



Original: English

**No. ICC-01/14-01/21
Date: 4 August 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 the Defence's request for leave to appeal the '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

Ms Sarah Pellet
Ms Caroline Walter

**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 the Defence’s request for leave to appeal the “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, 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’).⁴
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 Submissions on Victims’).⁵

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

⁴ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG.

⁵ [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).

6. On 11 March 2021, the Defence filed its response to the Registry's Submissions on Victims,⁶ in which it, *inter alia*, sought disclosure of the personal details and identity of the intermediaries of the Victims Participation and Reparations Section (the 'VPRS') and, as an alternative request to its main request on victim applications, access to application forms of all victims permitted to participate in the proceedings (the '11 March Response').

7. On 16 April 2021, the Single Judge issued the 'Decision establishing the principles applicable to victims' applications for participation' (the 'Victims' Participation Decision'),⁷ in which the examination of the two above-mentioned requests made in the 11 March Response was deferred and the Registry was ordered to submit a report, including on these issues.

8. On 26 April 2021, the Defence requested leave to appeal the Victims' Participation Decision (the '26 April Leave to Appeal Request').⁸

9. On 21 May 2021, the Single Judge granted the Defence's 26 April Leave to Appeal Request with respect to the issue of compliance of the Victims' Participation Decision with the statutory framework, in particular with rule 89(1) of the Rules, and rejected the remainder of the request (the 'Decision on the 26 April Leave to Appeal Request').⁹

10. 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').¹⁰

11. On 26 May 2021, the Defence filed its response to the Registry's Report (the '26 May Response').¹¹

⁶ [Réponse de la Défense aux « Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings » \(ICC-01/14-01/21-25\)](#), ICC-01/14-01/21-36.

⁷ [ICC-01/14-01/21-56](#).

⁸ [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.

⁹ [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.

¹⁰ [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](#))).

¹¹ [Réponse de la Défense au « Registry Report on Legal Representation of Victims and Observations on the Defence Requests » \(ICC-01/14-01/21-80\)](#), ICC-01/14-01/21-84-Conf-Exp (confidential redacted

12. On 9 July 2021, the Single Judge issued the ‘Decision on legal representation of victims and related matters’ (the ‘Decision on Legal Representation of Victims’),¹² rejecting, *inter alia*, the Defence’s request for access to application forms of all victims permitted to participate in the proceedings and for disclosure of the personal details and identity of the intermediaries of the VPRS.¹³

13. On 19 July 2021, the Defence filed its request for leave to appeal the Decision on Legal Representation of Victims (the ‘Defence’s Request’).¹⁴

14. On 23 July 2021, the Office of the Public Counsel for Victims (the ‘OPCV’) responded to the Defence’s Request (the ‘OPCV’s Response’).¹⁵

15. On 26 July 2021, the Defence requested leave to reply to the OPCV’s Response (the ‘Request for Leave to Reply’).¹⁶

II. SUBMISSIONS

A. The Defence’s Request

16. According to the Defence, the Decision on Legal Representation of Victims raises two appealable issues. First, the Defence submits that the Single Judge’s decision not to grant the parties access to information concerning VPRS intermediaries is not supported by facts and constitutes an error of fact (the ‘First Proposed Issue’). In particular, the Defence argues that the Single Judge improperly relied on the submissions of the Registry which were unsubstantiated; and that the Single Judge’s finding that disclosure of the relevant information could result in the rupture of VPRS intermediaries’ collaboration with the Court, is not based on any fact.

and public redacted versions notified on 27 May 2021 (ICC-01/14-01/21-84-Conf-Red; ICC-01/14-01/21-84-Red2)).

¹² [ICC-01/14-01/21-119](#).

¹³ [Decision on Legal Representation of Victims](#), ICC-01/14-01/21-119, paras 32-34.

¹⁴ [Demande d’autorisation d’interjeter appel de la « Decision on legal representation of victims and related matters » \(ICC-01/14-01/21-119\)](#), ICC-01/14-01/21-128.

