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

Date: **8 April 2021**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

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

Public

**Public Redacted Version of “Prosecution’s Request for Leave to Reply to the
Defence’s Consolidated Response - ICC-01/14-01/21-32-Conf dated 8 March 2021”,
ICC-01 14-01 21-35-Conf, dated 10 March 2021**

Source: Office of the Prosecutor

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

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**Unrepresented Applicants for
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I. INTRODUCTION

1. The Prosecution requests leave to reply to 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-01/04-01/21-13)”* (“Consolidated Response”).¹ The Prosecution seeks to submit a focused reply addressing the Defence request to: 1) have access to the entirety of the Prosecution’s evidence collection (“open file disclosure”),² 2) receive in the same disclosure package or at the same time, every piece of evidence related to the same disclosed material,³ and 3) reject categories A.8 and B.5 from the proposed Protocol on Redactions.⁴ 4) The Prosecution also seeks to reply to the proposed amendments to the *“Protocol on the Handling of Confidential Information and Contacts with Witnesses”*,⁵ with the exception of the proposed amendment of the Defence to paragraph 31 of the said Protocol.

II. CONFIDENTIALITY

2. This Request is filed confidential pursuant to regulation 23bis(1) of the Regulations of the Court as they relate to the submissions of the same designation.⁶

¹ ICC-01/14-01/21-32-Conf.

² *Ibid.*, p. 17, “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 exculpataires et utiles à la préparation de la Défense”.

³ *Ibid.*, “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”.

⁴ *Ibid.*, “Rejeter la proposition du Procureur d’adopter les catégories résiduelles d’expurgations standard A.8 et B.5, puisqu’elles sont trop vagues et contraires à la logique du Protocole”.

⁵ *Ibid.*, p. 17 *in fine*.

⁶ ICC-01/14-01/21-11-Conf and its Annexes, ICC-01/14-01/21-13 and its confidential Annexe A, and ICC-01/14-01/21-32-Conf.

III. SUBMISSIONS

A) Request for leave to reply related to the Modalities and Procedure for Evidence Disclosure

3. The Prosecution requests leave to reply on two specific issues advanced in the Response which relate to the Modalities and Procedure for Evidence Disclosure, namely:

- (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 exculpataires et utiles à la préparation de la Défense.*⁷
- (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.*⁸

4. These proposals by the Defence could not have been anticipated and the Prosecution considers that a reply on these two issues will assist the Chamber to adopt an efficient and effective system of disclosure in line not only with the Court's established practice but also with the legal regime under the Statute and jurisprudence of the Court. The proposed reply will 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. The 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.

⁷ ICC-01/14-01/21-32-Conf, p. 17.

⁸ *Ibid.*

B) Request for leave to reply related to the Protocol on Redactions

5. The Prosecution also requests leave to reply one specific issue raised in the Response which relates to Protocol on Redactions, namely:

(iii) *Rejeter la proposition du Procureur d'adopter les catégories résiduelles d'expurgations standard A.8 et B.5, puisqu'elles sont trop vagues et contraires à la logique du Protocole.*⁹

6. The Prosecution seeks leave to reply on the issue of the redaction categories A.8 and B.5.¹⁰ If leave is granted, the Prosecution will detail why these two standard redactions categories included in the proposed Protocol are essential in this case when disclosure implicates the interests protected by rules 81(2) and (4) given the dangers attendant to conducting investigations and witness protection in CAR. The proposed reply will explain how the categories will be applied in practice in a focussed manner and will thus actually lead to reduced redactions in documents rather than an increase. This will serve in mitigating the fear shared on the part of the Defence that the categories are too broad and could be used disproportionately to prejudice the Suspect. The Prosecution considers that a reply focused on this discrete issue will assist the Chamber to develop an efficient and effective system of redaction in line with the Court's established practice – one which has evolved and incorporates the Court's experiences dealing with the threats underlying rules 81(2) and (4). A properly formulated protocol is important at this stage of the proceedings, [REDACTED]. As these two categories are included in the Chambers Practice Manual these proposed amendments of the Defence could not have been anticipated.¹¹

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 10-11, para. 37-39.

¹¹ Chambers Practice Manual (2019), p. 34, para. 3.

C) Request for leave to reply related to the Protocol on Handling of Confidential Information and Contacts with Witnesses

7. Last, the Prosecution requests leave to reply to the following specific issues raised in the Response which relate to the Protocol on Handling of Confidential Information and Contacts with Witnesses:

- (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».*¹²
- (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.*¹³
- (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.*¹⁴
- (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.*¹⁵

8. None of these proposed amendments could have been anticipated. The Prosecution considers that these proposals go to some of the fundamental issues the Protocol aims to protect. A reply will assist the Chamber to adopt an efficient and practical Protocol that protects the rights of the Parties when contacting witnesses of

¹² *Ibid.*, in fine.

¹³ *Ibid.*, p. 18.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

the opposing party. The proposed reply will explain how the proposed amendments of the Defence would be a setback from the normal evolution of this Protocol which incorporates the Court's experiences dealing with, the handling of confidential information and contacts with witnesses of the opposing party.

9. Specifically, the Prosecution will describe how the Defence proposal to amend the title of part III.2, as submitted in French, unnecessarily expands the definition of witnesses by the use of the word "*personnes*". As to the handling of confidential information related to the evidence of victims of sexual violence, the Prosecution will explain 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. The Prosecution will also explain the factual circumstances as to why as foreseen at paragraph 40 of the Protocol a recording of the interview of the witness of the opposing party is necessary. Finally, the Prosecution seeks leave to reply to the Defence's proposal denying a party the possibility to oppose an interview of its witness by the opposing party. The Prosecution will explain how factually and legally this proposal is flawed.

10. The Defence also seeks to exclude the Legal Representatives from having the possibility to interview the witnesses of the Parties.¹⁶ Since victims are yet to be permitted to participate in the proceedings, the Chamber may want to seek the views of the Office of Public Counsel for Victims since this may impacts on the rights of victims.

¹⁶ *Ibid.*, paras 50-53 and p.18.

IV. RELIEF SOUGHT

For the above reasons, the Chamber should permit the Prosecution to reply to the Defence's Consolidated Response



Fatou Bensouda, Prosecutor

Dated this 8th day of April 2021
At The Hague, The Netherlands