

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/14-01/21**

Date: **8 June 2021**

APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding Judge
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

Public Redacted Version of “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)”

Source: Defence team for Mahamat Said Abdel Kani

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence of Mahamat

Said Abdel Kani
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims
Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verril

Detention Section

**Victims Participation and Reparations
Section**

Other

Classification:

1. This response is filed on a confidential basis pursuant to regulation 23bis(2) of the Regulations of the Court as it refers to confidential evidence. The Defence will file a public redacted version.

I. Procedural history

2. On 26 February 2021, the Registry filed its “Submissions on Aspects Related to the Participation of Victims in the Proceedings”,¹ in which its representatives set out the procedure for the assessment of applications for victim participation proposed by the Registry in *The Prosecutor v. Mr Said* (the *Said* case). The Registry proposed that applications for participation be classified into three categories: Group A, “applicants who clearly qualify as victims”; Group B, “applicants who clearly do not qualify as victims”; and Group C, “applicants for whom VPRS could not make a clear determination for any reason”; and that the parties be provided only with examples of what would be covered by category C.

3. 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”,² in which it showed that the procedure proposed by the Registry for the assessment of applications for victim participation was contrary to the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence, and therefore requested that all applications for participation be provided to the parties in redacted form if necessary to ensure the protection of victims seeking to participate in the proceedings.

¹ ICC-01/14-01/21-25.

² ICC-01/14-01/21-36-tENG.

4. On 16 April 2021, the Single Judge issued a “Decision establishing the principles applicable to victims’ applications for participation”,³ in which he decided, *inter alia*, that only those applications for participation by victims for whom the Registry could not make a clear determination as to whether they met the requirements for participation would be provided to the parties (i.e. all applications falling under category C).

5. On 26 April 2021, the Defence filed an “Application for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’”,⁴ in which it raised, *inter alia*, the issue of the compliance of that decision with the letter of rule 89(1) of the Rules of Procedure and Evidence.

6. On 21 May 2021, the Single Judge granted the Defence leave to appeal on the issue of whether the decision on victim participation of 16 April 2021 “contradicts rule 89(1) of the Rules”.⁵

7. On the same day, the Registry filed the “Registry Report on Legal Representation of Victims and Observations on the Defence Requests”.⁶

8. On 26 May 2021, the Defence filed a response to the “Registry Report on Legal Representation of Victims and Observations on the Defence Requests”,⁷ in which it addressed, *inter alia*, the issue of the latent conflict of interest faced by the legal representatives of victims (LVRs) called upon to intervene in both the *Said* case and the *Yekatom and Ngaïssona* case.

³ ICC-01/14-01/21-56.

⁴ ICC-01/14-01/21-63-tENG.

⁵ ICC-01/14-01/21-79, para. 12.

⁶ ICC-01/14-01/21-80.

⁷ ICC-01/14-01/21-84-Conf-Exp.

9. On 3 June 2021, the Defence filed its brief in support of its appeal against the Single Judge's "Decision establishing the principles applicable to victims' applications for participation (ICC-01/14-01/21-56) issued on 16 April 2021".⁸

10. On 7 June 2021, the Office of Public Counsel for Victims (OPCV) filed a "Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court".⁹

II. Discussion

1. In the main: Request to dismiss the OPCV's Request.

1.1. The OPCV's request to intervene in the present case was submitted too late and is not based on a recognized role in the proceedings. It cannot thus be granted without creating an imbalance in the proceedings

11. The Defence notes, first, that the parties and the Registry's representatives have been discussing the issue of the procedure applicable to the participation of victims in the *Said* case since 26 February 2021, i.e. for over three and a half months. This is a complex issue which has been the subject of numerous submissions and at no time have the representatives of the OPCV requested permission to participate in the ongoing discussions.

12. The OPCV representatives did not seek to respond to or comment on the Registry report of 26 February 2021, which laid the basis for future discussions on all issues relating to victim participation in this case. Nor did they seek to respond to the Defence observations on the Registry report, filed on 11 March 2021, nor to the Defence application, filed on 26 April 2021, for leave to appeal the decision of 16

⁸ ICC-01/14-01/21-88.

