



**Original: English**

**No. ICC-02/05-01/20 OA7**

**Date: 3 May 2021**

**THE APPEALS CHAMBER**

**Before:**

**Judge Piotr Hofmański, Presiding  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-  
RAHMAN ('ALI KUSHAYB')**

**Public document**

**Decision on the Office of Public Counsel for victims' request to appear and file  
observations in the present appeal**

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
Helen Brady

**Counsel for the Defence**

Cyril Laucci

**Legal Representatives of Victims**

Amal Clooney  
Nasser Mohamed Amin Abdalla

**The Office of Public Counsel for victims**

Paolina Massidda

**REGISTRY**

---

**Registrar**

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 review of detention’ of 12 April 2021 (ICC-02/05-01/20-338),

Having before it the ‘Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ of 21 April 2021 (ICC-02/05-01/20-356),

*Delivers* the following

## DECISION

The Office of Public Counsel for victims may file its observations on the above-mentioned appeal by 16h00 on 7 May 2021. The observations shall not exceed 20 pages.

## REASONS

### I. RELEVANT PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 18 January 2021, Pre-Trial Chamber II, through the Single Judge (the ‘Pre-Trial Chamber’), issued a decision setting out the procedure for admitting victims to participate in the proceedings, and appointing the Office of Public Counsel for victims (the ‘OPCV’) ‘to represent the collective interests of the victims during the confirmation hearing’<sup>1</sup> (the ‘First Decision’).
2. On 5 February 2021, the Pre-Trial Chamber issued a decision supplementing the First Decision and providing additional guidance (the ‘Second Decision’).<sup>2</sup> In this decision, the Pre-Trial Chamber clarified that the appointment of the OPCV ‘is aimed at ensuring the protection of the interests of applicant victims, as well as to provide

---

<sup>1</sup> [Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing](#), 18 January 2021, ICC-02/05-01/20-259, para. 37.

<sup>2</sup> [Decision supplementing the First Decision on victims’ participation and representation and providing additional guidance](#), 5 February 2021, ICC-02/05-01/20-277.

assistance and support to applicants within the meaning of regulation 81(4)' of the Regulations of the Court (the 'Regulations').<sup>3</sup> It added that this appointment is 'temporary and will be superseded by the decisions to be taken in matters of legal representation at the stage of the determination of the merits of the applications by the Chamber'.<sup>4</sup>

3. On 22 March 2021, the Pre-Trial Chamber provisionally authorised 28 persons to participate as victims in the proceedings, clarifying that 'this authorisation is subject to review on the basis of the content of the forthcoming DCC and, accordingly, [instructing] the Registry to update its assessment as soon as the DCC has become available'.<sup>5</sup> It further appointed Mr Nasser Mohamed Amin Abdalla and Ms Amal Clooney as the joint legal representatives of the abovementioned victims.<sup>6</sup> With regard to the role of the OPCV, the Pre-Trial Chamber clarified that the OPCV, 'in accordance with the First Decision and the Second Decision, will remain responsible for providing general support and assistance to all applicant victims within the meaning of regulations 81(4) of the Regulations and for preserving their interests throughout the stage between the collection of the applications by the Registry and their transmission to and adjudication by the Chamber'.<sup>7</sup>

4. On 12 April 2021, the Pre-Trial Chamber filed a decision on the continuation of Mr Abd-Al-Rahman's pre-trial detention<sup>8</sup> (the 'Impugned Decision').

5. On 14 April 2021, counsel for Mr Abd-Al-Rahman filed a notice of appeal against the Impugned Decision.<sup>9</sup>

6. On 16 April 2021, the Appeals Chamber issued an order on the conduct of the proceedings, in which it decided to proceed in this appeal by way of written submissions

---

<sup>3</sup> [Second Decision](#), p. 11.

<sup>4</sup> [Second Decision](#), p. 11.

<sup>5</sup> [Decision regarding the Registry's First Assessment Report, legal representation, and the victims' procedural position](#), dated 19 March 2021 and notified on 22 March 2021, ICC-02/05-01/20-314 (hereinafter: 'Decision on the Registry First Report').

<sup>6</sup> [Decision on the Registry First Report](#), para. 25.

<sup>7</sup> [Decision on the Registry First Report](#), para. 26.

<sup>8</sup> [Decision on review of detention](#), ICC-02/05-01/20-338, 12 April 2021 (hereinafter: Impugned Decision).

