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**No. ICC-01/14-01/18
Date: 27 September 2022**

TRIAL CHAMBER V

**Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Request for an Amendment of the
Victim Application Procedure**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64 and 68(1) of the Rome Statute (the ‘Statute’) and Rule 89(1) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for an Amendment of the Victim Application Procedure’.

I. Procedural history

1. On 19 March 2020, this Chamber confirmed that the procedure for transmission and admission of victims’ applications for participation adopted by Pre-Trial Chamber II (the ‘A-B-C Approach’) continues to remain in place.¹
2. On 23 June 2022, the Yekatom Defence (the ‘Defence’) requested to ‘amend Section E of the victim application procedure [...] as to order the transmission by the Registry of Group A victim applications of alleged former child soldiers admitted to participate in the proceedings’ to the Defence (the ‘Request’).²
3. On 4 July 2022, the Common Legal Representative of the Former Child Soldiers (the ‘CLRV1’) responded to the Request, requesting the Chamber to dismiss it in its entirety (the ‘CLRV1 Response’).³
4. On 5 July 2022, the Ngaïssona Defence indicated that it does not intend to respond to the Request.⁴

¹ Order Scheduling First Status Conference, ICC-01/14-01/18-459, para. 8 *with reference to* Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, ICC-01/14-01/18-141 (the ‘Decision Establishing the Victim Application Procedure’).

² Yekatom Defence Request for the Amendment of the Victim Application Procedure, ICC-01/14-01/18-1478-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Common Legal Representative of the Former Child Soldiers and the Registry (confidential redacted notified on 24 June 2022, ICC-01/14-01/18-1478-Conf-Red; public redacted version notified on 24 June 2022, ICC-01/14-01/18-1478-Red2).

³ Response of the Common Legal Representative of the Former Child Soldiers to the “Yekatom Defence Request for the Amendment of the Victim Application Procedure”, ICC-01/14-01/18-1498-Conf-Exp, confidential *ex parte*, only available to Yekatom Defence and the CLRV 1 (confidential redacted version notified on 5 July 2022, ICC-01/14-01/18-1498-Conf-Red).

⁴ Email from the Ngaïssona Defence, 5 July 2022, at 11:12.

5. On 6 July 2022, the Common Legal Representatives of the Victims of Other Crimes indicated that they fully join and support the CLRV1 Response.⁵
6. On 7 July 2022, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request, asking the Chamber to reject it in its entirety (the ‘Prosecution Response’).⁶
7. On 8 August 2022, after having been granted leave to do so,⁷ the Defence filed a reply to the CLRV1 Response (the ‘Defence Reply’).⁸

II. Analysis

8. According to the A-B-C Approach, the Registry ‘classifies the applicants into three categories: (a) applicants who clearly qualify as victims (“Group A”); (b) applicants who clearly do not qualify as victims (“Group B”); and (c) applicants for whom the Registry could not make a clear determination for any reason (“Group C”)’. While Group C applications are transmitted to the parties, Group A and B applications are only provided to the Chamber which, ‘barring a clear, material error in the Registry’s assessment’, will ratify them.⁹

⁵ Email from the Common Legal Representatives of the Victims of Other Crimes, 6 July 2022, at 16:58.

⁶ Prosecution’s Response to “Confidential Redacted Version of ‘Yekatom Defence Request for the Amendment of the Victim Application Procedure’,” (ICC-01/14-01/18-1478), 24 June 2022, ICC-01/14-01/18-1501-Conf.

⁷ Decision on the Yekatom Defence Request for Leave to Reply to the CLRV1 (former child soldiers) Response to the ‘Yekatom Defence Request for the Amendment of the Victim Application Procedure’, 28 July 2022, ICC-01/14-01/18-1532-Conf-Exp, confidential *ex parte*, only available to the CLRV1, the Registry and the Yekatom Defence (confidential redacted version notified on 20 September 2022); Yekatom Defence Request for Leave to Reply to the ‘Response of the Common Legal Representative of the Former Child Soldiers to the “Yekatom Defence Request for the Amendment of the Victim Application Procedure”’, 4 July 2022, ICC-01/14-01/18-1498-Con-Exp, 7 July 2022, ICC-01/14-01/18-1500-Conf-Exp, confidential *ex parte*, only available to the CLRV1, the Registry and the Yekatom Defence (public redacted version notified the same day, ICC-01/14-01/18-1500-Red). This request was opposed by the CLRV1, see Response of the Common Legal Representative of the Former Child Soldiers to the Yekatom Defence Request for Leave to Reply (ICC-01/14-01/18-1500-Conf-Exp), ICC-01/14-01/18-1507-Conf-Exp, confidential *ex parte*, only available to the CLRV1, the Registry and the Yekatom Defence (confidential redacted version notified on 13 July 2022, ICC-01/14-01/18-1507-Conf-Red).