⁹ ICC-01/14-01/21-90.

April 2021 setting out the framework for victim participation in the proceedings in this case.

13. The Defence further notes that the OPCV representatives have also not requested to participate in the ongoing discussions on the issue of legal representation of victims, either following the Registry report of 21 May 2021 (dealing specifically with the possibility of the OPCV representing victims and the issue of providing the Defence with copies of applications for participation of victims who have been authorized to participate in proceedings) or following the Defence response to the Registry report on 26 May 2021.

14. The Defence therefore considers that the OPCV has submitted its request to intervene too late at the appeal stage and that it risks upsetting the balance of the proceedings, since its representatives would be called upon to discuss appellate issues based on previous discussions in which they did not participate. Judicial logic prescribes that a legal debate should take into account, from the outset, the arguments of all participants concerned. If the OPCV considered it useful to participate in discussions on the victim participation procedure – in particular because its representatives disagreed with the analysis of one of the parties – it was incumbent upon it to seek leave to participate in the discussions at that time. Allowing the OPCV to intervene at the appeal stage would upset the balance of the proceedings since the appeals Judges could rule on the content of the impugned decision taking into account new arguments not presented to the Judge who rendered the decision in the first instance, and which, therefore, could not have been taken into account by the Judge in question. The appeals Judges could equally rule on the content of the Defence appeal brief in which, by definition, the Defence could not have taken into account or responded to any new arguments presented by the OPCV.

15. It therefore appears that the OPCV representatives did not act diligently: insofar as they considered that this was a matter with a “clear bearing on the interests of victims”,¹⁰ as they state in their request, they should have sought to intervene as soon as the discussions on the participation procedure were taking place before the Pre-Trial Chamber, without waiting for proceedings before the Appeals Chamber, which are merely the continuation of a judicial process that has been underway since 26 February 2021.

16. Furthermore, it should be noted that, in the present case, the OPCV representatives were not appointed by the Single Judge, even temporarily, to represent the victims who applied to participate in the proceedings. As the debate on the legal representation of victims was ongoing, it was up to the OPCV representatives to apply to the Single Judge for authorization to intervene in the proceedings on the procedure for victim participation, even before any decision on the representation of victims was taken, if they considered it appropriate.

17. If the OPCV had been granted, even temporarily, the status of victims’ representative, then it would be up to its representatives to decide whether or not they wished to intervene and when to intervene on specific issues both at first instance and at the appeal stage.

18. In other words, in the specific circumstances of this case, the OPCV representatives have not acted with sufficient diligence on issues relating to the procedure for victim participation as they have not seen fit to intervene in the pre-trial phase. Since they have no recognized role in the pre-trial phase to date, they cannot be allowed to intervene at a late stage, in the appeal, in a debate which is already underway and is based on well-founded and argued discussions. Otherwise,

¹⁰ ICC-01/14-01/21-90, para. 2.

that would be tantamount to allowing the OPCV representatives to wait for a debate to take place and then decide whether they consider it appropriate to take part if it does not go in the expected direction.

19. In this regard, the Defence notes that, in support of its request for leave to intervene in the present proceedings, the OPCV relies on a decision in the *Abd-Al Rahman* case, in which the Appeals Chamber granted the OPCV leave to intervene in ongoing appeal proceedings.¹¹ However, in the *Abd-Al Rahman* case, the OPCV had already been granted a role in the proceedings by being appointed by the Single Judge, on a temporary basis, as the representative of persons having applied to participate in the proceedings, pending a final decision on their participation.¹² It was on the basis of this role, recognized early on by the Single Judge, that the OPCV applied for leave to participate in the appeal proceedings in question¹³ and it was on the basis of this specific role recognized by the Single Judge that the Appeals Chamber granted its request.¹⁴ In the present case, the situation is very different, as the OPCV never participated in any discussion before the Pre-Trial Chamber, nor was it granted any role during the pre-trial phase.

