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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

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

Public

With Confidential Annexes A to C

**Public Redacted Version of “Prosecution Response to Defence Request for
Reconsideration or Alternatively Application for Leave to Appeal the Decision on
Matters Related to Translation”, ICC-01/14-01/21-71-Conf, dated 6 May 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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I. INTRODUCTION

1. The Prosecution supports the Defence's request for reconsideration which, alternatively, seeks leave to appeal ("Request")¹ the Decision on matters related to translation ("Decision").² The Prosecution agrees with the Defence's submissions in relation to the part of the Decision which orders "to make available the statements of the Prosecutor's witnesses in Sango" and that "the Document Containing the Charges be translated into Sango".³ The Prosecution contends that Mr SAID's understanding of written and oral French is such that the ordered translations are not necessary. Subsidiarily, the Single Judge could order a language assessment of Mr SAID in order to assess the merits of the Request or to adopt all measures considered to be necessary.
2. Alternatively, if the Single Judge were to reject the Defence's request for reconsideration, the Prosecution supports the Defence's Application for leave to appeal the Decision.

II. CONFIDENTIALITY

3. This response and its Annexes are filed as Confidential pursuant to regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), since the Decision and Request are of the same designation and because they refer to potential evidence in the possession of the Prosecution which should not be made public at this stage of the proceedings. A public redacted version of the Response shall be filed in due course.

¹ ICC-01/14-01/21-68-Conf-Corr.

² ICC-01/14-01/21-58-Conf, p. 10.

³ Decision, p. 10.

III. SUBMISSIONS

A. Request for reconsideration

4. A Chamber has discretion to reconsider a decision when it is manifestly unsound and when its consequences are manifestly unsatisfactory,⁴ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.⁵

a. The Single Judge was not aware that Mr SAID's reading language is French

5. On 30 March 2021, the Defence submitted on behalf of the Parties an agreement whereby Mr SAID consented to receive the disclosure of statements of Prosecution witnesses as well as the Document Containing the Charges in French.⁶ The Parties should have explained that their agreement was founded on the fact that Mr SAID's "first language" when reading is French not Sango. Mr SAID had originally expressed that the language he fully understands is Sango. Consequently, one would presume that, as with the majority of languages, fully understanding encompasses both written and oral command of a language.⁷ However, and as demonstrated by the Defence's Request, written Sango is a recent development in the Central African Republic ("CAR") and is not mastered by all its nationals.

b. SAID understands fully written and oral French

6. In Annex 1 of the Defence's Request, Mr SAID unequivocally states that written French is the language that he understands ("*comprends*").⁸ He further stipulates that he never learnt to read Sango. This stipulation is corroborated by the evolution and

⁴ Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras. 13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (*see, e.g.*, ICC-02/04-01/05-60, para. 18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras. 36-39).

⁵ ICC-01/05-01/08-1691-Red, para. 17. An analogous application of article 84 also supports this submission.

⁶ ICC-01/14-01/21-49-Conf.

⁷ Decision, para. 24.

⁸ Request, Conf-Corr-Anx1.

use of written Sango in CAR,⁹ as well as by material in the possession of the Prosecution drafted or signed by Mr SAID.

7. [REDACTED],¹⁰ [REDACTED].¹¹

8. As a representative of the FPRC, Mr SAID has signed a number of binding documents drafted in French, including a ceasefire agreement.¹² These documents are elaborate and of a certain complexity. They are also important documents since they engage his responsibility and by his signature, Mr SAID affirmed that he fully understood them.

