

**Cour
Pénale
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**International
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Court**

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No.: **ICC-01/14-01/21 OA2**

Date: **11 June 2021**

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding
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

**Prosecution's response to Mahamat Said Abdel Kani's appeal against the
"Decision establishing the principles applicable to victims' applications for
participation"**

Source: Office of the Prosecutor

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Introduction

1. The appeal by the Defence of Mahamat Said Abdel Kani¹ against the “Decision establishing the principles applicable to victims”² should be rejected.

2. The Single Judge accepted the proposal of the Victims Participation and Reparation Section (“VPRS”) to assess all victim applications for participation in the proceedings in light of the requirements of rule 85 and to categorise them into the following three groups:³

- Group A: applications that clearly meet the requirements of rule 85;
- Group B: applications that clearly do not meet the requirements of rule 85;
- Group C: applications for which the VPRS could not make a clear determination for any reason.

3. The Single Judge adopted a process whereby the VPRS would transmit all victim applications and VPRS’s assessments to the Chamber. However, only Group C applications and the relevant assessments—with redactions as needed—would be transmitted to the Prosecutor and the Defence (the “Parties”) pursuant to rule 89(1) for them to make observations on the applications.⁴

4. According to the Single Judge, this approach is “(i) in compliance with the Court’s legal framework; (ii) conducive to the expeditious conduct of the proceedings as a whole, which includes Mr Said’s right to have the proceedings conducted expeditiously; and (iii) in the interests of the victims by enabling the greatest number of victims to apply to participate in the hearing on the confirmation of charges.”⁵

¹ ICC-01/14-01/21-88 (“[Appeal](#)”).

² ICC-01/14-01/21-56 (“[Decision](#)”).

³ [Decision](#), para. 32. *See also* ICC-01/14-01/21-25 (“[VPRS Request](#)”), paras. 6-8.

⁴ [Decision](#), para. 35. The Decision incorporates by reference the relevant portion from ICC-01/14-01/18-141 (“[Yekatom and Ngaïssona Victims Decision](#)”), para. 41. Contrary to the VPRS’s proposal, the Decision specified that *all* Group C applications shall be transmitted to the Chamber and the Parties, and not merely a sample thereof ([Decision](#), para. 36).

⁵ [Decision](#), para. 35.

5. In its Appeal, the Defence argues that the Single Judge erred in law by violating rule 89(1), according to which the Registrar shall provide *all* victim applications to the Parties.⁶ However, rule 89(1) is not absolute and does not necessarily prevent the Single Judge from withholding victim applications from the Parties if that is necessary, for instance, to protect the applicant victims or to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the accused. Because the Defence has not shown an error of law, the Appeal should be rejected.

6. Due to the narrow scope of the Appeal, the Appeals Chamber need not assess whether the Single Judge correctly exercised his discretion under rule 89(1) by limiting the applications to be transmitted to the Parties to those for which the VPRS could not make a clear determination for any reason (Group C). In any event, the Single Judge correctly exercised his discretion, considering the impact that his Decision will have on the fair and expeditious conduct of the proceedings and the interests of the victims. In addition, contrary to the Defence's contention,⁷ the Decision does not cause prejudice to the Defence.

Submissions

(i) The Single Judge did not err in law in his interpretation of rule 89(1)

7. The Defence was granted leave to appeal on a narrow issue of law, namely "whether the Single Judge erred in finding, in line with previous jurisprudence of this Court, that the system for the transmission and admission of victim applications set out into three categories of groups – A, B and C – [...] is in compliance with the statutory framework, in particular rule 89 of the Rules."⁸

⁶ [Appeal](#), para. 19.

⁷ [Appeal](#), para. 13.

⁸ ICC-01/14-01/21-79 ("[Decision Granting Leave to Appeal](#)"), para. 21. Its request for leave to appeal issues of fact and the Single Judge's exercise of discretion were both rejected ([Decision Granting Leave to Appeal](#), paras. 22-23).

