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No.: **ICC-01/14-01/21**
Date: **28 June 2021**

APPEALS CHAMBER

Before: **Judge Gocha Lordkipanidze, Presiding Judge**
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 Document

Defence Consolidated Response to 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)" (ICC-01/14-01/21-105) and to 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)" (ICC-01/14-01/21-106)

Source: **Defence team for Mahamat Said Abdel Kani**

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

Office of the Prosecutor Mr Karim A. A. Khan QC, Prosecutor Mr James Stewart Mr Eric MacDonald	**Counsel for the Defence of Mahamat Said Abdel Kani** Ms Jennifer Naouri Mr Dov Jacobs
Legal Representatives of Victims	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparations**
Office of Public Counsel for Victims Ms Paolina Massidda	**Office of Public Counsel for the Defence**
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Mr Peter Lewis	**Counsel Support Section**
Victims and Witnesses Section Mr Nigel Verril	**Detention Section**
Victims Participation and Reparations Section Mr Philip Ambach	**Other**

Introduction

1. These appeal proceedings concern a clear legal issue: how to interpret the letter and spirit of rule 89(1) of the Rules of Procedure and Evidence. Determining the correct interpretation of rule 89(1) and above all its *raison d'être* is crucial, because victims' participation in proceedings is a fundamental question which goes to the fairness of the proceedings. The participating victims play a wide-ranging and varied role which will have an impact on many key questions discussed in the proceedings, in particular concerning the rights and innocence of the Accused. The legal representatives of the victims will, for example, intervene in many legal discussions concerning the rights of the Accused; 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 a conviction; call witnesses and tender their evidence; and intervene in appeal proceedings.

2. 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 places responsibility on the person charged, since they are required to show a link to the charges laid against that person. In other words, a victim wishing to participate in the proceedings who fails to show a link to the charges will not be admitted to participate in the proceedings. Victims who wish to participate in the proceedings must therefore show a link to the Accused. Subsequently they will participate in discussions about the charges and the culpability of the person charged.

3. The participating victims, through their representatives, 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 innocence.

4. The Defence therefore considers that the question for which the Single Judge gave leave to appeal is a fundamental question from which the Pre-Trial Chamber will have to draw the necessary conclusions in each individual instance, and that, depending on the answer given by the Appeals Chamber to that question, the Accused's rights and ability to conduct a defence will be determined, in particular, relative to the modalities of victim participation in the proceedings, which by definition have an impact on the exercise of the rights of the Accused. The extent to which the Defence is in practice able to work to ensure that the rights of the person charged are actually upheld will be contingent on the legal framework resulting from the interpretation of the letter and spirit of rule 89(1) of the RPE.

5. The matter of any limitation on the Accused's enjoyment of the rights expressly recognized by the Statute can only be determined on the basis of interpretation of the letter and spirit of rule 89(1), rather than on the basis of logistical or even financial considerations, as the Registry would have it in its observations. Such considerations cannot be taken into account in a discussion whose purpose is to elucidate the *raison d'être* of a clear provision drafted by the States Parties in their legislative capacity – a discussion that will determine what rights are afforded to persons charged so that they can conduct a defence on a fully informed basis against all the accusations made against them in the proceedings. Such a discussion goes to the very heart of the rights of the Accused and thus to the fairness of the proceedings as a whole. Discussion of the fairness of the proceedings can never take as its point of reference technical, logistical or financial considerations; otherwise there would be no such thing as

impartial justice because justice could be compromised, even if in appearance only, by material considerations.

6. A Court which serves as a paragon, and whose task is to conduct fair trials, cannot run the risk of vitiating ongoing proceedings because it lacks the time or resources needed to perform its task or to provide the Accused with all the means and information to conduct a fully informed defence, in particular in respect of allegations made against the Accused and which may in some way influence the decisions taken as to innocence or culpability.

7. It is for that reason that the Registry's task is to provide all participants in the trial – Prosecution, Defence, legal representatives of victims and the Bench – with the means necessary to carry out their tasks, and no logistical argument may impede the performance of the task which falls to all of them in their respective roles, that of ensuring a fair trial.

8. Therein lies the *raison d'être* of the Court and of the instruments governing proceedings before it: the Accused must be informed of all material containing accusations, and the exceptions are expressly laid down in the instruments (see article 68(1): "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses").