<sup>9</sup> [Acte d'appel de la decision ICC-02/05-01/20-338](#), 14 April 2021, ICC-02/05-01/20-342.

only, and set the time limits for the filing of the appeal brief to 23 April 2021 and for the responses by the Prosecutor and participating victims to 30 April 2021.<sup>10</sup>

7. On 21 April 2021, the OPCV filed a request seeking leave to ‘appear, if necessary, on the issues on appeal, and to file observations within the deadline as established for the Prosecutor and the participating victims’<sup>11</sup> (the ‘Request’). In light of the appointment of the OPCV, as set out by the Pre-Trial Chamber in the First Decision and in the Second Decision,<sup>12</sup> and pursuant to regulation 81(4) of the Regulations, the OPCV requests ‘to appear before the Appeals Chamber to convey the views of the victims having communicated with the Court in this case, and to represent the general interest of the victims, in the appeal of the Defence against the [Impugned Decision]’.<sup>13</sup>

8. In support of the Request, the OPCV recalls that Trial Chamber I in the *Lubanga* case confirmed that the opportunity for the OPCV to appear in respect of specific issues can be initiated, *inter alios*, by ‘the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability)’.<sup>14</sup> It also submits that ‘in the past, the [OPCV] requested, and was granted, leave to appear on specific issues pertaining to the general interest of the victims [and in] other instances, [it] appeared at the request of the Chambers of this Court’.<sup>15</sup> The OPCV submits that this practice reflects the obligation binding on the OPCV to provide, where appropriate, assistance to victims by, *inter alia*, appearing before the Chamber in respect of specific issues, in accordance

---

<sup>10</sup> [Order on the conduct of the appeal proceedings](#), 16 April 2021, ICC-02/05-01/20-345, p. 3.

<sup>11</sup> [Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court](#), ICC-02/05-01/20-356, para. 18.

<sup>12</sup> [Request](#), para. 1.

<sup>13</sup> [Request](#), para. 2.

<sup>14</sup> [Request](#), para. 10, referring to Trial Chamber I, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, 6 March 2008, ICC-01/04-01/06-1211, para. 35.

<sup>15</sup> [Request](#), para. 11, referring, *inter alia*, to [Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Order on the Office of Public Counsel for Victims’ request filed on 21 November 2007](#), 27 November 2007, ICC-01/04-01/06-1046, para. 2; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Order on Written Submissions on the Interpretation of Regulation 42 of the Regulations of the Court \(Regulation 28 of the Regulations of the Court\)](#), 12 June 2009, ICC-01/04-01/07-1205; Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, [Decision on the OPCV’s ‘Second Request to appear before the Chamber pursuant to Regulation 81\(4\)\(b\) of the Regulations of the Court on issues related to the victims’ application process](#), 13 March 2012, ICC-02/11-01/11-57; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the OPCV’s request to participate in the reparations proceedings](#), 5 April 2012, ICC-01/04-01/06-2858.

with regulation 81(4) of the Regulations.<sup>16</sup> In this regard, it notes that the OPCV was established as an independent permanent body within the Court and is ‘able to provide expert advice and assistance’ on victims’ issues.<sup>17</sup>

9. The OPCV submits that the subject-matter of the present appeal affects the interests of the victims because it involves a review of a decision denying the release of Mr Abd-Al-Rahman, and that the Appeals Chamber has previously held that where the underlying issue on appeal was whether the accused would stand trial, this issue affects a victim’s personal interest.<sup>18</sup>

10. Finally, the OPCV notes that, pursuant to rule 119(3) of the Rules, the views of the ‘victims having communicated with the Court’ have to be sought before imposing or amending any conditions restricting liberty, and allowing the OPCV to appear before the Appeals Chamber in this appeal would also give effect to this provision.<sup>19</sup>

11. On 22 April 2021, the Appeals Chamber ordered that any response to the Request be filed by 26 April 2021.<sup>20</sup>

12. On 23 April 2021, the Defence for Mr Abd-Al-Rahman filed a response.<sup>21</sup> Recalling the procedure of participation and representation of victims in the case,<sup>22</sup> the Defence submits that the OPCV currently represents at least 725 applicants, and the legal representatives of victims represent at best 28 persons ‘provisionally’ admitted to participate.<sup>23</sup> According to the Defence, the approach adopted by the Pre-Trial Chamber to assess victims’ applications is in violation of rule 89(1) of the Rules and sections 95(iii), 96(v) and 98(i) of the Chambers Practice Manual, and is inconsistent with the Appeals Chamber’s relevant case-law.<sup>24</sup> The Defence submits that a request for leave

---

<sup>16</sup> [Request](#), para. 12.

<sup>17</sup> [Request](#), para. 12.

<sup>18</sup> [Request](#), para. 15, *referring to Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Participation of Victims in the Appeal against the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” of Trial Chamber III*, 18 August 2010, ICC-01/05-01/08-857, para. 10.

<sup>19</sup> [Request](#), paras 16-17.

