Cour Pénale Internationale

International Criminal Court

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Date: **26 April 2021**

PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Presiding Judge**
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public document

Application for leave to appeal the "Decision establishing the principles applicable to victims' applications for participation" (ICC-01/14-01/21-56)

Source: **Defence team for Mahamat Said Abdel Kani**

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

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I. Procedural history

1. On 7 January 2019, the Single Judge issued a warrant of arrest for Mr Said.[1]

2. On 24 January 2021, Mr Said was transferred to the International Criminal Court. He arrived at the detention centre on 25 January 2021.

3. On 29 January 2021, Mr. Said made his first appearance.

4. On 26 February 2021, the Registry filed "Submissions on Aspects Related to the Participation of Victims in the Proceedings".[2]

5. On 11 March 2021, the Defence filed a response to the Registry's "Submissions on Aspects Related to the Participation of Victims in the Proceedings".[3]

6. On 16 April 2021, the Single Judge issued a "Decision establishing the principles applicable to victims' applications for participation" (the "Impugned Decision").[4]

II. Applicable law

7. Under article 82(1)(d) of the Rome Statute,

> [e]ither party may appeal […] [a] decision that involves an issue that would **significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial**, and for which, in the opinion of the Pre-Trial or Trial Chamber, an **immediate resolution** by the Appeals Chamber may materially advance the proceedings.[5]

8. According to rule 155(1) of the Rules of Procedure and Evidence, if a party wishes to appeal such a decision, it must make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

[1] ICC-01/14-01/21-2-Red2.
[2] ICC-01/14-01/21-25.
[3] ICC-01/14-01/21-36.
[4] ICC-01/14-01/21-56.
[5] Emphasis added.

9. Regulation 65 of the Regulations of the Court states that:

> 1. An application for leave to appeal under rule 155 shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof. If the facts relied upon in support are not apparent from the record of the proceedings, they shall, as far as possible, be substantiated by a solemn affirmation by a person having knowledge of the facts stated therein.
> 2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons **warranting immediate resolution** by the Appeals Chamber of the matter at issue.[6]

10. In its interpretation of article 82(1)(d), the Appeals Chamber considers that, in order to grant a party leave to appeal, a Chamber must take into account several factors such as whether there is an appealable issue and whether that issue must be put to the Appeals Chamber for consideration.[7]

11. It is generally well established in case law[8] that under article 82(1)(d), a Chamber must determine (1) whether there is an appealable issue, (2) whether these issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (3) whether an immediate resolution by the Appeals Chamber would materially advance the proceedings.

12. The Defence submits the following remarks on those criteria:

13. Firstly, it is not for a Chamber to rule on the merits of the issues raised by a party following a decision by that Chamber, but merely to determine whether the party has indeed identified an appealable issue. A decision on an application for leave to appeal is not an occasion for the Judges to explain why the party might have misunderstood the decision, to clarify what they meant or to express disagreement with the points raised by the party wishing to appeal. For Judges to assume that they did not err in handing down a decision is understandable, but that is not what they should take into account in certifying an appeal.

14. This cautious approach is warranted by the fact that it is not for a Judge to rule twice on the same points. Leave to appeal granted by judges appertains to their own decision,

[6] Emphasis added.
[7] ICC-01/04-168, para. 8.
[8] ICC-01/14-01/18-206, para. 10; ICC-01/04-02/06-322, para. 9; ICC-01/04-01/06-1191, para. 9.

which places on them a duty of objectivity and detachment when deciding whether to grant the leave to appeal.

15. This obligation on Judges to exercise caution when ruling on an application for leave to appeal is observed in the Court's case law. Thus Pre-Trial Chamber II, in the situation in Uganda, had established as a guiding principle for applying article 82(1)(d) "the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merits or substance of the appeal".[9] In that decision, the Pre-Trial Chamber considered that "the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted"[10] and that accordingly "it would be inappropriate for the Chamber to examine arguments on the merit of the appeal in the context of the [...] Application".[11] In that regard, Judge Blattman stated in *Lubanga,* that "the chamber must tread carefully to apply the test provided in Article 82(1)(d), resisting any temptation to decide upon the substantive issues involved as that is reserved for the Appeals Chamber itself to determine."[12]

16. Second, the Defence is of the opinion that a violation of the fairness of the proceedings must be assessed in such a way as to safeguard all the rights of the person charged, as recognized by the Statute. A decision that directly violates a fundamental right of the person charged can necessarily affect the fairness of the proceedings in the broader sense. Indeed, the fairness of the proceedings must be understood as the duty to respect all the rights of the person charged in all aspects of the proceedings against that person.