9. Those are the only reasons that can justify not providing certain material to the Defence and they must be specifically assessed on a case-by-case basis; to do otherwise would run counter to the *raison d'être* of the exceptions, since it is clearly stated in article 68(1) that "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

1. Defence response to the submissions of the OPCV

1.1 The OPCV misinterprets the letter of rule 89(1)

10. The OPCV states in relation to rule 89(1) that:

> the Defence submits that the Chamber failed to consider that according to the French version of said provision, all victims' application forms would "always" have to be transmitted to the parties. However, Counsel notes that the French adverb "toujours" – which does not appear in the correspondent English text – refers instead to the right of the parties to respond to victims' application forms once those are transmitted to them.[1]

According to the OPCV, rule 89(1) should therefore have been construed as follows: the Parties "always" have a right to reply to victims' applications for participation, but only when those applications are actually transmitted to the Parties. That reasoning renders rule 89(1) entirely devoid of content, since the plain wording used in the text of rule 89(1) is that, as regards victims' applications for participation, the Parties "shall be entitled **to reply** [in the French version, literally, 'always have the right **to reply'**] within a time limit to be set by the Chamber". The text therefore explicitly provides that the parties always have a right to reply to any victim application for participation. The grammatical construction of the sentence is very clear and nothing in it suggests a distinction between applications for participation that have been transmitted to the parties and those that have not. On the contrary, the sentence is unambiguous: the Parties are entitled to reply to victims' applications for participation. A Party that is entitled to reply to an application for participation cannot do so unless it is provided with the application. The sentence cannot be severed and parsed artificially so as to justify, *ex post facto*, a system for disclosing applications for participation that runs counter to the letter and spirit of rule 89(1).

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[1] ICC-01/14-01/21-105, para. 13.

11. The English and French versions of rule 89(1) are identical in meaning and the translation is exact. In French, "*toujours*" ["always"] has been used to convey the idea that the Registry has no discretion as to whether or not it discloses victims' applications for participation; it "always" transmits a copy of an application for participation, with no exceptions. That is what the French means, and that is exactly what the English text says when it uses the mandatory "shall" (must, has a duty to). The English version likewise requires the Registry to provide every victim application for participation to the Parties: "the Registrar **shall** provide a copy of the application to the Prosecutor and the defence". The Registry has no leeway; it must always (with no exceptions) provide the applications to the Parties. On the other hand, in accordance with its task and duties, the Registry may redact those applications for participation pursuant to the protections provided for in article 68(1). It must therefore disclose the applications, in redacted form if necessary. The Parties' absolute right to reply to those applications for participation is also clearly stated in the English version: "the Prosecutor and the defence, **who shall be entitled to reply** within a time limit to be set by the Chamber". It is mandatory that the Parties have the right, are "entitled", to reply. The English text and the French text are therefore identical and, accordingly, in order to exercise that right of reply – a right explicitly recognized in both versions of rule 89(1) – the Parties must be provided with the applications for participation; otherwise no reply is possible.

1.2 <u>The OPCV misinterprets the earlier holding of the Appeals Chamber</u>

12. In paragraph 15 of its submissions, the OPCV misleads the Appeals Chamber as to the exact content of the appeal decision to which the Defence refers in its appeal brief.[2] The fact that, in the decision concerned, the Appeals Chamber had to rule

[2] ICC-01/14-01/21-88-tENG, para. 22.

specifically on whether the Prosecution was under a particular obligation to disclose an application for participation in its possession to the Defence under rule 77 of the Rules of Procedure and Evidence does not alter the fact that the fundamental premise of the Appeals Chamber's reasoning was that "[u]nder 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."[3] In the decision cited, the Appeals Chamber therefore did indeed confirm the interpretation of rule 89(1) that the Defence set out in its brief.

1.3 <u>The OPCV's claim that "the Appeals Chamber has already established that the Defence is not entitled to receive information, whether incriminatory or potentially exculpatory, from the victims"[4] does not relate to the question at issue in this appeal</u>

13. At issue here is not whether the victims have an obligation, equivalent to that on the Prosecutor, to disclose exculpatory information to the Defence, which was the question being ventilated before the Appeals Chamber in the *Katanga* case to which the OPCV is referring, but the need to establish that the Defence is entitled, as expressly established in rule 89(1), to receive the victims' applications for participation so that it can reply to them in order to ascertain whether the criteria for a victim to participate are indeed satisfied. The reference to the appeal judgment in *Katanga* therefore adds nothing to the present discussion.