¹⁵ 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, ICC-01/14-01/21-130.

¹⁶ Demande d’autorisation de répliquer à la « 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 » (ICC-01/14-01/21-130), ICC-01/14-01/21-132.

17. Second, the Defence submits that the Single Judge committed errors of fact and law by declining to grant the parties access to application forms of victims permitted to participate in the proceedings (the ‘Second Proposed Issue’). In this respect, the Defence argues that the Single Judge committed errors by (i) assuming that redactions to applications will be necessary (‘Sub-Issue (i)’); (ii) taking into consideration logistical and financial reasons related to the redactions process (‘Sub-Issue (ii)’); (iii) stating that the transmission of applications would result in potentially limiting the number of applicants (‘Sub-Issue (iii)’); (iv) misinterpreting the principle of expeditiousness of the proceedings (‘Sub-Issue (iv)’); and (v) failing to consider the Defence’s arguments on the impact of the non-communication of applications on its preparation (‘Sub-Issue (v)’).

18. Lastly, the Defence argues that the proposed issues significantly affect the fair and expeditious conduct of the proceedings or outcome of trial, because they concern Mr Said’s right to be notified of applications of victims permitted to participate and the failure to communicate them would cause prejudice to Mr Said. In addition, the Defence argues that immediate resolution by the Appeals Chamber is warranted because these issues have never been addressed by the Appeals Chamber; and the intervention of the Appeals Chamber on the question concerning the communication of application forms of victims permitted to participate in the proceedings could materially advance the proceedings.

B. The OPCV’s Response

19. The OPCV submits that the Defence’s Request should be rejected, as the proposed issues do not arise from the Decision on Legal Representation of Victims and are already before the Appeals Chamber. In addition, the OPCV argues that the issues will not significantly affect the fair and expeditious conduct of the proceedings and that their ‘re-litigation’ by the Appeals Chamber will not materially advance the proceedings.

C. The Request for Leave to Reply

20. The Defence requests leave to reply to the OPCV’s Response, submitting that the latter misconstrues the Defence’s Request. The Defence submits that its request concerns access to applications of victims already permitted to participate, rather than

the issue of access to application forms of victims seeking to participate in the proceedings, the latter currently being considered the Appeals Chamber.

III. DETERMINATION BY THE SINGLE JUDGE

21. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules and regulations 24(5) and 65 of the Regulations of the Court (the ‘Regulations’).

22. As a preliminary matter, the Single Judge rejects the Defence’s Request for Leave to Reply. The Single Judge has sufficient information to make a determination on the Defence’s Request, and would not be assisted by the reply which the Defence seeks to file. The Single Judge also notes that the Request for Leave to Reply contains a number of substantive arguments which in fact constitute a reply to the OPCV’s Response. The Single Judges strongly disapproves of the filing of a *de facto* reply prior to leave being granted and recalls that such practice defeats the purpose of regulation 24(5) of the Regulations.¹⁷ The Defence must refrain from such practice in future.

23. Turning to the Defence’s Request, the Single Judge notes that it contains extensive arguments challenging the Decision on Legal Representation of Victims and that the Defence repeats, often *verbatim*, a number of arguments made in previous filings.¹⁸ The Single Judge reiterates¹⁹ that such arguments exceed the scope of a request for leave to appeal, which should focus on whether the requirements set forth in article 82(1)(d) of the Statute are met, rather than presenting arguments that are going to the merits of the issues raised. The Single Judge disapproves of the Defence’s use of such arguments and directs it to refrain from doing so in future. The Single Judge again recalls that the requirements set forth in article 82(1)(d) of the Statute are the only

¹⁷ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), [Decision on the Defence request and observations on reparations pursuant to article 75\(1\) of the Rome Statute](#), 18 August 2020, ICC-02/05-01/20-117, para. 9; Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), [Decision on the Defence request to amend the name of the case](#), 26 June 2020, ICC-02/05-01/20-8, para. 12.

