

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **3 June 2021**

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public document

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

Source: Defence team for Mahamat Said Abdel Kani

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

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Other

I. Procedural history.

1. On 26 February 2021, the Registry filed “Submissions on Aspects Related to the Participation of Victims in the Proceedings”.¹
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
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 by victims in respect of which the Registry could not make a clear determination as to whether they met the requirements for participation would be provided to the parties.
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 compliance of that decision with rule 89(1) of the Rules of Procedure and Evidence.
5. On 21 May 2021, the Single Judge granted the Defence leave to appeal on the issue of whether the decision on victims participation of 16 April 2021 “contradicts rule 89(1) of the Rules”.⁵

¹ ICC-01/14-01/21-25.

² ICC-01/14-01/21-36-tENG.

³ ICC-01/14-01/21-56.

⁴ ICC-01/14-01/21-63-tENG.

⁵ ICC-01/14-01/21-79, para. 12.

II. Discussion.

Introduction

6. Victims' participation in the proceedings is a key question which goes to the fairness of the proceedings since the participating victims play a wide-ranging and varied role which will have an impact on many key questions discussed during the proceedings, in particular questions concerning the rights of the Accused (such as his right to come and go freely) and concerning his innocence.

7. Specifically, the victims who are admitted to participate in the proceedings will be entitled to present their "views and concerns" where their personal interests are affected (article 68(3) of the Statute).

8. That means in practice that the legal representatives of the victims will, for example, intervene in many legal discussions concerning the rights of the Accused (such as interim release or restrictions on communication by the Accused with the outside world); be able to make written submissions on the Prosecution evidence and, in consequence, request that the charges against the Accused be confirmed and subsequently seek his conviction; call witnesses and tender their evidence; and intervene in appeal proceedings.

9. Furthermore, the role of participating victims is not an insignificant one because throughout the proceedings, through their "views and concerns", they make accusations against the person charged. Indeed, the first step that victims take in order to be admitted to participate in the proceedings is to submit an account in their application for participation that alleges the responsibility of the person charged.

Subsequently, they will participate in discussions about the charges and the culpability of the person charged.

10. The participating victims, through their representative, will therefore have an active role in the proceedings which will, by definition, have an impact on the rights of the Accused, including the presumption of his innocence.

11. It should also be noted that in the practice followed before the ICC, interventions by the legal representatives of victims on occasion replace those of the Prosecution, and the legal representatives of victims sometimes go further than the Prosecution in their requests to the Chamber. For example, the Prosecution has on occasion abandoned one of the charges against an accused at trial but the legal representative of victims has argued for the charge in question to be maintained against the accused.⁶

12. Last, once victims have been admitted to participate in the proceedings, in addition to their various interventions during the proceedings, they will be able to apply for reparations for the harm they have suffered in the event that the Accused is convicted. The participating victims therefore have an interest in the proceedings on which they will be able to rely if there is a conviction. In that scenario, the victims will therefore have a key role to play in the proceedings and their participation will have a direct impact on the Accused, who will be accountable to the victims for any harm he has caused to them.

13. That is why a victim participation procedure under which the defence is prohibited from accessing and analysing all applications for participation causes

⁶ ICC-02/11-01/15-T-223-FRA ET, p. 31, lines 16 to 18.

prejudice to the defence in a manner likely to undermine the fairness of the proceedings.⁷ It is crucial that the procedure for the admission of applications for participation provides for the parties to be afforded notice and be heard. The procedure is naturally organized around the dialectic between the parties, which makes it possible to bring out all the useful elements for a full and informed debate on an issue. It is only at the end of such an exchange of arguments that the Chamber can render a fully informed decision. Any limitation of this dialectic carries with it the risk that important issues will not have been fully debated, and above all, that a decision will be rendered without the parties having been able to present all their arguments in full, thereby calling into question the fairness of the proceedings.

14. In this case, the role of the Defence in the analysis of an application for victim participation is fundamental since the Defence, like the Prosecutor, will have a different assessment of the content of an application to the Registry's. Only the parties know what is important to them and it is important for the fairness of the proceedings that they are able to discuss the content of each application for participation.

15. Under those circumstances, victim participation in the proceedings must, first, have its basis in an exchange of arguments between the parties (which is the *raison d'être* of rule 89(1) of the Rules) and, second, on the basis of that exchange of arguments, be subject to sufficient judicial oversight to ensure that victim participation does not upset the equilibrium of the proceedings and give rise to infringement of the right to a fair trial of the person charged.

