the Request.

25. The second option, as to the juncture or stage at which the Request was made, is, notably, that for which the OTP argued in its Response to the Application for Leave to Appeal.[31] Insofar as the Honourable Single Judge, who authored the Decision under Appeal, repudiated this interpretation by granting leave to appeal on the issue raised as to jurisdiction, as opposed to stage of proceedings,[32] reliance cannot be placed on it. The Defence discusses it here solely for the sake of thoroughness. No instrument of the Court determines at which stage of proceedings the principles of reparations are to be established under article 75(1) of the Statute. The fact that article 75(2) of the Statute operates only after a conviction has been handed down cannot qualify the scope of article 75(1), particularly as the Request identified the contradictions which a strictly post-conviction-stage reading of that provision creates with the provisions of rules 94-99 of the Rules, which "relat[e] to

[29] ICC-ASP/12/39: "Report of the Court on principles relating to victims' reparations", 8 October 2013, para. 3.
[30] ICC-02/05-01/20-98: *op. cit.*, para. 49.
[31] ICC-02/05-01/20-138: *op. cit.*, para. 11.
[32] ICC-02/05-01/20-141: *op. cit.*

various stages of the proceedings" pursuant to the title of Chapter 4 of the Rules.[33] The Request furthermore discussed in detail the reasons why the respective temporal scopes of articles 75(1) and 75(2) had to be decoupled.[34] The very nature of the proposed Additional Principles of reparations, which apply from the pre-trial stage, meant that the only useful juncture for consideration of the Request was the juncture at which it was submitted. The Request stated, moreover, the grounds for the timing of its filing.[35] On its second interpretation, therefore, concerning the stage at which the principles of reparations should be established, and which was in any case repudiated by the Decision Granting Leave to Appeal which rejected the OTP's submissions in this respect,[36] the Decision under Appeal erred in law in holding that article 75(1) of the Statute was not applicable to the present stage of proceedings.

26. Whichever option is settled upon to interpret it, therefore, the Honourable Single Judge's conclusion that the Request was without legal basis is wrong in law. The Defence therefore prays the Honourable Appeals Chamber to reverse the Decision under Appeal on the first aspect of this second ground.

Second ground of appeal – second aspect: the submission of the Request fell within the ambit of the prerogatives and duties of the Defence

27. The Defence submits, moreover, that the Decision under Appeal also erred in law in holding that the submission of the Request fell outside the prerogatives and duties of the Defence.

28. The Defence observes, first, that this conclusion reached in the Decision under Appeal does not rest on any instrument or reference going to the definition or bounds of the remit of Counsel for the Defence, and is therefore without legal basis.

29. The only instrument of the Court which governs the nature and extent of the remit of Defence Counsel before the Court is the Code of Professional Conduct for counsel (CPCC), adopted pursuant to rule 8 of the Rules. Article 6(1) of the CPCC

[33] ICC-02/05-01/20-98: *op. cit.*, paras. 57-62, 74.
[34] ICC-02/05-01/20-98: *op. cit.*, paras. 49-50.
[35] ICC-02/05-01/20-98: *op. cit.*, paras. 4-5, 75-76.
[36] ICC-02/05-01/20-138: *op. cit.*, para. 11.

requires Counsel to "act honourably, independently and freely" in the sole interests of his or her client. The range of Counsel's duties and prerogatives is therefore limited only by the requirement to act in the sole interests of his or her client, which are determined by agreement with the latter in the course of their privileged communications. On the basis of the defence strategy formulated in the course of those communications, Counsel exercises the prerogatives and uses the procedural remedies available to the person he or she represents, such as they are defined by the instruments of the Court. The bringing of requests before the Pre-Trial Chamber or the designated Single Judge is one such procedural remedy, for which article 57(2) of the Statute specifically provides.

