

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 23 July 2021

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Document

**Response to the Defence Request for Leave to Appeal
the “Decision on legal representation of victims and related matters
(ICC-01/14-01/21-119)” on behalf of victims**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) representing the collective interests of victims in the present case,¹ submits that the Defence request (the “Request”)² for leave to appeal the “Decision on legal representation of victims and related matters” (the “Impugned Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute (the “Statute”) and must be rejected.

2. The Defence does not demonstrate that the identified issue arises from the Impugned Decision and can be the subject of an interlocutory appeal. Instead, the Defence merely reiterates its disagreement with the system of transmission of victims’ application forms previously adopted by Pre-Trial Chamber II (the “Chamber”). In fact, said issue arises from the Chamber’s prior “Decision of on the principles applicable to victims’ applications for participation”.⁴ The Defence appeal against said ruling – raising the exact same issue – is currently pending before the Appeals Chamber.

3. In addition – assuming *arguendo* that Chamber were to accept that the identified issue is *re-appealable* – the Defence does not show how being granted leave to appeal an issue already pending before the Appeals Chamber can possibly affect either “*the fair and expeditious conduct of the proceedings*” or “*the outcome of the trial*”; and even less so how granting leave to litigate the same issue twice before the Appeals Chamber could “*materially advance the proceedings*”. Accordingly, the Request does not meet the criteria of article 82(1)(d) of the Rome Statute and shall be dismissed.

¹ See the “Decision on legal representation of victims and related matters” (Pre-Trial Chamber II, Single Judge), [No. ICC-01/14-01/21-119](#), 9 July 2021, para. 30 (the “Impugned Decision”). See also the “Notification pursuant to the ‘Decision on legal representation of victims and related matters’ (No. ICC-01/14-01/21-119)”, [No. ICC-01/14-01/21-121](#), 12 July 2021.

² See the “*Demande d’autorisation d’interjeter appel de la ‘Decision on legal representation of victims and related matters’ (ICC-01/14-01/21-119)*”, [No. ICC-01/14-01/21-128](#), 19 July 2021 (the “Request”).

³ See the Impugned Decision, *supra* note 1.

⁴ See the “Decision of on the principles applicable to victims’ applications for participation” (Pre-Trial Chamber II, Single Judge), [No. ICC-01/14-01/21-56](#), 16 April 2021.

II. PROCEDURAL BACKGROUND

4. On 16 April 2021, the Single Judge, acting on behalf of the Chamber, issued the “Decision establishing the principles applicable to victims’ applications for participation”.⁵

5. On 26 April 2021, the Defence filed the “Application for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation (ICC-01/14-01/21-56)’”.⁶

6. On 21 May 2021, the Single Judge partially granted the Defence Request for leave to appeal, on the “*question whether the Single Judge erred in finding, in line with previous jurisprudence of this Court, that the system for the transmission and admission of victims’ applications set out into three categories of groups – A, B and C – (the ‘A-B-C Approach’) is in compliance with the statutory framework, in particular rule 89 of the Rules*”.⁷

7. On 3 June 2021, the Defence filed the “Defence Appeal Brief in support of Appeal against the Single Judge’s ‘Decision establishing the principles applicable to victims’ applications for participation’ (ICC-01/14-01/21-56) of 16 April 2021”.⁸

8. On 7 June 2021, the OPCV requested to appear before the Appeals Chamber on the issues on appeal and to file observations within the deadline established by the Chamber.⁹

⁵ *Ibid.*

⁶ See the “Application for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation (ICC-01/14-01/21-56)’”, [No. ICC-01/14-01/21-63-tENG](#), 26 April 2021.

⁷ See the “Decision on the Defence’s request for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-79](#), 21 May 2021, para. 21.

⁸ See the “Defence Appeal Brief in support of Appeal against the Single Judge’s ‘Decision establishing the principles applicable to victims’ applications for participation’ (ICC-01/14-01/21-56) of 16 April 2021”, [No. ICC-01/14-01/21-88-tENG](#), 22 June 2021.

⁹ See the “Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, [No. ICC-01/14-01/21-90 OA2](#), 7 June 2021. See also, the “*Version publique expurgée de la ‘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)’*”, [No. ICC-01/14-01/21-93-Red OA2](#), 8 June 2021.