20. Lastly, in the specific circumstances of this case, the role of the OPCV representatives in representing victims is further complicated by the fact that the issue of a latent conflict of interest is being discussed before the Pre-Trial Chamber.

1.2. The issue of a latent conflict of interest arising from the simultaneous representation of victims in the *Said* case and in the *Yekatom and Ngaïssona* case.

¹¹ ICC-02/05-01/20-375.

¹² ICC-02/05-01/20-277.

¹³ ICC-02/05-01/20-375, para. 18.

¹⁴ ICC-02/05-01/20-375, para. 21.

21. The issue of a possible latent conflict of interest arising from the simultaneous representation of victims in the *Said* case and the *Yekatom and Ngaïssona* case is pending before the Pre-Trial Chamber.

22. In its submissions of 11 March 2021 on the report filed by the Registry on 26 February 2021 on the victim participation procedure, the Defence noted that:

given the existence of several proceedings at the Court relating to the CAR II situation, it is crucial to take all precautions to avoid possible conflicts of interest. For example, the Defence finds it difficult to imagine that lawyers representing victims in the *Yekatom and Ngaïssona* case could also represent victims in the present case.¹⁵

23. In the same vein, in its report on the representation of victims of 21 May 2021, the Registry noted that:

one of the legal representatives identified in the current report is currently involved in the legal representation of victims in the *Yekatom and Ngaïssona* case. It is however not in a position to assess whether there could be a potential conflict of interest, should this lawyer be appointed as CLR in the Case.¹⁶

24. For the Defence, the conflict of interest must be understood broadly. For example, a legal representative of victims (LRV) intervening in both cases, i.e. *The Prosecutor v. Yekatom and Ngaïssona* and the *The Prosecutor v. Said*, will be obliged to take different positions on the same issues. Indeed, in many cases the alleged victims of the anti-Balaka and the alleged victims of the Seleka will have different, even opposing, positions on the nature and course of the conflict in the CAR. An LRV who represents clients who are on opposite sides of a conflict is in an inherently complicated position, since the moment he or she makes a factual argument to the benefit of one party to the conflict, that argument may weaken the position of his or her other client, another party to the conflict.

¹⁵ ICC-01/14-01/21-36-tENG, para. 59.

¹⁶ ICC-01/14-01/21-80-AnxII-Red, para. 74.

25. Furthermore, it appears from the Defence's initial analyses of the Prosecution's evidence that the two cases, *The Prosecutor v. Yekatom and Ngaïssona* and *The Prosecutor v. Said*, are intrinsically linked. [REDACTED].¹⁷ This means that a person intervening in either case will necessarily face a conflict of interest.

26. Therefore, unless each participating victim is explicitly informed of the situation and each of those victims expressly waives the protection afforded to them by the very concept of conflict of interest, the Defence believes that there is a latent conflict of interest with respect to LRVs who would like to intervene in both cases, *Yekatom and Ngaïssona* and *Said*.

27. In this case, it should be noted that members of the OPCV are currently representing victims in the *Yekatom and Ngaïssona* case. It is therefore premature to allow the OPCV representatives to intervene in the present proceedings until the issue of legal representation of victims and the latent conflict of interest has been decided by the Single Judge, otherwise there is a risk of vitiating the appeal proceedings.

1.3. The intervention of the OPCV representatives may impinge on the discretion of the legal representatives who will be chosen by the victims admitted to participate in the proceedings

28. The OPCV justifies its request to intervene by the fact that:

[L]acking the appointment at this stage of the proceedings of a Legal Representative of Victims in the case, and since the issues raised by the Defence in its Appeal Brief have a clear bearing on the interests of victims, Counsel's appearance will be instrumental to duly represent the victims' general interest and ensure that the rights of victims are fully taken into account.¹⁸

29. As mentioned above, issues relating to the legal representation of victims are currently being discussed before the Single Judge, and relate, in particular, to the

¹⁷ [REDACTED].

