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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 document

Public redacted version of “Defence Response to the ‘Registry Report on Legal Representation of Victims and Observations on the Defence Requests’ (ICC-01/14-01/21-80)”

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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Other

Classification:

1. This response is filed as confidential *ex parte* the Registry and the Defence only pursuant to regulation 23bis(2) because it refers to the Defence strategy, including in respect of investigations. The Defence will file a public redacted version of this response.

I. Procedural history.

2. On 26 February 2021, the Registry filed submissions “on Aspects Related to the Participation of Victims in the Proceedings”.¹

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

4. On 16 April 2021, the Single Judge issued the “Decision establishing the principles applicable to victims’ applications for participation,³ in which he “defer[red] his assessment as to the Defence Intermediaries Request and, pursuant to regulation 28(2) of the Regulations, order[ed] the Registry to provide observations on this request in its upcoming report on the legal representation of victims”⁴ and “defer[red] his assessment of the Defence Further Alternative Admission Request and, pursuant to regulation 28(2) of the Regulations, order[ed] the Registry to provide observations on this request in its upcoming report on the legal representation of victims”⁵ He instructed the Registry to submit its report by 21 May 2021 and the parties to respond by 26 May 2021.⁶

¹ ICC-01/14-01/21-25.

² ICC-01/14-01/21-36.

³ ICC-01/14-01/21-56.

⁴ ICC-01/14-01/21-56, para. 31.

⁵ ICC-01/14-01/21-56, para. 37.

⁶ ICC-01/14-01/21-56, para. 38.

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’”.⁷

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”.⁸

7. On the same day, the Registry filed the “Registry Report on Legal Representation of Victims and Observations on the Defence Requests”⁹ (the “Report”).

II. Discussion.

Introduction

8. Victims’ participation in proceedings is a key question which goes to the fairness of the proceedings since the participating victims play a wide-ranging and varied role which will have an impact on many key questions discussed during the proceedings, in particular questions concerning the rights of the Accused (such as his right to come and go freely) and concerning his innocence.

9. Specifically, the victims who will be admitted to participate in the proceedings will be entitled to present their “views and concerns” where their personal interests are affected (article 68(3) of the Statute).

10. That means in practice that the legal representatives of the victims will, for example, intervene in many legal discussions concerning the rights of the Accused (such as interim release or restrictions on communication by the Accused with the outside world); be able to make written submissions on the Prosecution evidence and,

⁷ ICC-01/14-01/21-63-tENG.

⁸ ICC-01/14-01/21-79, para. 12.

⁹ ICC-01/14-01/21-80.

in consequence, request that the charges against the Accused be confirmed and subsequently seek his conviction; call witnesses and tender their evidence; and intervene in appeal proceedings.

11. Furthermore, the role of participating victims is not an insignificant one because throughout the proceedings, through their “views and concerns”, they make accusations against the person charged. Indeed, the first step that victims take in order to be admitted to participate in the proceedings is to submit an account in their application for participation that alleges the responsibility of the person charged. Subsequently, they will participate in discussions about the charges and the culpability of the person charged.

12. The participating victims, through their representative, will therefore have an active role in the proceedings which will, by definition, have an impact on the rights of the Accused, including the presumption of his innocence.

13. It should also be noted that in the practice followed before the ICC, interventions by the legal representatives of victims on occasion replace those of the Prosecution, and the legal representatives of victims sometimes go further than the Prosecution in their requests to the Chamber. For example, the Prosecution has on occasion abandoned one of the charges against an accused at trial but the legal representative of victims has argued for the charge in question to be maintained against the accused.¹⁰

14. Last, once victims have been admitted to participate in the proceedings, in addition to their various interventions during the proceedings, they will be able to apply for reparations for the harm they have suffered in the event that the Accused is convicted. The participating victims therefore have an interest in the proceedings on which they will be able to rely if there is a conviction. In that scenario, the victims will

¹⁰ ICC-02/11-01/15-T-223-FRA ET, p. 31, lines 16 to 18.

therefore have a key role to play in the proceedings and their participation will have a direct impact on the Accused, who will be accountable to the victims for any harm he has caused to them.

15. Under those circumstances, it is imperative that victim participation in the proceedings is regulated and there must be sufficient judicial oversight to ensure that victim participation does not upset the equilibrium of the proceedings and give rise to infringements of the right to a fair trial of the person charged.

