

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 1 October 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

Public Redacted Version of “OPCV Response to the Defence ‘*Demande d’autorisation de répliquer aux ‘Prosecution’s Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf)’ et aux ‘OPCV Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf)’*” No. ICC-01/14-01/21-191-Conf, dated 1 October 2021

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. In accordance with regulations 24(2) and 34(c) of the Regulations of the Court (the “Regulations”), Counsel from the Office of Public Counsel for Victims (respectively “Counsel” and the “OPCV”) representing the collective interests of victims in the present case,¹ hereby files her response to the Defence’s *“Demande d’autorisation de répliquer aux ‘Prosecution’s Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf) et aux ‘OPCV Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf)”* (the “Defence Request”).²

2. Counsel opposes the Defence Request in full and submits that the latter should be dismissed as the Defence fails to raise and/or demonstrate any new issues in both hers and the Prosecution’s responses which the former could not reasonably have anticipated, as per the requirements of regulation 24(5) of the Regulations. In addition, Counsel respectfully submits that the Chamber is already in possession of sufficient information to rule on the matters at hand and would therefore not be assisted by receiving further submissions from the Defence.³

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. 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 de répliquer aux ‘Prosecution’s Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf) et aux ‘OPCV Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf)’”*, [No. ICC-01/14-01/21-186-Conf](#), 28 September 2021 (the “Defence Request”).

³ See e.g. the “Public Redacted version of ‘Decision on the ‘Prosecution’s submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277’” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-293-Red](#), 23 March 2016, para. 8.

II. PROCEDURAL HISTORY

3. On 7 January 2019, Pre-Trial Chamber II (the “Chamber”) issued a warrant of arrest against Mr Mahamat Saïd Abdel Kani.⁴

4. On 26 February 2021, the Registry submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings in the present case.⁵

5. On 16 April 2021, the Single Judge, acting on behalf of the Chamber (the “Single Judge”), issued the “Decision establishing the principles applicable to victims’ applications for participation”.⁶

6. On 26 April 2021, the Defence submitted its “Application for leave to appeal the ‘Decision establishing the principles applicable to victims’ applications for participation’ (ICC-01/14-01/21-56)”,⁷ which was granted by the Single Judge on 21 May 2021.⁸

7. On 3 June 2021, the Defence submitted its “Defence Appeal Brief in support of Appeal against the Single Judge’s ‘Decision establishing the principles applicable to

⁴ See the “Public Redacted Version of ‘Warrant of Arrest for Mahamat Said Abdel Kani’, 7 January 2019, ICC-01/14-01/21-2-US-Exp”, [No. ICC-01/14-01/21-2-Red2](#), 17 February 2021.

⁵ See the “Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings”, [No. ICC-01/14-01/21-25](#), 26 February 2021.

⁶ See the “Decision 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.

⁷ 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.

⁸ 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, Single Judge), [No. ICC-01/14-01/21-79](#), 21 May 2021.

victims' applications for participation' (ICC-01/14-01/21-56) of 16 April 2021",⁹ to which the Prosecution responded on 11 June 2021.¹⁰

8. On 22 June 2021, following the Appeals Chamber's "Decision on the filing of additional submissions in the appeal",¹¹ Counsel¹² and the Registry¹³ respectively responded to the Defence Appeal.

9. On 9 July 2021, the Single Judge issued the "Decision on legal representation of victims and related matters", *inter alia*, "assign[ing] 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".¹⁴

⁹ 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](#), 3 June 2021.

¹⁰ 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](#), 11 June 2021.

¹¹ See the "Decision on the filing of additional submissions in the appeal" (Appeals Chamber), [No. ICC-01/14-01/21-101](#), 17 June 2021. See also the "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)", [No. ICC-01/14-01/21-96-tENG](#), 10 June 2021; 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](#), 9 June 2021; the "Public Redacted Version of '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-tENG](#), 8 June 2021; and 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](#), 7 June 2021.

¹² See 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.

¹³ See 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.

¹⁴ 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. 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.

10. On 16 August 2021, the Prosecution notified its Document Containing the Charges (the “DCC”).¹⁵
11. On 27 August 2021, the Registry transmitted 13 victim applications categorised in Group A¹⁶ together with a report thereon.¹⁷
12. On 30 August 2021, the Prosecution filed its Pre-Confirmation Brief.¹⁸
13. On 13 September 2021, the Registry transmitted 15 victim applications categorised in Group C¹⁹ together with a report thereon (the “Registry’s Report”).²⁰
14. On 14 September, the Appeals Chamber issued its “Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled ‘Decision establishing the principles applicable to victims’ applications for participation’”, confirming the Pre-Trial Chamber Decision.²¹

¹⁵ See the “Public Redacted Version of ‘Document Containing the Charges’, ICC-01/14-01/21-144-Conf’, dated 16 August 2021, [No. ICC-01/14-01/21-144-Red](#), 17 September 2021.

