



Original: English

**No. ICC-01/14-01/21 OA2
Date: 17 June 2021**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public document

Decision on the filing of additional submissions in the appeal

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

The Office of Public Counsel for Victims

Ms Paolina Massida
Ms Sarah Pellet

REGISTRY

Registrar

Mr Peter Lewis

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision establishing the principles applicable to victims’ applications for participation’ of 16 April 2021 (ICC-01/14-01/21-56),

Having before it the ‘Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ of 7 June 2021 (ICC-01/14-01/21-90),

Having before it the ‘Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56’ of 9 June 2021 (ICC-01/14-01/21-95),

Pursuant to regulations 24*bis* and 81(4)(b) of the Regulations of the Court,

Renders the following

DECISION

1. The OPCV is granted leave to file submissions in this appeal, as set out in paragraphs 12 and 13 of this decision. Said submissions shall be filed by 4pm on Tuesday, 22 June 2021.
2. The Registry is granted leave to file submissions as set out in paragraph 16 by 4pm on Tuesday, 22 June 2021.
3. The Defence may file a consolidated response to the submissions by the OPCV and the Registry, as referred to in paragraphs 1 and 2 above, by 12pm on Monday, 28 June 2021.

REASONS

I. PROCEDURAL HISTORY

1. On 16 April 2021, the Single Judge acting on behalf of Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) rendered the ‘Decision establishing the principles applicable to victims’ applications for participation’ (the ‘Impugned Decision’).¹

¹ [ICC-01/14-01/21-56](#).

2. Following a request by the Defence, leave to appeal, in respect of one issue, was granted on 21 May 2021.² This issue was identified as concerning,

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.³

3. The Defence filed its appeal brief on 3 June 2021 (the 'Appeal Brief').⁴

4. On 7 June 2021, the Office of Public Counsel for victims (the 'OPCV') filed a request to appear before the Appeals Chamber in this appeal (the 'OPCV Request').⁵ The Defence responded to this request on 8 June 2021 (the 'Response to OPCV Request').⁶

5. On 9 June 2021, the Registry submitted a request for leave to submit observations in the appeal, pursuant to regulation 24*bis* of the Regulations of the Court (the 'Registry Request').⁷ The Defence responded to this request on 11 June 2021 (the 'Response to Registry Request').⁸

6. On 11 June 2021, the Prosecutor filed her response to the Appeal Brief.⁹

² [Decision on the Defence's request for leave to appeal the 'Decision establishing the principles applicable to victims' applications for participation'](#), ICC-01/14-01/21-79 (the 'Decision Granting Leave to Appeal').

³ [Decision Granting Leave to Appeal](#), para. 21.

⁴ [Mémoire d'appel de la Défense au soutien de son appel contre la « Decision establishing the principles applicable to victims' applications for participation » \(ICC-01/14-01/21-56\) du Juge Unique rendue le 16 avril 2021.](#), ICC-01/14-01/21-88 (OA2).

⁵ [Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court](#), ICC-01/14-01/21-90 (OA2).

⁶ [Réponse de la Défense à la « Request to appear before the Appeals Chamber pursuant to regulation 81\(4\)\(b\) of the Regulations of the Court » \(ICC-01/14-01/21-90\) », ICC-01/14-01/21-93-Red \(OA2\)](#) (original confidential version filed on the same day).

⁷ [Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56](#), ICC-01/14-01/21-95 (OA2).

⁸ [Réponse de la Défense à la « Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56 » \(ICC-01/14-01/21-95\)](#), ICC-01/14-01/21-96 (OA2).

⁹ [Prosecution's response to Mahamat Said Abdel Kani's appeal against the 'Decision establishing the principles applicable to victims' applications for participation'](#), ICC-01/14-01/21-97 (OA2).

