

1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic II
4 In the case of The Prosecutor v. Mahamat Said Abdel Kani - ICC-01/14-01/21
5 Presiding Judge Gocha Lordkipanidze
6 Appeals Judgment - Courtroom 1
7 Tuesday, 14 September 2021
8 (The hearing starts in open session at 4.46 p.m.)
9 THE COURT USHER: [16:46:22] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE LORDKIPANIDZE: [16:47:12] Good afternoon.
13 Microphone is on, right.
14 Good afternoon.
15 Would the court officer please call the case.
16 THE COURT OFFICER: [16:47:24] Good afternoon, Mr President.
17 situation in the Central African Republic II, in the case of The Prosecutor versus
18 Mahamat Said Abdel Kani, case reference ICC-01/14-01/21.
19 And for the record, we are in open session.
20 PRESIDING JUDGE LORDKIPANIDZE: [16:47:41] Thank you.
21 I am Judge Gocha Lordkipanidze, presiding in this appeal arising from the case
22 The Prosecutor v. Mahamat Said Abdel Kani. I appear on behalf of the
23 Appeals Chamber today. My fellow judges in this appeal are Judge Piotr Hofmański,
24 Judge Luz del Carmen Ibáñez Carranza, Judge Marc Perrin de Brichambaut, and
25 Judge Solomy Balungi Bossa.

1 Now I turn to the parties and participants. May I ask the parties and participants to
2 introduce themselves as for the record please, starting with the Defence.

3 MS NAOURI: [16:48:39](Interpretation) Thank you, Mr President.

4 To my right Dov Jacobs, co-counsel, and behind me Victoria Amann-Lasnier, our case
5 manager, and myself, I am Jennifer Naouri, lead counsel for the -- Mr Kani.

6 PRESIDING JUDGE LORDKIPANIDZE: [16:49:03] Now I turn to
7 the Office of the Prosecutor.

8 MS BRADY: [16:49:10] Good afternoon, your Honour. My name is Helen Brady.

9 I'm the senior appeals counsel and I'm appearing for the Prosecution in this matter.

10 And I'm here with Mr Reinhold Gallmetzer, appeals counsel. Thank you.

11 PRESIDING JUDGE LORDKIPANIDZE: [16:49:25] Thank you.

12 OPCV.

13 MS PELLET: [16:49:30](Interpretation) Thank you, Mr President.

14 For the OPCV, my name is Sarah Pellet, counsel.

15 PRESIDING JUDGE LORDKIPANIDZE: [16:49:42] Thank you.

16 Registry, please.

17 MR AMBACH: [16:49:46] Good afternoon, your Honour. This is Philipp Ambach,
18 chief of the Victims Participation and Reparations Section, on behalf of the Registry.

19 PRESIDING JUDGE LORDKIPANIDZE: [16:49:57] Thank you.

20 Thank you very much.

21 For the record, I note that Mr Mahamat Said Abdel Kani is also present in
22 the courtroom.

23 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Said
24 against the decision of Pre-Trial Chamber II entitled "Decision establishing
25 the principles applicable to victims' applications for participation".

1 This is a non-authoritative summary of the Appeals Chamber's written judgment in
2 this appeal. The latter will be notified after this hearing.

3 I will now briefly explain the context of this appeal.

4 On April 16, 2021, after receiving submissions from the Registry and the Defence,
5 the Single Judge acting on behalf of the Pre-Trial Chamber rendered the "Decision
6 establishing the principles applicable to victims' applications for participation" which
7 I will refer to as the Impugned Decision.

8 On 26 April 2021, the Defence filed an application seeking leave to appeal the
9 Impugned Decision in relation to three issues.

10 On 21 May 2021, leave was granted in respect of one issue, namely "whether
11 the Single Judge erred in finding, in line with previous jurisprudence of this Court,
12 that the system for the transmission and admission of victims' applications set out in
13 three categories of groups - A, B, C - (the A-B-C Approach), is in compliance with
14 the statutory framework, in particular Rule 89 of the Rules".