<sup>20</sup> [Order setting a time limit for responses](#), 22 April 2021, ICC-02/05-01/20-360.

<sup>21</sup> [Réponse à la Requête ICC-02/05-01/20-356 OA7](#), 23 April 2021, ICC-02/05-01/20-361 (hereinafter: ‘Defence Response’).

<sup>22</sup> [Defence Response](#), paras 3-9.

<sup>23</sup> [Defence Response](#), paras 4-5.

<sup>24</sup> [Defence Response](#), paras 9, 13.

to appeal the Pre-Trial Chamber's decision is currently pending and the decision is therefore not final.<sup>25</sup> Thus, the Defence argues that no victim has yet been definitively admitted to participate in the proceedings by a final decision.<sup>26</sup>

13. The Defence submits that, in the absence of a final decision by the Pre-Trial Chamber, the Appeals Chamber should evaluate the victims' applications for participation in the appeal proceedings, in accordance with rule 89(1) of the Rules, and the Chambers Practice Manual,<sup>27</sup> and pursuant to the Appeals Chamber's relevant case-law.<sup>28</sup> According to the Defence, once the Appeals Chamber has determined which victims are authorised to participate in the appeal proceedings, the OPCV and/or the legal representatives of victims will be able to present observations on behalf of the victims they represent.<sup>29</sup>

14. In the event that the Appeals Chamber decides not to engage in the process of assessing victims' applications, the Defence requests that the Appeals Chamber determine that, in the absence of a final decision by the Pre-Trial Chamber, no victims can be admitted to participate in the appeal proceedings.<sup>30</sup>

15. No other responses to the Request were received.

## II. MERITS

16. With the Request, the OPCV seeks leave to participate in the appeal that is currently pending before this Chamber, which concerns Mr Abd Al Rahman's continued detention.

17. The Appeals Chamber notes that the OPCV is not currently representing any individuals who have been authorised by the Pre-Trial Chamber to participate in the proceedings under article 68(3) of the Statute. Instead, on the basis of decisions issued by the Pre-Trial Chamber, the OPCV currently represents 'victim applicants who have

---

<sup>25</sup> [Defence Response](#), paras 5, 9, 13.

<sup>26</sup> [Defence Response](#), para. 9.

<sup>27</sup> [Defence Response](#), para. 10, p. 7.

<sup>28</sup> [Defence Response](#), para. 10, referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, 12 February 2007, ICC-01/04-01/06-824, paras 44-49.

<sup>29</sup> [Defence Response](#), para. 11, p. 7.

<sup>30</sup> [Defence Response](#), para. 12, pp. 7-8.

already communicated with the Court’ and whose applications are in the process of being assessed by the Pre-Trial Chamber.<sup>31</sup> With regard to the OPCV’s role, the Pre-Trial Chamber noted that:

[B]esides legal representation *stricto sensu*, the OPCV can be, and regularly is, also tasked with the broader responsibility to provide ‘general support and assistance’ to the benefit not only of applicants or admitted victims but also of their legal representatives; the time frame between the submission of the applications and the Chamber’s determination of its merits is one of those stages where those responsibilities can indeed prove critical.<sup>32</sup>

18. It is on account of this particular role of the OPCV in the present case that it seeks to participate in the appeal proceedings on the basis of regulation 81(4)(b) of the Regulations.<sup>33</sup>

19. The Appeals Chamber notes that, according to regulation 81(4) of the Regulations, the functions of the OPCV include, *inter alia*, the following:

(b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues;

(c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims’ applications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed;

20. The Appeals Chamber recognises that the subject-matter of the present appeal, the review of Mr Abd-Al-Rahman’s detention, may affect the interests of victims.<sup>34</sup> The Appeals Chamber recalls that the victims who have been authorised by the Pre-Trial Chamber to participate in the pre-trial proceedings are represented by the legal representatives of victims,<sup>35</sup> and that, in its order on the conduct of the proceedings in

---

<sup>31</sup> See [Order setting time limits for submissions in relation to the Defence Exception d’incompétence](#), 25 March 2021, ICC-02/05-01/20-321, para. 6. See also [First Decision](#), para. 37; [Second Decision](#), paras 18-19.

<sup>32</sup> Second Decision, para. 18.

<sup>33</sup> See [Request](#), paras 10 *et seq.*

<sup>34</sup> [Request](#), para. 15, referring to Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Participation of Victims in the Appeal against the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence” of Trial Chamber III](#), 18 August 2010, ICC-01/05-01/08-857, para. 10.

