

Annex I

Public

Observations on the Defence Requests

Introduction

1. On 26 February 2021, the Victims Participation and Reparations Section of the Registry ("VPRS") submitted observations on the admission process for victims seeking to participate in the proceedings, in which it recommended the classification of applications into three groups : (i) group A applications, clearly within the scope of the case of *The Prosecutor v. Mahamat Said Abdel Kani* ("Case") to be transmitted solely to Chamber; group B applications, clearly outside the scope of the Case to be transmitted solely to the Chamber; and group C unclear applications to be sent to the parties in redacted version for observations ("Registry Submissions" and "A/B/C approach").¹
2. On 11 March 2021, the Defence raised a number of issues in response to the Registry Submissions ("Defence Response"),² requesting the disclosure of: i) applications for participation admitted in the proceedings ("Defence Further Alternative Admission Request");³ and ii) information on VPRS intermediaries ("Defence Intermediaries Request").⁴
3. On 16 April 2021, the Single Judge of the Chamber ("Single Judge") issued a Decision Establishing the Principles Applicable to Victims' Applications for Participation ("Decision"), ordering the Registry to, *inter alia*, submit its observations on the Defence Intermediaries Request and the Defence Further Alternative Admission Request, by no later than 21 May 2021.⁵

¹ Registry, "Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings", 26 February 2021, ICC-01/14-01/21-25.

² Defence, "Réponse de la Défense aux 'Registry Submissions on Aspects Related to the Participation of Victims in the Proceedings' (ICC-01/14-01/21-25)", 11 March 2021, ICC-01/14-01/21-36.

³ *Ibid*, paras.53-55.

⁴ *Ibid*, paras 56-57.

⁵ Pre-Trial Chamber II, "Decision establishing the principles applicable to victims' applications for participation", 16 April 2021, ICC-01/14-01/21-56 (referring in para. 20 *in fine* and footnote 40 to ICC-01/14-01/21-36, p. 16 and paras 53-55, p. 19 as the "Defence Further Alternative Admission Request";

4. As a neutral service provider for the Court, the Registry presently provides relevant factual information for the Chamber's determination on those two Defence requests.

A. Observations on the "Defence Further Alternative Admission Request"

5. The Defence is requesting to receive a copy of all victim applications that would be eventually admitted in the record of the Case.
6. The Registry submits that the Defence Further Alternative Admission Request, if granted, would adversely impact the benefits of the A/B/C approach, as it would imply that the Registry engages in a heavier redaction process – concerning all applications transmitted in the record of the Case, instead of only the limited number of group C applications. Such exercise would be very resource intensive.
7. In particular, the Registry notes that the redaction exercise would have to be performed in consultation with the legal representative(s) appointed to represent the participating victims in the Case - the latter being best placed to assess the security of his/her clients and their personal situation.
8. Given the sensitive nature of the exercise, it is a cumbersome and time-consuming process, which also requires beforehand developing redaction guidelines in consultation with the Registry Country Office Staff and the Victims and Witnesses Section of the Registry.⁶

and referring in para. 21 and footnotes 41-43 to ICC-01/14-01/21-36, paras 56-57 as the "Defence Intermediaries Request").

⁶ Particularly where a legal representative(s) of victims is not (yet) known/assigned, the VPRS would have to conduct four rounds of redactions on each application, in consultation with the Registry Country Office staff in charge of the victims' participation and reparations (as per its standard practice on redactions), before transmitting these applications to the parties: (i) round 1 by a Data Processing Unit staff of the VPRS ("DPU staff") to propose redactions; (ii) round 2 by another DPU staff to conduct a review of the redactions proposed; (iii) round 3 by one Legal Unit staff of the VPRS to conduct a final review of the redactions to be applied; and (iv) round 4 by DPU staff to apply the redactions.

9. As a result, this would negatively impact the VPRS capacity to process the highest number of applications with a view to 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.
10. As to the question of the rights of the accused raised by the Defence, the Registry refers to previous assessments of Chambers of the matter.⁷ It is submitted that the particular circumstances of the case, in particular in terms of the general security situation and victims' confidentiality concerns, warrant the continuous non-disclosure of applications' details, as the circumstances did in the cases referenced to in footnote 7 *supra*.
11. For the above reasons, the Registry respectfully asks the Chamber to reject the Defence Further Alternative Admission Request.

B. Observations on the "Defence Intermediaries Request"

12. The Defence is requesting the disclosure to the parties (notably for dual status victims) of: i) Registry intermediaries' identities; ii) all information relating to intermediaries mentioned in the victim application forms; and iii) any VPRS reports related to its contacts with intermediaries, including the trainings it provided to them. The Defence bases these requests on the risk of manipulation of VPRS intermediaries.⁸

⁷ See Pre-Trial Chamber II, *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman*, "Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing", 18 January 2021, ICC-02/05-01/20-259, paras 30-33; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, "Decision on Defence request for provision of victims' applications", 12 January 2021, ICC-01/12-01/18-1248, paras 9,11 and 15; 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, paras. 42-43.