15 The Appeals Chamber notes that according to the A-B-C Approach, the Registry
16 examines the applications for participation in light of Rule 85 of the Rules and
17 the criteria set by the relevant Chamber, and classifies the applicants into three
18 categories: (a) applicants who clearly qualify as victims (Group A); (b) applicants who
19 clearly do not qualify as victims (Group B); and (c) applicants for whom the Registry
20 could not make a clear determination for any reason,(Group C). While the Registry
21 transmits to the Chamber all applications in unredacted form, it only transmits to
22 the parties the Group C applications with redactions as necessary.

23 On 3 June 2021, the Defence filed its appeal brief and the Prosecutor's response was
24 filed on 11 June 2021. Having been authorised by the Appeals Chamber to make
25 observations on this appeal, the OPCV and the Registry filed their submissions on

1 22 June 2021 and a consolidated response was filed by the Defence on 28 June 2021.

2 The Defence raises one ground of appeal, submitting that the Pre-Trial Chamber
3 committed a legal error when interpreting Rule 89(1) of the Rules which, according to
4 the Defence, provides that copies of all victims' applications for participation shall be
5 transmitted to the parties who are entitled to reply thereto. In the view of
6 the Defence, this error materially affected the Impugned Decision. It requests
7 the Appeals Chamber to reverse the Impugned Decision and remand the matter to
8 the Pre-Trial Chamber.

9 The Prosecutor submits that since the Defence has not shown an error in law -- error
10 of law, the appeal should be rejected. The OPCV contends that
11 the Pre-Trial Chamber did not err in law when interpreting Rule 89(1) in light
12 of the Statute's relevant provisions. The Registry submits that with the A-B-C
13 Approach, it "duly fulfils its role of providing an effective and efficient victim
14 application handling process in line with the ICC's regulatory framework, while
15 safeguarding victims' safety and well-being".

16 The Appeals Chamber considers that in order to determine the legal question before it,
17 it is unnecessary to review the correctness or otherwise of the manner in which
18 the Pre-Trial Chamber exercised its discretion in this case. While in its
19 determination of the issue on appeal, the Appeals Chamber will not consider
20 arguments that appear to relate to the exercise of discretion by the Pre-Trial Chamber,
21 as this aspect of the Impugned Decision falls outside the scope of the present appeal,
22 it may consider some of the factors taken into account by the Pre-Trial Chamber when
23 determining the legal question certified for appeal.

24 Moreover, in light of some arguments raised by the Defence, the Appeals Chamber
25 deems it necessary to clarify that the legal question before it does not concern

1 the modalities of participation of those victims who will eventually be admitted to
2 participate in the proceedings against Mr Said and/or any reparations proceedings
3 that may ensue. Therefore, the present judgment has no bearing on the extent of the
4 participatory rights of those victims.

5 The Appeals Chamber notes the Defence's arguments regarding the importance of
6 being able to challenge victims' applications, given that their content "may in some
7 way influence the decisions taken as to innocence or culpability" and that victims'
8 applications "are crucial to the participation of the Defence". The Appeals Chamber
9 is not persuaded by this argument. Under Rule 89(1) of the Rules, victims'
10 applications are, in principle, not provided for the purpose of allowing the Defence to
11 gather information that may be important for the preparation of its case. Instead,
12 the Statute and the Rules primarily establish for that purpose disclosure obligations
13 on the Prosecutor, which remain unaffected by Rule 89(1) of the Rules.

14 The Appeals Chamber also finds that, contrary to the suggestion of the Defence,
15 the Pre-Trial Chamber was correct in finding that "the parties' right to reply to victim
16 applications set out in Rule 89(1) of the Rules is not absolute". From the wording of
17 Rule 89(1) of the Rules, it is clear that the right of the parties to be provided with
18 copies of victims' applications is not absolute and exceptions are explicitly provided
19 for. Notably, Rule 89(1) of the Rules states that the transmission of victims'
20 applications to the parties is subject to Article 68(1) of the Statute, as well as to other
21 relevant considerations stemming from the statutory framework.

