

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **10 June 2021**

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding Judge
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Document

Defence Response to the “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)

Source: Defence team for Mahamat Said Abdel Kani

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence of Mahamat

Said Abdel Kani
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verril

Detention Section

**Victims Participation and Reparations
Section**

Mr Philip Ambach

Other

I. Procedural history

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

2. On 11 March 2021, the Defence filed a response to the Registry’s submissions “on Aspects Related to the Participation of Victims in the Proceedings”,² in which it showed that the system proposed by the Registry for the assessment of the victims’ applications for participation was contrary to the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence, and therefore requested that all applications for participation be provided to the parties, in redacted form if necessary to protect the victims seeking to participate in the proceedings.

3. On 16 April 2021, the Single Judge issued a “Decision establishing the principles applicable to victims’ applications for participation”,³ in which he decided, *inter alia*, that only those applications for participation in respect of which the Registry expresses doubt as to whether they meet the requirements for the applicants to be admitted to participate in the proceedings (i.e. all category C applications) would be provided to the parties.

¹ ICC-01/14-01/21-25.

² ICC-01/14-01/21-36-tENG.

³ ICC-01/14-01/21-56.

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

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

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

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

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

⁴ ICC-01/14-01/21-63-tENG.

⁵ ICC-01/14-01/21-79, para. 12.

⁶ ICC-01/14-01/21-80.

⁷ ICC-01/14-01/21-84-Conf-Exp.

⁸ ICC-01/14-01/21-88-tENG.

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

10. On 8 June 2021, the Defence responded to the OPCV’s request, pointing out that the OPCV’s application to intervene was late and that it had not established an interest entitling it to be heard in this appeal.¹⁰

11. On 9 June 2021, the Registry filed a “Registry Request for Leave to Submit Observations in the Defence Appeal Against Decision ICC-01/14-01/21-56”.¹¹

II. Discussion

1. Main head of relief sought: denial of the Registry’s request

1.1. The Registry’s representatives have not shown in what respect their intervention is necessary to the discussion before the Appeals Chamber, given that they have already presented submissions on the procedure for assessing the victims’ applications for participation in the *Said* case

12. To begin, the Defence would raise the fact that the Registry’s representatives have already presented – specifically in their report of 26 February 2021 – their submissions and arguments as to what they consider to be a suitable procedure for assessing the victims’ applications for participation in the *Said* case. As a result, the parties, the participants and the Bench are aware of the Registry’s position, which was formally entered into the record of the case by way of that report. The report is detailed enough to provide all of the protagonists in the proceedings

⁹ ICC-01/14-01/21-90.

¹⁰

¹¹ ICC-01/14-01/21-95.

with an understanding of the Registry's policy thus far as regards the assessment of the victims' applications for participation, how effect has been given to that policy in practice and the logistical considerations underlying the recommendations of the Registry's representatives. It is for that reason, moreover, that the report formed the basis for the discussion before the Pre-Trial Chamber. The parties – Defence included – were able to present their views on the contents of the report in a proceeding which afforded adequate notice and opportunity to respond, whereupon the Single Judge rendered his decision of 16 April 2021.

13. The Registry's representatives therefore had the opportunity to put forward all the relevant information, at the appropriate juncture, in the exercise of their judicial support role. Once they have supplied the Bench and the parties with the relevant information in their possession and made their recommendations – which go on to serve as the basis for the debate between the parties – it no longer rests with them to intervene in a proceeding in an attempt to impose those recommendations where the discussion before the Court has moved on in a particular direction.

14. One of two things must be true:

- either the Registry diligently set out in its various written submissions before the Single Judge all the relevant considerations needed by the parties to respond and by the Single Judge to render a decision on an informed basis, in which case the Registry has not shown the need for additional submissions before the Appeals Chamber on a matter on which it has already been heard;
- or the Registry wishes to adduce new information, which raises the question why that information was not brought to the notice of the parties and the Single Judge at the start of the proceedings to enable them to hold an informed discussion.