⁸ Defence Response, para. 56.

13. At the outset, the Registry wishes to clarify 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 for the victim to submit a valid request for reparations. It usually does not transmit the page which contains information on the person/organisation assisting the applicant to fill in the form, unless ordered otherwise.⁹
14. In line with its previous practice, the Registry intends to follow a "hands-on" approach, to the extent possible, in its continuing interactions with potential applicants. This means that when it organizes activities to collect applications, it will either assist applicants directly or rely on the use of trained intermediaries. However, the Registry anticipates that victims might prefer to be assisted by other persons than VPRS intermediaries (such as family members, legal representatives or human rights activists). The application form as such is publicly available on the Court's website and the assistance of a VPRS trained intermediary is not a prerequisite for the completeness of an application. The Registry recalls that at the pre-trial stage in the case of *The Prosecutor v. Yekatom and Ngaïssona* ("*Yekatom and Ngaïssona* case"), it has assisted hundreds of applicants through its hands-on approach, but it also received hundreds of applications collected through other channels.¹⁰
15. The Registry highlights that the role of intermediaries with VPRS is confined to informing and assisting potential victims to complete and submit an application form for participation and/or reparations.
16. The Registry considers that the security situation of intermediaries assisting the work of the VPRS must be assessed differently from intermediaries of other sections

⁹ Registry Submissions, para. 11.

¹⁰ Registry, "Public redacted version of 'Annex to Registry's Joint Report on Outreach and Other Victim Related Activities', 31 May 2019, ICC-01/14-01/18-216-Conf-Exp-Anx'", 18 February 2021, ICC-01/14-01/18-216-Anx-Red, paras 39-40.

and organs of the Court. Although several parts of the Court as well as Counsel cooperate with intermediaries, the nature of the relationship and level of support they receive, particularly regarding protecting measures, vary significantly between different organs and units of the Court and Counsel.¹⁰ The security of VPRS intermediaries relies on the adoption of preventive measures, good practices and their ability to remain at a low profile. Given the current security context in the Central African Republic (“CAR”),¹¹ the Registry considers that disclosing information on VPRS intermediaries poses a real risk to the safety of those intermediary and the applicants he or she has assisted.

17. Disclosing information on the identity and/or the *modus operandi* of VPRS with intermediaries may moreover impact VPRS’ activities in the field and have a potentially adverse effect on the collection of applications for participation to be carried out by the Registry. As highlighted in Annex II to the current submission,¹² civil society actors and victims consider that they are under a potential security risk because of their involvement in Court proceedings.
18. If the Defence request were to be granted, the small pool of VPRS intermediaries may decide not to collaborate with the VPRS and be the link with potential applicants any longer, for fear of being identified and/or perceived as potential collaborators with the Court with potential negative consequences for them in the field.
19. In the same vein, victims may decline to apply for participation – out of fear of being identified themselves - should they become aware that the identity of the person who directly assisted them is disclosed to the Defence.
20. The Registry recalls that ICC Chambers have consistently held that the identities of individuals who assisted applicants in completing their forms should not be

¹¹ See the Guidelines Governing the Relations between the Court and Intermediaries, March 2014.

¹² See Annex II, para. 21.

disclosed,¹³ except in specific situations.¹⁴ One of these exceptional situations would be the case of dual status individuals. By way of example, Trial Chamber V in the *Yekatom and Ngaïssona* case instructed the VPRS to provide the Prosecution - only - with the full application of dual status witnesses - including the page containing intermediary's information – recalling the Prosecution's obligation to apply redactions "ensuring the safety of the dual status witnesses before disclosing the applications to the Defence".¹⁵

21. Finally, in light of the Registry's continued training of intermediaries and the Chamber's overall oversight and review of any and all Registry victim application assessments as well as its activities, there is sufficient safeguard in place to prevent any potential abuse that could go to the detriment of the rights of the Defendant.
22. For the above reasons the Registry respectfully asks the Chamber to reject the Defence Intermediaries Request.

¹³ See for instance, Trial Chamber III, *The Prosecutor v Jean Pierre Bemba*, "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, paragraph 33; Pre-Trial Chamber I, *The Prosecutor v. 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. 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", 2 February 2007, ICC-02/04-01/05-134, para. 21.

¹⁴ See for instance, Trial Chamber III, *The Prosecutor v Jean Pierre Bemba*, "Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings", 19 July 2012, ICC-01/05-01/08-2247-Red, para. 25. See also Trial Chamber I, "Decision on the Legal Representative of Victims' requests to maintain redactions to information relating to certain intermediaries", 2 September 2015, ICC-02/11-01/15-202, para.21.

¹⁵ Registry, *Yekatom and Ngaïssona* Case "Annex 10 to the Third Registry Quarterly Report Filing on the Case Record Decisions issued by way of e-mail from 8 December 2020 to 14 March 2021", 15 March 2021, ICC-01/14-01/18-914-Anx10.