17. Such an approach is consonant with the Court's case law.

18. Thus, in *Lubanga*, the Appeals Chamber had laid emphasis on the importance of ensuring that the rights of the person charged are respected to safeguard the fairness of the proceedings:

> The term 'fair' in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and 21 (3); making its interpretation and

[9] ICC-02/04-01/05-20-US-EXP, para. 15.
[10] ICC-02/04-01/05-20-US-EXP, para. 22.
[11] ICC-02/04-01/05-20-US-EXP 19, para. 13.
[12] ICC-01/04-01/06-1191, Separate and Dissenting Opinion of Judge René Blattman, para. 5.

> application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial. The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of articles 55 and 54(1)(c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings. This is at the core of article 82(1)(d) of the Statute.[13]

19. In the same vein, the Appeals Chamber in *Bemba et al.* had held that a Chamber had the discretion to broadly interpret the criteria of article 82(1)(d) when respect for the fundamental rights of the person charged is at stake:

> The Appeals Chamber recalls that article 82(1)(d) of the Statute vests power in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings. In addition, article 21(3) of the Statute is applicable to all Chambers, not only the Appeals Chamber. Accordingly, should a first-instance Chamber find itself in a situation similar to that encountered by the Pre-Trial Chamber, the Appeals Chamber considers that the matter falls within the ambit of article 82(1)(d) of the Statute. Therefore, it is for that Chamber to exercise its discretion to broadly interpret the two prongs of article 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under to article 21(3) of the Statute.[14]

20. Third, the logic of an interlocutory appeal is straightforward: it means being able to *immediately* lodge an appeal against a contested decision that could have irreversible ramifications on the remainder of the proceedings, which would be difficult or impossible to remedy should it subsequently be found that the decision was erroneous. Judges with an application for leave to appeal before them must therefore determine whether, in the absence of an appeal, the consequences of an erroneous decision could be offset retroactively.

III. Discussion

Introduction

21. This application for leave to appeal concerns three appealable issues whose immediate resolution by the Appeals Chamber is necessary to safeguard the fairness of the proceedings.

[13] ICC-01/04-168, para. 11 (emphasis added).
[14] ICC-01/05-01/13-1533, para. 16.

1. Appealable issues

1.1. The Impugned Decision is vitiated by an error of law because it is contrary to the letter of rule 89(1) of the Rules of Procedure and Evidence

22. With regard to the applicable law establishing the procedure for the provision to the parties of victims' applications to participate in the proceedings ("applications for participation"), the Single Judge held that: "[I]t has been determined that 'the parties' right to reply to victim applications set out in Rule 89(1) of the Rules is not absolute' as it is '[s]ubject to the provisions of the Statute', including 'the Court's obligation under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims' and the obligation to ensure the fairness and expeditiousness of the proceedings. Furthermore, it has been found that 'Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to 'consider the applications in such a manner as to ensure the effectiveness of proceedings'". Therefore, contrary to the Defence's submissions, rule 89(4) of the Rules allows the Chamber to organise the application and admission process in light of the circumstances of each case".[15]

23. For the Defence, the Single Judge's interpretation is an error of law because it is clear from the wording of rule 89(1) that the Registry has an obligation to provide copies of applications for participation to the parties, who "shall" [*ont "toujours le droit"*] be entitled to reply. This right is reinforced by rule 89(2), which provides for the possibility for the parties to request the rejection of an application for participation. In order to request the rejection of an application, the parties must have had the opportunity to receive and examine the application.

