

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/21

Date: 23 March 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Confidential

Decision on the 'Prosecution's Request for Leave to Reply to the Defence's Consolidated Response' and the 'Prosecution's Response to Defence Request for the Translation of Protocols'

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

Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri

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

Amicus Curiae

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 (the ‘Chamber’ and the ‘Court’), issues this Decision on the ‘Prosecution’s Request for Leave to Reply to the Defence’s Consolidated Response’ and the ‘Prosecution’s Response to Defence Request for the Translation of Protocols’.

I. PROCEDURAL HISTORY

1. On 7 January 2019, Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of the Chamber, issued the ‘Warrant of arrest for Mahamat Said Abdel Kani’ (‘Mr Said’).¹
2. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.²
3. On 25 January 2021, Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.³
4. On 29 January 2021, in accordance with the Single Judge’s decision dated 26 January 2021⁴ and his further instructions dated 28 January 2021⁵, Mr Said appeared before the Single Judge pursuant to article 60(1) of the Rome Statute and rule 121(1) of the Rules of Procedure and Evidence.
5. On 5 February 2021, the Single Judge received the ‘Prosecution’s Submissions on the Modalities and Procedure for Evidence Disclosure’⁶ (the ‘Prosecutor’s Submissions’) and the ‘Prosecution’s Proposal for Protocol on the Handling of

¹ ICC-01/14-01/21-2-US-Exp; a public redacted version is also available, see ICC-01/14-01/21-2-Red2.

² Registry, Report of the Registry on the Arrest and Surrender of Mr Mahamat Said Abdel Kani and Request for Guidance, 27 January 2021, ICC-01/14-01/21-6-US-Exp, paras 13-27; a confidential redacted, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version is also available, see ICC-01/14-01/21-6-Conf-Exp-Red; a lesser redacted confidential, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version was filed on 18 March 2021, see ICC-01/14-01/21-6-Conf-Exp-Red2.

³ Decision on the designation of a Single Judge, ICC-01/14-01/21-3.

⁴ Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani, ICC-01/14-01/21-4.

⁵ ICC-01/14-01/21-T-001-ENG, pp 4-5.

⁶ ICC-01/14-01/21-11-Conf, together with public annex A and confidential annex B.

Confidential Information and Contacts with Witnesses' (the 'Prosecutor's Protocol Proposal').⁷

6. On 26 February 2021, following the appointment of Ms Naouri as Counsel for Mr Said,⁸ the Single Judge, by way of email, instructed the Defence to submit a consolidated response to the Prosecutor's Submissions and the Prosecutor's Protocol Proposal and extended the time limit for this consolidated response to 8 March 2021 at 16:00 hours.⁹

7. On 8 March 2021, the Single Judge received the 'Réponse consolidée de la Défense à la « Prosecution's Submissions on the Modalities and Procedure for Evidence Disclosure » (ICC-01/14-01/21-11-conf) et à la « Prosecution's Proposal for Protocol on the Handling of Confidential Information and Contacts with Witnesses » (ICC-01/14-01/21-13)' (the 'Consolidated Response').¹⁰

8. On 10 March 2021, the Single Judge received the 'Prosecution's Response to Defence Request for the Translation of Protocols' (the 'Prosecutor's Response')¹¹ and the 'Prosecution's Request for Leave to Reply to the Defence's Consolidated Response - ICC-01/14-01/21-32-Conf dated 8 March 2021' (the 'Prosecutor's Request').¹²

9. On 17 March 2021, following the recomposition of the Chambers by the Presidency,¹³ Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.¹⁴

10. The Single Judge has not received a response to the Prosecutor's Request within the time limit defined by regulation 34(c) of the Regulations of the Court (the 'Regulations').

⁷ ICC-01/14-01/21-13, together with one confidential annex.

⁸ Notification of the Appointment of Ms Jennifer Naouri as Counsel for Mr Mahamat Said Abdel Kani, ICC-01/14-01/21-24, together with confidential annex III and public annexes I and II.

⁹ Email from the Single Judge to Counsel for Mr Said, at 15:20 hours.

¹⁰ ICC-01/14-01/21-32-Conf.

¹¹ ICC-01/14-01/21-33-Conf.

¹² ICC-01/14-01/21-35-Conf.

¹³ Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, ICC-01/14-01/21-40.

¹⁴ Decision on the designation of a Single Judge, ICC-01/14-01/21-42.