16. For all the foregoing reasons, the Defence submits the following comments on the Registry's report:

1. The representation of victims:

1.1. The information accessible to the Defence

17. The Defence notes at the outset that "[a]s direct interaction with potential victim applicants has remained limited for the above-stated reasons, the present submissions are best considered as preliminary findings on the topic of victims' legal representation."¹¹ The Defence therefore submits its comments subject to a further report on victim representation being filed by the Registry.

18. In the same vein, the Defence also makes the point that its observations relate to the parts of the Report that are accessible to it, since many sections of the Report have been redacted.

19. The Defence notes that in its view, some of the redactions applied by the representatives of the Registry are not relevant. The representatives of the Registry justified the redactions on the grounds that the redacted parts "[contain] sensitive information which may lead to the identification of victims and intermediaries and

¹¹ ICC-01/14-01/21-80-AnxII-Red, para. 7.

their whereabouts".¹² Nevertheless, it appears on analysis that some of the information redacted by the Registry in its Report could have been provided to the parties and that the information in question, by its very nature, would not have enabled victims and intermediaries, or even their whereabouts, to be identified. For example, in paragraph 11 of the Report, the Registry seems to have redacted the number of potential victims that its representatives met. That figure could be very useful to the parties and does not disclose any sensitive information. Another example: there is no obvious reason for redacting references to the decision issuing the warrant of arrest and to the charges.¹³ Indeed, not only are the parties recipients of that decision, but they jointly debate the charges brought against the person charged in an adversarial process. These are therefore matters discussed in the Report which directly concern Mr Said because they relate to the accusations made against him. It is therefore right that the Defence should know how the representatives of the Registry use and talk about the accusations in their consultations with victims. There is no objective reason justifying those redactions.

20. Under those circumstances, the Defence notes that information of that nature should not be redacted in the Registry's upcoming report on the outstanding matters.

1.2. The potential conflict of interest relating to the legal representatives of victims intervening in the *Yekatom and Ngaïssona* case

21. The Defence observes that:

The Registry notes 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.¹⁴

¹² ICC-01/14-01/21-80, para. 3.

¹³ ICC-01/14-01/21-80-AnxII-Red, para. 11.

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

22. In its submissions of 11 March 2021, the Defence noted that:

[g]iven 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. For the Defence, “conflict of interest” must be construed broadly. For example, a legal representative of victims (LRV) intervening in both cases, i.e. *The Prosecutor v. Yekatom and Ngaïssona* and *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. Similarly, 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.

24. [REDACTED]. [REDACTED].¹⁶ This means that a person intervening in either case will necessarily face a conflict of interest.

25. 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 potential conflict of interest with respect to the LRVs who would like to intervene in both cases, *Yekatom and Ngaïssona* and *Said*.

2. Access to the applications for participation

¹⁵ ICC-01/14-01/21-36-tENG, para. 59.

¹⁶ [REDACTED].

26. In its observations of 11 March 2021, the Defence asked the Single Judge to order that the parties be provided with the applications for participation of the victims admitted to participate in the proceedings that had been submitted in the record of the case.¹⁷

27. It should be recalled here that no participation by any actor in judicial proceedings is ever an innocuous act, since that participation will necessarily have an impact on the conduct of the proceedings, on the questions to be aired in it and how they are discussed and, in criminal proceedings, on the rights of the person charged. In other words, wherever a person is admitted to participate in criminal proceedings, that person's role will not be purely symbolic but will be one of expounding before the Chamber lines of argument capable of having an impact on the decision-making process concerning the person charged, whether on matters relating to that person's fundamental rights, such as the right of a person who is presumed innocent to come and go freely, or on issues directly concerning the innocence or culpability of the person charged.

28. That is why it is of paramount importance that the parties should be fully informed of the identity of any third parties participating in the proceedings, such as amici curiae or participating victims, of their reasons for doing so and of the documents officially submitted in the record through those participants, so that they can take cognizance of the record of the case in its entirety and, accordingly, perform their role diligently and on a well-informed basis, for example in relation to investigations.

29. In relation specifically to victim participation in the proceedings, as noted above (see Introduction), victim participation before the International Criminal Court informs the criminal proceedings in their entirety and in those proceedings the

¹⁷ ICC-01/14-01/21-36, paras. 53-55.

personal interest of victims is interpreted broadly, meaning that participating victims are authorized to submit observations and applications on a large number of matters and that their actual effective participation in the proceedings is very important and has an impact on the decision-making process.