¹⁶ See the “First Registry Transmission of Group A Applications for Victim Participation in Participation in Pre-Trial Proceedings”, [No. ICC-01/14-01/21-151](#), 27 August 2021.

¹⁷ See the “First Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings”, [No. ICC-01/14-01/21-152](#), 27 August 2021.

¹⁸ See the “Public Redacted Version of ‘Pre-Confirmation Brief’, ICC-01/14-01/21-155-Conf, 30 August 2021”, [No. ICC-01/14-01/21-155-Red](#), 21 September 2021.

¹⁹ See the “Public redacted version of ‘First Registry Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings, 13 September 2021, ICC-01/14-01/21-167-Conf”, [No. ICC-01/14-01/21-167-Conf](#), 13 September 2021.

²⁰ See the “Public Redacted Version of ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings, 13 September 2021, ICC-01/14-01/21-168-Conf’, [No. ICC-01/14-01/21-168-Red](#), 20 September 2021.

²¹ See the “Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled ‘Decision establishing the principles applicable to victims’ applications for participation’” (Appeals Chamber), [No. ICC-01/14-01/21-171 OA2](#), 14 September 2021.

15. On 24 September 2021, the Prosecution,²² Counsel²³ and the Defence²⁴ respectively filed observations on the Registry's Report.

16. On 28 September 2021, the Defence filed its Request for leave to reply.²⁵

III. CLASSIFICATION

17. The present submission is filed confidential in accordance with regulation 23*bis* (2) of the Regulations, since it refers to submissions bearing the same level of classification. A public redacted version is filed simultaneously.

IV. SUBMISSIONS

18. Regulation 24(5) of the Regulations states that “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”. The Appeals Chamber ruled in this regard that said provision “precludes the possibility of an automatic response by the parties to the victims’ response, except with the leave of the [Chamber]”.²⁶

19. Trial Chamber IX also held that “[...] it is at the Chamber’s discretion as to whether such leave to reply will be granted. It is equally within the Chamber’s discretion to conclude that a reply would not be of assistance in reaching a decision and instead issue its decision

²² See the “Public Redacted Version of ‘Prosecution’s Observations on the Registry’s ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’, ICC-01/14-01/21-168-Conf’, ICC-01/14-01/21-178-Conf, 24 September 2021”, [No. ICC-01/14-01/21-178-Red](#), 27 September 2021.

²³ See the “Public Redacted Version of ‘OPCV Observations on the ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/14-01/21-168-Conf)’ No. ICC-01/14-01/21-Conf-Exp, dated 24 September 2021”, [No. ICC-01/14-01/21-180-Red3](#), 24 September 2021.

²⁴ See the “Réponse de la Défense au ‘Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings’ (ICC-01/10-01/21-168-Conf)”, [No. ICC-01/14-01/21-181-Conf](#), 24 September 2021.

²⁵ See the Defence Request, *supra* note 2.

²⁶ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’” (Appeals Chamber), [No. ICC-02/11-01/15-208 OA6](#), 8 September 2015, para. 22.

forthwith particularly when time is of the essence [...]".²⁷ Moreover, a request for leave to reply should be rejected if the Chamber is in possession of sufficient information to determine the matter at hand.²⁸

20. In its Request, the Defence seeks leave to reply to several issues which the latter allegedly could not reasonably anticipate. However, said issues were clearly foreseeable at the time it submitted its response to the Registry's Report.

21. Indeed, contrary to the Defence's contention on the speculations and new information allegedly submitted by Counsel, the latter underlines that she simply fulfill her mandate in the proceedings by putting forward the best interests of the victims. Doing so, Counsel put in perspective the information provided by victims in the well-known context of the present case, and shed some light on the applications concerned, basically referring to principles established by a continuous jurisprudence of this Court.²⁹ Said jurisprudence is public and therefore presumably known by the Defence, and was in any event cited by the Registry in its very Report.³⁰

22. Regarding the issues raised by the Defence with regard to the Prosecution's submissions, these are all the more surprising that the latter went in their vast majority in the same direction as the Defence's submissions. This being said, and to address the main concern that appears to underpin all the issues raised by the Defence in its Request – *i.e.* an alleged unfairness and inequality of arms that would flow from information in the possession of the Prosecution and of Counsel which would not be

²⁷ See the "Decision on Defence Request for Leave to Appeal Decision 1248" (Trial Chamber IX), [No. ICC-02/04-01/15-1263](#), 22 May 2018, para. 20. See also the "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" (Trial Chamber IX), [No. ICC-02/04-01/15-1147](#), 24 January 2018, para. 15.

