

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

Date: 23 April 2021

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
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.* MR ALI MUHAMMAD ALI ABD-AL-RAHMAN
("ALI KUSHAYB")**

Public Document

Response to Request ICC-02/05-01/20-356 OA7

Source: Mr Cyril Laucci, Lead Counsel

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

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1. The present submission is the Defence response to the request of the Office of Public Counsel for Victims (OPCV) to participate in the OA7 appeals proceedings (“Request”).¹ It is made pursuant to the direction of the Honourable Appeals Chamber dated 22 April 2021 (“Direction”).²

2. In principle, the Defence has no objection to and is in favour of the widest participation of all the victims in the case in accordance with article 68(3) of the Statute. What the Defence means here by “victims” are those persons who have been definitively admitted to participate in the proceedings by a final decision pursuant to rule 89 of the Rules of Procedure and Evidence (RPE) and who are represented by a legal representative of victims (LRV) or by the OPCV appointed to that end. So, in order to respond to the issue raised by the Request and the Direction, a brief recapitulation of the proceedings on the participation and representation of the victims in the case is first required, in order to make clear exactly which of the victims, to date, have been admitted to participate in the proceedings in the case by a final decision.

SUMMARY OF THE PROCEEDINGS ON THE PARTICIPATION AND REPRESENTATION OF THE VICTIMS IN THE CASE

3. The decision of the Honourable Pre-Trial Chamber II of 18 January 2021 (“1st Decision”) appointed the OPCV to represent those persons applying for the standing of victim in the case (“applicants for participation”).³ Aside appointing the OPCV to represent the applicants for participation, the 1st Decision also adopted a procedure for admitting victims to participate, whereby the applicants are assigned to three categories, A, B and C, of which only category C is provided to the Defence for observations (“A-B-C Approach”),⁴ even though rule 89(1) of the RPE and the Chambers Manual⁵ expressly require that all of the applications for participation

¹ [ICC-02/05-01/20-356](#).

² [ICC-02/05-01/20-358](#).

³ [ICC-02/05-01/20-259](#).

⁴ [ICC-02/05-01/20-259](#), para. 34.

⁵ [Chambers Practice Manual](#), 29 November 2019 version, sections 95(iii), 96(v) and 98(i).

must be submitted to the Defence before the applicants' admission. A supplementary decision followed the 1st Decision, clarifying its contents and scope ("Supplementary Decision").⁶ To this day, the application for leave to appeal filed by the Defence on 10 February 2021⁷ against the 1st Decision, as modified by the Supplementary Decision, is still pending before the Honourable Pre-Trial Chamber II. Absent a decision on the application for leave to appeal, the 1st Decision, as modified by the Supplementary Decision, is not yet final.

4. On 1 March 2021, the Registry filed its 1st Report on participation ("1st Report").⁸ Following the A-B-C Approach which was adopted in the 1st Decision, as modified by the Supplementary Decision, the Registry reported that 28 applicants for participation had been assessed as falling within category A.⁹ In accordance with the A-B-C Approach but in violation of rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of the Chambers Manual, the 28 applications were not disclosed to the Defence, who could not, therefore, make observations on their eligibility for participation. The Registry said that it had, moreover, received 725 applications for participation in the proceedings in the case. These applications were in the process of being assessed.¹⁰ Pursuant to the 1st Decision, the applicants for participation who submitted these 725 applications are represented by the OPCV.

5. The first decision provisionally admitting the 28 persons placed by the 1st Report in category A to participate as victims in the case was issued by the Honourable Pre-Trial Chamber II on 22 March 2021 ("2nd Decision").¹¹ The 28 persons are represented by the Distinguished LRV. This provisional admission was supposed to be reviewed once the content and exact ambit of the charges laid by the Office of the Prosecutor (OTP) against Mr Abd-Al-Rahman became known.¹² To this day the

⁶ [ICC-02/05-01/20-277](#).

⁷ [ICC-02/05-01/20-282](#).

⁸ [ICC-02/05-01/20-288](#).

⁹ [ICC-02/05-01/20-288](#), para. 14.

¹⁰ [ICC-02/05-01/20-288](#), para. 15.

¹¹ [ICC-02/05-01/20-314](#).