30. The interest entitling Mr Ali Muhammad Ali Abd-Al-Rahman to be heard on the matter *sub judice* was specifically discussed at paragraphs 4-5, 57, 60, 81, 91-94 and 98 of the Request[37] and lay principally in respect for the presumption of innocence guaranteed by article 66 of the Statute, disentanglement of the penal proceedings from the question of reparations to victims, and the opportunity to unlock what could be a substantial portion of the resources, time and energy devoted to victim participation by Chambers, the OTP and the Defence throughout the proceedings, to be dedicated solely to the determination as to his guilt or innocence. In its Request for Leave to Reply, moreover, the Defence raised a further basis for the interest entitling Mr Ali Muhammad Ali Abd-Al-Rahman to be heard, based on the need to put an end to the constrained, unnecessary and questionable union of the victims' right to reparations with the matters at stake in the criminal prosecution, which is consistent neither with the interests of victims, who are forced to support the OTP's case regardless of its merits or lack thereof, nor with the presumption of innocence, and which had disastrous consequences in the *Lubanga* case, where several victims who had appeared at trial saw their victim status revoked on account of inconsistencies in their evidence, which was clumsily modelled on the OTP's case.[38] It was in particular to defend these legitimate interests of the Defence,

[37] ICC-02/05-01/20-98: *op. cit.*, paras. 4-5, 57, 60, 81, 91-94 and 98.
[38] ICC-02/05-01/20-104: *op. cit.*, para. 8.

as well as the convergent interest of victims in receiving reparations for the harm they have suffered irrespective of the outcome of the criminal prosecution, that Counsel for the Defence exercised the procedural remedy, available under article 57(2)(b) of the Statute, of filing before the Honourable Single Judge the Request seeking the exercise of his authority to consider the establishment of new principles of reparations, which is conferred on him by article 75(1) of the Statute and the decision of the Court that the establishment of those principles was a matter for judicial proceedings.[39] The Defence was, therefore, fully exercising its prerogatives and duties, such as they are laid down by the instruments of the Court, when it submitted the Request. The Decision under Appeal therefore erred in law in holding otherwise.

Second ground of appeal – third aspect: the Request fell within the Chamber's sphere of competence

31. The fact that consideration of the Request fell within the ambit of the competence of the Honourable Pre-Trial Chamber II or its Single Judge to adjudicate the Request has already been discussed above. The competence of the Honourable Pre-Trial Chamber II or its Single Judge to adjudicate the Request rested on article 57(2) of the Statute as regards the jurisdiction of Pre-Trial Chambers to issue decisions on requests filed by parties to the proceedings; on article 75(1) of the Statute as concerns the Court's jurisdiction *ratione materiae* over the establishment of principles of reparations; on the decision taken by the Honourable Judges of the Court sitting in plenary session under rule 4(2) of the Rules that the establishment of those principles was a matter for judicial proceedings;[40] and on the exclusive jurisdiction of the Chambers of the Court as regards the exercise of judicial functions under articles 1 and 39(2)(a) of the Statute. The Decision under Appeal therefore erred in law in holding that the Honourable Pre-Trial Chamber II or its Honourable Single Judge was not competent to adjudicate the Request.

[39] ICC-ASP/12/39: *op. cit.*, para. 3.
[40] ICC-ASP/12/39: *op. cit.*, para. 3.

Second ground of appeal – conclusion

32. The Decision under Appeal, therefore, involved three errors of law in that it held that the Request was without legal basis, that the filing of the Request fell outside the Defence's prerogatives and that the Honourable Pre-Trial Chamber II or its Honourable Single Judge was not competent to adjudicate the Request. Those three errors prejudiced the Defence insofar as they precluded consideration of the merits of the Request. They form the second ground on which the Defence prays the Honourable Appeals Chamber to reverse the Decision under Appeal and to award the relief sought at paragraphs 47-49 below.

Third ground of appeal – error of law: the Honourable Single Judge was without authority to hold that the Honourable Pre-Trial Chamber II was not competent to adjudicate the Request

33. The Defence brought the Request before the Honourable Single Judge in accordance with the decision of the Honourable Pre-Trial Chamber II designating him, pursuant to article 57(2)(b) of the Statute, to carry out its functions in the case *sub judice*.[41] In the Defence's view, the Request did not fall under any of the exceptions to the delegation conferred on the Honourable Single Judge, which would have required the Chamber to exercise its judicial functions *en banc* pursuant to article 57(2)(a) of the Statute. Specifically, and for the reasons discussed under the second ground above, the Defence was not of the view that the Request raised a problem of jurisdiction.

34. However, in his deliberation on the Request, the Honourable Single Judge came to a different conclusion, that the Request raised a problem of jurisdiction. The Court's previous decisions have established that the exercise, by its Chambers, of jurisdiction to determine their own jurisdiction (*compétence de la compétence* or *Kompetenz-Kompetenz*) is an application of their prerogative under article 19(1) of the

[41] ICC-02/05-01/20-86: "Decision on the Designation of a Single Judge" (French version not available), 9 June 2020.