14. Indeed, the Defence is entitled to object to a victim being treated as a participating victim where it can show that the person in question does not fulfil the criteria laid down in the Court's instruments (see rule 89(2)) and previous decisions. However, if they are to be able to show whether or not the criteria are satisfied, the

[3] ICC-02/11-01/15-915-Red, para. 56 (emphasis added).
[4] ICC-01/14-01/21-105, para. 15.

Parties – Prosecution and Defence alike – must have access to the applications for participation. The Defence must also be placed in a position to comment, from its perspective, on the facts alleged by the applicants – for instance, on whether or not those facts fall within the geographical or temporal scope of the DCC and whether or not the crimes alleged are covered by the charges laid in the DCC. By way of further illustration, the Defence must also be in a position to discuss the link between the alleged harm and the alleged crimes. In the same vein, in order to be in a position to apply for leave to appeal the decision on victim participation, the Parties must have access to the applications so that they can understand the Pre-Trial Chamber's assessment.

1.4 Contrary to the OPCV's assertion,[5] the Practice Manual, while technically not binding, is owed considerable weight in this discussion because it represents the "best practice to be followed"

15. Where contention arises as to whether a provision of the Rules of Procedure and Evidence has been implemented lawfully, a document drafted by consensus by all the Judges of the Court and updated in November 2019 is inherently helpful to the discussion, representing as it does the judicial consensus that must guide practice before the ICC in order to provide a form of legal certainty for the participants in proceedings – its *raison d'être*. Furthermore, the first edition of the practice manual, published in 2015, stated in its introduction that "after more than 10 years of activity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings." It is therefore not a manual giving a snapshot of the "relevant practices adopted by Chambers of the Court" as the OPCV suggests, but

[5] ICC-01/14-01/21-105, para. 17.

rather one that surveys the "best" practice to be followed by the Judges. Put otherwise, the manual is intended not as a descriptive tool but as a prescriptive tool, prompting the Judges to follow what has been identified collectively as "best practice". Today, the practice relating to victim participation forms an integral part of the manual and since 2016 the Judges have, consistently on the appearance of each new edition, endorsed a clear practice which conforms to the letter and spirit of rule 89(1). The Judges have consistently reaffirmed that practice and have done so fully aware of the various approaches adopted by some Pre-Trial Chambers.

16. The OPCV suggests here that the Judges merely neglected to update the manual to reflect the Court's practice.[6] However, it must be noted that the regime for granting victims' applications for participation was first adopted by the Judges in the 2016 version of the practice manual, i.e. after the decision on victims' participation in the *Ntaganda* case (2015). The Bench in that case departed from the letter of rule 89 and from the consistent practice at the ICC of providing the parties with all victims' applications for participation. The victim participation regime adopted by all the Judges of the Court in the practice manual therefore *de facto* challenged the decision in *Ntaganda*, since it prescribed a victim participation regime in line with rule 89, allowing the parties to receive all of the victims' applications for participation, to analyse them and to submit observations on them. The regime was then maintained in that form in the subsequent 2017 version of the manual and in the latest version of November 2019, i.e. after the decisions in *Al Hassan* (2018) and *Yekatom and Ngaïssona* (March 2019).

17. Since the purpose of the manual is to serve as a basis for the Judges to make consistent decisions, and thus to provide legal certainty to the Parties, who can

[6] ICC-01/14-01/21-105, para.17.

anticipate the Judges' policy on particular matters, it is crucial that the manual be taken into account in the discussion at hand.

1.5 Contrary to the OPCV's claim, the existence of the procedure laid down in regulation 99 supports the Defence's position

18. The OPCV states that:

> lastly, in relation to the Defence's arguments on regulation 99 of the Regulations of the Registry, Counsel posits that they actually run against the Defence's position on the matter on appeal. In fact, such provision confirms that the Registry has an obligation to consider the security situation of the relevant victims before advising the Chamber on the non-disclosure to the parties of "all or part of the information provided" in the application forms. Accordingly, the provision supports the correctness of the Chamber's approach and its discretion in organising the transmission and admission of victims' application forms in light of article 68(1) of the Statute.[7]

19. First, the Defence would make the point that it has at no time questioned the Registry's role of verifying whether redactions need to be applied in order to perform its task of protecting the victims. On the contrary, in its response to the OPCV's request to appear in these proceedings it drew attention to the importance of ensuring the implementation of article 68(1) in the context of the victim participation regime.[8]

