



Original: English

No. ICC-01/14-01/21

Date: 9 July 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Decision on legal representation of victims and related matters

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Language Services Section

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Chamber’ and the ‘Court’), issues this ‘Decision on legal representation of victims and related matters’.

I. PROCEDURAL HISTORY

1. On 7 January 2019, Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of the Chamber, issued the ‘Warrant of arrest for Mahamat Said Abdel Kani’ (‘Mr Said’).¹
2. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.²
3. On 25 January 2021, Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.³
4. On 29 January 2021, in accordance with the Single Judge’s decision dated 26 January 2021⁴ and his further instructions dated 28 January 2021,⁵ Mr Said appeared before the Single Judge pursuant to article 60(1) of the Rome Statute (the ‘Statute’) and rule 121(1) of the Rules of Procedure and Evidence (the ‘Rules’).⁶

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

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

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

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

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

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

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

6. On 11 March 2021, the Defence filed the ‘Réponse de la Défense aux « Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings » (ICC-01/14-01/21-25)’, *inter alia*, requesting access to all admitted victim application forms (the ‘Defence’s First Request’) and disclosure of the personal details and identity of the intermediaries of the Victims Participation and Reparations Section (the ‘VPRS’) (the ‘Defence’s Second Request’) (jointly, the ‘Defence’s Requests’).⁸ The Prosecution did not respond to the Registry’s First Submissions on Victims.

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

8. On 16 April 2021, the Single Judge issued the ‘Decision establishing the principles applicable to victims’ applications for participation’ (the ‘Victims’ Participation Decision’), in which, *inter alia*, the assessment of the Defence’s Requests was deferred and the Registry was ordered to submit a report on the legal representation of victims, including observations on the Defence’s Requests by no later than 21 May 2021 (16:00 hours).¹¹

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

⁸ [ICC-01/14-01/21-36](#).

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

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

¹¹ [ICC-01/14-01/21-56](#). On 26 April 2021, the Defence requested leave to appeal the Victims’ Participation Decision. See Demande d’autorisation d’interjeter appel de la « Decision establishing the principles applicable to victims’ applications for participation » (ICC-01/14-01/21-56), ICC-01/14-01/21-63 (the ‘[Defence’s Request for Leave to Appeal](#)’). On 21 May 2021, the Single Judge granted the Defence’s Request for Leave to Appeal on one issue relating to the compatibility of the Victims’ Participation Decision with rule 89(1) of the Rules, and rejected the remainder of the request. See [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.

9. On the same day, the Registry filed the ‘Registry Report on Legal Representation of Victims and Observations on the Defence Requests’ (the ‘Registry’s Report’).¹²

10. On 26 May 2021, the Defence filed the ‘Réponse de la Défense au « Registry Report on Legal Representation of Victims and Observations on the Defence Requests » (ICC-01/14-01/21-80)’ (the ‘Defence’s Response’).¹³ The Prosecution did not respond to the Registry’s Report.

II. SUBMISSIONS

A. The Defence’s Requests

11. In its response to the Registry’s First Submissions on Victims, the Defence, *inter alia*, requested (i) the disclosure of information on the VPRS’s intermediaries to the parties, arguing that intermediaries may seek to manipulate victims and that the parties’ access to the identity of the VPRS’s intermediaries would be even more relevant in relation to dual status individuals; and (ii) access to all those victim applications that are admitted and on the case record.

B. The Registry’s Report

12. In its report, the Registry submits (i) observations and recommendations on the matter of legal representation of victims; and (ii) observations on the Defence’s Requests.

13. The Registry argues that the Defence’s Requests should be rejected. Regarding the Defence’s First Request, the Registry argues that if granted, it would adversely impact the benefits of the approach on the transmission and admission of victim applications based on categories A, B and C (the ‘A-B-C Approach’). In that regard, the Registry avers that it would imply a heavier redaction process, which would be very resource intensive and would require redaction guidelines to be adopted and be performed in consultation with the legal representatives of victims to be appointed. As

¹² [ICC-01/14-01/21-80](#), together with one public annex ([ICC-01/14-01/21-80-AnxI](#)) and one confidential *ex parte*, only available to the Registry, annex (ICC-01/14-01/21-80-Conf-Exp-AnxII (public redacted version filed on the same day ([ICC-01/14-01/21-80-AnxII-Red](#))).