2.1. Applications for participation are inherently necessary to preparing the defence of the accused and may become evidence, and it is therefore crucial that they be transmitted to the parties.

30. In response to the Defence's request for transmission of the applications for participation of victims who have been admitted to participate in the proceedings, the Registry refers to decisions in other cases (*Abd-Al-Rahman, Al Hassan* and *Yekatom and Ngaïssona*) in order for them to be applied without further qualification in the present case.¹⁸ The representatives of the Registry do not explain why those decisions should be applied here and give no clarification specific to this case.

31. In one of the decisions to which the Registry refers, it was stated that "[t]he factual statements made by the applicants in the application forms do not constitute evidence, neither against nor in favour of the accused and cannot be relied upon outside of the limited scope of the admission process."¹⁹

32. Although the applications for participation have not yet been submitted in the record as evidence in the strict sense, practice has shown that victims' applications for participation are key elements in the parties' investigations, that they are crucial elements for preparing the defence (a right guaranteed by article 67(1)(b)), and that during the proceedings some victims' applications for participation will in fact be used as evidence.

¹⁸ ICC-01/14-01/21-80-AnxI, para. 10.

¹⁹ ICC-02/05-01/20-259, para. 31.

33. Indeed, the nature of what constitutes evidence and classification as evidence are not static concepts that can be determined *a priori* and in the abstract. A document, such as a victim application for participation, may at first sight not be signalled or catalogued as evidence but prove on analysis to be useful. The parties will be able to decide from reading a document, whatever it may be – whether a victim application for participation, prior witness statement, NGO report, photographs, videos, newspaper article or other document – whether it is relevant. For example, a document may contain both incriminating and exonerating information and the parties will then need to decide whether they wish to disclose it and use it as evidence in the proceedings. Similarly, a document may be useful to the Prosecution or to the Defence because it is at first an investigatory lead and, depending on the outcome of the investigation, one of the parties may decide to use it as evidence. It is therefore only once a document – such as a victim application for participation – has been analysed that it may, depending on the strategic choices of the parties, *become* evidence in the record. Under the rules governing evidence it therefore cannot be said *a priori* and unreservedly that an entire category of documents, “cannot be relied upon”, because that circumstance will depend on how the parties have assessed those documents. Once again, the parties must be able to be apprised of those documents in order to perform their roles and in order for the Defence to have all the information relevant to preparing its case. This is a question of the exercise of a fundamental right of the defence.

34. Victims’ applications for participation, specifically, are by definition relevant to preparation of the defence of a person charged and do in fact often become evidence during the proceedings.

2.1.1. Applications for participation contain accusations made against the person charged and it is therefore imperative that the defence has access to them as part

of its preparations for the confirmation of charges hearing and any trial (in the event that the charges are confirmed).

35. In general terms, simply by participating, victims make accusations against the person charged: the starting point for their participation will necessarily – as an administrative imperative, since they will have to demonstrate it in their application for participation – consist of alleging that the accused is responsible. The “factual statements” of persons wishing to participate in the proceedings as victims will therefore necessarily go *against* the accused; that finding is the corollary of the very principle of victim participation.

36. It is unacceptable in a modern democratic legal system that an accused should have to confront numerous anonymous accusers and not be entitled to take cognizance of the documents underpinning their accusations and their right to participate in the proceedings.

37. This is especially true since the Chamber, which will be required to rule on both whether to confirm or decline to confirm the charges and, potentially, on the culpability or innocence of the person charged will, for its part, have had access to the content of those applications for participation. The content of the applications for participation may therefore have an impact on the Chamber’s decision-making process. According to the theory that justice must not only be done but must also be seen to be done, the mere fact that the Chamber has access to information – it is irrelevant whether the Chamber consults or relies on it – may cast doubt on the fairness of the proceedings if the parties do not have access to the same information as the Chamber. So long as the parties have access to the same information in the record as the Chamber, they will then be able to debate it adversarially if they so wish.

38. The Defence must therefore have access to any information capable of casting doubt on the accusations made against the person charged, which implies, at the very

least, being apprised of the contents of the accusations made against that person. Wherever a victim has been admitted to participate in the proceedings and will be able to intervene repeatedly, through his or her legal representative, on matters affecting the fundamental rights of the person charged and whom the victim is accusing, and that person's innocence or culpability, any document in which a participating victim makes accusations must be provided to the parties. The only means by which the person charged can conduct a defence on a fully informed basis is to be the recipient of any procedural document incriminating and accusing that person.