20. Second, the statement that regulation 99 "supports the correctness of the Chamber's approach and its discretion in organising the transmission and admission of victims' application forms in light of article 68(1) of the Statute"[9] does not reflect what has actually been put in place in this case. It is plain from the letter of regulation 99 that: (1) the Registry must first review the individual applications for participation in its possession to identify any information that may have to be redacted

[7] ICC-01/14-01/21-105, para. 19.
[8] ICC-01/14-01/21-93-Conf, para. 34.
[9] ICC-01/14-01/21-105, para. 19.

for reasons of safety and security; (2) the Registry must then inform the Chamber of the results of its assessment and make recommendations. Regulation 99 does not in the slightest provide that the Registry may, without having seen a single application for participation and without having considered the personal situation of a single victim, recommend in general and generic terms, as it did in its initial report of 25 February 2021 in this case, that none of those applications should be disclosed to the Defence. It is of the essence that the Registry perform that exercise in advance of any decision concerning victims' applications for participation because that – important – task will assist the Bench in its decision-making on the need for protective measures for victims.

21. Third, the fact that regulation 99 sets out so clearly the steps that the Registry must follow proves that the presumption under rule 89(1) is that victims' applications for participation will be disclosed to the Parties, not that non-disclosure will be the norm.

1.6 The OPCV's expositions on the standard of proof used to verify the criteria for applicants to participate as victims in the proceedings are not dispositive of the issue on appeal

22. The OPCV expounds[10] on the standard of proof used to verify the criteria according to which applicants qualify to participate as victims in the proceedings – be it the link to the accused or the link between the harm suffered and the accused and/or the charges – in response to the Defence's thesis that in the application for participation an applicant by definition directly or indirectly places responsibility on, and therefore accuses, the person charged. However, in its appeal brief the Defence

[10] ICC-01/14-01/21-105, paras. 23, 24 and 25?

did not address the standard of proof but rather emphasized the significance attaching to a victim application for participation throughout the proceedings, in particular because in an application for participation an applicant directly or indirectly accuses the person charged, whence the importance, in the Defence's view, of rigour in assessing an application for participation. The standard of proof is a different matter and has no bearing on the principle that a victim who wishes to participate in the proceedings must show a link to the charges, whatever the applicable standard. This goes to the very essence of victim participation in a specific case, and it stands to reason that the Court has, as a matter of course, consistently held that link to be a requirement. For example, in *Lubanga*, in 2006, the Pre-Trial Chamber stated that:

> CONSIDERING that at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant.[11]

The victim participation manual drawn up by the OPCV confirms that this is so:

> At the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they suffered and the crimes for which there are reasonable grounds to believe that the persons brought to the court bears criminal responsibility and for which the Chamber has issued an arrest warrant.[12]

23. The OPCV's discussion of the standard of proof therefore does not alter the simple logical observation that a participating victim is one who makes an accusation, since doing so is the *administrative and procedural requirement* that must be satisfied in order to participate in the proceedings. If the applicant does not directly or indirectly accuse the person charged, that applicant cannot be admitted to participate in the proceedings. That is why, to ensure the fairness of the proceedings, it is important that the Defence is able to verify whether the persons wishing to participate in the

[11] ICC-01/04-01/06-172-tEN, p. 6.

[12] OPCV, *Representing Victims before the International Criminal Court A Manual for legal representatives*, p. 66.

proceedings do in fact fulfil the requirements to do so, since in practice they will be acting in the proceedings in order to accuse the person charged.

1.7 In its submissions, the OPCV mistakenly asserts that the participation regime adopted by the Single Judge does not cause prejudice to the Defence[13]

24. The Defence emphasizes at the outset that infringement of the Court's instruments by definition causes prejudice to the Party whose rights are limited as a result of that infringement. That the drafters of the Statute and the RPE explicitly established a specific legal regime for the disclosure of applications for participation means by definition that they considered that the regime must be complied with and that non-compliance would have the effect of causing prejudice to the Party entitled to the protection of that legal regime.