II. MERITS

A. OPCV'S REQUEST TO APPEAR BEFORE THE APPEALS CHAMBER

7. In her request, counsel from the OPCV seeks permission to appear before the Appeals Chamber in order 'to represent the general interest of the victims in the appeal' brought by the Defence.¹⁰ Referring to the lack of appointment at this stage of a legal representative of victims in the case, and noting that the issues raised on appeal 'have a clear bearing on the interests of victims', she argues that her appearance 'will be instrumental to duly represent the victims' general interest and ensure that the rights of victims are fully take into account'.¹¹ The OPCV seeks to provide 'a meaningful contribution' while ensuring the expeditiousness and efficiency of the proceedings.¹² She further recalls the OPCV's function 'to provide expert advice and assistance' on issues affecting victims and noted its function when a determination on victims' applications under rule 89(1) of the Rules of Procedure and Evidence (the 'Rules') is pending.¹³ Finally, the OPCV recalls that the right to a fair trial is enjoyed by all parties and participants, including victims.¹⁴

8. In its response, the Defence opposes the OPCV Request given: (i) its belated nature which, in the Defence's view, risks creating an imbalance in the proceedings in light of the possibility of receiving submissions by the OPCV that were not considered by the Pre-Trial Chamber prior to the rendering of the Impugned Decision;¹⁵ (ii) the issue of potential conflict of interests presented by the simultaneous representation by the OPCV in this case and in the case of the *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* which is currently pending before the Pre-Trial Chamber;¹⁶ (iii) that the participation and submissions by the OPCV may be contrary to the wishes of the victims and potentially contested by the legal representatives eventually chosen by the victims or appointed by the Pre-Trial Chamber;¹⁷ and (iv) that the issue in relation

¹⁰ [OPCV Request](#), para. 1.

¹¹ [OPCV Request](#), para. 2. *See also* paras 13, 16.

¹² [OPCV Request](#), para. 3.

¹³ [OPCV Request](#), paras 10, 12.

¹⁴ [OPCV Request](#), para. 15.

¹⁵ [Response to OPCV Request](#), paras 11-20.

¹⁶ [Response to OPCV Request](#), paras 21-27.

¹⁷ [Response to OPCV Request](#), paras 28-31.

to which the OPCV seeks to appear before the Appeals Chamber exceeds the scope of the issue on appeal.¹⁸ In the event that the Appeals Chamber grants the OPCV Request to appear before the Appeals Chamber, the Defence submits that OPCV counsel participating in the case of the *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* should not intervene in the present case.¹⁹ It further seeks authorisation to respond to the OPCV observations.²⁰

9. The OPCV seeks leave to file submissions pursuant to regulation 81(4)(b) of the Regulations of the Court, which provides, as one of the tasks of this office, that it may ‘[a]pppear[], on the instruction or with the leave of the Chamber, in respect of specific issues’.

10. The issue raised in this appeal concerns the procedure for deciding on victims’ applications to participate in the proceedings before the Pre-Trial Chamber pursuant to rule 89(1) of the Rules.²¹ No legal representative of victims, including from the OPCV, has yet participated in the proceedings related to this issue. The Appeals Chamber considers that, given the nature of the issue on appeal, and its possible implications, it is important for it to facilitate the presentation of the views of victims at this stage of the proceedings, to ensure that their perspective may be heard.

11. The Appeals Chamber sees no obstacle to requesting such input from the OPCV, albeit it did not participate in the proceedings related to this issue before the Pre-Trial Chamber, being an office specifically endowed with the role of assisting Chambers on issues related to victims, when needed, including when no legal representative has yet been appointed in the proceedings.²² Furthermore, the Defence’s argument that a legal representative of victims to be appointed at a later stage may take a different view to

¹⁸ [Response to OPCV Request](#), paras 32-40.

¹⁹ [Response to OPCV Request](#), para. 42.

²⁰ [Response to OPCV Request](#), para. 43.

²¹ Rule 89(1) reads: ‘[i]n order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements’.

²² See also regulation 81(4)(c) of the Regulations of the Court listing as one of the OPCV tasks ‘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’.

any put forward now by the OPCV is speculative and does not justify rejecting the OPCV Request at this stage.