Statute. In particular, the Honourable Pre-Trial Chamber II, as it was then composed, so ruled in the case of *Kony et al.*:

> 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.**[42] [Emphasis added]. [French version not available].

35. In its decision on whether to entertain the first appeal against the Decision under Appeal, lodged on the basis of article 82(1)(a) of the Statute, the Honourable Appeals Chamber relied on an interpretation based on its reading of the word "jurisdiction" in article 82(1)(a) of the Statute, which it confines to the "jurisdiction of the Court".[43] That interpretation of article 82(1)(a) of the Statute by the Honourable Appeals Chamber is without prejudice and does not call into doubt the validity of the interpretation of article 19 of the Statute, by the aforementioned Honourable Pre-Trial Chambers, as being applicable to their determinations on their jurisdiction.

36. The conclusion of the Honourable Single Judge – disputed by the Defence – that the Request raised a problem as to the Chamber's jurisdiction, therefore, required the exercise of *compétence de la compétence* under article 19(1) of the Statute. Pursuant to article 57(2)(a) of the Statute, that determination required the Honourable Pre-Trial Chamber II to deliberate *en banc*. From the moment the Honourable Single Judge thought he discerned a problem as to the Chamber's competence to adjudicate the Request, he should accordingly have referred the issue, as article 57(2)(a) of the Statute and rule 7(2) of the Rules expressly obliged him to do, to the Honourable Pre-Trial Chamber II for determination *en banc*.

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[42] ICC-02/04-01/15-53-Red: "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. At least two subsequent decisions refer directly to this passage: see ICC-02/04-01/05-377: "Decision on the admissibility of the case under article 19(1) of the Statute", 10 March 2009, para. 45; and ICC-01/05-01/08-424: "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, para. 23.

[43] ICC-02/05-01/20-145_OA3: "Decision on the Admissibility of the Appeal" (French version not available), 4 September 2020, paras. 6, 8-9.

37. By not doing so, the Honourable Single Judge therefore exceeded the delegation conferred on him by the Honourable Pre-Trial Chamber II under article 57(2)(b) and acted *ultra vires* by encroaching on the latter's exclusive jurisdiction, under articles 57(2)(a) and 19 of the Statute, to rule on its competence to adjudicate the Request.

38. The Decision under Appeal was, therefore, handed down by the Honourable Single Judge *ultra vires*, which constitutes a third ground of appeal founded on that error of law. The decision thereby prejudiced the Defence insofar as it precluded the determination as to the Honourable Pre-Trial Chamber II's competence to adjudicate the Request from being made by the only authority empowered to do so under article 57(2)(a) of the Statute. The Defence prays the Honourable Appeals Chamber to reverse the Decision under Appeal on that basis.

Fourth ground of appeal – error of law: the Decision under Appeal violated article 68(3) of the Statute by ruling on the Request without first hearing the views and concerns of victims

39. Lastly, the Defence submits that the Request raised issues, relating in particular to the establishment of Additional Principles of reparations, which directly affected the personal interests of victims in the case and, more broadly, the situation, insofar as the proposed Additional Principles of reparations would also have enabled them to claim reparations without any requirement as to the outcome of the penal proceedings. As such, those issues were among those on which article 68(3) of the Statute requires the Court to permit "the views and concerns of the victims to be presented and considered". Previous decisions of the Honourable Appeals Chamber relating to the principles of reparations place particular emphasis on this point, laying down as one of those principles that "[i]n all matters relating to reparations, the Court, as enshrined in article 68 of the Statute and rule 86 of the Rules of

Procedure and Evidence, shall take into account the needs of all victims."[44] The Defence specifically addressed this aspect in its Request.[45]

40. At this very preliminary stage of the case *sub judice*, no victims are, as yet, represented. It was, *inter alia,* to attenuate this difficulty that the Defence suggested, at paragraph 101 of its Request,

> [TRANSLATION] inviting any interested State, international organization or individual to make written and or oral submissions on the issues raised in the present Request and Observations and the proposals for the adoption of additional principles of reparations, as amici curiae on the basis of rule 103(1) of the Rules.[46]

In making that suggestion the Defence anticipated, in particular, that organizations active in promoting the right of victims to reparations, such as Redress, Amnesty International, Human Rights Watch, the International Federation for Human Rights, *Avocats Sans Frontières* and others, would answer the invitation extended to them by the Honourable Single Judge to advance the views, concerns and interest of victims, the latter's lack of representation notwithstanding. The Office of Public Counsel for Victims (OPCV) could also have participated on that same basis or on the basis of its remit under regulation 81(4)(c) of the RoC.

