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No. ICC-01/14-01/21

Date: 21 May 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Decision on the Defence's request for leave to appeal the 'Decision establishing the principles applicable to victims' applications for participation'

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
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Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Other
Appeals Chamber

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Chamber’ and the ‘Court’), issues this Decision on the Defence’s request for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’.

I. PROCEDURAL HISTORY

1. On 7 January 2019, Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of the Chamber, issued the ‘Warrant of arrest for Mahamat Said Abdel Kani’ (‘Mr Said’).¹
2. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.²
3. On 25 January 2021, Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.³
4. On 29 January 2021, in accordance with the Single Judge’s decision dated 26 January 2021⁴ and his further instructions dated 28 January 2021,⁵ Mr Said appeared before the Single Judge pursuant to article 60(1) of the Rome Statute (the ‘Statute’) and rule 121(1) of the Rules of Procedure and Evidence (the ‘Rules’). The Single Judge, *inter alia*, scheduled the confirmation of charges hearing to commence on 5 October 2021.⁶

¹ ICC-01/14-01/21-2-US-Exp (public redacted version filed on 17 February 2021 ([ICC-01/14-01/21-2-Red2](#))).

² Registry, Report of the Registry on the Arrest and Surrender of Mr Mahamat Said Abdel Kani and Request for Guidance, 27 January 2021, ICC-01/14-01/21-6-US-Exp, paras 13-27 (confidential redacted, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version filed on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red); confidential, lesser redacted, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version filed on 18 March 2021 (ICC-01/14-01/21-6-Conf-Exp-Red2)).

³ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-3.

⁴ [Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-4.

⁵ [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

⁶ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG, p. 11, lines 11-12.

5. On 26 February 2021, the Single Judge received the ‘Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings’ (the ‘Registry’s Submissions’).⁷

6. On 11 March 2021, the Single Judge received the ‘Réponse de la Défense aux « Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings » (ICC-01/14-01/21-25)’ (the ‘Defence’s Response’).⁸

7. On 17 March 2021, following the recomposition of the Chambers by the Presidency,⁹ Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.¹⁰

8. On 16 April 2021, the Single Judge issued the ‘Decision establishing the principles applicable to victims’ applications for participation’ (the ‘Victims’ Participation Decision’).¹¹

9. On 26 April 2021, the Single Judge received the ‘Demande d’autorisation d’interjeter appel de la « Decision establishing the principles applicable to victims’ applications for participation » (ICC-01/14-01/21-56)’ (the ‘Defence’s Request’).¹²

10. The Prosecution did not respond to the Defence’s Request.

II. SUBMISSIONS RECEIVED BY THE SINGLE JUDGE

11. The Defence requests leave to appeal the Victims’ Participation Decision on three issues.

12. First, the Defence argues that the decision contradicts rule 89(1) of the Rules (the ‘First Issue’).

13. Second, the Defence submits that the Single Judge took into account irrelevant criteria ‘pour justifier la non-communication aux Parties de toutes les demandes de

⁷ [ICC-01/14-01/21-25](#), together with two public annexes and one confidential *ex parte* annex, only available to the Registry ([ICC-01/14-01/21-25-AnxI](#); [ICC-01/14-01/21-25-AnxII](#); ICC-01/14-01/21-25-Conf-Exp-AnxIII).

⁸ [ICC-01/14-01/21-36](#).

⁹ [Decision assigning judges to divisions and recomposing Chambers](#), 16 March 2021, ICC-01/14-01/21-40.

¹⁰ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-42.

¹¹ [ICC-01/14-01/21-56](#).

¹² [ICC-01/14-01/21-63](#).

participation des victims’, namely, (i) the issue of redactions; (ii) the potential number of victim applications; and (iii) ‘[I]’ inégalité de traitement entre les Parties d’une affaire de la CPI à l’autre qui découle de la prise en compte de la décision attaquée des deux critères ci-dessus’ (the ‘Second Issue’).