¹³ ICC-01/14-01/21-84-Conf-Exp (confidential redacted and public redacted versions notified on 27 May 2021 (ICC-01/14-01/21-84-Conf-Red; [ICC-01/14-01/21-84-Red2](#))).

a result, this would ‘negatively impact the VPRS capacity to process the highest number of applications’.

14. With regard to the Defence’s Second Request, the Registry clarifies that the VPRS generally ‘does not transmit the page which contains information on the person/organisation assisting the applicant to fill in the form, unless ordered otherwise’. The Registry highlights that the VPRS’s intermediaries’ role is ‘confined to informing and assisting potential victims to complete and submit an application form for participation and/or reparations’ and, therefore, ‘must be assessed differently from intermediaries of other sections and organs of the Court’.

15. Moreover, the Registry avers that ‘disclosing information on VPRS intermediaries poses a real risk to the safety of those intermediary and the applicants he or she has assisted’. Therefore, if the Defence’s Second Request were granted, ‘the small pool of VPRS intermediaries may decide not to collaborate with the VPRS and be the link with potential applicants any longer’ and the same holds true for the applicants themselves. According to the Registry, there are sufficient safeguards in place to prevent potential abuse, including the continued training of intermediaries and the Chamber’s overall oversight.

16. With regard to the legal representation of victims, the Registry submits that ‘many victims are currently not in a position to make an informed choice on a legal representative’ under rule 90(1) of the Rules. The Registry, therefore, ‘considers it unlikely that relying only on rule 90(1) of the Rules would suffice for victims of this Case to be efficiently and timely represented in the proceedings’. Furthermore, it is expected that victims will rely on the financial assistance that may be provided by the Court’s legal aid budget. In addition or alternatively, the Registry submits that the Office of Public Counsel for victims (the ‘OPCV’) may be vested with a mandate to represent victim applicants at the confirmation of charges stage and beyond.

17. The Registry adds that, based on its *prima facie* assessment and in the absence of any conflicting interests, all participating victims should be represented by one common legal representative. However, due to the *prima facie* nature of the assessment, the Registry recommends that identifying conflicting or diverging interests among victims should be an ongoing process.

18. With regard to potential conflict of interests, the Registry points out that one of the identified legal representatives is currently involved in the legal representation of victims in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* case (the ‘*Yekatom and Ngaïssona Case*’).

19. With regard to rule 90(2) of the Rules, the Registry submits that the approach regarding legal representation followed in the *Yekatom and Ngaïssona Case* is not applicable in the present case, as only a limited number of potential victims have been identified thus far. Since these victims had little or no contact with the legal representatives identified by the Registry, the views and proposals of these lawyers do not reflect the victims’ own views in terms of their legal representation under rule 90(2) of the Rules. The Registry does not consider that it should request the victims to choose a legal representative from among the lawyers it identified because they were not selected through a transparent and open process.

20. Accordingly, the Registry recommends a process under rule 90(3) of the Rules, which could involve a selection process that would include all legal representatives registered on the Court’s list of counsel or include only potential legal representatives identified in the Registry’s Report. The Registry estimates that these selection processes would last approximately two to three months after the issuance of the Chamber’s order.

21. Finally, the Registry considers it necessary that the selected legal representative of victims be present in Bangui during the pre-trial stage and that he/she receives support from the Court to facilitate the familiarisation with the Court’s framework.

C. The Defence’s Response

22. In its response to the Registry’s Report, the Defence makes the preliminary remark that the Registry’s redactions appear to be extensive and, at times, unnecessary. The Defence further submits that, if a legal representative were to represent victims in both the *Yekatom and Ngaïssona Case* and in the present case, there is a latent conflict of interest.

23. With respect to the transmission of all admitted victim applications, the Defence argues that access to them is necessary for the preparation of Mr Said’s defence as (i) they may become evidence; (ii) they contain allegations against the suspect, information in relation to the charges and for the parties’ investigations. The Defence

further avers that the Registry's arguments do not justify the non-communication of these applications to the parties.

24. On the matter of the intermediaries, the Defence submits that, even if the Registry takes numerous precautions, the inherent risks of the use of intermediaries persists, in particular if they do not have to identify themselves to the parties or the Chambers. According to the Defence, if intermediaries are allowed to work 'dans l'ombre', it opens the door to manipulations, which *de facto* affect the fairness of the proceedings. In addition, the Defence is concerned that some intermediaries may not be validated or vetted by the Registry (e.g. when victims are helped to fill out the form by a family member). The Defence adds that the Registry cannot decide unilaterally what is communicated to the Single Judge (and the parties in relation to Group C applications) by not transmitting the page, which contains information about intermediaries.