II. SUBMISSIONS RECEIVED BY THE SINGLE JUDGE

A. The Prosecutor's Response

11. The Prosecutor submits that the Defence request to translate all protocols in the present proceedings into French should be rejected.¹⁵ According to the Prosecutor, 'the working languages of the Court are *both* French and English' and the Defence 'showed that it is capable of submitting a detailed response to the Prosecution Requests demonstrating that the protocols were understood and their work not impaired'.¹⁶

12. The Prosecutor further contends that '[Mr Said] is not prejudiced by the lack of translation of the protocols into French'.¹⁷ In the view of the Prosecutor, '[t]he protocols governing the modalities of disclosure as well as issues of confidentiality are mere auxiliary documents governing procedural aspects of the proceedings' with the 'primary purpose [...] to govern and assist the Parties in the conduct of the proceedings'.¹⁸ The Prosecutor also avers that, pursuant to the statutory framework, as interpreted by the Appeals Chamber and other chambers of this Court, 'only the document containing the charges, the decision confirming the charges, the list of the evidence relied upon by the Prosecutor and the witnesses' statements should be made available to a suspect and accused in a language he or she fully understands and speaks'.¹⁹ Therefore, according to the Prosecutor, a lack of translation of 'a document of the type of the protocols at issue here would not amount to infringing the right set forth in article 67(1)(a), in particular when the suspect can rely on counsel able to function effectively in both working languages of the Court, which is the case here'.²⁰

13. Finally, the Prosecutor suggests that the Single Judge 'should consider consulting the Registry on this matter', as 'translating procedural documents of this nature would

¹⁵ ICC-01/14-01/21-33-Conf, paras 1, 3.

¹⁶ ICC-01/14-01/21-33-Conf, para. 4 (emphasis in original).

¹⁷ ICC-01/14-01/21-33-Conf, para. 5.

¹⁸ ICC-01/14-01/21-33-Conf, para. 5.

¹⁹ ICC-01/14-01/21-33-Conf, para. 5, n. 6-7, referring to Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, Decision on Mr Gbagbo's request for translation and an extension of time for the filing of a response to the document in support of the appeal, 22 August 2013, ICC-02/11-01/11-489, para. 10; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the request for suspension of the time limit to respond to the Prosecutor's Trial Brief submitted by the Defence for Mr Gbagbo, 27 March 2018, ICC-02/11-01/15-1141.

²⁰ ICC-01/14-01/21-33-Conf, para. 5.

set a precedent which could seriously impact on available resources for translation beyond the case at hand'.²¹

B. The Prosecutor's Request

14. The Prosecutor seeks authorisation to reply to a number of requests by the Defence arising from the Consolidated Response.

15. With regard to the modalities and procedure for evidence disclosure, the Prosecutor requests leave to reply to the following two requests by the Defence:

- (i) *Ordonner à l'Accusation, dans le Protocole, de donner accès à la Défense à la base de données unique regroupant tous les éléments utiles dans le cadre de la situation CARII afin que la Défense puisse identifier, sans délai, elle-même, les éléments exculpatoires et utiles à la préparation de la Défense.*
- (ii) *Indiquer, dans le Protocole, que le Procureur a l'obligation de divulguer en même temps tous les éléments utiles permettant de comprendre sa preuve, comme expliqué au paragraphes 20 à 21 de la présente réponse.*²²

16. In this regard, the Prosecutor argues that these proposals 'could not have been anticipated' and that a reply would 'describe the legal regime under the Statute, the practice of the Court and its jurisprudence and the factual and logistical circumstances as to why open disclosure is not a viable option'.²³ Further, the Prosecutor submits that a reply 'will also address the issue as to how the Prosecution can strive to disclose, at the same time, every piece of information related to the main disclosed evidence material but also why this is not feasible in all circumstances'.²⁴

17. As regards the proposed Protocol on Redactions, the Prosecutor seeks leave to reply to the Defence's request to reject the standard redactions categories A.8 and B.5 on the basis that '*elles sont trop vagues et contraires à la logique du Protocole*'.²⁵

18. The Prosecutor submits that a reply would 'detail why these two standard redactions categories [...] are essential in this case when disclosure implicates the interests protected by rules 81(2) and (4)' and 'explain how the categories will be

²¹ ICC-01/14-01/21-33-Conf, para. 6.

²² ICC-01/14-01/21-35-Conf, para. 3 (emphasis in original).

²³ ICC-01/14-01/21-35-Conf, para. 4.

²⁴ ICC-01/14-01/21-35-Conf, para. 4.

²⁵ ICC-01/14-01/21-35-Conf, para. 5 (emphasis in original).

applied in practice’.²⁶ The Prosecutor further avers that, ‘[a]s these two categories are included in the Chambers Practice Manual these proposed amendments of the Defence could not have been anticipated’.²⁷

19. In addition, the Prosecutor seeks leave to reply to the following requests by the Defence concerning the Protocol on Handling of Confidential Information and Contacts with Witnesses (the ‘Protocol’):