14. Third, the Defence avers that the decision has misinterpreted the principle of expeditiousness of the proceedings (the ‘Third Issue’; the three issues jointly, the ‘Proposed Issues’). The Defence maintains that the principle of expeditiousness of the proceedings is a right of the suspect to be judged without undue delay and ‘[c]e droit qu’a Monsieur Said à être jugé avec célérité ne peut lui être opposé pour lui interdire d’exercer les droits qui lui sont reconnus par le Statut et le Règlement de procédure et de preuve, ici le droit qu’a la Défense à prendre connaissance des demandes de participation des victimes’.

15. According to the Defence, as soon as a decision touches upon the exercise of the rights of the suspect, it has to be considered as ‘affectant nécessairement le déroulement équitable de la procédure’, including in the present case, where the adopted victims participation regime prevents the Defence to access and analyse the totality of victims’ applications and to discuss them in an adversarial proceeding.

16. In addition, the Defence notes that the Proposed Issues have never been addressed by the Appeals Chamber and that the resolution of these questions by the Appeals Chamber is essential.

17. Finally, the Defence avers that the impact of the Victims’ Participation Decision goes well beyond the present case and at present there is a legal uncertainty, which requires the Appeals Chamber to intervene and to immediately resolve the Proposed Issues.

III. DETERMINATION BY THE SINGLE JUDGE

18. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations.

19. The Single Judge recalls that the requirements under article 82(1)(d) of the Statute are cumulative and, for leave to be granted, both requirements need to be fulfilled.¹³

20. The Single Judge further notes that the Defence repeats arguments presented in its Defence Response. In this regard, the Single Judge recalls that the requesting party must demonstrate that the requirements for leave to appeal have been met, rather than presenting arguments that are going to the merits of the issues raised.¹⁴

21. Nonetheless, with regard to the First Issue, the Single Judge considers that it amounts to ‘an identifiable subject or topic requiring a decision for its resolution’.¹⁵ This issue concerns the question whether the Single Judge erred in finding, in line with previous jurisprudence of this Court, that the system for the transmission and admission of victims’ applications set out into three categories of groups – A, B and C – (the ‘A-B-C Approach’) is in compliance with the statutory framework, in particular rule 89 of the Rules. This issue has also the potential to ‘significantly affect the fair and expeditious conduct of the proceedings’,¹⁶ as the adopted A-B-C Approach determines the procedure of the transmission and admission of victims’ applications for the entire length of the proceedings. The Appeals Chamber’s intervention may therefore ensure ‘that the proceedings follow the right course’¹⁷ and ‘an immediate resolution [of the First Issue] by the Appeals Chamber may materially advance the proceedings’.¹⁸ As the Appeals Chamber has not yet had the opportunity to express itself on this key issue for

¹³ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), [Decision on the Defence alternative request for reclassification of a document or reconsideration of a decision and subsidiary request for leave to appeal a decision](#), 3 May 2021, ICC-02/05-01/20-372, para. 10; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’](#), 24 May 2019, ICC-01/14-01/18-206, para. 11; Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision on a Request for a Leave to Appeal](#), 11 February 2011, ICC-01/09-43, para. 12; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on the OPCD’s request for leave to appeal the 3 July 2008 decision on applications for participation](#), 4 September 2008, ICC-01/04-535, para. 16.

¹⁴ See e.g. Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Public redacted version of ‘Decision on Defence request for leave to appeal the “Decision on the Defence request to terminate the proceedings and related requests”’](#), 29 October 2020, ICC-01/12-01/18-1099-Red, para. 10.

¹⁵ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA3) (the ‘[DRC OA3 Appeal Judgment](#)’), para. 9.

¹⁶ Article 82(1)(d) of the Statute. See also [DRC OA3 Appeal Judgment](#), ICC-01/04-168, para. 10.

¹⁷ [DRC OA3 Appeal Judgment](#), ICC-01/04-168, para. 15.