25. That said, in this case, before both the Pre-Trial Chamber[14] and the Appeals Chamber,[15] the Defence has established other kinds of prejudice that it would suffer as a result of not having access to victims' applications for participation and which would affect the fairness of the proceedings, as the Single Judge confirmed by granting the Defence's application for leave to appeal.[16] Added to the prejudice already claimed by the Defence in the current proceedings in this appeal (that is to say, the prejudice resulting from the lack of notice and opportunity to be heard concerning the process for granting applications for participation, and the prejudice that inherently results from a victim's participation in the proceedings) is the prejudice that would result from the Defence's not being able to gain access to the applications for participation

[13] ICC-01/14-01/21-105, para. 22.
[14] ICC-01/14-01/21-36-tENG, paras. 32-35, ICC-01/14-01/21-63-tENG, paras. 43-48.
[15] ICC-01/14-01/21-88-tENG, para. 13.
[16] ICC-01/14-01/21-79.

as part of its preparations because the OPCV states that "[u]nlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature" and "are intended to serve a limited purpose". The Defence comments as follows in that regard:

26. First, the fact that an application for participation starts as an administrative document enabling a victim to participate is one thing; the usefulness of that application to the Defence's preparation is another. Thus the OPCV is treating the reason for a document's creation on the same footing as its usefulness in judicial proceedings, specifically criminal proceedings in which the document may become incriminating or exonerating evidence depending on what the Parties wish to show in the course of the trial.

27. Once the applications for participation have been granted by the Single Judge, they will be submitted into the record. Although initially the applications for participation are not submitted into the record as evidence in the strict sense, practice has shown that victims' applications for participation are key elements in the Parties' investigations and crucial to the preparation of the Defence (a right guaranteed by article 67(1)(b)), and that during the proceedings some victims' applications for participation will in fact be used as evidence.

28. Indeed, the nature of what constitutes evidence and its characterization as evidence is not a static concept that can be predetermined in the abstract. A document, such as a victim's application for participation, may at first sight not be marked or numbered as evidence but prove on analysis to be useful. The Parties will be able to decide from reading a document, whatever it may be – a victim's application for participation, a witness's prior statement, an NGO report, photographs, videos, a media article or anything else – whether it is relevant. For example, a document may

contain both incriminating and exonerating information, and the Parties will then need to decide whether they wish to disclose it and use it as evidence in the proceedings. Similarly, a document may be useful to the Prosecution or to the Defence because it is at first an investigatory lead, and, depending on the outcome of the investigation, one of the Parties may decide to use it as evidence. It is therefore only once a document – such as a victim's application for participation – has been analysed that it may, depending on the strategic choices of the Parties, *become* evidence in the record. Under the Court's evidentiary regime, therefore, it cannot be unreservedly stated, sight unseen, that a category of documents cannot become evidence, because that will depend on the Parties' assessment of those documents. The Parties must, however, be enabled to examine the documents in order to perform their roles and in order for the Defence to have all the information relevant to preparing its case. The point of the exercise is to give effect to a fundamental right of the defence.

29. More specifically, in proceedings before the ICC, many administrative documents that were drawn up for a different purpose (marriage certificates, death certificates, interview records, domestic complaints, police reports, articles of association, identity documents, medical certificates, etc.) have been entered in the record as evidence by the Parties – both Prosecution and Defence. Such documents were originally drawn up by administrative authorities for various purposes, including to confer rights on individuals. For example, a marriage certificate is not drawn up to serve as evidence but to confer rights on the couple. Although it is intrinsically an administrative document, the Prosecution frequently submits a marriage certificate as evidence.

30. Victims' applications for participation are by definition useful for the preparation of the Defence of a person charged, and they frequently become evidence in the course of the proceedings.

31. The Defence notes that while it has shown in detail how failure to follow the system established by rule 89(1), prescribing that victims' applications for participation (redacted if necessary) are to be disclosed – as they were for example in *Lubanga*, *Katanga and Chui*, *Bemba*, *Gbagbo and Blé Goudé* and *Ongwen* – was unfair to the Defence, at no point in the OPCV's submissions has it been explained or demonstrated in what respect following that system would be unfair to the victims.

Conclusion

32. On analysis, it is therefore apparent that the OPCV has not advanced any argument that justifies non-compliance with the letter and spirit of rule 89(1), which provides that victims' applications for participation are to be disclosed to the Parties.