24. The phrase "[s]ubject to the provisions of the Statute, in particular article 68(1)" does not change this. While this phrase naturally allows Judges to decide, on a case-by-case basis, on protective measures that are absolutely necessary for the protection of victims under article 68(1), it cannot be used to decide in a general and generic manner to deny the Defence a right under the Rules of Procedure and Evidence. The States Parties – the legislators of both the Rome Statute and the Rules of Procedure and Evidence – adopted rule 89(1) with full knowledge of article 68(1) and the Judges cannot render ineffective a provision of the Rules

[15] ICC-01/14-01/21-56, para. 33.

adopted by the States without assuming a legislative role that goes beyond the scope of their function. This analysis of the function of rule 68(1) is confirmed by the Chambers Practice Manual, which provides that rule 68(1) allows redactions to be applied in applications for participation on a case-by-case basis, and not for the purpose of preventing parties from accessing applications for participation in general.[16]

25. It is one thing to accept, on a case-by-case basis, that a Chamber may order protective measures under article 68(1), as permitted by rule 89(1), which may limit the parties' access to portions of certain applications for participation. It is quite another to allow a Chamber, on the basis of criteria that have no real connection with article 68(1) (such as the number of applications or the time it would take to redact them), to simply and *ab initio* prohibit the parties from exercising the right expressly granted to them by rule 89(1). The Impugned Decision, insofar as it denies the parties *de jure* access to the totality of applications for participation, goes beyond the scope of what is permitted by rule 89(1).

26. Similarly, rule 89(4), to which the Single Judge refers, does not allow for a limitation on the right of the parties to be provided with all applications for victim participation. Indeed, it follows from rule 89(4) – which provides that "[w]here there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision" – that it is intended to allow Judges, **within the legal framework set out in rule 89 as a whole,** not to have to consider applications for participation one by one, which would entail having to render dozens of separate decisions, but rather to allow Judges to issue "one decision". This provision is not intended to allow for a procedure for admitting applications for victim participation that would deny the Defence a right explicitly provided for in the preceding paragraphs of the same rule.

27. The Single Judge also refers to the obligation "to ensure the fairness and expeditionousness of the proceedings"[17] to limit the parties' access to applications for participation. This obligation arises from article 64(2), which provides generally that "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and

[16] Chambers Practice Manual, para. 96(vi).
[17] ICC-01/14-01/21-56, para. 33.

witnesses". This article cannot be used as a basis for a Chamber to disregard provisions explicitly included in the Statute or the Rules of Procedure and Evidence. The article provides that the Chamber must ensure that the trial is "fair". However, it would appear that a procedure which does not allow the parties, including the Defence, to exercise a right explicitly provided for in the Statute cannot be considered fair. In other words, to use article 64(2) to deny the Defence the right granted to it in rule 89(1) is to reject the spirit of article 64(2). Otherwise, it would be possible, on the basis of article 64(2), for a Chamber to organize proceedings in a discretionary manner without taking into account all the rights of the accused under the Statute.

28. The Defence notes that its position is in line with the Chambers Practice Manual,[18] adopted by all the Judges of the Court, which clearly provides for a procedure for admission of victims' applications for participation in accordance with rule 89, which explicitly provides that parties have the right to receive all victim applications in order to assess them and submit observations on such applications. The Impugned Decision does not explain why the Single Judge decided not to follow the requirements of the Chambers Practice Manual.

29. For all these reasons, the Defence believes that the Single Judge erred in law by refusing, as a matter of principle, to allow the Defence to be provided with all the victims' applications for participation. This is not simply a disagreement with the Impugned Decision, but a questioning of its legal basis on the basis of an interpretation of the legal framework in accordance with the letter of rule 89, an interpretation which the Judges of the Court themselves have adopted in the Chambers Practice Manual. The fact that the Single Judge is of the view that he has legally justified his decision, which is quite normal, or that he disagrees with the legal framework presented by a party, cannot justify prohibiting that party from appealing, otherwise a party could never appeal an aspect of a decision raising questions of legal interpretation of the Statute or the Rules of Procedure and Evidence, since the Judge or Judges who rendered the decision in question will always consider that it was well founded.

[18] Chambers Practice Manual, paras. 95-96.

1.2. The Impugned Decision is vitiated by an error of law in that it took into account irrelevant criteria to justify not providing to the parties all of the victims' applications for participation.