12. As to the issue of a potential conflict of interest, the Appeals Chamber's decision is limited to granting leave to the OPCV, pursuant to regulation 81(4)(b) of the Regulations of the Court, to make focused submissions on the legal question before it and without reference to the facts of this case. In these circumstances, the Appeals Chamber's decision should have no bearing on the issue of conflict of interest which has been raised by the Defence before the Pre-Trial Chamber, noting what will be the limited nature of the OPCV's involvement in this appeal.

13. The OPCV is, accordingly, granted leave to make submissions on the legal question before it and without reference to the facts of this case. Such submissions shall be filed by 4pm on Tuesday, 22 June 2021.

B. Registry Request

14. In its request, the Registry seeks leave to file observations before the Appeals Chamber, 'mindful of its neutral role in the proceedings', on the 'admission process of victim applications' adopted in the present case.²³ It intends to make submissions on the relevant legal, judicial and case-specific security considerations that have triggered the Registry to consistently recommend the said admission process to the Pre-Trial Chamber and other chambers.²⁴ The Registry emphasises 'the efficiency of this admission system which enhances victims' access to the judicial process' while respecting the legal framework of the Court and the rights of parties and participants.²⁵

15. In its response, the Defence opposes the Registry Request on the basis that: (i) in the proceedings leading to the Impugned Decision, the Registry has already made submissions on the issue on appeal and therefore its participation in the appeal proceedings is unnecessary;²⁶ (ii) the logistical considerations that the Registry intends to bring to the Appeals Chamber's attention exceed the scope of the issue on appeal which concerns a legal question: the interpretation of rule 89(1) of the Rules, and a

²³ [Registry Request](#), paras 2, 10.

²⁴ [Registry Request](#), para. 10.

²⁵ [Registry Request](#), para. 10.

²⁶ [Response to Registry Request](#), paras 12-16.

procedure that would limit the rights of the accused on the basis of logistical or budgetary considerations would be unfair;²⁷ (iii) the legal considerations that the Registry intends to raise in its observations are *ultra vires* insofar as they exceed the specific function of the Registry to provide logistical support to the Judges and risk affecting its neutrality;²⁸ (iv) given the position adopted by the Registry and its interest on the issue on appeal, authorising it to submit observations on appeal would result in the Registry acting as a party to the proceedings;²⁹ and (v) the Registry's reference to ongoing external discussions on the issue on appeal is irrelevant and inappropriate.³⁰ In the event that the Appeals Chamber grants the Registry Request to appear before the Appeals Chamber, the Defence submits that the Registry should not be allowed to make submissions regarding its internal bureaucratic and logistical organisation.³¹ It further seeks authorisation to respond to the Registry observations.³²

16. Regulation 24bis(1) of the Regulations of the Court provides that '[t]he Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants'. The Appeals Chamber notes that the Registry filed submissions before the Pre-Trial Chamber, in relation to the issue on appeal.³³ Given the role of the Registry in the overall admission system of victim applications to participate, the Appeals Chamber considers it appropriate, and of assistance to it, to receive submissions from the Registry on the matter on appeal, in particular on its role in the challenged system. The Appeals Chamber does not find that this would be inappropriate and/or risk the Registry's neutrality in the proceedings, as suggested by the Defence.

17. Accordingly, the Appeals Chamber grants the Registry Request and orders the Registry to file its submissions by 4pm on Tuesday, 22 June 2021.

²⁷ [Response to Registry Request](#), paras 17-22.

²⁸ [Response to Registry Request](#), paras 23-26.

²⁹ [Response to Registry Request](#), paras 27-31.

³⁰ [Response to Registry Request](#), paras 32-38.

³¹ [Response to Registry Request](#), para. 39.

³² [Response to Registry Request](#), para. 40.

³³ [Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings](#), 26 February 2021, ICC-01/14-01/21-25.

18. Finally, the Appeals Chamber considers it appropriate to grant the Defence an opportunity to file a consolidated response to the observations by the OPCV and the Registry. It may do so by 12pm on Monday, 28 June 2021.

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



Judge Gocha Lordkipanidze
Presiding

Dated this 17th day of June 2021

At The Hague, The Netherlands