¹⁸ ICC-01/14-01/21-90, para. 2 (emphasis added).

issue of the latent conflict of interest regarding the intervention of OPCV members (see above). It is important to take this context into account to understand why, at this stage of the proceedings, there is still no legal representation for victims. It is only at the end of the ongoing discussions that the Single Judge will be able to make a fully informed decision on the legal representation of victims. This is why allowing the OPCV to intervene at this stage may be premature and even fraught with risk: such intervention could later be challenged by the legal representatives of the victims freely chosen by the participating victims as it could be contrary to the victims' wishes or the strategic choices of their representatives.

30. In other words, it is precisely because no LRV has yet been appointed in the proceedings that it is crucial to be cautious and to ensure that the OPCV's intervention does not encroach on the discretion of the legal representatives of victims who will be appointed in the future, as it is quite possible that these representatives will not have the same position as the OPCV. It is important that the OPCV representatives do not encroach on the strategic vision of the legal representatives of victims, who will have the legitimacy to submit in a timely manner the views and concerns of participating victims, which views and concerns will be based on interaction with actual victims and not on an abstract and theoretical concept of "victims' interests".

31. It is all the more important in this case to be cautious since it emerged from the Registry's consultations with potential victims that the latter did not express a specific wish to be represented by the OPCV. On the contrary, according to the Registry representatives, those consulted expressed a preference for a local lawyer with knowledge of the local culture, the specific situation in the Central African Republic and who spoke Sango:

In light of the CAR context, it was suggested that the legal representative must have a strong understanding of the victims' culture and the complexities of the case. Some CSOs and lawyers consulted considered that national lawyers would be in a position to be closer to their clients, others indicated that the lawyer should be locally based to collect better information¹⁹ [and] while most victims explained that the lawyer does not necessarily need to be from CAR, they explained that he/she must have a sound knowledge of the country, the 'realities' of its people and must understand Sango.²⁰

1.4. The issue on which the OPCV representatives seek to intervene is not the one dealt with in this appeal

32. The Defence notes that the issue that the OPCV proposes to address in its intervention does not fall within the scope of the present appeal, which is limited to the issue of the compliance of the impugned decision with the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence.

33. Indeed, the OPCV's request focuses exclusively on the implementation of article 68(1) on the protective measures to be adopted to protect victims under the participation procedure. At no point in its request does the OPCV mention rule 89(1) of the Rules of Procedure and Evidence, nor is the subject of the interpretation of rule 89(1) addressed in the request.

34. The OPCV's request addresses an issue that is not at stake in this appeal: the importance of ensuring the implementation of article 68(1) in the context of the victim participation procedure. At no time did the Defence question the application of this article. On the contrary, the Defence argued that it was possible for it to be provided with copies of all applications for victim participation, subject to verifying, on a case-by-case basis, the implementation of protective measures if necessary, and thus applying *ad hoc* redactions to such applications.²¹ In the Defence's view, the procedure provided for in article 68(1) makes it possible precisely to guarantee the

¹⁹ ICC-01/14-01/21-80-AnxII-Red, para. 38.

²⁰ ICC-01/14-01/21-80-AnxII-Red, para. 33.

²¹ ICC-01/14-01/21-88, paras. 35-40.

provision of applications for victim participation to the parties in accordance with the founding texts. The Defence even stressed that these redactions should be ordered, on a case-by-case basis, in accordance with the existing legal framework, in particular article 68(1) and regulation 99 of the Regulations of the Registry.

35. It therefore appears that the OPCV misinterprets the framework of the present appeal by stating that “the issue raised by the Defence touches upon the victims’ rights to participate safely and meaningfully in the proceedings before the Court”.²² Similarly, the OPCV quotes the following extract from the *Lubanga* case:

protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with article 68(1) of the Statute.²³

However, the OPCV does not explain how this extract is relevant to the present appeal, since no one questions the importance of article 68(1). It should be noted here that the OPCV seems to base its remarks concerning article 68(1) on an erroneous understanding of the impugned decision, as the OPCV states that: “The system as currently adopted has the benefit of limiting the disclosure of victims’ sensitive information by focusing the debates on ‘unclear or borderline’ issues arising from a limited number of applications that pose assessment problems”,²⁴ while specifying in a footnote: “I.e. Only relevant examples from the Group C applications submitted to the Chamber and the parties”.²⁵ However, the Single Judge, in his decision of 16 April 2021, explicitly rejected the Registry’s proposal to transmit to the parties only examples of applications for participation by victims for whom no clear determination could be made (category C) and ordered the Registry to provide the parties with copies of *all* category C applications.²⁶

²² ICC-01/14-01/21-90, para. 13.