39. Furthermore, in the event of a conviction, the accused must be able to take cognizance of the victim's application for participation in order to dispute the victim's alleged harm whose reparation is being sought from the accused. Here again, the right of the person charged to conduct a defence depends directly on having access to the victim's application for participation.

2.1.2. Applications for participation contain information relating to the charges and it is therefore imperative that the defence has access to them as part of its preparations for the confirmation of charges hearing and any trial (in the event that the charges are confirmed).

40. By definition, applications for participation also contain information relating to the charges brought against the accused, since one of the preconditions for admission to participate in the proceedings is that the person in question can allege harm in connection with the charges.

41. Applications for participation therefore necessarily contain relevant information that can be used in objecting to the charges. Applications for participation must include relevant information on the sequence of the events discussed in the context of the charges and those applications for participation may also involve

information that contradicts the Prosecution's allegations about that sequence of events. [REDACTED]. Only the Defence is in a position to identify what in those applications for participation is relevant to it in the context of its preparations. So that it can carry out those preparations using all available information, it is therefore imperative that the Defence has access to the victims' applications for participation. [REDACTED] it is not speculation to say that applications for participation, by definition, contain information relevant to the Defence's investigations. It is clear that applications for participation are replete with information that is essential to the Defence's investigations and its preparations in general.

2.1.3. Applications for participation contain information that is key for the parties' investigations and it is therefore imperative that the defence has access to them as part of its preparations for the confirmation of charges hearing and any trial (in the event that the charges are confirmed).

42. The information in the applications for participation may comprise important investigatory leads. [REDACTED].

43. In the context of its investigations, the Prosecution may also choose to call participating victims to give evidence. In order to do so, the Prosecution can accordingly approach the LRV(s) and make contact with the participating victims. The Prosecution, by virtue of *inter parties* exchanges, then has access to the "factual statements" of participating victims in the course of its investigations and will be able to decide whether or not to call them. While only some of those participating victims will then be dual status witnesses, the Prosecution will nevertheless be apprised of the contents of the accounts of the participating victims that it decided not to call. The Defence, in contrast, will not have that access during its investigations and will not be on an equal footing with the Prosecution. Because participating victims are, by definition, potential Prosecution (but not defence) witnesses, the Defence is therefore

at a disadvantage during its investigations, a situation that creates inequality between the parties and thereby adversely affects the fairness of the trial.

44. Transmitting the victims' applications for participation to the parties would therefore place them on an equal footing in terms of access to the information available in the record and would enable them to conduct their investigations with the same level of information.

2.1.4. Once analysed, applications for participation may be used by the parties as evidence at the confirmation of charges hearing and/or at the trial (in the event that the charges are confirmed).

45. When preparing for the confirmation of charges hearing and/or the trial (in the event that the charges are confirmed), the Prosecution and defence teams may disclose victims' applications for participation and use them as evidence. That is obviously true of dual status witnesses, but not of them alone. For example, in the Defence's experience, preparations for cross examination have consisted of combining the statements of one witness (whether a dual status witness or otherwise) with the applications for participation of other victims who, even though they were not called to give evidence, talked about the same incidents as the witness. It therefore proved necessary in relation to that cross examination to disclose the victims' applications for participation of persons whom the Prosecution did not call to give evidence, so that they could be used as evidence at the trial.

2.2. The Registry's arguments on the process of redacting applications for participation do not justify non-transmission of those applications to the parties.

46. In its submissions of 21 May 2021, the Registry objects to the transmission of the applications for participation to the parties and puts forward arguments that

cannot be entertained in judicial proceedings that uphold the rights of the person charged.

47. First, the Registry states that, because it would be “very resource intensive”, the process of redacting applications for participation justifies not transmitting the applications for participation to the defence.²⁰ However, the Registry neither substantiates nor explains that statement. It is a hypothetical *a priori* statement made even before the Registry analysed the specific applications for participation in this case or assessed the contents of the information that would need to be redacted vis-à-vis the parties (as opposed to the general public). The Defence notes in that respect that any redaction of victims’ applications for participation must be exceptional and specifically justified in each individual case. VPRS should therefore justify the redactions to the Chamber and demonstrate that its representatives have complied with the principle of proportionality as laid down in article 68(1) of the Statute.