1.2.1. The issue of redactions

30. In the Impugned Decision, the Single Judge considered that: "the Defence fails to take into account 'the challenges presented by the difficult security situation in the CAR and, hence, the extensive redactions anticipated to protect the victims in accordance with article 68(1) of the Statute'".[19]

31. First, the Defence observes that the Single Judge does not give reasons for this assertion in his decision, which would have involved explaining (1) what the "difficult security situation in the CAR" would be and (2) in what way this situation would necessarily lead to the need to make "extensive redactions" in respect of the parties. The Single Judge refers only in a footnote to a decision he rendered in *Ngaïssona and Yekatom*, in which it is simply stated that: "the Chamber first points out that it has factored in the challenges presented by the difficult security situation in the CAR and, hence, the extensive redactions anticipated to protect the victims in accordance with article 68(1) of the Statute".[20] This statement is not accompanied by any footnote or explanation in the body of the text about what the situation in the CAR would be or what "extensive redactions" would be necessary due to this security situation. The Impugned Decision does not provide the parties with any information as to why the current security situation in the Central African Republic would require redactions to the applications for participation that would be provided to the Prosecutor and the Defence.

32. Second, the Defence notes that the starting point of the Single Judge's reasoning appears to be that applications for participation will necessarily have to be redacted before being provided to the parties. A distinction must be made here between information that can be provided to the parties and information that could be made public. The parties are subject to ethical and professional obligations to respect the confidentiality of the case record and

[19] ICC-01/14-01/21-56, para. 34.
[20] ICC-01/14-01/18-141, para. 43.

redactions vis-à-vis the parties must therefore be exceptional, reasoned and not based on a stereotypical logic. Consequently, the provision of applications for participation to the parties cannot be equated with the communication of information to the general public. In other words, the fact that the security situation in the Central African Republic may warrant the confidentiality of information relating to the participation of victims in the proceedings is one thing, but the fact that the parties themselves cannot receive this information is another, which must be specifically justified on a case-by-case basis. There is nothing in the Impugned Decision to explain why applications for participation should be subject, *a priori,* to redactions vis-à-vis the parties.

33. Third, even if victim applications for participation were to require redaction before being provided to the parties, the fact that redaction as such is necessary is not a reason not to transmit applications for participation to the parties simply to avoid having to apply redactions. In particular, the fact that applying redactions may be time-consuming is not a reason to dispense with it, even less so when the consequence of this choice is to deny the parties a right expressly granted to them by the Rules of Procedure and Evidence. It is the responsibility of the Registry to take the necessary measures to ensure that the parties and the Judges are able to work in conditions conducive to implementation of the basic texts of the ICC. The Registry must make adequate resources available to the parties and Judges so that a fair trial, as provided for in the Rome Statute and the Rules of Procedure and Evidence, can take place. It is not for the parties to waive a right on account of the resources available to the Registry or for a Judge to deny the parties a right because of the Registry's lack of resources or the time required for the Registry to carry out its task.

1.2.2. The question of the potential number of applications for participation

34. The Impugned Decision states: "The Defence further omits to consider that it may be expected that a substantial number of victims will submit applications to participate in the present proceedings".[21]

35. The Single Judge does not explain how the expected number of applications for participation would justify the parties not being able to exercise their right to have access to

[21] ICC-01/14-01/21-56, para. 34.

such applications. As with the issue of redactions, the volume of work involved in assessing victims' applications for participation and the time required to carry out such assessments is not a reason to limit a right of the parties and therefore not to transmit applications for participation to them just to save them such assessments. The fact that such assessments may take time is not a reason to arbitrarily decide to deny the parties the possibility of carrying them out since the Rules of Procedure and Evidence expressly provide for such a right.

36. The Defence submits that taking into account such a logistical criterion to limit the exercise of a right by one of the parties constitutes an error of law, since it has no basis in the texts of the Court.