9. On 9 June 2021, the Registry filed a request to submit observations in the Defence Appeal (the “Registry Request”).¹⁰

10. On 11 June 2021, the Prosecution filed the “Prosecution’s response to Mahamat Said Abdel Kani’s appeal against the ‘Decision establishing the principles applicable to victims’ applications for participation’”.¹¹

11. On 17 June 2021, the Appeals Chamber granted the OPCV Request to Appear and the Registry Request.¹²

12. On 9 July 2021, the Single Judge, acting on behalf of the Chamber, issued the Impugned Decision.¹³

13. On 19 July 2021, the Defence filed the Request.¹⁴

III. SUBMISSIONS

14. Article 82(1)(d) of the Statute provides for the possibility for the parties to seek leave to appeal “*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*”.

¹⁰ See the “Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56, [No. ICC-01/14-01/21-95 OA2](#), 9 June 2021. See also, the “*Réponse de la Défense à la ‘Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56’* (ICC-01/14-01/21-95)”, [No. ICC-01/14-01/21-96 OA2](#), 11 June 2021.

¹¹ See the “Prosecution’s response to Mahamat Said Abdel Kani’s appeal against the ‘Decision establishing the principles applicable to victims’ applications for participation’”, [No. ICC-01/14-01/21-97 OA 2](#), 11 June 2021.

¹² See the “Decision on the filing of additional submissions in the appeal” (Appeals Chamber), [No. ICC-01/14-01/21-101 OA2](#), 17 June 2021. See also the “Submissions in the general interest of victims in the Defence’s Appeal against the “Decision establishing the principles applicable to victims’ applications for participation” (ICC-01/14-01/21-56)”, [No. ICC-01/14-01/21-105](#), 22 June 2021, and the “Registry Observations in the Defence Appeal against the ‘Decision establishing the principles applicable to victims’ applications for participation’ (ICC-01/14-01/21-56)”, [No. ICC-01/14-01/21-106](#), 22 June 2021.

¹³ See the Impugned Decision, *supra* note 1.

¹⁴ See the Request, *supra* note 2.

15. The jurisprudence of the Court has clarified the various requirements of article 82(1)(d) of the Statute.¹⁵ In this regard, the Appeals Chamber ruled that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁶ The Appeals Chamber further stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁷ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁸ The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁹

16. Consequently, it must first be determined whether the purported “issue” identified in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, “while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.²⁰

¹⁵ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21. See also the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8 and 14.

¹⁶ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 15, para. 8.

¹⁷ *Idem*, para. 9.

¹⁸ *Ibid.*

¹⁹ *Idem*, para. 10.

²⁰ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 21 October 2015, para. 70.

1. The identified issue and sub-issues do not arise from the Impugned Decision

17. None of the issues identified by the Defence arise from the Impugned Decision, because the latter merely reiterates the Chamber's prior ruling adopting the current system for transmission of victims' application forms.²¹ The Defence appeal against such ruling – raising the exact same issue contained in the Request – is currently pending before the Appeals Chamber.²²

18. In its Request, the Defence alleges that the issue of non-communication to the Parties of the victims' applications forms in Group A and B arises from the Impugned Decision. Accordingly, the Defence seeks leave to appeal such ruling in so far as the it would prevent the Parties' access to all information contained in the victims' application forms²³ – including, in particular, the identities and details of the VPRS intermediaries assisting the victims with completing their participation forms.²⁴

19. In this regard, Counsel limits her submissions to recall that the A-B-C system has been adopted and implemented by the Chamber's previous "Decision establishing the principles applicable to victims' applications for participation".²⁵ On 21 May 2021, the Defence was granted leave to appeal such ruling on the "*question whether the Single Judge erred in finding, in line with previous jurisprudence of this Court, that the system for the transmission and admission of victims' applications set out into three categories of groups – A, B and C – (the 'A-B-C Approach') is in compliance with the statutory framework, in particular rule 89 of the Rules*".²⁶

²¹ See the "Decision of on the principles applicable to victims' applications for participation", *supra* note 4.

²² See the "Defence Appeal Brief in support of Appeal against the Single Judge's 'Decision establishing the principles applicable to victims' applications for participation' (ICC-01/14-01/21-56) of 16 April 2021", *supra* note 8.

²³ See the Request, *supra* note 2, paras. 27-30, with sub-issues developed in paras. 31-47.

²⁴ See in particular paras. 27-29 of the Request, *supra* note 2.

²⁵ See the "Decision of on the principles applicable to victims' applications for participation", *supra* note 4.