1. Single ground of appeal: the misinterpretation of rule 89(1) in the impugned decision constitutes an error of law.

⁷ ICC-01/14-01/21-63-tENG, paras. 43-48.

16. In the impugned decision, the Single Judge adopted a procedure for transmitting victims' applications for participation in the proceedings ("applications for participation") to the Parties under which the applications for participation will be divided into three categories:⁸

- Category A, comprising applications for participation which the Registry has found meet the requirements for applicants to participate in the proceedings as participating victims;
- Category B, comprising applications for participation which the Registry has found do not meet the requirements for applicants to participate in the proceedings as participating victims;
- Category C, comprising applications for participation in respect of which the Registry is unable to make a clear determination as to whether they meet the requirements for applicants to participate in the proceedings as participating victims.

17. The Single Judge ordered that only category C applications for participation should be transmitted to the parties.⁹

18. As grounds for not transmitting the applications for participation in categories A and B to the parties, the Single Judge found:

it has been determined that "the parties' right to reply to victim applications set out in Rule 89(1) of the Rules is not absolute" as it is "[s]ubject to the provisions of the Statute", including "the Court's obligation under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims" and the obligation to ensure the fairness and expeditiousness of the proceedings. Furthermore, it has been found that "Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to 'consider the applications in such a manner as to ensure the effectiveness of proceedings'". Therefore, contrary to the Defence's submissions, rule 89(4)

⁸ ICC-01/14-01/21-56, para 35.

⁹ ICC-01/14-01/21-56, para 36.

of the Rules allows the Chamber to organise the application and admission process in light of the circumstances of each case.¹⁰

1.1 The interpretation of rule 89(1) in the impugned decision infringes the right under that rule by virtue of which victims' applications for participation "shall" be transmitted to the parties.

1.1.1 A literal interpretation of rule 89(1) dictates that all victims' applications for participation be transmitted to the parties.

19. According to the Defence, the Single Judge's interpretation constitutes an error of law because it is unequivocally apparent from the wording of rule 89(1) that the Registry has a duty to transmit the applications for participation to the parties who, according to the wording of the rule, "shall" be entitled to reply to them:

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.¹¹

20. That entitlement is reinforced by rule 89(2) which expressly provides that the parties may apply for an application for participation to be rejected:

The Chamber, on its own initiative or on the application of the Prosecutor **or the defence**, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled.¹²

21. The logical corollary of that rule, which clearly provides that the parties may apply for an application for participation to be rejected, is that the applications for

¹⁰ ICC-01/14-01/21-56, para. 33.

¹¹ Emphasis added.

¹² Emphasis added.

participation must be transmitted to those parties so that they can decide whether to apply for rejection. The parties should be given the means to exercise the rights formally granted to them in the texts. To be able to seek rejection of an application, the parties must have received it and been able to analyse it.

22. The Appeals Chamber confirmed that interpretation of rule 89(1) in the specific context of a debate on whether redactions in an application for participation could be lifted in order to prepare cross-examination during the trial phase: “Under rule 89 (1) of the Rules, the Registry is under an **obligation** to provide copies of such applications to the defence and to the Prosecutor”.¹³

1.1.2 Other relevant documents forming part of the body of law derived from the ICC statutory texts corroborate a literal interpretation of rule 89(1) dictating that all victims’ applications for participation be transmitted to the parties.

23. First, the Defence notes that its position is in line with the Chambers Practice Manual,¹⁴ adopted by all the judges of the Court, which clearly provides for a procedure for admission of victims’ applications for participation in accordance with rule 89: the parties are explicitly entitled to receive all applications for participation by victims in order to assess them and submit observations on such applications.

24. Specifically, the Chambers Practice Manual states:

Rule 89 of the Rules of Procedure and Evidence sets out the basic requirements for the admission of victims to participate in the proceedings. The core elements of the system designed by Rule 89 are, in essence, the following: (i) victims who wish to participate in the proceedings must make written application to the Registrar; (ii) the application is transmitted to the Chamber; (iii) **a copy of the application is provided to the Prosecutor and the Defence, who are entitled to reply within a time limit to be set by the**

¹³ ICC-02/11-01/15-915-Red, para. 56. Emphasis added.

¹⁴ [Chambers Practice Manual](#), paras. 95-96.