25. Regarding the security of intermediaries and the victims and their potential fear related to the disclosure of their identities or their collaboration with the Court, the Defence argues that (i) the parties are bound by the same confidentiality obligations; (ii) the intermediaries are by their very nature collaborating with the Court and the disclosure of their identities to the parties and the Chamber has no impact on the outside world's perception; and (iii) it is normal for a person's identity to be disclosed to the Chamber and the parties, when he/she formally participates in judicial proceedings and it is the Registry's duty to explain this to applicants.

III. DETERMINATION BY THE SINGLE JUDGE

26. The Single Judge notes article 68 of the Statute and rules 89-90 of the Rules, regulation 81(4) of the Regulations of the Court and regulation 112 of the Regulations of the Registry.

A. The Legal Representation for Victims

27. On the matter of the legal representation for victims, the Single Judge first notes the Registry's submissions that (i) due to the general lack of knowledge and understanding of victims regarding their rights, the Court and the role of lawyers, many victims are currently not in a position to make an informed choice on a legal representative pursuant to rule 90(1) of the Rules; and that (ii) there is a concern that

victims may receive unsolicited offers by ‘various actors in order to influence their choice in terms of legal representation’.

28. Second, the Single Judge notes that the Registry has, thus far, only identified a limited number of victims. The Single Judge has also considered the Registry’s submissions with regard to rule 90(2) of the Rules, in particular that the Registry would need to (i) ‘identify a representative sample of victims in the Case’; (ii) ‘constitute a shortlist of qualified lawyers to represent victims from the Court’s list of Counsel’; and (iii) ‘consult the representative sample of victims, in a safe and secure manner, in order to obtain their preference for a legal representative from the shortlist’. Moreover, the Registry adds that, in light of the COVID-19 pandemic and the limitations on gatherings, meeting victims in groups might not be feasible in the short term and/or prove to be too resource intensive.

29. Third, the Single Judge notes that the Registry recommends a process under rule 90(3) of the Rules.

30. For these reasons and, taking into account the inherent difficulties detailed above and that ‘appropriate and timely assistance is instrumental to every potential victim’s right to meaningfully participate in the proceeding’,¹⁴ the Single Judge considers it necessary and appropriate in the circumstances to devise a temporary and provisional arrangement as envisaged under regulation 81(4) of the Regulations of the Court on the involvement of the OPCV, which would be vested with the role of general support and assistance at this stage of the proceedings.¹⁵ Accordingly, the Single Judge assigns the OPCV to represent the collective interests of victims, with a view to protect the interests of, and provide assistance and support to all applicant victims pending completion of the transmission of their applications to the Chamber pursuant to the system devised in the Victims’ Participation Decision, and the Chamber’s consideration of their merits.¹⁶ The Single Judge stresses the temporary and provisional nature of this assignment and

¹⁴ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance, 5 February 2021, ICC-02/05-01/20-277 ([‘Abd-Al-Rahman Supplementing Decision on Victims’](#)), para. 15.

¹⁵ See [Abd-Al-Rahman Supplementing Decision on Victims](#), ICC-02/05-01/20-277, paras 15, 19.

¹⁶ See [Abd-Al-Rahman Supplementing Decision on Victims](#), ICC-02/05-01/20-277, para. 15.

specifies that the OPCV's involvement is limited to the stage between the present decision and the Chamber's eventual decision taken on matters of legal representation at the stage of the determinations of the merits of the victim applications and on the status of victims.

B. The Defence's Requests

31. With regard to the Defence's First Request, the Single Judge notes the Registry's submissions that granting this request would adversely impact the benefits of the A-B-C Approach, as it would involve a heavier redaction process, which would be very resource intensive. The Registry also points out that it 'would negatively impact the VPRS capacity to process the highest number of applications with a view to [ensuring] their timely participation in the proceedings, and the legal representative(s) of victims' ability to conduct other activities necessary for the implementation of his/her/their mandate'.