48. Under article 68(1) of the Statute, protective measures may be taken to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The same article states that “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”²¹ It should be recalled that the defence is subject to the same ethical and professional obligations concerning the confidentiality of the record as the Prosecution and that it cannot be found, as a matter of principle, that transmitting any information whatsoever to the defence equates to transmission to the public and may in itself constitute a risk to victims.

49. The Defence submits that were it necessary to redact the applications for participation, it should be done only in the context of article 68(1) and those redactions should not go beyond what is necessary to ensure that the applicants are protected.

²⁰ ICC-01/14-01/21-80-AnxI, para. 6.

²¹ Emphasis added.

For example, if the applicants state explicitly that they have no reason to be concerned for their security, well-being, dignity or privacy or that of their loved ones, the representatives of the Registry must not then be able to redact the applications for participation without justification. So that it can verify that the representatives of the Registry do not go beyond what has been requested by a participating victim, the Defence must therefore have access to the applications for participation.

50. Second, even if it were necessary to redact the applications for participation, that circumstance cannot be grounds for not transmitting the applications for participation to the Defence solely because it would take time for the Registry to do so. Logistical and financial reasons cannot be used as grounds for limiting the parties' right to have access to information in the record. What otherwise would prevent the Prosecution, on that pretext, from declining to disclose evidence to the defence because it considered that redacting it would be too time consuming? The Registry has a responsibility to use all the means necessary to perform its tasks instead of taking the view, hypothetically and as a matter of principle, that a key exercise that safeguards compliance with the rights of the defence and the right to a fair trial is too complicated to perform and therefore asking the Chamber to dispense with performance of those tasks for logistical and budgetary reasons. It behoves the Registry to ensure that proceedings are conducted properly and to make specific constructive proposals to the parties and the Chamber so that they can fulfil their tasks. In other words, the Registry has a duty to provide assistance to the parties and the Chamber to ensure that they have access to all the necessary information and therefore that the Court can conduct fair trials.

51. Furthermore, in relation to the redaction procedure in the strict sense, the Registry states that: "[g]iven the sensitive nature of the exercise, it is a cumbersome and time-consuming process, which also requires beforehand developing redaction guidelines in consultation with the Registry Country Office Staff and the Victims and

Witnesses Section of the Registry.”²² The Registry does not explain why, in this case specifically, it is necessary to adopt new “redaction guidelines”.

52. The Defence notes that the Single Judge has already adopted a redactions protocol in this case which the Registry could quite simply apply. Even were it necessary to apply a different protocol for the applications for participation (which the Registry has not demonstrated to be the case), the Defence is surprised that such a protocol does not exist already since the Registry must have over 20 years’ experience in these matters and it should therefore be sufficient merely to update that experience in practice in the present case, if necessary entering into contact with the Court’s country office in CAR. Likewise, the parties and the Chamber should not have to suffer as a result of the Registry choosing to use a particularly complicated procedure, as described in its submissions,²³ involving three different VPRS units and no less than four “rounds” of reviews of the redactions to be applied to the applications for participation.

53. Last, the Defence asserts that since the start of discussions on victim participation in this case it has been posited that there would be a large number of applications for participation. However, the Registry has never substantiated that assertion. Nothing in the record suggests that there will in fact be a large number of applications for participation. On the contrary, the Defence notes that the geographical and factual context of the charges is likely to mean that there are only a small number of participating victims. The Defence observes in that respect that the Registry itself states in its report on the representation of victims that “**only a small number of potential victims have been identified so far**”.²⁴

²² ICC-01/14-01/21-80-AnxI, para. 8.

²³ ICC-01/14-01/21-80-AnxI, footnote 6.

²⁴ ICC-01/14-01/21-80-AnxII-Red, para. 76. Emphasis added.

54. It seems therefore that the Registry has not actually demonstrated that the task of redacting any victims' applications for participation is genuinely too time-consuming, especially if the participating victims are few in number and the redactions to the applications for participation are kept to the minimum necessary. The Defence notes in that respect that the Registry has not suggested that it could redact the victims' applications for participation on a rolling basis. That system would save time and ensure that the Registry, and the VPRS in particular, perform its tasks.

