

Pursuant to Decision ICC-01/14-01/22-80 dated 19.08.2022 this document is reclassified as Public

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

**No. ICC-01/14
Date: 25 March 2021**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

Under seal, *ex parte*, only available to the Prosecutor and the Registry

**Decision on the ‘Prosecution’s Request to Inform Mr Nicholas Kaufman of the
Existence of a Warrant of Arrest for Mahamat Nouradine Adam’**

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

The Office of the Prosecutor Ms Fatou Bensouda Mr James Stewart	Counsel for the Defence
Legal Representatives of Victims	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants for Participation/Reparations
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States Representatives	<i>Amicus Curiae</i>

REGISTRY

Registrar Mr Peter Lewis	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,¹ issues this Decision on the ‘Prosecution’s Request to Inform Mr Nicholas Kaufman of the Existence of a Warrant of Arrest for Mahamat Nouradine Adam’ (the ‘Request’).²

1. On 7 January 2019, the Single Judge issued the ‘Warrant of Arrest for Mahamat Nouradine Adam’ (the ‘Warrant of Arrest’ and ‘Mr Adam’) under seal, *ex parte*, only available to the Prosecutor.³

2. On 8 March 2021, the Prosecutor filed the Request, submitting that (i) Mr Adam signed a power of attorney to appoint Mr Nicholas Kaufman (‘Mr Kaufman’) as his Counsel;⁴ (ii) Mr Kaufman ‘has [...] been in contact with the Prosecution to enquire about the existence of a Warrant of Arrest for his client [Mr Adam]’; and (iii) whilst having so far neither ‘disclosed nor acknowledged the existence of a Warrant of Arrest’, in light of ‘the time since the issuance of the Warrant of Arrest, the current location of [Mr Adam] and the transfer of co-suspect SAID’ to the Court, ‘possible options to execute the Warrant of Arrest for [Mr Adam] should now directly be discussed with Mr Kaufman’. Accordingly, the Prosecutor seeks ‘authorisation to inform Mr Kaufman, as soon as possible, of the existence of the Warrant of Arrest and the corresponding charges for his client [Mr Adam] in order to discuss options to facilitate its execution’.

3. On 19 March 2021, upon order of the Single Judge,⁵ a status conference was held in closed session, *ex parte* with the Prosecutor and the Registry only, with a view to discussing the Request and addressing issues arising therefrom.⁶

¹ Decision on the designation of a Single Judge, 17 March 2021, ICC-01/14-141. *See also* Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, ICC-01/14-139, assigning the situation in the Central African Republic II to Pre-Trial Chamber II, the composition of which remained unchanged; Pre-Trial Chamber II, Decision on the Election of the Presiding Judge, 17 March 2021, ICC-01/14-140, deciding that Judge Rosario Salvatore Aitala is the Presiding Judge of Pre-Trial Chamber II.

² ICC-01/14-138-US-Exp, with under seal, *ex parte*, only available to the Prosecutor Annexes A and B (ICC-01/14-138-US-Exp-AnxA, ICC-01/14-138-US-Exp-AnxB).

³ ICC-01/14-41-US-Exp (redacted under seal, *ex parte*, only available to the Prosecutor and the Victims and Witnesses Unit version notified on 31 January 2019, ICC-01/14-41-US-Exp-Red).

⁴ Request, para. 8. *See also* Annex A and B to the Request, respectively containing the power of attorney signed by Mr Adam and pictures of Mr Adam signing said document.

⁵ Order convening a status conference, 18 March 2021, ICC-01/14-142-US-Exp.

⁶ Transcript of hearing, ICC-01/14-T-006-CONF-EXP-ENG.

4. The Single Judge recalls that the Warrant of Arrest was issued, and remains to this day, under seal, *ex parte* only available to the Prosecutor. This classification was decided pursuant to regulation 23bis of the Regulations of the Court (the ‘Regulations’)⁷ based on the reasons submitted by the Prosecutor in the application under article 58 of the Rome Statute (the ‘Statute’), namely (i) the protection of ongoing investigations; (ii) the protection of victims and witnesses; and (iii) the facilitation of the arrest of the suspects and their transfer to the seat of the Court.⁸

5. At the outset, the Single Judge notes that the Prosecutor does not indicate a legal basis for the Request, which might lead to its rejection *in limine*. By the same token, since the Prosecutor requests that the Single Judge authorise the Office of the Prosecutor ‘to inform Mr Kaufman, as soon as possible, of the existence of the Warrant of Arrest’,⁹ the Single Judge considers that, in essence, the Prosecutor is seeking a partial reclassification of the level of confidentiality of the Warrant of Arrest; more specifically, to include Mr Kaufman and Mr Adam among those having access to it (or at least, if not to its content, to the fact of its existence). The fleeting reference to the regulation that deals with under seal documents made by the Prosecutor during the status conference¹⁰ seems to indicate that the Prosecutor frames the Request in the same or similar terms. Accordingly, in the interest of the efficiency of the proceedings, the Single Judge will consider the Request as an application for reclassification pursuant to regulation 23bis of the Regulations, according to which ‘[w]here the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document’. The regulation makes it clear that each and every application for amendment of the level of confidentiality must be supported by information allowing the Chamber to determine that ‘the basis for the classification no longer exists’. The Single Judge notes that the

⁷ Warrant of Arrest, para. 26.