¹⁸ [DRC OA3 Appeal Judgment](#), ICC-01/04-168, para. 14.

the proceedings, ‘a prompt reference of the issue to the court of appeal’ is necessary.¹⁹ Accordingly, the Single Judge grants the Defence’s Request in so far as the First Issue is concerned.

22. The Single Judge rejects the remainder of the Defence’s Request. With respect to the Second Issue, the Single Judge first notes that, contrary to the Defence’s submission regarding the non-communication of *all* victim applications,²⁰ all group C victims’ applications will be transmitted to the Chamber and, where necessary with redactions, to the parties.²¹ As to the question whether the Second Issue is an appealable issue, the Single Judge finds that the Defence’s submissions amount to a mere disagreement with the Single Judge’s additional reasons in support of the A-B-C Approach and is not an appealable issue for which the resolution ‘is essential for the determination of matters arising in the judicial cause under examination’.²² In that regard, the Defence presents its own views on these criteria and, in particular, speculates on the Single Judge’s starting point of his reasoning regarding potential redactions that would need to be applied to victims’ applications before they can be communicated to the parties. The Defence’s contention regarding the parties’ professionalism and ethics obligations has no bearing on any anticipated redactions required to protect the potential victims as such assessment is independent of said obligations. Equally amounting to a disagreement with the Single Judge’s finding is the Defence’s views on the potential number of applicants which fail to establish how this issue requires the immediate intervention of the Appeals Chamber.

23. With regard to the Third Issue, the Single Judge finds that it does not arise from the Victims’ Participation Decision but rather rests on a misrepresentation of the Single Judge’s finding. The Defence challenges the finding that the A-B-C Approach is ‘conducive to the expeditious conduct of the proceedings as a *whole*, which includes Mr Said’s right to have the proceedings conducted expeditiously’.²³ Contrary to the Defence’s contention, this finding concerns the overall expeditiousness of the entire proceedings in this case, rather than being an issue confined specifically to the Victims’ Participation Decision. Hence, it is incorrect for Mr Said to allege that it is for him to

¹⁹ [DRC OA3 Appeal Judgment](#), ICC-01/04-168, para. 18.

²⁰ Emphasis added.

²¹ [Victims’ Participation Decision](#), ICC-01/14-01/21-56, para. 36.

²² See [DRC OA3 Appeal Judgment](#), ICC-01/04-168, para. 9.

²³ [Victims’ Participation Decision](#), ICC-01/14-01/21-56, para. 35 (emphasis added).

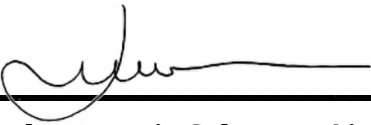
decide how this fair trial principle should be applied during the course of the proceedings in the present case. In the same vein, the Defence's claim that the right to be judged expeditiously is a right of the suspect (only) and that it cannot be used to prevent him from exercising his other statutory rights misrepresents the Single Judge's finding. The Single Judge was mindful of the Chamber's duty to ensure the fairness and expeditiousness of the proceedings, which entails a delicate balance between different interests, including, but not limited to, Mr Said's statutory right to have proceedings being conducted in a fair and expeditious manner as provided under article 67 of the Statute.

24. Turning to the Defence's submissions regarding the second requirement under article 82(1)(d) of the Statute, the Single Judge notes that the Defence does not draw a clear distinction between the Proposed Issues as to whether an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings, which, as recalled above, needs to be met cumulatively with the first requirement set out under that provision. The Single Judge reiterates that, due to their cumulative nature, each requirement has to be established for leave to be granted and it follows that the requested party also needs to establish these requirements clearly and separately for each proposed issue, rather than addressing them together, as done in the Defence's Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **GRANTS** the Defence's Request in so far as the First Issue is concerned;
and
- b) **REJECTS** the remainder of the Defence's Request.

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



Judge Rosario Salvatore Aitala,
Single Judge

Dated this Friday, 21 May 2021

At The Hague, The Netherlands