32. Accordingly, the Single Judge is of the view that granting the Defence's First Request would result in a time-consuming redaction process, which could negatively impact the suspect's right to have the proceedings conducted expeditiously and the victims' rights, including by potentially limiting the number of victims able to participate in the hearing on the confirmation of charges given the 'general security situation and the victims' confidentiality concerns'. In light of this and, considering the Chamber's duty to ensure the expeditious conduct of the proceedings as a whole, which includes but is not limited to Mr Said's right to have the proceedings conducted expeditiously, the Single Judge rejects the Defence's First Request.

33. Regarding the Defence's Second Request on the disclosure of the intermediaries' identities, the Single Judge notes the Registry's submissions that the VPRS's intermediaries play a different role than intermediaries of other sections and organs of the Court and, more importantly, should the VPRS's intermediaries' identity be disclosed this would constitute a serious risk to their safety and the potential applicants they assisted. The Single Judge further observes that the majority of the jurisprudence on intermediaries referred to by the Defence concerns intermediaries of other sections and organs of the Court rather than those from the VPRS.

34. Noting further that the jurisprudence of the Court has previously established that the name and contact details of intermediaries may be redacted,¹⁷ the Single Judge finds the reasons provided by the Registry persuasive, in particular in relation to a ‘real risk to the safety of those intermediaries and the applicants he or she has assisted’, and the resulting adverse consequences that would affect the collaboration of intermediaries with the VPRS, which would compromise access to potential applicants through these intermediaries and the same would ‘hold true for the applicants themselves’. The Defence’s contention challenging this consideration omits to take into account that the mere fact that an intermediary would be informed of the possible disclosure of information relating to his or her identification, in and of itself, could prompt a rupture in the collaboration between the intermediary and the VPRS and compromise the application process for potential victims, directly or indirectly affected by this situation.

35. However, the Single Judge notes the Registry’s submissions 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 that, therefore, the page containing information on the person/organisation assisting the applicant in filling in the form is not transmitted ‘unless ordered otherwise’. In order to allow the Chamber to fulfil its oversight function, the Single Judge hereby orders the Registry to transmit the full victim application forms including the page(s) which contains information on the person/organisation assisting the applicant to fill in the form, to the Chamber.

36. The Single Judge recalls that the VPRS has the responsibility for ensuring appropriate vetting and training of its intermediaries.¹⁸ In that same vein, the Single

¹⁷ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants](#), 22 February 2010, ICC-01/05-01/08-699, para. 33; Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Observations Submitted by the ad hoc Counsel for the Defence in relation to Applications a/0443/09 to a/0450/09 for Participation in the Proceedings](#), 28 January 2010, ICC-02/05-01/09-72, para. 9; Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, [Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 1 February 2007, ICC-02/04-01/05-134, para. 21.

¹⁸ See [Victims’ Participation Decision](#), ICC-01/14-01/21-56, fn. 63, referring to Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, ICC-01/14-01/18-141 (‘[Yekatom and Ngaïssona Victims Decision](#)’), paras 26-38, in particular para. 28.

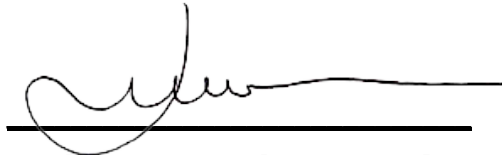
Judge emphasises that the ‘VPRS must ensure that the collection process is fair and unbiased’ and thus it ‘must maintain appropriate oversight over its intermediaries at all times’.¹⁹ In light of this and the reasons above, the Single Judge is persuaded that the measures taken by the VPRS in relation to the training of the intermediaries, in addition with the Chamber’s overall oversight, provide sufficient safeguards in place to prevent any potential abuse. Accordingly, the Single Judge rejects the Defence’s Second Request, without prejudice to any future requests to lift specific redactions.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

ASSIGNS the OPCV to represent the collective interests of applicant victims, on a temporary and provisional basis, which is limited to the stage between the present decision and the Chamber’s eventual decision taken on matters of legal representation at the stage of the determinations of the merits of the victim applications and on the status of victims; and

REJECTS the Defence’s Requests.

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



Judge Rosario Salvatore Aitala,
Single Judge

Dated this Friday, 9 July 2021

At The Hague, The Netherlands

¹⁹ See [Victims’ Participation Decision](#), ICC-01/14-01/21-56, fn. 63, referring to [Yekatom and Ngaïssona Victims Decision](#), paras 26-38, in particular para. 27. See also Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, [Decision establishing the principles applicable to victims’ and representation during the Confirmation Hearing](#), 18 January 2021, ICC-02/05-01/20-259, para. 14.