²³ ICC-01/04-01/06-1119, para. 128.

²⁴ ICC-01/14-01/21-90, para. 13.

²⁵ ICC-01/14-01/21-90, footnote 15.

²⁶ ICC-01/14-01/21-56, para. 36.

36. The issue at stake in this appeal is not whether protective measures (in particular by means of redactions to applications for participation) should be imposed in accordance with article 68(1), but whether the decision on the victim participation procedure is in conformity with the terms of rule 89(1) of the Rules of Procedure and Evidence.

37. In addition, the Defence notes that, on analysis, the reference in the OPCV's request to the *Lubanga* case is consistent with the Defence position for the following reasons:

38. 1) The OPCV relies on the practice in the *Lubanga* case. It should be noted that in that case, the Pre-Trial Chamber had, in accordance with the text of rule 89(1), ordered that the parties be provided with copies of applications for participation:

CONSIDERING that under rule 89(1) of the Rules, the Prosecutor and the Defence have the right to respond to any application for participation within a time limit set by the Pre-Trial Chamber and that in order to allow them to exercise this right effectively, the Registrar must provide them with a copy of any such request.²⁷

39. 2) The OPCV fails to point out to the Appeals Chamber that later in the cited decision, the Trial Chamber in the *Lubanga* case stated:

However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.²⁸

²⁷ ICC-01/04-01/06-463-tENG, p. 3.

²⁸ ICC-01/04-01/06-1119, para. 131.

In other words, the decision cited by the OPCV recalls the importance for the respect of the rights of the Defence that an accused should not be confronted with anonymous victims and that protective measures should only be taken when necessary, which is therefore in line with the position expressed by the Defence in its submissions on article 68(1). Therefore, the OPCV's intervention adds nothing new to the current proceedings.

40. It is thus clear that the OPCV's request does not relate to the error of law raised by the Defence and, therefore, that it is an off-topic submission. Furthermore, the matters that the OPCV proposes to address are not helpful in determining the issue under discussion and bring nothing to the ongoing debate because they fall outside the scope of this appeal.

2. In the alternative, if the Appeals Chamber were to authorize the OPCV to intervene in the present appeal, the Defence would ask the Appeals Chamber to regulate this intervention in order to respect the rights of the Defence and the integrity of the proceedings

41. Should the Appeals Chamber allow the OPCV to intervene in the present appeal, the Defence respectfully submits that:

42. First, for the reasons set out above regarding the latent conflict of interest arising from simultaneous representation of victims in the *Said* and *Yekatom and Ngaïssoua* cases, the Defence submits that no OPCV member involved in the *Yekatom and Ngaïssoua* case should appear before the Appeals Chamber in the *Said* case. Such recusal of OPCV members already working on the *Yekatom and Ngaïssoua* case guarantees the integrity of the present proceedings.

43. Second, since the OPCV's intervention is late, the Defence could not, by definition, take into account in its appeal brief the arguments that the OPCV seeks to raise. In order to avoid the Appeals Chamber having to rule on the basis of submissions that have not been discussed in an exchange of arguments, the Defence respectfully requests that it be allowed to respond to any submissions that the OPCV representatives make in the course of this appeal in order to safeguard the fairness of the proceedings.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

In the main,

- **Reject** the "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);

In the alternative,

- **Order** that no OPCV member involved in the *Yekatom and Ngaïssona* case may appear before the Appeals Chamber in the *Said* case in order to safeguard the integrity of the proceedings;
- **Authorize** the Defence to respond to any submissions made by the OPCV representatives in the context of this appeal in order to safeguard the fairness of the proceedings.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 8 June 2021

At The Hague, Netherlands