37. Still on the subject of the anticipated number of applications for participation, the Single Judge considers that limiting the parties' access to such applications would be "in the interests of the victims by enabling the greatest number of victims to apply to participate in the hearing on the confirmation of charges".[22] In the Defence's view, such a statement is an error of law since the Single Judge never explains the link between the ability of individuals in the Central African Republic to apply to participate and the fact that the parties can exercise their right to inspect such applications. These are two separate things, as they are two separate moments in the process. The objective, which is part of the Registry's outreach activities, of facilitating access to the ICC for victims who believe they meet the criteria and who wish to apply to participate in the proceedings is not incompatible with the parties' subsequent exercise of their right to assess these applications for participation. Facilitating access to the ICC for victims wishing to participate in the proceedings is no justification for a prohibition on the parties receiving all applications for participation.

1.2.3. *The unequal treatment of parties from one ICC case to the next that results from the consideration of the above two criteria in the Impugned Decision*

38. The logic that "extensive redactions" and analysis of the potentially numerous applications would be a draining and time-consuming exercise that would justify limiting the parties' access to all applications, would, moreover, lead to unequal treatment of the parties from one case to the next.

[22] ICC-01/14-01/21-56, para. 35.

39. Following this logic, in cases where there may be few applications for participation from victims and/or few redactions to be made, the parties would be able to access all applications for participation, which would not be the case if there were many applications. Furthermore, it is difficult to understand how the limit on the number of applications for participation and/or redactions to be made would be determined in order to decide not to provide all applications for participation to the parties. This criterion of the number of applications in order to prohibit parties from inspecting them would lead to legal uncertainty from case to case, which is incompatible with the rule of law.

1.3. The Impugned Decision is vitiated by an error of law in that it misinterpreted the principle of expeditiousness of proceedings

40. In the Impugned Decision, the Single Judge states that the system adopted which limits the ability of parties to inspect all of the applications for participation would be "conducive to the expeditious conduct of the proceedings as a whole, which includes Mr Said's right to have the proceedings conducted expeditiously".[23]

41. Such reasoning, in the Defence's view, constitutes an error of law. Indeed, the expeditiousness of the proceedings is a right of the person charged to be tried without undue delay. What is an undue delay? It is a delay that is due to conduct attributable to either the Prosecutor or the Chamber. In no way can Mr. Said's exercise of his rights be considered a "delay" in the proceedings. Therefore, Mr. Said's right to be tried expeditiously cannot be used to deny him the exercise of his rights under the Statute and the Rules of Procedure and Evidence, in this case the right of the Defence to inspect victims' applications for participation. The consequence of such an approach would be to either prohibit Mr. Said from exercising his fundamental rights, or to put him in the impossible position of having to "choose" between his different rights.

42. Proceedings conducted expeditiously, because they did not allow the person charged to exercise all of his or her rights, would, by definition, be unfair. Therefore, the person charged must be put in a position where he or she can exercise all of his or her rights under the Statute and the Rules of Procedure and Evidence. The desire to accelerate proceedings as

[23] ICC-01/14-01/21-56, para. 35.

a matter of principle could result in the accused being unable to exercise his or her rights in practice. For example, by analogy, the reasoning that leads to limiting the exercise of a right expressly provided for in the founding texts (here rule 89) could also justify limiting the exercise of the right of the accused to "adequate time and facilities for the preparation of the defence" because the exercise of this right would be too time-consuming. Similarly, the logic of speeding up proceedings without taking into account the exercise of his or her rights by the accused could result in justifying limiting the accused's right to receive all prior witness statements because of the number of prior statements or the amount of redactions to be made.

2. The issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

43. This is an appeal by the Defence against a decision that affects the exercise by Mr Said of his rights under rule 89(1) of the Rules of Procedure and Evidence. From the moment a decision affects the exercise of his or her rights by the person charged, it must be considered as necessarily affecting the fair conduct of the proceedings.

44. The Defence considers that the procedure for victim participation in the proceedings, in that it prohibits the Defence from accessing and analysing all applications for participation, causes prejudice to the Defence and affects the fairness of the proceedings. Similarly, the prohibition on the Defence discussing the content of the applications for participation in an exchange of arguments constitutes a violation of the fair trial principle.