2. Response to the observations of the Registry's representatives

33. The Defence notes at the outset that the Registry has not adduced anything dispositive of the question at issue before the Appeals Chamber concerning the legal interpretation of rule 89(1) of the Rules of Procedure and Evidence. The Registry has not expounded any legal argument or replied to the discussion of the law set out by the Defence in its appeal brief. The Registry has confined itself essentially to (1) describing the various procedural stages in the proceedings thus far; (2) calling to mind the various practices followed in other cases; and (3) – forming the bulk of its submissions – explaining in what respects the procedure adopted by the Single Judge, on the Registry's recommendation, would represent a saving of time and money for the Registry. In reality therefore the Registry's position comes down to a logistical and

financial argument: the Registry is saying that it is not required to put in place the means necessary to redact victims' applications for participation (if indeed redactions are required), even though doing so would enable the Defence to inspect the victims' applications for participation as it is entitled to do under rule 89(1).

34. The Defence considers that all the logistical and financial matters referred to by the Registry, whose task is to distribute the resources to enable the actors in the legal proceedings to perform their tasks, fall outside the scope of this appeal, since an instrument that establishes rights cannot be interpreted by reference to such considerations. The fact that the Registry's observations do not adduce anything going to the question at issue and focus solely on logistical and financial questions is in the view of the Defence justification for rejecting those observations *in limine*. Were the Appeals Chamber nevertheless to entertain the Registry's submissions, the Defence makes the following observations:

2.1 At no stage in its reasoning does the Registry show that withholding the victims' applications for participation from the Parties is warranted

35. The first stage of the Registry's reasoning is that there are risks to the victims, owing to the security context in a given situation, which arise from their interaction with the Court.[17] It is undeniable that the Court intervenes in situations in which the security context poses challenges. Nevertheless, any risk arising from interaction with the Court arises from the moment a person wishing to participate in the proceedings makes contact with a Registry body. There is no correlation between any such risk, which arises as a result of interaction with the Court, and the procedure internal to the judicial process of assessing the applications for participation. The judicial process of

[17] ICC-01/14-01/21-106, para. 15.

assessing the applications for participation is a rigorous confidential exercise that takes place between legal professionals bound by ethical duties. As a confidential process internal to the Court, it does not allow any link whatsoever with the Court to be revealed and therefore involves no risk.

36. To be precise, the Registry has at no point shown that any risk would arise specifically from disclosure of the applications for participation – let alone redacted applications – to the Parties. Nothing in the Registry's observations even addresses any risk supposedly resulting from disclosure of the applications to the Parties.

37. Viewed from the standpoint of the risks arising from an applicant's interaction with the Court, which is the perspective the Registry is taking, the security context of a situation would almost always prevent the victims from participating in the proceedings, since interaction with the Court is a prerequisite for such participation.

38. Furthermore, if the existence of a general risk arising from the security context in situations before the Court prevented applications for participation from being provided to the Parties, why would the drafters of the RPE, knowing the kind of situation in which the Court would have to intervene, have established a regime for disclosing the applications for participation to the Parties? Why was that regime applied in *Lubanga*, *Gbagbo*, *Katanga*, *Bemba* and *Ongwen*, cases in which the security situations could, on the Registry's reasoning, have been considered to pose challenges and to involve risk?

39. The second stage of the Registry's reasoning concerns the large number of redactions that it claims would need to be applied to the – likewise numerous – applications for participation. As justification for providing almost no applications for participation to the Defence, since the start of the proceedings, the Registry's

representatives have asserted that a very large number of redactions would need to be applied.

40. First, the Registry has at no point shown in practical terms that it would be necessary to apply a large number of redactions in the instant case. The Defence emphasizes that disclosing information to the Parties cannot be equated with disclosure to the general public. The parties are under significant ethical and professional obligations. Accordingly the number of redactions must be very limited and justified in each individual case.

41. Second, still in respect of the allegedly large number of redactions that would need to be applied, no indication has been provided by the Registry or submitted into the case record that, in this case, there are in reality a large number of participating victims. Nothing in the record appears to suggest that there will in fact be many applications for participation. On the contrary, the Defence notes that the geographical and factual scope of the charges is likely to admit only a limited number of participating victims. The Defence observes in this respect that the Registry itself states in its report on the representation of victims that "**only a small number of potential victims have been identified so far**".[18] In this case, therefore, it cannot be assumed, with a view to limiting the transmission of the applications for participation to the Parties, that there will be a large number of applications for participation or a resulting large number of applications to be redacted.