41. It was not permissible for any decision on the Request, let alone one dismissing it *in limine*, to be rendered without considering, by whatever means might be chosen, the views, concerns and general interests of victims, whose personal interests were directly in question under article 68(3). Issuing a decision which dismissed the Request *in limine* without considering the general interests of victims was a serious and patent violation of article 68(3) of the Statute.

42. The Decision under Appeal dismissed the Request *in limine* without considering the views, concerns and general interests of victims as to the issues it raised in direct relation to their right to reparations for the harm they have suffered. It gave no justification for that failure. The violation is all the more serious in that it follows immediately on the heels of the violation of regulation 16 of its own Regulations by the OTP, which also did not carry out the required consultation of

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[44] ICC-01/04-01/06-3129-AnxA A A2 A3: "Order for Reparations", 1 August 2016, para. 14.
[45] ICC-02/05-01/20-98: *op. cit.*, para. 48.
[46] ICC-02/05-01/20-98: *op. cit.*, para. 101.

victims when devising its Response seeking dismissal of the Request *in limine*. The Defence brought that violation of regulation 16 of the Regulations of the OTP to the attention of the Honourable Single Judge in its Request for Leave to Reply.[47] The Honourable Single Judge rejected the Request for Leave to Reply out of hand and hence did not acknowledge the violation, by the OTP, of regulation 16 of its own Regulations. Instead he repeated the same error as the OTP by failing, in his turn, in the duty to consider the views, concerns and interests of victims before handing down the Decision under Appeal, in violation of article 68(3) of the Statute. The Defence therefore prays the Honourable Appeals Chamber to hold that the Decision under Appeal was affected by a further error of law in that it did not respect the terms of article 68(3) of the Statute. That decision thereby prejudiced the Defence by precluding consideration of the merits of the Request in the light of the views, concerns and interests of victims, and the Defence prays the Honourable Appeals Chamber to reverse it, also, on this fourth ground.

43. To remedy the violation of article 68(3) by the Decision under Appeal, and since no victims are represented at the current preliminary stage of proceedings, the Defence invites the Honourable Appeals Chamber to consider granting applications made under rule 103(1) of the Rules, if any, for leave to participate as *amicus curiae* to assist in the determination of the new issues raised in the Request and on the present appeal by presenting, *inter alia*, the views and interests of victims of crimes within the Court's jurisdiction. For the Court should not conclusively reject the new and ambitious proposals raised in the Request without having taken into consideration the interests of the victims, whatever the means by which it chooses to do so. Such an outcome would not only be irreconcilable with article 68(3) of the Statute; it would also paint an extremely negative picture of the Court – and one inconsistent with the object and purpose of the Statute – as a judicial institution that is prepared to reject proposals relating to the rights of victims to reparations, regardless of the ground for those proposals, without showing that it has taken their

[47] ICC-02/05-01/20-104: *op. cit.*, para. 5.

interests into consideration. The Defence solemnly prays the Honourable Appeals Chamber not to let that happen.

PREJUDICE CAUSED TO THE DEFENCE BY THE DECISION UNDER APPEAL

44. The Decision under Appeal prejudiced the interests of the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman insofar as, by dismissing the Request *in limine*, it precluded consideration of the merits of the Request and violated the legitimate procedural interests which entitled him to be heard, such as they were set out at paragraphs 4-5, 57, 60, 81, 91-94 and 98[48] of the Request and paragraph 8 of the Request for Leave to Reply.[49] Those interests were many and substantial. They included (i) the right of Mr Ali Muhammad Ali Abd-Al-Rahman to a presumption of innocence unimpaired by the question as to whether victims may be awarded reparations; (ii) his desire to help ensure that all victims of the violence in Darfur, and more generally in Sudan, may be afforded reparation for the harm they have suffered, without having to await the remote and uncertain outcome of his trial; (iii) his right to devote the entirety of the scant resources accorded to him for the needs of his Defence to scrutinizing and refuting the OTP's case, rather than seeing a substantial portion of those resources diverted for the sole purpose of issues related to victim participation; (iv) his right, in the event that the proceedings against him are unsuccessful, not to see the termination of those proceedings or his acquittal met with the same avalanche of criticism as in the previous cases referred to in footnote 4 to the Request, and to be able to resume his life as an ordinary, decent citizen of Sudan, in peace, without being hounded by public outcry over the deprivation of victims of their right to reparations for the harm they have suffered; and lastly (v) his right to contribute what little he can to the restoration of peace and to reconciliation in the country so dear to him, Sudan, which he chose to leave in order to appear voluntarily before the Court.