Chamber;^[15] and (iv) the Chamber, *proprio motu* or upon request of the Prosecutor or the Defence, may reject the application *inter alia* if the person does not qualify as a victim.¹⁶

25. The Chambers Practice Manual also provides:

In accordance with Rule 89(1), all complete applications falling within the scope of the concerned case that are transmitted to the Chamber, and any supporting documentation, **are also provided, together with the transmission report,**^[17] to the Prosecutor and the Defence, at the same time and by way of the same filing in the record of the case made for the transmission to the Chamber.¹⁸

26. The Chambers Practice Manual further states:

“The Prosecutor and the Defence, in accordance with Rule 89(1), are entitled to provide observations on the applications and request, as provided in Rule 89(2), that one or more individual applications be rejected. The Single Judge/Chamber shall establish a time limit within which the parties may present specific objections to the admission as victims of any individual applicant. Evidently, neither party has a duty in this respect: it is entirely within their discretion to determine the extent of time and resources, if any, which they find worthy dedicating to the assessment of the applications. **In case any objection is raised by either party, the Single Judge/Chamber assesses the contested application(s) individually.** Conversely, upon expiration of the time limit for the parties’ objections, all those victims whose applications for participation have not been objected by either party, or otherwise rejected by the Single Judge/Chamber, are admitted *ex lege* to participate in the proceedings, as envisaged in the last sentence of Rule 89(1), in conjunction with Rule 89(2), which states that *without prejudice* to the possibility for a Chamber to reject applications on its own motion or when prompted by the parties, the Chamber upon receipt of the application shall proceed to specify the proceedings and modalities for participation. In sum, the Chamber is seized with a decision on an individual application only in case **either party objects, for any particular reason, the person’s admission** contesting the Registry’s original assessment.¹⁹

27. It is therefore apparent from those various provisions that the judges clearly stated, on several occasions, that the procedure for admitting victims’ applications for

¹⁵ Emphasis added.

¹⁶ Chambers Practice Manual, para. 95.

¹⁷ Emphasis added.

¹⁸ Chambers Practice Manual, para. 96(v).

¹⁹ Chambers Practice Manual, para. 96(vii) and (viii). Emphasis added.

participation must safeguard the parties' ability to receive all victims' applications for participation so that they can request their rejection if they consider it necessary.

28. The Manual also makes it clear that "[t]he above mentioned system applies equally to **all stages of the case**".²⁰ It is therefore not intended that the confirmation of charges phase should be different, even though that hearing may result in the charges not being confirmed.

29. Second, the Registry's single policy document on the Court's legal aid system, adopted by the States Parties, also suggests that rule 89(1) should be interpreted literally since it provides explicitly that the defence is to have the necessary resources to examine victims' applications for participation.²¹

30. Third, the Regulations of the Registry likewise suggest that rule 89(1) should be interpreted literally. Specifically, regulation 99 of the Regulations of the Court provides:

Upon receipt of an application from a victim and pending any decision by the Chamber, the Registry shall review the application and assess whether the disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety and security of the victim concerned or any third person.²²

The existence of a procedure to identify, on a case-by-case basis, any information that cannot be disclosed to the parties demonstrates that the victim participation procedure is premised on the applications for participation being transmitted to the parties, including the defence.

²⁰ Chambers Practice Manual, para. 97, emphasis added.

²¹ Registry's single policy document on the Court's legal aid system, para.n69.

²² Regulation 99 of the Regulations of the Registry.

1.1.3 The academic literature on the body of law derived from the ICC statutory texts corroborates a literal interpretation of rule 89(1) dictating that all victims' applications for participation be transmitted to the parties.

31. Accordingly, it is worth noting that when respected commentators mention the procedure under rule 89(1), they recall that under that rule, applications for participation are to be transmitted to the parties, including the defence.

32. For Professor Kai Ambos: "The prosecution and the defence receive copies of the applications and have the right to reply to them".²³ Similarly, for Professor William Schabas: "the application may be contested by the Prosecutor and the Defence".²⁴

33. In the same vein, one of the core works on victim participation in international criminal proceedings states unambiguously:

Under Rule 89(1) of the ICC RPE, the Registrar shall provide a copy of the applications to the Prosecution and to the Defence, "who shall be entitled to reply within a time limit set by the Chamber." Observations on applications for participation can then be made by the parties.²⁵

A further example: one of the best-known commentaries on the law of the ICC, edited for CILRAP by two international criminal procedure experts, Mark Klamberg and Jonas Nilsson, in which the entry on rule 89(1) has been written by a former OPCV Senior Legal Officer, states:

The Court's **only obligation** under rule 89(1) is to order the Registrar to provide the Prosecution and the Defence with copies of the applications, such that they may make observations on the applications within a time limit set by the Chamber.²⁶

²³ K. Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, p. 181.

²⁴ W. Schabas, *The International Criminal Court: A commentary of the Rome Statute*, 2nd edition, p. 1066.