⁸ Yekatom Defence Reply to the ‘Response of the Common Legal Representative of the Former Child Soldiers to the “Yekatom Defence Request for the Amendment of the Victim Application Procedure”’, 4 July 2022, ICC-01/14-01/18-1498-Conf-Exp, ICC-01/14-01/18-1539-Conf-Exp, confidential *ex parte*, only available to the CLRV1, the Registry and the Yekatom Defence (confidential redacted version notified on 9 August 2022, ICC-01/14-01/18-1539-Conf-Red).

⁹ Decision Establishing the Victim Application Procedure, ICC-01/14-01/18-141, para. 41.

9. The Defence essentially seeks to be provided with victims' applications of any alleged former child soldiers which have been classified as Group A. It submits that a recent Appeals Chamber judgment on the A-B-C Approach in the case of *The Prosecutor v. Mahamat Said Abdel Kani*¹⁰ (the '*Said Appeals Judgment*') warrants this amendment.¹¹
10. Specifically, it argues that 'in light of the highly contested nature of the evidence related to the age of alleged child soldiers [...] serious concerns remain on the reliability of their applications as participating victims in these proceedings'.¹² Furthermore, it contends that the expected low number of alleged child soldiers in this case merits the requested amendment. In this regard, it alludes to the Appeals Chamber's finding that 'in cases where the number of victims' applications is expected to remain low, the interest of the suspect or accused in receiving copies thereof and replying thereto may outweigh the benefits gained by the implementation of the A-B-C Approach'.¹³
11. The Chamber is not persuaded that the A-B-C Approach needs to be amended in light of the *Said Appeals Judgment* and/or the specific circumstances in this case. On the contrary, the Chamber is of the view that the *Said Appeals Judgment* clearly confirmed that the A-B-C Approach is an appropriate option for victim application procedures under Rule 89(1) of the Rules. Notably, the Appeals Chamber found that the A-B-C Approach is 'in principle an adequate tool to ensure the fairness and expeditiousness of the proceedings while at the same time respecting the rights of both the suspect/accused and the victims' and is 'not *per se* incompatible with rule 89(1) of the Rules and the Statute legal framework', depending on the specific circumstances of case.¹⁴

¹⁰ Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation", 14 September 2021, ICC-01/14-01/21-171.

¹¹ Request, ICC-01/14-01/18-1478-Red2, paras 11-14, 26.

¹² Request, ICC-01/14-01/18-1478-Red2, paras 2, 18-19.

¹³ Request, ICC-01/14-01/18-1478-Red2, paras 13-14 *referring to Said Appeals Judgment*, ICC-01/14-01/21-171, para. 82.

¹⁴ *Said Appeals Judgment*, ICC-01/14-01/21-171, paras 5, 81-82.

12. The Chamber recalls that, in the present case, the A-B-C Approach was adopted in light of, *inter alia*, the difficult security situation in the Central African Republic, the ‘large number of victims’ expected to submit applications for participation and related efficiency considerations.¹⁵ The Chamber considers that these circumstances continue to persist and finds the Defence’s submission that the ‘number of alleged child soldiers in this case is expected to remain low’¹⁶ misplaced.
13. While the Appeals Chamber gave no indication as to how many applicants constitute a ‘low number’, the Chamber is of the view that the current number of 243 alleged child soldier victims¹⁷ cannot be considered low in the context of this case and the present stage of the proceedings. In this regard, it notes that so far it has only heard 46 out of 93 live Prosecution witnesses¹⁸ and that the deadline for the collection of applications was extended until the end of the Prosecution’s presentation of evidence.¹⁹ It can therefore reasonably be expected that the number will grow further.
14. The Chamber also notes that the Defence based its initial submissions on a wrong number of victims, namely only 161,²⁰ as it later recognised itself.²¹ Moreover, the Defence also acknowledged that the number of 284 victims in the case of *The Prosecutor v. Bosco Ntaganda* – which seems comparable to the numbers in this case – was *not* low.²²
15. The Chamber is cognisant that the age of the alleged child soldiers, as well as the alleged [REDACTED] and the collection of their victim applications, is a contested matter in this case.²³ However, the Chamber recalls that the parties’

¹⁵ Decision Establishing the Victim Application Procedure, ICC-01/14-01/18-141, paras 43-44.

¹⁶ Request, ICC-01/14-01/18-1478-Red2, para. 16.

¹⁷ CLRV Response, ICC-01/14-01/18-1498-Conf-Red, para. 27; Prosecution Response, ICC-01/14-01/18-1501-Conf, para. 8.

¹⁸ This number is based on the Prosecution’s latest communication regarding the ‘anticipated upcoming Prosecution’s witness order’, see email from the Prosecution, 1 September 2022, at 10:23.