¹² [ICC-02/05-01/20-314](#), para. 22 and p. 13.

application for leave to appeal filed by the Defence on 23 March 2021¹³ against the 2nd Decision is still pending before the Honourable Pre-Trial Chamber II. Absent a ruling on the application for leave to appeal, the 2nd Decision is therefore not final either. The 28 victims concerned by that decision have, moreover, been admitted to participate only on a provisional basis and their eligibility for participation remains to be confirmed by the Honourable Pre-Trial Chamber II in the light of the Document Containing the Charges (DCC).¹⁴

6. The OTP filed the DCC on 29 March 2021.¹⁵

7. The Registry filed its 2nd Report on the victims' participation ("2nd Report")¹⁶ on 22 April 2021. In its 2nd Report, the Registry looked at how the DCC affects the 28 victims provisionally admitted to participate in the case by the 2nd Decision: in the Registry's assessment, 22 of them still belonged to category A, *viz.* those who could be admitted to participate under the A-B-C Approach; three were reclassified in group C and provided to the Defence for observations; and another three were assessed as "incomplete" and returned to the Distinguished LRV for further information.¹⁷ Also according to the 2nd Report, a further 21 applications for participation, not provided to the Defence in violation of rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of the Chambers Manual, were assessed as belonging to category A,¹⁸ and nine others, provided to the Defence for observations, as coming within group C.¹⁹

8. The Honourable Pre-Trial Chamber II has not issued a decision confirming that the 43 applicants who in the 2nd Report were assessed as belonging to category A have been admitted to participate. Hence there is no final decision definitively admitting the 22 applicants to participate in the proceedings.

¹³ [ICC-02/05-01/20-320](#).

¹⁴ [ICC-02/05-01/20-314](#), para. 22 and p. 13.

¹⁵ [ICC-02/05-01/20-325](#).

¹⁶ [ICC-02/05-01/20-358](#).

¹⁷ [ICC-02/05-01/20-358](#), paras. 16-18.

¹⁸ [ICC-02/05-01/20-358](#), paras. 19-20.

¹⁹ [ICC-02/05-01/20-358](#), paras. 21-40.

9. At the time of filing this response, the OPCV is thus representing at least 725 applicants for participation, none of whose applications have been provided, as rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of the Chambers Manual prescribe, to the Defence for observations and who are in the process of being assessed by the Registry. For her part, the Distinguished LRV is now representing, at most, 28 persons who, by a decision that lacks finality, have been provisionally admitted to participate – with nothing provided to the Defence, in violation of rule 89(1) of the RPE and the Chambers Manual – and of whom only 22 are, in the Registry’s assessment vis-à-vis the DCC, eligible for admission to participate, which the Honourable Pre-Trial Chamber II has yet to confirm. And so no victim has been definitively admitted to participate in the proceedings in the case by a final decision pursuant to rule 89(1) of the RPE.

THE VICTIMS’ APPLICATION TO PARTICIPATE IN THE OA7 APPEALS PROCEEDINGS

10. Absent a final decision admitting victims to participate in the case pursuant to rule 89(1) of the RPE, the Defence submits that it therefore rests with the Honourable Appeals Chamber to assess the applications for participation in the OA7 proceedings. As the Honourable Appeals Chamber has held,²⁰ that determination must be made in accordance with the procedure for which rule 89(1) of the RPE provides. Absent a final decision from the Honourable Pre-Trial Chamber II on the matter,²¹ the applications for participation received to date by the Registry must be transmitted to the Honourable Appeals Chamber, the OTP and the Defence. The OTP and the Defence must, under rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of the Chambers Manual, have the opportunity to make observations in the light of which the Honourable Appeals Chamber will decide “whether, and in what manner, the victims may participate in the appeal, necessarily taking into account the

²⁰ [ICC-01/04-01/06-824 OA7](#), paras. 44-49.

²¹ [ICC-01/04-01/06-824 OA7](#), para. 45.

provisions of article 68 (3).”²² Should the Honourable Appeals Chamber grant the victims leave to participate in the OA7 proceedings, “the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91 (2) of the Rules of Procedure and Evidence.”²³

11. The Defence solemnly prays the Honourable Appeals Chamber to, in its adjudication of the Request, stand by its holding *aforecited*, not to stray from it and venture into the manifestly unlawful territory of the A-B-C Approach followed to date by the Honourable Pre-Trial Chamber II²⁴ in violation of rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of Chambers Manual. It is the Defence’s hope that the Honourable Appeals Chamber’s eschewing the A-B-C Approach *sub judice* will send a sufficiently clear reminder to the Honourable Pre-Trial Chamber II that lawfulness is called for. Once the Honourable Appeals Chamber has determined which victims are admitted to participate in the OA7 proceedings, the Distinguished Principal Counsel of the OPCV and/or the Distinguished LRV may make observations on behalf of those of them whom they are representing pursuant to article 68(3) of the Statute.

12. Should the Honourable Appeals Chamber understandably be reluctant to embark on a full-blown process of determining the eligibility of the victims to participate pursuant to rule 89(1) of the RPE solely for the limited requirements of the OA7 proceedings, the Defence prays it to adjudge and declare that, absent a final decision from the Honourable Pre-Trial Chamber II on the participation of the victims – a decision made on the basis of the OTP’s and the Defence’s observations on their eligibility to participate pursuant to rule 89(1) of the RPE and sections 95(iii), 96(v) and 98(i) of the Chambers Manual – it is regrettably the case that no victim can be admitted to participate for the purposes of the OA7 proceedings. The Defence prays the Honourable Appeals Chamber to contemplate this second option only in the alternative, insofar as it may be prejudicial to victims who might have been

²² [ICC-01/04-01/06-824 OA7](#), para. 48.