42. In that regard, the Defence would point out that the Registry has not explained how non-disclosure of the applications for participation to the Parties would have any impact on the number of people wishing to participate in the proceedings. At any rate,

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[18] ICC-01/14-01/21-80-AnxII-Red, para. 76. Emphasis added.

the figures provided by the Registry itself do not appear to corroborate its position; quite the reverse. The Registry states in its observations that more than 5,000 applications were considered in *Bemba* and more than 4,000 in *Ongwen* – but in both those cases rule 89(1) was complied with and the applications were provided to the Parties.[19] In contrast, in the cases in which the ABC regime was implemented, it is noted that relatively few victims were admitted to participate: 151 in *Abd-Al-Rahman*, 325 in *Yekatom and Ngaïssona* and 800 in *Al Hassan*. Those figures are well below those in *Bemba* and *Ongwen* and are of the same order of magnitude as in other cases before the ICC. There therefore seems to be no correlation, let alone any causal link, between the admission regime adopted and the number of victims admitted to participate. Moreover, there is no link between the ability of individuals in the Central African Republic to apply to participate and the fact that the Parties may exercise their right to inspect such applications. Those are two separate things, concerning two different moments in the process.

43. Third, even if it were necessary to redact the applications for participation, that circumstance cannot be grounds for not transmitting the applications for participation to the Defence solely because it would take time for the Registry to do so. Logistical and financial reasons cannot be used as grounds for limiting the Parties' right to information in the record. What otherwise would prevent the Prosecution, by that standard, from withholding evidence from the Defence because it considers that redacting it would be too time-consuming? The Registry has a responsibility to use all the means necessary to perform its task instead of taking the view, abstractly and on principle, that a key exercise that safeguards respect for the rights of the defence and the right to a fair trial is too complicated to perform and therefore asking the Bench to dispense with performance of that task for logistical and budgetary reasons. The

[19] ICC-01/14-01/21-106, para. 30.

Registry has a duty to provide assistance to the Parties and the Chamber to ensure that they have the necessary information and therefore that the Court can conduct fair trials.

44. At this stage in the reasoning, the Appeals Chamber will be able to see that none of the "arguments" put forward by the Registry is justification for not complying with the requirements of rule 89(1) and accordingly not disclosing the applications for participation to the Parties. Redacting the victims' applications for participation is sufficient to safeguard both the interests of the victims and the rights of the Parties, including those of the Defence. That is what rule 89(1) and regulation 99 clearly provide (see above).

45. Since the interests of the victims are fully safeguarded and protected by the redaction procedure (which exists for precisely that purpose: see regulation 99), it is not the interests of the victims and their protection that underpin the Registry's position that, on principle, almost none of the applications for participation should be disclosed to the Defence. The logistical and financial argument alone is left to support that position.

46. Likewise, were there a principled argument as to victim safety for not disclosing the applications for participation, logically that argument would concern all three categories, A, B and C, rather than categories A and B alone. The fact that the Registry is able to disclose the category C applications for participation clearly demonstrates that there is no principled justification for why the applications cannot be disclosed to the Parties.

47. Put otherwise, the fact that the Registry can redact the category C applications for participation means that there is no principled justification for why it cannot redact applications in categories A and B. The only argument offered by the Registry relates to the saving of time and money that would be made if it did not have to put in place the means necessary to redact the category A and B applications for participation. The Registry therefore seems to be making a bureaucratic decision not to allocate the resources necessary to redact the category A and B applications, which has the consequence of barring the Defence from exercising a right, and in practice prevents it from factoring the applications for participation into its preparation.

2.2 The Registry's assertion that "the approach has been found to be conducive to expeditious proceedings"[20] cannot be entertained here because it would have the effect of giving precedence to the expeditiousness of the proceedings in the abstract over the actual exercise of the Accused's rights, specifically the right to be provided with the applications for participation

48. The expeditiousness of the proceedings is a right of the person charged to be tried without undue delay. What is undue delay? It is delay caused by conduct attributable either to the Prosecutor or to the Chamber. In no way can the exercise of the Accused's rights be considered a "delay" in the proceedings. Therefore, Mr Said's right to be tried expeditiously cannot be used against him to bar the exercise of the rights vested in him by the Statute and the Rules of Procedure and Evidence, in this instance the right of the Defence to inspect the victims' applications for participation. The consequence of such an approach would be either to prohibit the person charged from exercising his or her fundamental rights, or to put such persons in the impossible position of having to "choose" between their different rights.

[20] ICC-01/14-01/21-106, para. 33.