²⁵ M. Fardel and N. Vehils Olarra, "The Application Process: Procedure and Player", in K. Tibori-Szabo and M. Hirst, *Victim Participation in International Criminal Justice*, p. 30.

²⁶ E. Carnero Rojo, "Rule 89(1) – Transmission of and response to victims' applications to participate in the proceedings", M. Klamberg and J. Nilsson (Eds) *Commentary on the Law of the International Criminal*

1.2 The texts used in the impugned decision do not undermine the principle that applications for participation “shall” be transmitted to the parties, including the defence.

34. The impugned decision departs from a literal interpretation of rule 89(1) insofar as it prohibits the parties from having access to all the victims’ applications for participation (see above) relying *inter alia* on article 68(1), rule 89(4) and article 64(2) of the Statute.

35. The statement in rule 89(1) to the effect that it applies “[s]ubject to the provisions of the Statute, in particular article 68, paragraph 1”, does not mean that access by the parties to all victims’ applications for participation may be limited as a matter of policy.

36. While this phrase naturally allows Judges to decide, on a case-by-case basis, on protective measures that are absolutely necessary for the protection of victims under article 68(1), it cannot be used to decide in a general and generic manner to deny the defence a right expressly laid down by the Rules of Procedure and Evidence. The States Parties – drafters of both the Rome Statute and of the Rules of Procedure and Evidence – adopted rule 89(1) with full knowledge of article 68(1) and the judges cannot render ineffective a provision of the Rules adopted by the States without thereby assuming a legislative role that goes beyond the scope of their function. The foregoing assessment of the function of article 68(1) is confirmed by the Chambers Practice Manual, which provides that article 68(1) allows individual applications for

Court – The Rome Statute, available at <https://cilrap-lexsis.org/clicc/content/5ba5084816abcdfbf60b1562>, last accessed on 30.05.2021 (emphasis added).

participation to be redacted but does not allow the parties to be prevented on a general basis from having access to applications for participation.²⁷

37. That is nevertheless exactly what the impugned decision does, since, in order to limit the parties' right to have the applications for participation transmitted to them, it relies on "the challenges presented by the difficult security situation in the CAR and, hence, the extensive redactions anticipated to protect the victims in accordance with article 68(1) of the Statute".²⁸

38. However, all that rule 89(1) does, by reference to article 68(1), is to allow the Chamber, on a case-by-case basis, where justified, to order redactions to be made to parts of applications for participation. Rule 89(1) does not allow the Chamber to decline to transmit the applications for participation to the parties merely to spare the making of redactions. In particular, the fact that applying redactions may be time-consuming is not a reason to dispense with them, especially when the consequence of that choice is to deny the parties a right expressly granted to them by the Rules of Procedure and Evidence. It is the responsibility of the Registry to take the necessary measures to ensure that the parties and judges are able to work in conditions conducive to implementation of the basic texts of the ICC. The Registry must make adequate resources available to the parties and the judges so that a fair trial, as laid down in the Rome Statute and the Rules of Procedure and Evidence, can take place. That is moreover what Regulation 99 of the Regulations of the Registry expressly provides (see above).

²⁷ Chambers Practice Manual, para. 96(vi).

²⁸ ICC-01/14-01/21-56, para. 34.

39. It is not for the parties to waive a right for reasons associated with the resources available to the Registry, or for a judge to deny the parties a right because of the Registry's lack of resources or the time required for the Registry to carry out its task.

40. In other words, it is one thing to accept, on a case-by-case basis, that a Chamber may order protective measures under article 68(1) as permitted by rule 89(1), which may in specific instances limit the parties' access to parts of certain applications for participation. It is quite another to allow a Chamber, on the basis of criteria that have no real connection with article 68(1) (such as the number of applications or the time it would take to redact them), to simply and *ab initio* prohibit the parties from exercising the right expressly granted to them under rule 89(1)). The impugned decision, insofar as it denies the Parties *de jure* access to the totality of applications for participation, goes beyond the scope of what is permitted by rule 89(1).

41. Similarly, rule 89(4), to which the impugned decision also refers, does not allow for a limitation on the right of the parties to be provided with of all the victims' applications for participation. It is clear from rule 89(4), according to which "[w]here there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision", that the rule is intended to allow judges, **within the legal framework set out in rule 89 as a whole**, not to have to consider applications for participation one by one, which would entail having to render dozens of separate decisions, but rather to allow judges to issue "one decision". This provision is not intended to allow for a procedure for admitting applications for victim participation that would deny the defence a right explicitly provided for in the proceeding paragraphs of the same rule.