45. First, it is fundamental that the procedure for the admission of victims' applications for participation provides for the parties to be afforded notice and be heard. Indeed, the procedure is naturally organized around the dialectic between parties, which makes it possible to bring out all the useful elements for a full and informed debate on an issue. It is only at the end of such an exchange of arguments that the Chamber can render a fully informed decision. Any limitation of this dialectic carries with it the risk that important issues will not have been fully debated, and above all, that a decision will be rendered without the parties having been able to present all their arguments in full, thereby calling into question the fairness of the proceedings.

46. In this case, the role of the Defence in the analysis of an application for victim participation ("application") is fundamental since the Defence, like the Prosecutor, will have a different assessment of the content of an application to the Registry's. The Chamber will only be able to decide on an application following an exchange of arguments between parties to assess whether the criteria for participation are met for a given application. The Registry, as an external body, cannot, by definition, identify what is relevant for the parties and cannot represent their interests. Only the parties know what is important to them and it is important for the fairness of the procedure that they are able to discuss the content of each application for participation.

47. Second, it is important to take into account the role that victims who are admitted to participate in proceedings may play, as these participants will be able to intervene on many issues through their legal representation. It is common practice before the ICC for legal representative(s) of victims to file numerous submissions, to participate in debates on important legal issues (e.g. an application for interim release) and to advocate at hearings (e.g. status conferences and confirmation of charges hearings). If the Defence has been unable to challenge their participation, then at the confirmation of charges stage it will have to respond to and deal with participants, some of whom may not meet the criteria to qualify as victims. All submissions and interventions by participating victims form part of the proceedings and are taken into account in the Chambers' decisions. Above all, the participation of victims has a real and significant impact on the work of the Defence, which frequently has to respond to them, in addition to having to respond to the Prosecutor's submissions. Because of this legal status and the role of participants in the proceedings, and its impact on the work of the Defence, it should be ensured *ab initio* that these participants have the standing to act in the proceedings.

48. Third, the prejudice to the Defence arises from the very nature of a victim's participation in the proceedings. It is not, by definition, a neutral participation, but involves making a direct accusation against the accused. It is inconceivable that the Defence should be unable to apprise itself of the accusations made against the accused in the proceedings and verify whether they are well founded, even if only prima facie. The fairness of the proceedings does not require a "casting of the net" to ensure the participation of as many victims as possible in the proceedings – and thus a proliferation of accusers against the

accused – but rather the participation only of those who meet the criteria set out in the texts and case law.

3. The immediate resolution of the issues by the Appeals Chamber could significantly advance the proceedings

49. The Defence notes that the issues raised in the present application for leave to appeal have, to the knowledge of the Defence, never been resolved by the Appeals Chamber. The Defence believes that resolution by the Appeals Chamber of these issues is essential for several reasons:

50. First, in the Impugned Decision, the Single Judge states that: "the arguments in support of the Defence Admission Request and the Defence Alternative Admission Request have been previously considered".[24] The Defence notes that in a footnote, the Single Judge refers to four decisions.[25] Of these four decisions, two were rendered either by the Single Judge himself (*Yekatom and Ngaïssona* case) or by the same Pre-Trial Chamber of which the Single Judge is a member (*Abd-Al-Rahman* case). The Defence considers that the reference by Judges to decisions of their own making does not allow the fundamental issues addressed therein to be considered definitively settled, especially when these issues have never been subject to review by the Appeals Chamber.

51. On the contrary, if the same Judges have repeatedly decided the same issue, the role of the Appeals Judges in implementing the two-tier system is all the more important since it involves exercising judicial control over repeated decisions that may impact on the legal procedure for victim participation in all the recent cases before the ICC. If the same Judges reiterate their reading of the texts and the legality of this reading has been discussed in different cases, it is important that the Appeals Judges rule on a new procedure that seems to be emerging, especially when this new procedure seems to go against the spirit and the letter of the Rules of Procedure and Evidence, in this case rule 89.

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[24] ICC-01/14-01/21-56, para. 33.
[25] *Prosecutor v Bosco Ntaganda*, 6 February 2015, ICC-01/04-02/06-449; *Prosecutor v Al Hassan*, 24 May 2018, ICC-01/12-01/18-37-tENG; *Prosecutor v Yekatom and Ngaissona*, 5 March 2019, ICC-01/14-01/18-141, *Prosecutor v Ali Muhamat Abd-Al-Rahman*, 18 January 2021, ICC-02/05-01/20-259

52. Second, it is all the more important for the Appeals Judges to resolve the issues raised in this application for leave to appeal as these issues highlight a change in jurisprudence that sets up a victim participation procedure that not only goes against the letter and spirit of rule 89, but also goes against the requirements for victim participation adopted by all the Judges of the Court in the Chambers Practice Manual.