2.3. The Registry's other arguments for objecting to transmission of the victims' applications for participation to the parties are neither supported nor substantiated.

55. The Registry also states that: "It is submitted that the particular circumstances of the case, in particular in terms of the general security situation and victims' confidentiality concerns, warrant the continuous nondisclosure of applications' details".²⁵

56. The Registry does not explain in what respect the "general security situation" justifies not transmitting the applications for participation to the Defence. Nor does the Registry identify the "victims' confidentiality concerns". The Defence considers that it is the Registry's responsibility to explain to persons wishing to participate in the proceedings that the transmission of information to the parties is not in any respect the same as the transmission of information to the general public. The Prosecution, the defence and the Chamber are subject to strict obligations to keep the record of the case confidential and unsupported "concerns" cannot be relied upon to decline to transmit information to the parties in the context of judicial proceedings. As alluded to above, participation in judicial proceedings is not an innocuous act: victims participate in order to present their views and concerns including as regards the responsibility of

²⁵ ICC-01/14-01/21-80-AnxI, para. 10.

the accused, and to obtain reparations for harm from an international court. It is therefore quite proper that they cannot participate in the proceedings without allowing the information on which that participation is based to be debated by the parties before professional judges. Only the protective measures under article 68(1) of the Statute can be grounds for not transmitting information to the parties or to one of the parties, and then only if that non-transmission is not prejudicial to or inconsistent with the rights of the defence and the requirements of a fair and impartial trial.

3. Intermediaries.

57. The Defence notes the Registry's clarifications about the use of intermediaries in the field and in particular in relation to the training and monitoring of the activities of intermediaries in the field. That information is particularly useful to the parties and enables them to understand the scope of the Registry's involvement and, accordingly, the safeguards put in place.

58. Nevertheless, even if the Registry takes numerous precautions, the risks inherent in the use of intermediaries remain, especially if the intermediaries are not required to identify themselves or to make themselves known to the parties and the Chamber. Wherever recourse is had to a third party, who is not bound by the same obligations of neutrality as the representatives of the Registry, and that third party is able to act autonomously, it is in fact impossible to be certain that the third party in question is not acting with bias or attempting to influence participating victims. Indeed, to authorize an intermediary to act in the shadows, without having to provide official evidence of his or her status as intermediary, is to open the door to all manner of manipulations and those manipulations will in practice adversely affect the holding of a fair trial. The Court's case law has provided very many examples of the difficulties

of using intermediaries in legal proceedings,²⁶ including in the case of intermediaries who had a role in filling in the victims' applications for participation.²⁷

59. Since the Registry gives no indication of the profile of its intermediaries, the risk of bias on the part of those intermediaries is even greater because, by definition, a person acting on behalf of an NGO will be seeking to pursue the objectives of that NGO and cannot be regarded as neutral, including in the context of judicial proceedings.

60. Furthermore, as the Registry itself states, it

anticipates that victims might prefer to be assisted by other persons than VPRS intermediaries (such as family members, legal representatives or human rights activists). The application form as such is publicly available on the Court's website and the assistance of a VPRS trained intermediary is not a prerequisite for the completeness of an application.

61. This means that there may be cases where the identity of an intermediary who is not trained or validated by representatives of the Registry is concealed and that intermediary could therefore act autonomously, with no monitoring by the Registry, the parties or the Chamber, and that the intermediaries will therefore be able to act in the shadows.

62. In consequence, it is not possible to concur with the Registry when it takes the view that it is appropriate not to disclose the identity of the intermediaries to the parties.

63. Objecting to the Defence request for access to the identity of the intermediaries, the Registry states:

At the outset, the Registry wishes to clarify that the VPRS generally only transmits on the case record the information necessary for the Chamber to make a determination on the victim's participatory status and for the victim to submit a valid request for reparations. It

²⁶ ICC-01/04-01/06-2434-Red2, paras. 6-7 and 43; ICC-01/04-01/07-3436-tENG, para. 124; and ICC-01/05-01/08-3343, para. 342.