- (iv) *Reformuler le titre de la section III.2 du Protocole de la manière suivante : «personnes dont le statut de témoin ou les relations avec la Cour n’ont pas été rendues publiques».*
- (v) *Adopter, dans le Protocole, une procédure portant sur les allégations de violences sexuelles qui reflète les propositions de la Défense aux paragraphes 48 et 49 de la présente réponse.*
- (vi) *Rejeter la proposition de paragraphe 40 dans le projet de Protocole portant sur l’obligation de communiquer à la Partie appelante un enregistrement de l’entretien entre la Partie non-appelante et un témoin de la Partie appelante.*
- (vii) *Rejeter la proposition de paragraphe 41 dans le projet de Protocole portant sur la possibilité pour la Partie appelante de s’opposer à un entretien entre un de ses témoins et la Partie non-appelante, même dans le cas où le témoin a consenti à un tel entretien.*²⁸

20. The Prosecutor argues that ‘[n]one of these proposed amendments could have been anticipated’.²⁹ In the view of the Prosecutor, ‘these proposals go to some of the fundamental issues the Protocol aims to protect’.³⁰ The Prosecutor submits that it would, in particular, be described ‘how the Defence proposal to amend the title of part III.2, as submitted in French, unnecessarily expands the definition of witnesses [...]’ and ‘how the proposed amendments are a marked departure from the current practice and go against the interest intended to be protected – the physical and psychological stigma and vulnerability of victims of sexual violence’.³¹ The Prosecutor also contends that it would be explained why ‘a recording of the interview of the witness of the opposing party is necessary’ and how the Defence’s proposal denying a party the

²⁶ ICC-01/14-01/21-35-Conf, para. 6.

²⁷ ICC-01/14-01/21-35-Conf, para. 6.

²⁸ ICC-01/14-01/21-35-Conf, para. 7 (emphasis in original).

²⁹ ICC-01/14-01/21-35-Conf, para. 8.

³⁰ ICC-01/14-01/21-35-Conf, para. 8.

³¹ ICC-01/14-01/21-35-Conf, para. 9.

possibility to oppose an interview of its witness by the opposing party is ‘factually and legally [...] flawed’.³²

21. Finally, the Prosecutor suggests that the Single Judge ‘may want to seek the views of the Office of Public Counsel for Victims’ concerning the Defence’s request to exclude the Legal Representatives from having the possibility to interview the witnesses of the Parties.³³

III. DETERMINATION BY THE SINGLE JUDGE

22. The Single Judge notes regulation 24(5) of the Regulations, pursuant to which participants ‘may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations’. This provision further provides that, ‘[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not have reasonably anticipated’.

23. Commencing with the Prosecutor’s Request, the Single Judge considers that the Prosecutor could not have reasonably anticipated the requests by the Defence: (i) regarding the modalities and procedure for evidence disclosure; (ii) to reformulate the title of section III.2 of the Protocol on Handling of Confidential Information and Contacts with Witnesses; and (iii) to amend the procedure as to the handling of confidential information related to the evidence of victims of sexual violence as set forth in this Protocol. These requests concern new issues independently proposed by the Defence. Whereas the remaining requests by the Defence do not concern matters that could not have been reasonably anticipated by the Prosecutor, the Single Judge considers that, due to the complexity and technical nature of the matters concerned, a reply by the Prosecutor may be of assistance in rendering his decision. Accordingly, the Single Judge grants the Prosecutor’s Request. However, in view of the submissions on the record and the impending reply by the Prosecutor, the Single Judge considers that additional submissions by the Office of Public Counsel for Victims are not required.

24. Turning to the Prosecutor’s Response, the Single Judge notes that it should have been submitted as part of the Prosecutor’s Request, as the request to translate the protocols into French was raised in the Consolidated Response. However, as the matter

³² ICC-01/14-01/21-35-Conf, para. 9.

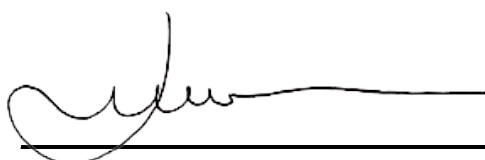
³³ ICC-01/14-01/21-35-Conf, para. 10.

could not have been reasonably anticipated by the Prosecutor, the Single Judge decides, on an exceptional basis and in the interests of efficiency, to take the Prosecutor's Response into account as part of the Prosecutor's Request. Therefore, the arguments raised will not have to be repeated in the Prosecutor's reply. However, the Single Judge stresses the exceptional nature of this decision and urges the Prosecutor to refrain from replying directly to matters raised in a Defence response prior to being authorised to do so. In view of the submissions on the record, the Single Judge considers that it is not necessary to request additional submissions from the Registry.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **GRANTS** the Prosecutor's Request;
- b) **DECIDES** to exceptionally accept the Prosecutor's Response as part of the Prosecutor's Request; and
- c) **DIRECTS** the Prosecutor to submit a reply to the Consolidated Response by no later than 25 March 2021, at 16:00 hours.

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 horizontal line.

**Judge Rosario Salvatore Aitala,
Single Judge**

Dated this Tuesday, 23 March 2021

At The Hague, The Netherlands