8. Accordingly, the Appeal is limited to a discrete question of law concerning the interpretation of rule 89(1). The core of the Defence’s argument is that the Single Judge erred in law by requiring that only Group C applications—but not also Group A and Group B applications—be submitted to the Parties. According to the Defence, rule 89(1) mandates that *all* victim applications be communicated to the Parties, without giving the Single Judge any discretion in this respect.⁹ This interpretation of rule 89(1) is incorrect.¹⁰

9. The relevant part of rule 89(1) provides as follows:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. [...]

10. The Single Judge correctly held that the Parties’ right to receive copies of victim applications is not absolute.¹¹ Rather, it is “[s]ubject to the provisions of the Statute, in particular article 68, paragraph 1”. Accordingly, when determining to what extent the Parties are to be provided with copies of victim applications, a Chamber may restrict such access, among other reasons, to protect the safety, physical and psychological well-being dignity and privacy of victims.¹²

11. Article 68(1) is not the only provision of the Statute that guides a chamber’s decision under rule 89(1). Rule 89(1) is “[s]ubject to [all] the provisions of the Statute”¹³ and “[i]n the event of conflict between the Statute and the Rules of

⁹ [Appeal](#), paras. 19-42, 47-48. The Defence concedes that under rule 89(1) and article 68(1) a Chamber is allowed to apply redactions to victim application on a case-by-case basis, when absolutely required to protect victims, before submitting the redacted application to the Parties ([Appeal](#), paras. 38, 40, 47-48).

¹⁰ [Appeal](#), paras. 19, 47-48.

¹¹ [Decision](#), para. 33; *see also* ICC-01/04-02/06-449 ([Ntaganda Victims Decision](#)), para. 29; ICC-02/05-01/20-259 (“[Abd-Al-Rahman Victims Decision](#)”), para. 25; ICC-01/12-01/18-37-tENG (“[Al Hassan Victims Decision](#)”), para. 61; [Yekatom and Ngaïssona Victims Decision](#), para. 43.

¹² Article 68(1).

¹³ Rule 89(1).

Procedure and Evidence, the Statute shall prevail.”¹⁴ This is also consistent with the explanatory note of the Rules of Procedure and Evidence, which states that they are “an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases”.¹⁵ The Appeals Chamber’s prior finding that under rule 89(1), “the Registry is under an obligation to provide copies of such applications to the defence and to the Prosecutor”,¹⁶ must be read in this context. So must the sections on the application of rule 89(1) in the Chamber’s Practice Manual,¹⁷ the Registry’s single policy document on the Court’s legal aid system;¹⁸ and the Regulations of the Court¹⁹ referred to by the Defence.

12. Article 64(2) is another important provision of the Statute that guides decisions under rule 89(1).²⁰ It requires a chamber to ensure that the proceedings are “fair and expeditious and [are] conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. As repeatedly observed by the Appeals Chamber, “[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges.”²¹ Under article 64(2), the Chamber has the power to “regulate the proceedings”²² and to “regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct does not cause undue delay to the proceedings.”²³

¹⁴ Article 51(5).

¹⁵ Rules of Procedure and Evidence, * Explanatory note.

¹⁶ [ICC-02/11-01/15-915-Red](#), para. 56; *contra*, [Appeal](#), para. 22.

¹⁷ [Chambers Practice Manual](#), paras. 95-96; *contra* [Appeal](#), paras. 23-28.

¹⁸ Registry’s single policy document on the Court’s legal aid system, [ICC-ASP/12/3](#), 4 June 2013, para. 69. See also [ICC-01/04-01/06-873 OA8](#), para. 7: “In connection with legal aid, only decisions of the Registrar on the scope of the payment of legal assistance are subject to review by the relevant Chamber, i.e. the Chamber dealing with the case, on the application of a legally aided person (regulation 83 (4) of the Regulations of the Court).” *Contra* [Appeal](#), para. 29.

¹⁹ Regulations of the Registry, Regulation 99. Regulation 1(1) specifically provides that “[t]hese Regulations have been adopted pursuant to rule 14 and shall be read subject to the Statute, the Rules and the Regulations of the Court.” See also [ICC-01/04-01/07-776 OA7](#), para. 81. *Contra*, [Appeal](#), para. 30.