15. Whatever the case may be, the Defence would point out that, since the Appeals Chamber has to adjudge the legality of the impugned decision, it must test that decision against the proceedings that led up to it, relying on the information available to the parties and the Single Judge when the decision was handed down.

16. It follows that the Registry's representatives have not shown in what respect their intervention is necessary to the present discussion on appeal, and granting them permission to make further submissions would upset the equilibrium of these proceedings.

1.2. The logistical considerations which the Registry proposes to discuss are beyond the scope of this appeal

17. It is important to recall the scope of this appeal: at issue is a pure question of law concerning the interpretation of rule 89(1) of the Rules of Procedure and Evidence.

18. Since the question on appeal is purely one of law, logistical considerations relating to the internal *modus operandi* of the Registry and the "efficiency of this admission system" are especially irrelevant to the matter *sub judice*.¹²

19. The internal *modus operandi* put in place by the Registry to discharge its task cannot affect the discussion that is taking place as to the law.

20. In general, in the Defence's view, the internal *modus operandi* of the Registry cannot affect the legal interpretation of the Court's instruments, least of all when respect for the rights of the person charged and the fairness of the proceedings are

¹² ICC-01/14-01/21-95, para. 10.

at issue. In other words, proceedings in which the rights of the accused are restricted on the basis of logistical or budgetary considerations would be unfair.

21. In this context, the Registry's only role is to provide the parties and the Bench with the means of discharging their remits. The Registry's task is not to advance logistical arguments that would entail limiting the parties' exercise of their rights, but to provide them with all the means necessary to the full exercise of those rights.

22. Accordingly, the Registry's application to intervene, insofar as it seeks to advance submissions on the Registry's internal *modus operandi* for the assessment of the victims' applications for participation, goes beyond the scope of this appeal and must be denied.

1.3. The legal considerations which the Registry proposes to discuss are *ultra vires* in that they exceed the scope of its task, which is solely to provide logistical support to the parties and the Bench in the discharge of their remits

23. The Defence would underscore that it is not the Registry's task to intervene in a discussion as to the law that is taking place within the confines of an ongoing judicial proceeding, in particular by putting before the Bench "relevant legal and judicial determinations".¹³

24. It is the role of the parties to argue the law before the Bench, be it at first instance or on appeal. The legal discussion as to the interpretation of rule 89(1) began before the Single Judge and continues now before the Appeals Bench. The Bench does not need the assistance of the Registry in order to form a picture of how the Court's previous decisions have treated a particular question – such as the

¹³ ICC-01/14-01/21-95, para. 10.

procedures for victim participation in the proceedings – and it is not the Registry’s role to suggest to the Bench an interpretation of the existing authorities. It is for the parties to set out their interpretation of the applicable law, *inter alia* by placing before the Bench their interpretation of the founding instruments and previous decisions. It then rests with the Bench to analyse the parties’ arguments and to interpret them in the light of the decisions and scholarship as they stand. The members of the Appeals Bench are professional judges and do not require guidance from the representatives of the Registry in order to discharge their office.

25. Were the Registry’s representatives to put their reading of previous decisions before the Bench within the confines of a purely technical discussion as to the interpretation of the law – here, rule 89(1) of the RPE – they would so exceed the scope of their task as to no longer be neutral participants in the proceedings. By placing before the Bench an interpretation of previous decisions they would in fact be setting out a line of argument as to the law in an attempt to persuade the Appeals Bench and would thus, effectively, be contributing to a judicial determination in the same capacity as a party.