53. It should be noted here that the procedure for admitting victims' applications for participation was first adopted by the Judges in the 2016 version of the Chambers Practice Manual ("Practice Manual"), i.e. after the decision on victims' participation in the *Ntaganda* case (2015). In that case, the Judges departed from the letter of rule 89 and the consistent practice at the ICC which allowed the parties to be notified of all applications for victim participation. The victim participation procedure adopted by all the Judges of the Court in the Practice Manual therefore *de facto* challenged the decision in *Ntaganda*, since it prescribes a victim participation procedure in line with rule 89, allowing the parties to receive all applications for participation, to analyse them and to submit observations on those applications. This procedure was then maintained as such in the subsequent 2017 version of the Practice Manual, as well as in the latest version of November 2019, i.e. after the decisions in *Al Hassan* (2018) and *Yekatom and Ngaïssona* (March 2019). Since the last version of the Practice Manual, the procedure set out therein has still not been implemented, as the Pre-Trial Chambers have subsequently continued, in 2021, to implement a victim participation procedure, both in the *Abd-Al-Rahman* case and in the *Said* case, which is contrary to the one set out in the Practice Manual.

54. The present situation raises the question of how it is that there is such a difference between the procedure for admitting applications for participation adopted by all the Judges of the Court in the Practice Manual in 2016 and the individual decisions of Pre-Trial Chambers since the adoption of the Practice Manual. It is difficult for the parties, and any outside observer, to understand how the Court's Judges can agree on the adoption of one procedure for the admission of victims' applications (including those who have rendered their decisions in the various cases cited above), maintain it in successive versions of the Practice Manual, and then, when sitting on a given case, systematically apply another procedure, completely different from the one provided for in the Practice Manual. While the Defence is aware that the Practice Manual is not technically binding on individual Judges, its purpose is

to serve as a basis for the Judges to make consistent decisions and thus provide legal certainty to the parties who can anticipate the Judges' policy position on particular issues. For example, the Practice Manual has been used as a basis in decisions on redaction protocols. At the very least, the current situation raises issues of judicial policy coherence and predictability which it would be in everyone's interest to address through the involvement of the Appeals Chamber on the legal basis of the procedure for victim participation at the ICC.

55. Furthermore, it appears that, contrary to what is stated in the Impugned Decision, the procedure applicable to applications for participation is not tailored to the circumstances of the case, as the Pre-Trial Chambers are developing a new legal framework – which departs from the letter of rule 89 and the Practice Manual – that now applies automatically from one case to the next.

56. The Impugned Decision therefore has an impact that goes far beyond the present case, as it affects the procedure for victim participation in all recent cases at the Court and there is now such legal uncertainty for the parties regarding their rights as regards victim participation that it is crucial that the Appeals Chamber intervene and immediately resolve the issues raised in this application for leave to appeal.

57. Lastly, the Defence notes that it is vital that the Appeals Chamber resolve the issues raised in the present application since, following the Impugned Decision – subject to the Single Judge's pending decision on the parties' access to all admitted applications for participation – the Defence would not have access to documents that are, by definition, relevant for the preparation of the defence. Indeed, the victims' applications for participation relate directly to the charges against Mr. Said (otherwise such persons would not be allowed to participate in proceedings) and it is crucial to be able to work on such applications in preparation for the confirmation hearing. In the absence of an immediate resolution by the Appeals Chamber, the Defence could be denied the means necessary to prepare the defence, thereby jeopardizing the fairness of the proceedings.

FOR THESE REASONS, MAY IT PLEASE THE PRE-TRIAL CHAMBER TO:

- **Grant** the Defence leave to appeal the "Decision establishing the principles applicable to victims' applications for participation" (ICC-01/14-01/21-56).

[signed]

Jennifer Naouri
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Dated this 26 April 2021
At The Hague, Netherlands