²⁶ See the "Decision on the Defence's request for leave to appeal the 'Decision establishing the principles applicable to victims' applications for participation'", *supra* note 7, para. 21.

20. On 3 June 2021, the Defence appealed the Chamber's ruling on the basis that it failed to properly interpret rule 89 of the Rules in light of the Statute and committed an error of law in adopting the three categories approach (A-B-C) when transmitting the victims' application forms to the Parties.²⁷ In particular, the Defence challenged such system on the ground that - by limiting the transmission to those forms presenting unclear or borderline issues (*i.e.* Group C) - it prevents the Defence to access all information related to victims, causing undue prejudice.²⁸

21. As also acknowledged by the Defence, the issue is currently *sub judice* before the Appeals Chamber.²⁹ Yet, through the present Request, the Defence seeks leave to appeal the Impugned Decision on the basis of the exact same issue. Accordingly, the Defence fails to demonstrate that the identified issue arises from the Impugned Decision and can be the subject of an interlocutory appeal for a second time. Assuming *arguendo* that Chamber were to accept that the proposed issue is *re-appealable*, the Defence does not show how being granted leave to litigate said issue twice before the Appeals Chamber possibly affects either "*the fair and expeditious conduct of the proceedings*" or "*the outcome of the trial*"; and even less so how it can "*materially advance the proceedings*".

2. The identified issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their re-litigation before the Appeals Chamber will not materially advance the proceedings

22. The Defence argues that the issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.³⁰ In support of its arguments, the Defence merely reiterates its previous submissions

²⁷ See the "Defence Appeal Brief in support of Appeal against the Single Judge's 'Decision establishing the principles applicable to victims' applications for participation' (ICC-01/14-01/21-56) of 16 April 2021", *supra* note 8.

²⁸ *Ibid.*

²⁹ See the Request, *supra* note 2, para. 52.

³⁰ *Idem*, paras. 48-51.

underpinning its request for leave to appeal the Chamber's previous "Decision establishing the principles applicable to victims' applications for participation".³¹

23. In analysing whether an appealable issue would "*significantly affect*" the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of 'fairness' must be understood as making reference to situations "*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*".³² In turn, 'expeditiousness' must be read as "*closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".³³ The Appeals Chamber stated that in order to determine whether an issue would significantly affect the 'outcome of the trial' under article 82(1)(d) of the Statute, "[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".³⁴

24. However, the Defence fails to explain how the fairness, expeditiousness and outcome of the proceedings could possibly be affected if the Appeals Chamber is already seized with exactly the same issue and its resolution is pending.

25. Similarly, the Defence submissions fall short to demonstrate how granting leave to litigate the same issue twice before the Appeals Chamber could materially advance the proceedings.³⁵ In particular, the Defence seems to conflate

³¹ See the "Application for leave to appeal the 'Decision establishing the principles applicable to victims' applications for participation (ICC-01/14-01/21-56)'" , *supra* note 6.

³² See e.g. the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

³³ *Idem*, para. 18.

³⁴ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 13.

³⁵ See the Request, *supra* note 2, paras. 52-68.

its duty to act diligently and make an appropriate use of all remedies to advocate for the Suspect's rights,³⁶ with the abuse of such practice – which inevitably leads to unwarranted “*duplication of proceedings*” and “*interferes with the expeditious administration of justice*”.³⁷

26. The Appeals Chamber interpreted the meaning conveyed by ‘advance’ as ‘move forward’ by ensuring that the proceedings follow the right course;³⁸ “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings”.³⁹ In this sense, whether the pending appeal on the same issue raised in the present Request will be resolved against or in favour of the Defence is immaterial. The Court's legal framework and available legal avenues do not contemplate the possibility for a party to litigate before the Appeals Chamber an identical issue more than once through an interlocutory appeal.

FOR THE FOREGOING REASONS, Counsel respectfully requests the Chamber to dismiss the Defence Request as it does not meet the legal criteria set out in article 82(1)(d) of the Rome Statute.



Sarah Pellet
Counsel

Dated this 23rd day of July 2021
At The Hague, The Netherlands

³⁶ *Idem*, para. 52.

³⁷ See e.g., the “Decision on the ‘*Requête en vertu des Articles 38-3-a, 43-2 et 115-b*’ dated 25 September 2020 (ICC-02/05-01/20-165)” (Presidency), [No. ICC-02/05-01/20-180](#), 12 October 2020, para. 6.

³⁸ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 34, para. 15.

³⁹ *Ibid.*