26. Moreover, the fact that the Registry’s representatives do not have the same remit as a party may make it unsafe to rely on their understanding of the decisions. For instance, the Registry states: “The admission process of victim applications adopted in the Case by the Single Judge has been applied by the Registry as a standard practice in proceedings since 2018 per order of different Chambers across four cases.”¹⁴ The Defence would note that, in fact, only two Chambers have applied the category-based (A, B, C) system of disclosure of applications for participation, since the Pre-Trial Chamber that dealt with *Ngaïssona and Yekatom* and *Abd-Al Rahman* is the same one now hearing the *Said* case. The Defence would also point out that the

¹⁴ ICC-01/14-01/21-95, para. 10.

Single Judge in *Al Hassan* quoted from rule 89(1) – specifically the provision that the parties must be provided with the applications for participation and “shall” be entitled to reply – and “took note” of the Chambers Practice Manual – which restates and is consistent with rule 89(1) in providing for disclosure of the applications for participation to the parties¹⁵ – only then to adopt, without any explanation as to the law, a system that departs from the provisions of rule 89(1), in circumstances where the parties themselves had chosen not to take part in the discussion.¹⁶ That decision is, therefore, of fairly limited assistance regarding the matter *sub judice*.

1.4. The stance taken by the Registry means that granting it leave to intervene in these appeal proceedings would put it on the same level as the parties

27. The Defence submits that the Registry, in promoting its recommendations, setting out a line of legal argument as to its interpretation of the Court’s instruments and previous decisions, and placing itself in opposition to the Defence, would be conducting itself in the manner of a litigant and would, thus, be akin to a party to the proceedings.

28. The Registry’s application to intervene reveals that its position is underpinned by logistical considerations of a general nature relating to its internal organization. The Registry’s statement that it has “consistently” recommended “this process to the Chambers”¹⁷ makes apparent that, far from arising out of a case-by-case assessment of the circumstances, as it attempts to suggest, the Registry’s position is a predetermined, established position that it wishes to defend, over against the Defence’s position, in these appeal proceedings.

¹⁵ ICC-01/12-01/18-37-tENG, para. 58.

¹⁶ ICC-01/12-01/18-37-tENG, para. 57.

¹⁷ ICC-01/14-01/21-95, para. 10.

29. In reality, the Registry is acting not as a neutral participant but as a full-fledged party defending its interests by resisting the arguments of another party. The interests arising out of the constraints on the budgetary and human resources available to certain sections of the Registry – specifically for the redaction, if any, of the victims’ applications for participation pursuant to article 68(1) of the Statute – are what is informing the Registry’s submissions, since it objects to disclosure of the applications for participation to the Defence on the ground that the exercise of redacting them “would be very resources intensive”¹⁸ and a “cumbersome and time-consuming process”.¹⁹ Once the representatives of the Registry have a vested interest in the matter *sub judice*, they can no longer be regarded as neutral participants capable of assisting the Bench in a way that does not interfere with the proceedings.

30. What is more, the Registry’s established stance entails not only that its representatives exceed their role but also that they disregard the specific nature of the *Said* case.

31. The Registry itself stated in its report on the representation of victims that “only a small number of potential victims have been identified so far”.²⁰ This would suggest that, in the particular circumstances of the *Said* case, logistical considerations should not – even by the Registry’s standards – be relevant.

1.5. The Registry positions itself as speaking for “external fora” in the proceedings

32. The Registry predicates its application to intervene on the fact that the issues raised in this appeal have purportedly been discussed in “external fora”.²¹

¹⁸ ICC-01/14-01/21-80-AnxI, para. 6

¹⁹ ICC-01/14-01/21-80-AnxI, para. 8.

²⁰ ICC-01/14-01/21-80-AnxII-Red, para. 76.

²¹ ICC-01/14-01/21-95, para. 11.

33. The Registry does not explain, in the first place, how the existence of discussion and commentary on an issue related to proceedings before the ICC entitles it, in law, to intervene in an ongoing proceeding.

34. Secondly, the Registry's representatives, by way of their application to intervene in this appeal, seem to be speaking for persons extraneous to the proceedings by drawing the attention of the Appeals Chamber to commentary which they think relevant. But it is not the role of the Registry, as neutral organ, to relay the views of particular commentators on the Court's work.