²⁸ See *e.g.* the "Public Redacted version of the Decision on the 'Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277'" (Pre-Trial Chamber II, Single Judge), *supra* note 3.

²⁹ See the "OPCV Observations on the 'Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings' (ICC-01/14-01/21-168-Conf)", *supra* note 23, paras. 13-15.

³⁰ See the "Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings", *supra* note 20, para. 23.

in the possession of the Defence – Counsel respectfully draws the attention of the Chamber on the fact that she and the Defence have the exact same access and level of information in relation to the evidence disclosed in the record of the case.³¹ Indeed, Counsel and the Defence have the same access to the evidence disclosed by the Prosecution, and therefore, any comments drawn thereon could have, and should have, been anticipated. The same goes for the information drawn by the Prosecution from the evidence available, which were all in the possession of the Defence, therefore not constitutive of new information. Accordingly, the Defence was in a position to anticipate said submissions. [REDACTED].³² [REDACTED]. Consequently, the issue raised by the Defence in support of its Request is entirely unsubstantiated and thus, unfounded.

23. Furthermore, and more generally, Counsel respectfully notes that the Defence Request, which itself builds on its previous response to the Registry's Report,³³ confuses possible debates and assessments pertaining on the one hand to the *prima facie* admissibility of victim applications, and, on the other hand, to the roles and modalities of participation granted to the victims and their legal representatives. Moreover, since the Defence reiterates its previous submissions recently rejected on appeal regarding the scope of redactions applied to the applications transmitted, the Request not only constitutes an attempt to circumvent the Appeals Chamber's

³¹ Counsel notes that the Defence's own statement contained in its email dated 9 September 2021 (sent at 15:29), underlying that: "*Le Conseil du BCPV et la Défense disposent donc exactement du même degré d'information. Par conséquent, le Conseil du BCPV dispose de toutes les informations nécessaires pour répondre à la requête de la Défense*".

³² [REDACTED].

³³ See the "*Réponse de la Défense au 'Second Registry Assessment Report on Victim Applications for Participation in Pre-Trial Proceedings' (ICC-01/10-01/21-168-Conf)*", *supra* note 24.

judgment, but is also *de facto* and *de jure* moot.³⁴ In this regard, Counsel limits herself to refer to the latest Judgment of the Appeals Chamber on this very issue.³⁵

24. In addition, Counsel respectfully submits that the Chamber is already in possession of sufficient information to determine the matter at hand and therefore would not be assisted by receiving further submissions from the Defence. The parties and participants have fully explored the contested issues and made their submissions in their respective responses to the Registry's Report, thus enabling the Chamber to dispose of the matter expeditiously.

25. Finally, Counsel notes that to a large extent, the Defence Request already contains the anticipated reply itself and its substantive arguments, which constitutes a blatant violation of the unequivocal wording of the Regulations and of the jurisprudence of this Court in this regard.³⁶

³⁴ See the Defence Request, *supra* note 2, paras. 14 and 20. See also the "Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled 'Decision establishing the principles applicable to victims' applications for participation'", *supra* note 21, para. 51: "[...] under rule 89(1) of the Rules, victims' applications are, in principle, not provided for the purpose of allowing the defence to gather information that may be important for the preparation of its case. Instead, the Statute and the Rules primarily establish for that purpose disclosure obligations on the Prosecutor, which remain unaffected by rule 89(1) of the Rules". See also para. 72: "It is the chamber that orders the Registry to apply any necessary redactions of the Group C applications before they are transmitted to the parties".

³⁵ See the "Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled 'Decision establishing the principles applicable to victims' applications for participation'", *idem*, paras. 46-47: "The Chamber is called upon to determine the compatibility with the Court's legal framework of one procedure that regulates the admission of victims to participate in the proceedings and not the extent to which those victims who are eventually admitted will participate in any concrete case". See also para. 50: "Moreover, as noted by Trial Chamber VI, 'notwithstanding any other purpose they may fulfil for the individuals concerned, victim applications are primarily intended as a procedural mechanism to participate in proceedings'".

³⁶ See e.g. the "Decision on the Defence's request for leave to appeal the 'Decision on legal representation of victims and related matters' (Pre-Trial Chamber II, Single Judge), [No. ICC-01/14-01/21-136](#), 4 August 2021, para. 22; and the "Decision on the Defence Request for Leave to Reply" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1608](#), 23 September 2019, para. 7.

V. CONCLUSION

26. For the foregoing reasons, Counsel respectfully requests the Chamber to dismiss the Defence Request for leave to reply in its entirety.

A handwritten signature in black ink, appearing to read 'Pellet', followed by a period.

Sarah Pellet
Counsel

Dated this 1st day of October 2021
At The Hague, The Netherlands