²⁰ See e.g. [Ntaganda Victims Decision](#), para. 29.

²¹ [ICC-01/04-01/06-2582 OA18](#), para. 47; [ICC-01/04-01/06-568 OA3](#), para. 76.

²² [ICC-01/04-01/07-2259 OA10](#), para. 77.

²³ [ICC-01/04-01/07-2259 OA10](#), para. 53.

13. Although article 64(2) regulates the conduct of trial proceedings, its principles—which are an expression of fair trial rights under human rights law—are equally applicable to pre-trial proceedings. The Appeals Chamber has previously held that “[h]uman rights underpin the Statute; every aspect of it [...]. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights; first and foremost, in the context of the Statute [and] the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”.²⁴ The Defence does not contest the applicability of article 64(2) to pre-trial proceedings.²⁵

14. Because rule 89(1) is subject to the provisions of the Statute, a chamber has some discretion when deciding whether, or to what extent, victim applications should be transmitted to the Parties. A chamber must exercise this discretion, among others, with a view to protecting victims under article 68(1) and to ensuring that the trial is fair and expeditious and conducted with full respect to the rights of the accused pursuant to articles 64(2) and 67.

15. In this context, the Single Judge also correctly relied on rule 89(4), which is equally subject to the Statute and the overall objective of ensuring the protection of victims and the fair and expeditious conduct of the proceedings. According to the to the Single Judge, because rule 89(4) gives the Chamber discretion to “consider the applications in such a manner as to ensure the effectiveness of proceedings [it] allows the Chamber to organise the applications and admission process in light of the circumstances of each case.”²⁶

²⁴ [ICC-01/04-01/06-772 OA4](#), para. 37.

²⁵ The Defence contends that rule 89(1) sets out absolute rights of the accused, to which any interpretation of article 64(2) must adhere to ([Appeal](#), para. 42).

²⁶ [Decision](#), para. 33. See also [Abd-Al-Rahman Victims Decision](#), para. 26; [Ntaganda Victims Decision](#), para. 31. *Contra*, [Appeal](#), para. 41.

16. Based on the above, the Single Judge—following the recent practice of the Court²⁷—correctly held that the system of transmission of victim applications to the Parties, as adopted by Decision, is “in compliance with the Court’s legal framework”.²⁸ The Defence has failed to show that the Single Judge misdirected himself on a question of law. In particular, it has failed to show that rule 89(1) necessarily requires that *all* victim applications be submitted to the Parties.

17. The Defence’s Appeal should therefore be rejected.

(ii) In any event, the Single Judge correctly exercised his discretion under rule 89(1)

18. As noted above, this Appeal focusses on an alleged error of law regarding the interpretation of rule 89(1).²⁹ The Appeal does not concern whether the Single Judge erred in the exercise of his discretion in this case. The Single Judge expressly rejected the Defence’s request for leave to appeal the Decision on such issues.³⁰ Although the Defence has made some arguments concerning the Single Judge’s exercise of discretion,³¹ the Appeals Chamber should not entertain those arguments, because they exceed the scope of the Appeal.

19. In any event, if the Appeals Chamber were to decide to consider the Defence’s arguments, the Single Judge correctly exercised his discretion under rule 89(1) by limiting the applications to be transmitted to the Parties to those for which the VPRS could not make a clear determination for any reason (Group C).

²⁷ [Decision](#), para. 33, referring to [Ntaganda Victims Decision](#), paras. 29-32; [Yekatom and Ngaiissona Victims Decision](#), paras. 42-45; [Al Hassan Victims Decision](#), paras 60-63; [Abd-Al-Rahman Victims Decision](#), paras. 25-28.

²⁸ [Decision](#), para. 35(i).

²⁹ See paras. 7-8 above.