49. Proceedings conducted expeditiously because they did not allow the person charged to exercise all of his or her rights would, by definition, be unfair. Therefore, the person charged must be put in a position where he or she can actually exercise all of his or her rights under the Statute and the Rules of Procedure and Evidence. The desire to accelerate the proceedings on principle could result in the Accused's being unable to exercise those rights in practice. For example, the reasoning that leads to limiting the exercise of a right expressly provided for in the founding instruments (here rule 89) could also, by analogy, justify limiting the exercise of the right of the Accused to "have adequate time and facilities for the preparation of the defence" because the exercise of that right would be too time-consuming. Similarly, the approach of expediting the proceedings without allowing for the exercise of the rights of the person charged could justify limiting the Accused's right to receive all prior witness statements because of the number of statements or the volume of redactions to be made.

2.3 <u>In its observations, the Registry errs in stating that the participation regime adopted by the Single Judge does not cause prejudice to the Defence</u>

50. It can be seen from the Registry's observations that, like the OPCV, its representatives understate the impact that not receiving the applications for participation would have on the Defence. According to the Registry,

> while key provisions pertaining to the handling of evidence such as article 69 of the Statute and rules 63 et seq. of the Rules (and notably rule 77) apply to witnesses before the ICC, they do not to victims– unless they are also called to take the oath and provide evidence as witnesses. This distinction is important because the fair trial rights of the Defence are a fundamental building block of the evidence regime at the ICC, while they may be much less impacted in administrative processes such as the facilitation of victims' access to the ICC.[21]

[21] ICC-01/14-01/21-106, para. 14.

51. During these proceedings and in these submissions in particular, the Defence has already set out the practical importance, to respect for the rights of the person charged, of receiving the applications for participation (see paragraphs 24-31, above); what is specifically involved in its work; and how it uses the procedural tools available to it in the Court's founding instruments to ensure that it can fully exercise those rights. The Parties, and the Defence in particular, must be in a position to avail themselves of all the rights, all the guarantees and all the safeguards laid down in the Court's governing instruments to enable trials to be conducted fairly. The Parties can freely choose to avail themselves of a particular right and therefore a particular procedural remedy. Here, the Defence has explained how analysing the applications for participation enables the practical exercise of the rights of the Defence, including the right to have adequate time and facilities for its preparation (article 67(1)(b)), since the applications assist the Defence in understanding the charges brought against the Accused, enable it to carry out full investigations and afford an opportunity to verify the Prosecution evidence and the Prosecution case in general. The applications also enable the Defence to build its own case and its own strategy, and inform the choices made concerning, for example, the evidence to be disclosed and its admissibility and credibility.

52. The administrative approach taken by the Registry's representatives to the victim participation process and to the victims' applications for participation in particular is inherently incapable of taking into account the reality of the work to be done by the Parties or how the Parties, including the Defence, have decided to use the rights conferred on them by the instruments. The Registry is a neutral body and is not a Party to the trial; it has no contentious role to play in the proceedings. While the Registry might, from its perspective, regard victim participation as an administrative procedure because the Registry's representatives intervene purely in an administrative context, it is not in a position to know whether a victim's application

for participation might be vital to an investigation (and therefore fall squarely within the Court's evidentiary regime) and might subsequently become evidence. In consequence, the victim admission procedure cannot be artificially separated from the evidentiary regime. The Registry itself makes the point that "the fair trial rights of the Defence are a fundamental building block of the evidence regime at the ICC". It should therefore be left to the Defence to assess what does or does not fall within the evidentiary regime.

53. The Parties have control of the cases they present and their strategic choices and it is therefore they who can explain how they actually make use of the procedural remedies available to them. It is not for the Registry to interfere in that use; on the contrary, its role is to support them, both Prosecution and Defence. The Registry cannot put itself in the place of an experienced Defence that has – in part by dint of analysing applications for participation – constructed cases and shed light on crucial points relating to the evidentiary regime in the proceedings in which it has acted. The Registry's representatives are therefore not able to assess the impact on the Defence, and especially the procedural handicap, that non-disclosure of the applications for participation to the Defence could cause.

Conclusion

54. On analysis, it is therefore apparent that the Registry has not advanced any argument that justifies non-compliance with the letter and spirit of rule 89(1), which provides that victims' applications for participation are to be disclosed to the Parties.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 28 June 2021 at The Hague, Netherlands.