45. By way of his Request, Mr Ali Muhammad Ali Abd-Al-Rahman never intended to shirk any liability which the Court, in the exercise of its final authority,

[48] ICC-02/05-01/20-98: *op. cit.*, paras. 4-5, 57, 60, 81, 91-94 and 98.
[49] ICC-02/05-01/20-104: *op. cit.*, para. 8.

might determine that he bore, upon conclusion of his trial, should the OTP manage despite his innocence to persuade it, beyond reasonable doubt, of his guilt in respect of the suffering endured by victims in the case. The principle that it falls essentially to the convicted person to shoulder the burden of reparations to victims – to the extent, necessarily, of the part he is found to have had in the commission of the crimes[50] and of his ability to pay – is not placed in question by the Request. The Request expressly recalls that principle[51] and gives effect to it by substituting the TFV for victims in reparations proceedings where brought against a convicted person pursuant to article 75(2) of the Statute.[52] This core principle of reparations, therefore, on which previous decisions of the Honourable Appeals Chamber have relied, is fully respected by the Request.

46. By dismissing the Request *in limine*, the Decision under Appeal impeded the initiation of a comprehensive discussion before the Court – between the parties, the victims and the organizations that promote their rights – that could have resulted in supplementing the current single system, under which reparations to victims depend on the conviction of the person charged. As stated in the Request for Leave to Reply, the side effect of this single system is that it puts the victims, *de facto*, in the position of having foisted upon them an objective interest in supporting the case advanced by the Office of the Prosecutor, in hopes of a conviction, irrespective of the content of that case, its merits or lack thereof and its consonance with their actual victimization. The Defence submitted that this questionable union, which was not consistent with the interests of victims, the presumption of innocence or the right to a fair trial, had previously had disastrous consequences in the *Lubanga* case. Nevertheless it was this needless and questionable dependence of reparations on a conviction that the OTP, in its Response to the Request, was at pains to preserve as the single system of reparations, thus disregarding the Statute, its own Regulations and the interests of victims. It was this single system that the Request proposed be

[50] ICC-01/04-01/06-3129-AnxA A A2 A3: *op. cit.*, paras. 20-21.
[51] ICC-02/05-01/20-98: *op. cit.*, para. 86.
[52] ICC-02/05-01/20-98: *op. cit.*, paras. 54, 62, 81, 86, 100 and "[TRANSLATION] Additional Principle of reparations No. 9 – Effect of reparations on case proceedings".

supplemented by the establishment of Additional Principles of reparations, providing for a procedure distinct from that under article 75(2) of the Statute, and pursuant to which the conviction of the person charged would no longer be a prerequisite to reparations. And it is the exclusive character of this system, resting on the dependence of reparations on a conviction, that the Decision under Appeal perpetuates to the detriment of the Defence's rights to a fair trial and the presumption of innocence.

RELIEF SOUGHT

47. Pursuant to rule 158 of the Rules, the Defence prays the Honourable Appeals Chamber, firstly, to reverse the Decision under Appeal.

48. Secondly, the Defence prays the Honourable Appeals Chamber to confirm the competence of the Honourable Pre-Trial Chamber II to adjudicate the Request.

49. Thirdly and finally, the Defence prays the Honourable Appeals Chamber to direct the Honourable Pre-Trial Chamber II, as it has done in previous judgments,[53] to rule on the merits of the Request, after allowing *amicus curiae* submissions under rule 103(1) of the Rules, including submissions on the views, concerns and general interests of victims in relation to the proposed Additional Principles of reparations.

[53] ICC-01/04-169 OA: "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 13 July 2006, para. 92.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER to:

GRANT the present appeal and **REVERSE** the Decision under Appeal;

ADJUDGE AND DECLARE that the Honourable Pre-Trial Chamber II was competent to adjudicate the Request;

REMAND the Request to the Honourable Pre-Trial Chamber II for determination on the merits after consideration of *amicus curiae* submissions, if filed, which it shall invite under rule 103(1) of the Rules, including submissions on the views, concerns and general interests of victims in relation to the Additional Principles of reparations.

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

Dated this 9 September 2020

At The Hague, Netherlands