¹⁸ See [11 March Response](#), ICC-01/14-01/21-36, paras 23-25, 34-35; [26 May Response](#), ICC-01/14-01/21-84-Red2, paras 10-14, 28, 32-45, 50.

¹⁹ [Decision on the 26 April Leave to Appeal Request](#), ICC-01/14-01/21-79, para. 20.

considerations relevant to the determination of whether leave to appeal should be granted or not.²⁰

24. Having considered the Defence's Request and the OPCV's Response, the Single Judge rejects the Defence's Request in its entirety for the following reasons.

25. In relation to the First Proposed Issue, the Single Judge notes that this issue is limited to the argument that the rejection of the Defence's request for the disclosure of intermediaries' identities is not based on any facts. The Defence's Request simply disagrees with the Single Judge's reliance on the submissions made by the Registry in this regard. The First Proposed Issue therefore amounts to a mere disagreement with the findings made in the Decision on Legal Representation of Victims and does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute. In any case, the Defence fails to present any arguments to demonstrate that the First Proposed Issue meets the remaining requirements of article 82(1)(d) of the Statute. All arguments it makes in this respect concern in fact the Second Proposed Issue.

26. In relation to the Second Proposed Issue, the Single Judge considers that some of the sub-issues do not arise from or misconstrue the Decision on Legal Representation of Victims. In particular, Sub-Issues (i) and (ii) concern an alleged assumption that redactions would be necessary and that they would be resource intensive. However, the Decision on Legal Representation of Victims refers to 'a time-consuming redaction process', without specifying whether redactions would be applied as a result of that process. The Defence misconstrues the Single Judge's finding, which simply acknowledged that the process of assessing whether redactions would in fact be needed, rather than the application of redactions, if any, would be time-consuming. The decision also does not contain a finding that such process would be resource intensive. It only

²⁰ Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the Prosecutor's Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006](#), 10 July 2006, ICC-02/04-01/15-64, para. 16; Pre-Trial Chamber II, *Situation in Uganda*, [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](#), 9 August 2005, ICC-02/04-01/05-20, para. 22; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Public redacted version of 'Decision on Defence request for leave to appeal the "Decision on the Defence request to terminate the proceedings and related requests"'](#), 29 October 2020, ICC-01/12-01/18-1099-Red, para. 10.

takes note of the Registry's submission to this effect. Furthermore, the Defence's argument that Mr Said is prevented from exercising his right to be judged expeditiously (Sub-Issue (iv)) is based on a misrepresentation of the Decision on Legal Representation of Victims. In that decision the Single Judge only acknowledged the need to strike a balance between different interests, including, but not limited to, Mr Said's right to expeditious proceedings.²¹

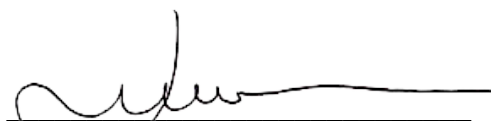
27. The Single Judge further considers that the remaining sub-issues of the Second Proposed Issue (Sub-Issues (iii) and (v)) amount to a mere disagreement with the findings made in the Decision on Legal Representation of Victims, and do not constitute appealable issues within the meaning of article 82(1)(d) of the Statute. Other than offering a different view on the Single Judge's finding that granting the Defence access to victims' applications would potentially limit the number of victims able to participate in the hearing on the confirmation of charges, the Defence does not explain how Sub-Issue (iii) amounts to an appealable issue. Similarly, in relation to Sub-Issue (v), the Defence's argument that the Single Judge failed to take its submissions into consideration is based on an erroneous assumption, and merely disagrees with the Single Judge's approach.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Reply; and

REJECTS the Defence's Request.

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



Judge Rosario Salvatore Aitala,
Single Judge

Dated this Wednesday, 4 August 2021

At The Hague, The Netherlands

²¹ See [Decision on the 26 April Leave to Appeal Request](#), ICC-01/14-01/21-79, para. 23.