22 The Appeals Chamber considers that Rule 89(1) of the Rules must be interpreted in
23 such a way that it gives effect both to Article 68(1) of the Statute - reflecting the duty
24 to ensure the protection of victims - and Article 68(3) of the Statute - requiring
25 the Court to ensure meaningful victim participation in a manner which is not

1 prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.
2 Such a holistic interpretation of Rule 89(1) of the Rules is reinforced by the wording of
3 the provision itself, which refers to the Statute as a whole and not just to its
4 Article 68(1). Depending on circumstances, a procedure of individual assessment of
5 applications for the purpose of applying redactions - while ensuring the protection of
6 the victims - may undermine meaningful victim participation. The narrow
7 interpretation of Rule 89(1) of the Rules, which would allow only for one potential
8 procedure for the transmission of victim applications, must therefore be rejected.
9 In this regard, the Appeals Chamber considers that the Pre-Trial Chamber was correct
10 in finding that "Rule 89(1) of the Rules should be interpreted in light of Rule 89(4),
11 which gives the Chamber discretion to 'consider the applications in such a manner as
12 to ensure the effectiveness of proceedings'", allowing the Chamber to "organise
13 the application and admission process in light of the circumstances of each case".
14 In exercising such discretion, as correctly held by the Pre-Trial Chamber, the parties'
15 right to receive victims' applications should also be considered in light of
16 the Chamber's general obligation to ensure the fairness and expeditiousness of
17 the proceedings. When interpreting Rule 89(1) of the Rules in light of other relevant
18 statutory provisions addressing the need for the expeditious proceedings before
19 the Court (in particular Articles 61(1), 64(2) and 67(1)(c) of the Statute), Rule 89 must
20 be understood as affording chambers discretion to resort to effective systems to
21 process victims' applications. In this context, the efficient and expeditious
22 processing of victims' applications gives effect to Article 68(3) of the Statute by
23 ensuring the timely and thus meaningful participation of victims as well as giving
24 effect to the Chamber's general obligation to conduct proceedings in an expeditious
25 and efficient manner.

1 The Appeals Chamber considers that any decision on the most appropriate system for
2 the processing of victims' applications must always be case-specific, based on
3 objective information and the result of a proper balancing of all of the interests at
4 stake. Importantly, any such decision cannot be prejudicial to the suspect/accused,
5 or inconsistent with his or her rights.

6 It follows that while 89(1) provides that copies of victims' applications should be
7 provided to the parties for them to make observations, it also allows for exceptions.
8 Indeed, nothing in the text or spirit of Rule 89(1) of the Rules, Article 68 of the Statute
9 or the statutory framework more broadly suggests that the non-transmission of
10 victims' applications is per se impermissible. The only limit in this regard is that
11 the procedure put in place by the relevant chamber when exercising its discretion
12 under Rule 89 of the Rules (transmission of redacted application forms or their
13 non-transmission) cannot be prejudicial to, or inconsistent with, the rights of a suspect
14 or an accused to a fair trial.

15 In assessing whether any such exception is appropriate in a given case, it is
16 incumbent upon a chamber to strike the right balance among all of the interests at
17 stake: the interest of the Defence in having access to victims' applications for
18 participation and, if deemed necessary, challenging the admission of victims to
19 participate in the proceedings against the suspect/accused; the safety, physical and
20 psychological well-being, dignity and privacy of the victims, the need to ensure that
21 victim participation is meaningful, as well as the expeditiousness of the proceedings.

22 The Appeals Chamber turns now to the question of whether the A-B-C Approach is
23 one of the exceptions within the Court's legal framework to the transmission of copies
24 of victims' applications to the parties under Rule 89(1) of the Rules.