¹⁹ Decision Setting the Commencement Date of the Trial, 16 July 2022, ICC-01/14-01/18-589, para. 20.

²⁰ Request, ICC-01/14-01/18-1478-Red2, para. 15.

²¹ Defence Reply, ICC-01/14-01/18-1539-Conf-Red, paras 35-39.

²² Request, ICC-01/14-01/18-1478-Red2, para. 16.

²³ See for example Request, ICC-01/14-01/18-1478-Conf-Exp, paras 18-24.

right to be provided with copies of victims' applications is not absolute²⁴ and that 'victims' applications are, in principle, not provided for the purpose of allowing the defence to gather information that may be important for the preparation of its case'.²⁵

16. Instead, the legal framework of the Court establishes the disclosure regime for this purpose.²⁶ In compliance with this regime, the Defence is provided with the victim applications of those individuals who testify for the Prosecution (the so-called dual status witnesses), where the Prosecution determines that it has an obligation to disclose them under Article 67(2) of the Statute or Rule 77 of the Rules.²⁷ For that reason, the applications of the only two dual status witnesses represented by the CLRV1, P-2582 and P-2620, have been disclosed to the Defence. In this regard, the Chamber also recalls that it recently instructed the Prosecution to provide lesser redacted versions of their victims' application forms, disclosing further information to the Defence.²⁸ The Defence will be able to use the information contained in these witnesses' victim applications, including information with regard to [REDACTED],²⁹ when examining these witnesses in court.
17. Additionally, the Chamber notes that the A-B-C Approach ensures judicial oversight of the entire victim participation and retains the Chamber's power to withdraw or grant victims participation status if they have previously been wrongly admitted or rejected.³⁰ In this context, the Chamber recalls that the initial assessment of victims' applications is based on a *prima facie* standard.³¹ It is thus

²⁴ *Said Appeals Judgment*, ICC-01/14-01/21-171, para. 53.

²⁵ *Said Appeals Judgment*, ICC-01/14-01/21-171, para. 51.

²⁶ *Said Appeals Judgment*, ICC-01/14-01/21-171, paras 4, 51 (footnotes omitted).

²⁷ *See also Appeals Chamber, The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 11 May 2017, ICC-02/11-01/15-915-Conf OA9 (public redacted version notified on 31 July 2017), para. 56.

²⁸ Decision on the Common Legal Representative of the Former Child Soldiers Request to Maintain Redactions to Identifying and Contact Information of Intermediaries mentioned in Victim Application Forms, 21 September 2022, ICC-01/14-01/18-1578-Conf (public redacted version notified the same day).

²⁹ The Chamber notes the Defence's submissions in this regard, *see Request*, ICC-01/14-01/18-1478-Red2, paras 19-22.

³⁰ *See also Said Appeals Judgment*, ICC-01/14-01/21-171, paras 71-73 *referring to* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 (the '*Lubanga Judgment*'), para. 484.

³¹ *See for example Decision Establishing the Victim Application Procedure*, ICC-01/14-01/18-141, para. 37.

open to review at the deliberation stage, should a more detailed understanding of the full evidence demonstrate that these applications no longer meet the relevant criteria.³²

18. In light of the above, the Chamber considers that the A-B-C Approach adopted remains the most suitable procedure in this case. This approach enables the Chamber to strike an appropriate balance between ensuring the expeditiousness of the proceedings, the meaningfulness of victim participation, the protection of victims, the equal treatment of all victims in this case,³³ and the rights of the accused to a fair trial.³⁴ Accordingly, the Chamber rejects the Request.
19. Nonetheless, the Chamber recalls that applications for which the Registry was unable to make a clear determination for any reason, including the applicants' age, will be classified as Group C and transmitted to the parties.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

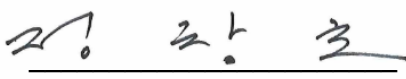
ORDERS the Prosecution, the Defence and the CLRV1 to file public redacted versions of the Prosecution Response, ICC-01/14-01/18-1501-Conf, the Defence Reply, ICC-01/14-01/18-1539-Conf, and the CLRV1 Response, ICC-01/14-01/18-1498-Conf, respectively, within one week of notification of this decision.

³² See also *Lubanga* Judgment, ICC-01/04-01/06-2842, para. 484.

³³ The Chamber notes that there are two groups of victims in this case – the former child soldier victims and the victims of other crimes – and that Request is limited to the former, classified as Group A. See also CLRV Response, ICC-01/14-01/18-1498-Conf-Red, paras 2, 18-25.

³⁴ See also *Said* Appeals Judgment, ICC-01/14-01/21-171, paras 3, 5, 60-63, 64-67.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 27 September 2022

At The Hague, The Netherlands