42. The impugned decision also refers to the obligation “to ensure the fairness and expeditiousness of the proceedings”²⁹ as grounds for limiting the Parties’ access to the applications for participation. That obligation arises from article 64(2), which provides generally that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” That article cannot be used as a basis for a Chamber to disregard provisions explicitly laid down in the Statute or the Rules of Procedure and Evidence. The article provides that the Chamber must ensure that the trial is “fair”. However, it would appear that a procedure which does not allow the parties, including the defence, to exercise a right explicitly laid down in the Statute cannot be considered fair. In other words, to use article 64(2) to deny the defence the right granted to it in rule 89(1) is to reject the spirit of article 64(2). Otherwise, it would be possible, on the basis of article 64(2), for a Chamber to organize proceedings in a discretionary manner without taking into account all the rights of the accused under the Statute.

1.3 The fact that there may be a large number of applications for participation cannot cast doubt on the principle that applications for participation “shall” be transmitted to the parties.

43. The impugned decision states that: “The Defence further omits to consider that it may be expected that a substantial number of victims will submit applications to participate in the present proceedings”.³⁰

44. The impugned decision does not explain how the expected number of applications for participation would justify the Parties not being able to exercise their

²⁹ ICC-01/14-01/21-56, para. 33.

³⁰ ICC-01/14-01/21-56, para. 34.

right to have access to those applications. As with the issue of redactions, the volume of work involved in assessing victims' applications for participation and the time required to carry out such assessments is not a reason to limit a right of the parties and therefore not to transmit applications for participation to them just to spare them such assessments. The fact that such assessments may take time is not a reason to arbitrarily deny the parties the possibility of carrying them out since the Rules of Procedure and Evidence expressly provide for such a right.

45. The Defence also notes that it is impossible, at this stage, to know how many victims will apply to participate in the proceedings and therefore this is a matter of speculation, particularly since nothing in the case file appears to suggest that there will in fact be a large number of applications for participation. On the contrary, the Defence observes that the geographical and factual scope of the charges is likely to allow only a small number of participating victims. The Defence observes that the Registry itself states in its Report on Legal Representation of Victims that "**only a small number of potential victims have been identified so far**".³¹

46. According to the Defence, taking a logistical criterion of that nature into account for the purposes of limiting the exercise of a right by one of the parties constitutes an error of law as there is no basis for it in the texts governing the Court.

Conclusion:

47. It emerges from the foregoing that the other available sources corroborate a literal interpretation of rule 89(1). On analysis, no provision in the Statute, the Rules of Procedure and Evidence or the other statutory texts allows an interpretation that departs from the letter of rule 89(1); furthermore, the majority of respected

³¹ ICC-01/14-01/21-80-AnxII-Red, para. 76. Emphasis added.

commentators emphasize the parties' right to receive the victims' applications for participation, as part of an adversarial process, so that they can, if they judge it appropriate, apply for those applications to be rejected, and present that right as the starting point for the procedure for the participation of victims at the ICC.

48. Applying the principle of legality, the parties' access to the applications for participation can therefore only be limited within the legal framework laid down by the texts (for example article 68(1) of the Statute, according to which the parties' access to certain information in an application for participation may be limited on a case-by-case basis); however, the texts governing the Court do not provide that the parties may be prevented from gaining access to all the victims' applications for participation as a matter of policy and no logistical reason may justify limiting that access.

2. The material impact on the impugned decision of the error of law concerning the interpretation of rule 89(1).

49. The Defence considers that the error of law consisting of an interpretation of rule 89(1) in a manner not consistent with the letter and spirit of that rule materially affected the impugned decision. Indeed, had that error of law not been made in the impugned decision, the parties would have had access to all the victims' applications for participation, redacted if necessary.

50. Rule 89(1) is clear: it applies "[s]ubject to the provisions of the Statute, in particular article 68, paragraph 1", and therefore transmission to the parties can be declined only in respect of extracts of applications for participation.

ON THOSE GROUNDS, MAY IT PLEASE THE APPEALS CHAMBER:

- **To find** that the impugned decision infringes rule 89(1) of the Rules of Procedure and Evidence which establishes that the parties “shall” have access to those applications for participation, insofar as it prevents all the victims’ applications for participation from being transmitted to the parties;
- **To find** that the misinterpretation of rule 89(1) thus described constitutes an error of law which invalidates the impugned decision;

And therefore:

- **To set aside** the impugned decision;

And,

- **To remand** the matter to the Single Judge.

_____ **[signed]**

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 3 June 2021 at The Hague, Netherlands.