³⁰ [Decision Granting Leave to Appeal](#), paras, 22-23, rejecting the second and third ground of appeal, as set out in paras. 13-14 (“Second, the Defence submits that the Single Judge took into account irrelevant criteria ‘*pour justifier la non-communication aux Parties de toutes les demandes de participation des victimes*’, namely, (i) the issue of redactions; (ii) the potential number of victim applications; and (iii) ‘*[l]’ inégalité de traitement entre les Parties d’une affaire de la CPI à l’autre qui découle de la prise en compte de la décision attaquée des deux critères ci-dessus*’ (the ‘Second Issue’). [...] Third, the Defence avers that the decision has misinterpreted the principle of expeditiousness of the proceedings (the ‘Third Issue’”).

³¹ [Appeal](#), paras. 43-46.

20. As highlighted by the VPRS, the process adopted by the Single Judge in this Decision was also followed in the *Ntaganda, Al Hassan, Yekatom and Ngaissona* and *Ali Kushayb* cases. According to the VPRS, the experience in those cases shows that this process leads to considerable time and resource savings and allows the VPRS and the Chamber to process the highest number of victim applications prior to the confirmation of charges hearing.³² This is because it allows the Parties and the Chamber to concentrate on applications which have been pre-assessed as unclear or containing borderline issues rather than examining all applications. It also ensures that the VPRS's processing and redaction obligations extend only to a fraction of the relevant forms.³³ The recent Independent Expert Review of the ICC report also acknowledged that as a result of this process, "[t]he task of the Judiciary is greatly simplified and expedited".³⁴

21. In his Decision, the Single Judge noted the challenges presented by the difficult security situation in the CAR and hence, the extensive redactions anticipated to protect victims in accordance with article 68(1) of the Statute. He also noted that a substantial number of victims will likely submit applications to participate in the present proceedings.³⁵ Based on these considerations, the Single Judge held that only Group C applications should be submitted to the Parties, because this is conducive to the expeditious conduct of the proceedings as a whole, including Mr Said's right to have the proceedings conducted expeditiously. He also held that it is in the interests of the victims by enabling the greatest number of victims to apply to participate in the hearing on the confirmation of charges.³⁶

22. Accordingly, the Single Judge correctly applied rule 89(1) to the facts of this case. He did so by taking appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims pursuant to article 68(3),

³² [VPRS Request](#), para. 9.

³³ [VPRS Request](#), para. 9.

³⁴ Independent Expert Review of the International Criminal Court and the Rome Statute System [Final Report](#), 30 September 2020, para. 847.

³⁵ [Decision](#), para. 34.

³⁶ [Decision](#), para. 35.

and by ensuring that the process is consistent with the Chamber's duty to ensure fair and expeditious proceedings under article 64(2) and does not affect the Mr Said's right to be tried without undue delay under article 67(1)(c).

23. This demonstrates that the Single Judge correctly exercised his discretion under rule 89(1). The Defence merely disagrees with the Single Judge's approach,³⁷ but fails to show an error in the Decision.

(iii) The decision does not cause prejudice to the Defence

24. Nor does the Decision cause prejudice to the Defence.³⁸ The Defence alleges that as a result of the Decision, it will be prejudiced by the victims' views and concerns, by the submissions of their legal representatives and by any requests for compensation.³⁹

25. However, this Decision does not concern the admission of victims to participate in the proceedings, much less the modalities of any future victim participation pursuant to rule 91. The Decision does not even concern the question of whether the Parties will actually get access to the applications of those victims who will be eventually admitted. The Single Judge expressly deferred that determination to a future decision. It ordered the Registry to make observations on that matter and allowed the Prosecution and the Defence to respond.⁴⁰

26. Accordingly, the Defence's arguments on prejudice are speculative and premature and should be rejected.

³⁷ [Appeal](#), paras. 43-46.

³⁸ *Contra*, [Appeal](#), paras. 6-15.

³⁹ [Appeal](#), paras. 7-12.

⁴⁰ [Decision](#), para. 37.

Conclusion

27. For the reasons set out above, the Appeals Chamber should reject the Appeal.



Fatou Bensouda, Prosecutor

Dated this 11th day of June 2021

At The Hague, The Netherlands