²³ [ICC-01/04-01/06-824 OA7](#), para. 49.

²⁴ [ICC-02/05-01/20-259](#), para. 34.

admitted to participate had the process of their admission before the Honourable Pre-Trial Chamber II been undertaken in compliance with rule 89(1) of the RPE and seen through to completion.

13. Irrespective of which option the Honourable Appeals Chamber chooses, neither the victims represented by the Distinguished LRV nor the applicants for participation represented by the OPCV can be admitted to participate in the OA7 proceedings since to admit them would be tantamount to relying on the outcome of A-B-C Approach which was followed in manifest violation of rule 89(1) of the RPE, sections 95(iii), 96(v) and 98(i) of the Chambers Manual and the Honourable Appeals Chamber's aforecited holding.²⁵ The fact that the decisions on the Defence applications for leave to appeal against the use of the A-B-C Approach²⁶ have yet to be issued must not force the Honourable Appeals Chamber into accepting the outcome of that manifestly unlawful approach.

14. The Defence humbly prays the Honourable Appeals Chamber not to regard the foregoing submissions, pleaded in the alternative, as disputing the basis for its order of 16 April 2021 authorizing the participating victims to make observations in response to the Appeal Brief,²⁷ since that order, purely procedural in nature, does not in any way predetermine whether they can be admitted under article 68(3) of the Statute. The present submissions just give some idea of the observations which the Defence might make in response to any which the Victims might see fit to make on the OA7 Appeal, should they be so authorized. The sole reason for making them in advance is that the Honourable Appeals Chamber's Direction so requires.²⁸

15. Lastly, the Defence respectfully observes that the references the Request makes to the OA4 Appeal Judgment given by the Honourable Appeals Chamber in *Bemba* ("*Bemba* OA4 Appeal Judgment")²⁹ and to rule 119(3) of the RPE³⁰ do not apply to the matter at hand. The quotation taken from the *Bemba* OA4 Appeal Judgment

²⁵ [ICC-01/04-01/06-824 OA7](#), paras. 44-49.

²⁶ [ICC-02/05-01/20-282](#); [ICC-02/05-01/20-320](#).

²⁷ [ICC-02/05-01/20-345](#).

²⁸ [ICC-02/05-01/20-358](#).

²⁹ [ICC-01/05-01/08-857](#), para. 10, cited in [ICC-02/05-01/20-356](#), para. 15.

³⁰ [ICC-02/05-01/20-356](#), para. 16.

addresses the issue of the appearance of an accused person at trial, which is unconnected to the issue of Mr Abd-Al-Rahman's release – the subject of the present OA7 proceedings. Similarly, rule 119(3) of the RPE applies only to victims "the Chamber considers could be at risk as a result of a release or conditions imposed". No determination of the kind has been made to date in the case *sub judice* – not by the Honourable Pre-Trial Chamber II, to which rule 119(3) of the RPE applies, and not by the Honourable Appeals Chamber. Rule 119(3) of the RPE therefore does not apply.

FOR THESE REASONS, LEAD COUNSEL PRAYS THE HONOURABLE APPEALS CHAMBER

- **TO DETERMINE**, of its own motion, in accordance with the procedure laid down by rule 89(1) of the RPE, sections 95(iii), 96(v) and 98(i) of the Chambers Manual and its aforecited holding,³¹ after receiving the OTP's and the Defence's observations on the applications for participation, which victims may be admitted to participate in the OA7 proceedings. The Distinguished Principal Counsel of the OPCV and/or the Distinguished LRV may, pursuant to article 68(3) of the Statute, make observations on behalf of the persons they represent who have been admitted to participate by the Honourable Appeals Chamber;
- **IN THE ALTERNATIVE, TO ADJUDGE AND DECLARE** that the A-B-C Approach followed by the Honourable Pre-Trial Chamber II in relation to the victims represented by the Distinguished LRV and the Distinguished Principal Counsel of the OPCV is unlawful – in that it has not allowed the Defence to exercise the procedural rights vested in it by rule 89(1) of the RPE – and that, absent a final, definitive decision to date from the Honourable Pre-Trial Chamber II on the participation of the victims in accordance with rule 89(1) of

³¹ [ICC-01/04-01/06-824 OA7](#), paras. 44-49.

the RPE, it is regrettably the case that no victim can be admitted to participate for the purposes of the OA7 proceedings.

[signed]

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

Dated this 23 April 2021

At The Hague, Netherlands