⁸ Prosecutor’s application pursuant to article 58 for warrants of arrest against Mahamat Nouradine ADAM, Mahamat SAID Abdel Kani, Adam Babala ASSEID, Mahamat Ahmat MAKIN and Ibrahim FAKI, 30 October 2018, ICC-01/14-19-US-Exp, paras 275-276.

⁹ See also Transcript of hearing, 19 March 2021, ICC-01/14-T-006-CONF-EXP-ENG, p. 3 lines 20 to 22 (‘Our request to the Chamber is to be able to, first of all, reveal to Mr Kaufman indeed the existence of the warrant and then therefore being able to speak to him freely about why he wants to talk to us and listen to him’) and p. 4 lines 21-22 (‘[...] what we want to do is to listen to Mr Kaufman, see what his client has in mind, see if it’s possible to agree. [...]’).

¹⁰ Transcript of hearing, 19 March 2021, ICC-01/14-T-006-CONF-EXP-ENG, p. 12 line 6.

Prosecutor fails to provide information suitable to substantiate this requirement and explicitly opposes a reclassification of the Warrant of Arrest, by stating that '[t]he Prosecution has also contemplated the option of making the Warrant of Arrest public, but believes that it should still remain under seal for strategic reasons and that public disclosure, at this juncture given the known circumstances, would not increase chances of execution'.¹¹

6. The Single Judge recalls that both the need to ensure the protection of witnesses and victims and to avoid that Mr Adam become aware of the existence of a warrant for him were critical considerations underlying the initial decision to issue the Warrant of Arrest as under seal. Similar considerations were also at the heart of several of the Prosecutor's submissions following the recent surrender of Mr Said, another suspect in the situation; if, to what extent and in what form the link between Mr Said and Mr Adam should be among the details of the *Said* case available to the public originated a number of submissions and decisions by the Chamber.¹² At the status conference, the Prosecutor acknowledged that granting the Request would imply risks in terms of protection of the relevant witnesses and victims.¹³ The Single Judge, mindful of the Chamber's obligation to ensure the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in accordance with article 68(1) of the Statute, is not persuaded by the Prosecutor's generic statement to the effect that, should Mr Adam and his counsel become aware of the existence of the Warrant, those risks would be 'manageable'. Furthermore, the Court is not in a position to monitor or otherwise influence either Mr Adam or Mr Kaufman, or their behaviour *vis-à-vis* victims and witnesses, unless and until they appear before the Court as respectively suspect and Counsel for the suspect.

¹¹ Request, para. 6. *See also* Transcript of hearing, 19 March 2021, ICC-01/14-T-006-CONF-EXP-ENG, p. 19 lines 24 to 25 and p. 20 lines 1 to 5 and 7 to 8.

¹² *See in The Prosecutor v. Mahamat Said Abdel Kani*: Prosecution's Urgent Request for Additional Redactions to the Arrest Warrant for Mahamat Said Abdel Kani, 24 January 2021, ICC-01/14-01/21-16-US-Exp with under seal, *ex parte*, only available to the Prosecutor and the Registry Annex A (ICC-01/14-01/21-16-US-Exp-AnxA); Decision Ordering a Consolidated Request for Redactions to the Warrant of Arrest, 9 February 2021, ICC-01/14-01/21-14-US-Exp; Prosecution's Updated Request for Redactions to the Warrant of Arrest for Mahamat Said Abdel Kani, 12 February 2021, ICC-01/14-01/21-19-US-Exp; Decision on the 'Prosecution's Updated Request for Redactions to the Warrant of Arrest for Mahamat Said Abdel Kani', 17 February 2021, ICC-01/14-01/21-21-US-Exp.

¹³ Transcript of hearing, 19 March 2021, ICC-01/14-T-006-CONF-EXP-ENG, p. 12 lines 12 to 25 and p. 13 lines 1 to 10.

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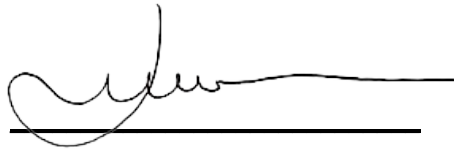
7. Finally, as regards the contention to the effect that the prospects for Mr Adam's appearance before the Court would be enhanced, rather than weakened, if himself and his Counsel would be made aware of the Warrant of Arrest, the Single Judge notes that it directly contradicts the submissions of the Prosecutor both at the time of the issuance of the Warrant of Arrest and, more recently, in the context of the *Said* case; even leaving aside this aspect, the information provided by the Prosecutor both in the Request and at the status conference is insufficient for the Chamber to be satisfied that this would indeed be the result of granting the Request. It remains in particular unclear why Mr Adam's alleged determination to appear before the Court would be strengthened by, or even entirely conditional upon, receiving confirmation by the Prosecutor that a warrant for Mr Adam indeed exists.

8. The Single Judge clarifies that this decision is without prejudice to the Prosecutor and the Registry's statutory responsibilities, prerogatives and established practices in connection with the execution of warrants of arrest and, accordingly, encourages the Prosecutor to pursue the efforts aimed at enhancing the prospects for Mr Adam's prompt appearance before the Court, in close cooperation with the relevant services of the Registry.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Thursday, 25 March 2021

At The Hague, The Netherlands