25 The Appeals Chamber considers that in cases where "the level of redaction necessary

1 to satisfactorily provide the protection provided by Article 68(1) of the Statute may
2 compromise the receiving party's ability to investigate them and/or make meaningful
3 submissions", the A-B-C Approach may indeed "be conducive to expeditious
4 proceedings" allowing victims "to participate through their LRVs at the earliest
5 possible juncture" thereby enhancing the meaningfulness of their participation.
6 Importantly, the Appeals Chamber highlights that the A-B-C Approach preserves
7 judicial oversight of the entire process with the relevant chamber being involved in
8 the screening and processing of victims' applications. In this regard "while VPRS's
9 conclusions may be of assistance, it is for the Chamber to ultimately authorise or
10 reject an applicant to participate in the proceedings".
11 Furthermore, if at any point during the proceedings, it becomes clear that certain
12 victims have been either wrongly admitted or rejected as participants, the relevant
13 chamber retains the power to withdraw or grant victim status.
14 The Appeals Chamber considers that, when adopting the A-B-C Approach, chambers
15 have a heightened duty to exercise judicial oversight over the assessments made by
16 the Registry. This is particularly so given the fact that a potentially large part of the
17 victims' applications are not provided to the parties for them to reply thereto.
18 The Appeals Chamber further considers that, since the parties will under this
19 approach receive what are presumably the contentious victim applications - with
20 redactions as necessary - participation of the parties in the admission process will be
21 ensured.
22 The Appeals Chamber further recalls that regardless of the system adopted by
23 a chamber to transmit and process victims' applications, when victims admitted to
24 participate in the proceedings testify before the court as witnesses called by
25 the Prosecutor ("dual status witnesses"), the disclosure regime becomes applicable

1 and therefore the onus would be on the Prosecutor to provide the Defence with all
2 the -- with all of the disclosable information in his possession, including victims'
3 applications, in redacted form, if necessary.

4 For reasons fully elaborated in the judgment, the Appeals Chamber finds no merit in
5 the remaining arguments of the Defence concerning the alleged incompatibility of the
6 ABC approach with the Chambers Practice Manual, the Registry single policy
7 document on the Court's legal aid system and the Regulations of the Registry.

8 Finally, the Appeals Chamber considers that it is inapposite to submit, as the Defence
9 does, that a system regulating the admission of victims is prejudicial to the suspect or
10 accused by speculating on the possible modalities of participation that a chamber may
11 decide to implement. In any event, the Appeals Chamber considers that when
12 eventually deciding on the modalities of participation of victims, the relevant
13 chamber must remain mindful of the fact that a large part of victims' applications
14 were not transmitted to the parties for observations.

15 Thus, the A-B-C Approach is in principle an adequate tool to ensure fairness and
16 expeditiousness of the proceedings while at the same time respecting the rights of
17 both the suspect/accused and the victims. Nonetheless, in cases where the number
18 of victims' applications is expected to remain low, the interest of the suspect or
19 accused in receiving copies thereof and replying thereto may outweigh the benefits
20 gained by the implementation of the A-B-C Approach. In such cases, the safety and
21 well-being of the victims may be appropriately safeguarded by implementing
22 necessary redactions to the victims' applications prior to their transmission to
23 the parties.

24 Therefore, without prejudice to the correctness or otherwise of the
25 Pre-Trial Chamber's exercise of discretion in this particular case,

1 the Appeals Chamber finds that the Pre-Trial Chamber did not err in law when
2 determining that the A-B-C Approach is in compliance with the Court's legal
3 framework.

4 For these reasons - and for the reasons stated more fully in the written
5 judgment - the Appeals Chamber rejects the appeal and confirms the Impugned
6 Decision.

7 This brings us to the end of the summary of the Appeals Chamber's judgment.

8 I would like to thank the court reporters, interpreters and the other staff of the
9 Registry for their invaluable assistance today in holding this hearing.

10 The hearing is adjourned.

11 THE COURT USHER: [17:13:15] All rise.

12 (The hearing ends in open session at 5.13 p.m.)