<sup>35</sup> [Decision regarding the Registry’s First Assessment Report, legal representation, and the victims’ procedural position](#), 19 March 2021, ICC-02/05-01/20-314, para. 25. See also [Second Registry Assessment Report and Transmission of Victim Applications for Participation in Pre-Trial Proceedings](#), 22 April 2021, ICC-02/05-01/20-358.



the appeal, the Appeals Chamber has invited these participating victims to file a response to the appeal brief by 30 April 2021.<sup>36</sup>

21. This notwithstanding, the Appeals Chamber considers that, in the specific circumstances of this case,<sup>37</sup> it is appropriate to grant leave to the OPCV to file submissions in the present appeal proceedings, on the basis of regulation 81(4) of the Regulations. This will allow the Appeals Chamber to benefit as well from the perspective of the individuals who are currently represented by the OPCV.

22. Contrary to the submissions of the Defence, the Appeals Chamber does not consider that this would require it to first rule on the pending applications for participation, as per rule 89(1) of the Rules.<sup>38</sup> This is because the Request has been raised, and is granted, under regulation 81(4) of the Regulations, which does not require a prior determination of applications for participation under rule 89(1) of the Rules. Rather, it reflects the specific role of the OPCV, as established in the Regulations and recognised in the decisions of the Pre-Trial Chamber, *inter alia* in situations where applications under rule 89 of the Rules are still pending. Accordingly, the Appeals Chamber grants the Request and decides that the OPCV may file its observations, which shall not exceed 20 pages, by 16h00 on 7 May 2021.

23. The Appeals Chamber notes that the Defence also argues that those victims who are represented by the legal representatives of victims should not be allowed to participate in the appeal because the determination of their right to participate in the proceedings is not definitive.<sup>39</sup> The Appeals Chamber is not persuaded by this argument. It recalls its practice to allow victims who have participated pursuant to article 68(3) of the Statute in the proceedings giving rise to a decision on interim release to participate automatically in the ensuing appeal.<sup>40</sup> In this regard, the Appeals Chamber has held that it:

---

<sup>36</sup> [Order on the conduct of the proceedings](#), 16 April 2021, ICC-02/05-01/20-345, p. 3.

<sup>37</sup> See [Decision on the Registry First Report](#), para. 26. See also [First Decision](#), para. 37; [Second Decision](#), paras 18-19; [Order setting time limits for submissions in relation to the Defence Exception d'incompétence](#), 25 March 2021, ICC-02/05-01/20-321, para. 6.

<sup>38</sup> See [Defence Response](#), para. 10, p. 7.


<sup>39</sup> [Defence Response](#), paras 9, 12.

<sup>40</sup> See *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the 'Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate](#)

will not, in the absence of compelling reasons, overturn prior decisions of a relevant Chamber on the status, personal interest and/or participatory rights accorded to victims in that case. Instead, these criteria underlying victim participation will be assumed for the purposes of the interlocutory appeal, given the victims' prior participation in the proceedings which gave rise to the appeal.<sup>41</sup>

24. There is therefore no need for the Appeals Chamber to revisit the Pre-Trial Chamber's decision on victim participation for the purposes of this appeal. Furthermore, the Appeals Chamber notes the Defence submissions that the Pre-Trial Chamber's approach to assessing victims' applications is in violation, *inter alia*, of rule 89(1) of the Rules<sup>42</sup> and that the Appeals Chamber should itself evaluate the victims' applications or, failing which, not allow any victim participation in the proceedings on appeal.<sup>43</sup> The Appeals Chamber considers that it is inappropriate for the Defence to challenge the Pre-Trial Chamber's approach to victim participation in this appeal given the pending proceedings before that Chamber on the issue.<sup>44</sup> Therefore, the Defence's argument is rejected. This is without prejudice to any eventual appeal that may arise with regard to the participation of victims in the proceedings before the Pre-Trial Chamber.

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



**Judge Piotr Hofmański**  
**Presiding**

Dated this 3<sup>rd</sup> day of April 2021

At The Hague, The Netherlands

---

[in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention \(ICC-02/11-01/15-134-Red3\)”, 31 July 2015, ICC-02/11-01/15-172, para. 16, referring to \*Prosecutor v. Thomas Lubanga Dyilo\*, \[Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims\]\(#\), ICC-01/04-01/06-824 \(OA 7\), pp. 55-57. See also \*Prosecutor v. Laurent Gbagbo and Charles Blé Goudé\*, \[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60\\(3\\) of the Statute’\]\(#\), 8 September 2015, ICC-02/11-01/15-208, paras 27, 87.](#)

<sup>41</sup> *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the ‘Decision on the “Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”, 31 July 2015, ICC-02/11-01/15-172, para. 17.](#)

<sup>42</sup> [Defence Response](#), paras 9, 13.

<sup>43</sup> [Defence Response](#), paras 10-12, p. 7.

<sup>44</sup> [Defence Response](#), paras 5, 9, 13.