35. Thirdly, the Defence notes that the sources to which the Registry refers are not relevant to a determination of the question of law before the Appeals Bench.

36. Looking at the report of the Independent Experts (IER report), the Defence sees that it describes the practice of the Court concerning the procedures for assessing the victims' applications for participation but does not even enter into the question of the consistency of that approach with the Court's instruments, and so is not helpful to a determination of the question on appeal. Nonetheless, the Defence would point out that the report (1) expressly notes that the admission process "involves intimation of applications to defence counsel for their interest"²² and (2) calls into question the connection that the Registry makes between the purported "efficiency" of the "admission system" and the facilitation of "victims' access to the judicial process":

Critics may point to the fact that, as with all procedures tried, only a proportion of the total victims are reached by it. That is not the result of the application procedure, but depends on other factors, including the steps taken to reach out to victim communities to alert them to the interest of the Court and ensure that they are fully informed of their

²² IER report, para. 849.

rights as victims, and the extent to which these steps are successful in the face of various obstacles and communication difficulties referred to below.²³

In other words – and as the Defence pointed out in the proceedings before the Single Judge²⁴ – the question of victims’ access to the Court turns on the outreach activities undertaken in the field, not on the extent of disclosure to the parties of the applications for participation.

37. Of note in this connection is that the Registry has offered no showing, other than blanket assertions, that the question of disclosure to the parties of the applications for participation has any bearing whatsoever on the victims’ access to the Court. At any rate, the adoption of a system consistent with the letter and spirit of rule 89(1), in which applications for participation are disclosed to the parties, did not prevent the admission of more than 5,000 victims to participate in the *Bemba* case and more than 4,000 to participate in *Ongwen*.

38. As to the FIDH report which the Registry references in a footnote, it describes the Court’s current practice from the standpoint, not of its legality, but of its being a “pragmatic and efficient process”.²⁵ Moreover, the report notes: “The wording of Rule 89(1) mandates that the Registry ‘shall provide’ all applications to the Prosecutor and the Defence ‘who shall be entitled to reply within a time limit to be set by the Chamber’”,²⁶ but gives not the slightest explanation as to how a system in which applications for participation are not disclosed to the parties can sit with the plain terms of rule 89(1). The report is of no assistance to the discussion concerning the law on this appeal.

²³ IER report, para. 849.

²⁴ ICC-01/14-01/21-63-tENG, para. 37.

²⁵ FIDH report, p. 46.

²⁶ FIDH report, p. 45.

2. **In the alternative: should the Appeals Chamber grant the Registry leave to intervene in this appeal, the Defence moves the Appeals Chamber to delineate the parameters of that intervention and to give the Defence an opportunity to respond**

39. Should the Appeals Chamber grant the Registry leave to intervene in these appeal proceedings, the Defence respectfully moves that the Registry be ordered to confine its submissions to the question of law at issue: consistency of the impugned decision with the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence. Specifically, the Defence is of the view that the Registry must not be permitted to file observations pertaining to the bureaucracy and logistics of its internal organization. Such considerations, which, in general, should not be taken into account in judicial proceedings conducted with respect for the rights of the accused, are even less relevant to determining a purely technical question of law.

40. Furthermore, in order to ensure that the Appeals Chamber does not reach a determination on the basis of submissions that have not been canvassed *inter partes*, the Defence requests leave to respond to any submissions filed by the Registry's representatives in this appeal, so as to safeguard the fairness of the proceedings.

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

- **Deny** the “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);

In the alternative, to

- **Order** the Registry to confine its submissions to the question of law at issue: consistency of the impugned decision with the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence.
- **Grant** the Defence leave to respond to any submissions filed by the Registry’s representatives in this appeal, so as to safeguard the fairness of the proceedings.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 10 June 2021 at The Hague, Netherlands