²⁷ ICC-02/11-01/15-809-Red.

usually does not transmit the page which contains information on the person/organisation assisting the applicant to fill in the form, unless ordered otherwise.²⁸

64. To the Defence, that clarification by the Registry poses difficulties in several respects:

65. First, the Registry cannot arbitrarily decide what should be transmitted to the Judge. In the circumstances of the present case, only the Judge reviews the assessment by the representatives of the Registry of the applications for participation. Since the parties do not have access to the vast majority of the applications for participation, the work of the Registry is not reviewed and subjected to critical scrutiny. The representatives of the Registry cannot alone decide who is a participating victim and who is not. By unilaterally removing information that should be brought to the attention of the Judge, they are preventing him from taking cognizance of all the necessary information and from effectively reviewing the Registry's proposals. If the representatives of the Registry do not transmit all the applications for participation to the Judge, they are effectively taking the place of the Chamber. In the absence of an adversarial process on the applications for participation it is even more imperative that the Judge should not be left unaware of information that could have a significant impact on the proceedings, such as the credibility of an application for participation. Knowing who helped a person to complete an application for participation is clearly part of the information from which that application for participation can be assessed. Moreover, knowledge of the intermediaries makes it possible to identify similarities between several applications for participation or the fact that unconnected victims have given stereotyped and generic descriptions of events, losing sight of the fact that the intention is to determine personal harm.

66. In the same vein, the Defence emphasizes that in relation to the category C applications for participation to which it will have access, it is not appropriate

²⁸ ICC-01/14-01/21-80-AnxI, para. 13.

unilaterally and arbitrarily to remove a page or relevant information from the application for participation.

67. Second, on the security of intermediaries, the Registry states:

The security of VPRS intermediaries relies on the adoption of preventive measures, good practices and their ability to remain at a low profile. Given the current security context in the Central African Republic (“CAR”), the Registry considers that disclosing information on VPRS intermediaries poses a real risk to the safety of those intermediary and the applicants he or she has assisted.²⁹

68. The Registry does not specify in what respect giving information about the Registry’s intermediaries to the Chamber and the parties could give rise to a risk to the security of intermediaries in the field. As noted above, all the participants in criminal proceedings are bound by the same confidentiality obligations. In reality there is no more risk, in theory, in transmitting that information to the Chamber and the parties than in transmitting it to the organs of the Registry. Once information can be disclosed to the representatives of the Registry, who have a purely administrative role and are not bound by duties of professional conduct, there is no reason not to disclose that information to lawyers and judges who are professionals subject to the highest ethical requirements.

69. Third, the Registry states:

If the Defence request were to be granted, the small pool of VPRS intermediaries may decide not to collaborate with the VPRS and be the link with potential applicants any longer, for fear of being identified and/or perceived as potential collaborators with the Court with potential negative consequences for them in the field.

70. First of all, the Defence does not understand the import of the statement that some intermediaries would be afraid of being identified as collaborating with the Court. As soon as an intermediary is trained by the Registry, goes into the field to find potential victims for the Registry, in doing so has to inform the potential victims of

²⁹ ICC-01/14-01/21-80-AnxI, para. 16.

what is involved in their participation in the proceedings before the ICC, and actively assists a victim to complete an application for participation in the proceedings before the ICC (which will contain the name of that intermediary), a link with the Court is clearly established and disclosure of the intermediaries' identity to the parties and to the Chamber has no impact on how the outside world perceives their collaboration with the Court. The very exercise that is asked of the intermediaries is to act in relation to ICC proceedings and it is precisely that link that enables the intermediary in practice to "act as intermediary" with the Court, as the name suggests.

71. Similarly, the Registry states that "victims may decline to apply for participation – out of fear of being identified themselves – should they become aware that the identity of the person who directly assisted them is disclosed to the Defence".³⁰

72. However, as recalled above, it is quite proper that a person participating in formal judicial proceedings should be identifiable by the Chamber and the parties. It is the consequence of participating in criminal judicial proceedings. The Registry has a responsibility to set out the nature of the proceedings and the consequences of an application for participation, thereby enabling people to make a fully informed and educated choice as to whether or not they in fact wish to participate in the proceedings. In all instances, therefore, the victims must be informed that they cannot participate anonymously in judicial proceedings. Since victims' participation in the proceedings must not be prejudicial to the rights of the accused, it is imperative that they understand what their participation will involve. The guiding principles of judicial proceedings must be upheld in order to ensure a fair trial and the role of the defence cannot be curtailed in order to enable victim participation, which must take place in the context of a fair trial.

³⁰ ICC-01/14-01/21-80-AnxI, para. 19.

[signed]

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Dated this 26 May 2021 at The Hague, Netherlands.