9. The Single Judge noted in his Decision that “according to the Joint Information, *“il sera difficile pour Monsieur Said de saisir tous les enjeux et de complètement comprendre des documents qui lui seraient communiqués [en français]”* without the assistance of his Defence team.”¹³ This portion of the Parties’ agreement has always been understood by the Prosecution, including in its conversations with the Defence, to refer to documents such as the Document Containing the Charges where facts are interlinked with legal concepts or that are simply more complex. Such documents may also be expert reports, investigation reports and other documents of a similar nature. As with any client, the Defence of Mr SAID has the duty to “translate” these documents in layman terms for his full understanding of their content. As held by the Appeals Chamber, the requirements under the Statute and the Rules that an accused “fully”

⁹ “In 1984, President André Kolingba signed “Décret No 84.025”, establishing an official orthography for Sango. [...] Sango has little written material apart from religious literature, but some basic literacy material has been developed.”⁹ [Extracted from https://en.wikipedia.org/wiki/Sango_language.] In 1987, Samarin noted: “[...] Sango, the national language, is far from being standardized, in spite of steps taken to codify it, and there has not yet emerged a correct form of the language.” While there has been progress in the teaching of Sango in schools subsequently, since French is the language of education and literacy levels remain fairly low in a country beset by warfare, the everyday acceptance, permeation into society and use of the officially codified Sango is relatively limited; there seems to be a significant contrast between its high official status and comparatively little recognition in practice.

¹⁰ [REDACTED].

¹¹ See Confidential Annex A for such examples.

¹² See Confidential Annex B – cease fire agreement CAR-OTP-2130-3681 dated 18 March 2020, the signature of SAID can be found on p. 3682. See Confidential Annex C, press release CAR-OTP-2125-0326 dated 6 February 2020; the signature of SAID can be found on p. 0331 at entry No. 5.

¹³ Decision, para. 24.

understands and speaks a language, does not mean that “he or she has an understanding as if he or she were trained as a lawyer or judicial officer.”¹⁴

c. The Single Judge could order a language assessment

10. However, independently of the Request and these submissions, if there is still uncertainty as to the extent of Mr SAID’s knowledge of written French, the Single Judge could order an independent language assessment. This assessment could be conducted by the Registry as was done in the case of the accused Mr Alfred Yekatom.¹⁵ If the Single Judge were to order such an assessment, the Prosecution recommends that it include a full assessment of Mr SAID’s understanding of the French language. The Prosecution contends that Mr SAID understands, reads and speaks French to such a level that in-court interpretation would not be necessary for him to follow the proceedings. The Prosecution refers to the following video recordings of interviews of Mr SAID in which he expresses himself in French:

- a.* HBO – Vice series – episode 9 – No choice but to choose/Rebel Republic at CAR-OTP-2107-1164, from minute 00 :19 :59 onwards;
- b.* HBO – Vice news - Children Are Being Kidnapped To Fight In The Central African Republic's Brutal War at CAR-OTP-2127-7743, from minute 00:01:00 to 00:01:59 and from 00:05:00 to 00:05:38; and
- c.* Reportage France 24 – *le journal Afrique - Centrafrique : malgré la présence militaire, les tensions continuent* at CAR-OTP-2075-2005, from minute 00:01:40 to 00:01:57.

¹⁴ ICC-01/04-01/07-522 OA3, para. 61

¹⁵ ICC-01/14-01/18-36-Corr.

d. The practical consequences of the Decision

11. The Prosecution also submits that the Decision, as it stands, would have a severe impact on the current schedule of the proceedings because of the resources and time needed to translate the volume of material subject to the Decision.

i. Scope of the work

12. Based on the current list of witnesses¹⁶ and applying current work practices,¹⁷ the Prosecution estimates that 6,701 pages of narrative statements and of interview transcripts with no Sango would need to be translated and that an additional 33,5 hours of interviews with Sango would need to be transcribed.

13. Given the status of French alongside Sango in the CAR, any Sango translations will necessarily be produced either from (i) the French original or (ii) by relay through a French translation of the English original, meaning that a translation of those items not originally in French would always have to be produced.

14. Prior to the commencement of any translation work, it would have to be firmly established that Mr SAID can read the officially codified form of Sango. Alternatively, Mr SAID would first have to be taught to read Sango fluently.

ii. Translation

15. The translators would have to translate 6,701 pages. On average each page contains about 350 words, which amounts to a total of 2,345,350 words. The normal costs to produce draft translations at standard tariff is 0.15 cents per word. It is anticipated that the total costs of the workload/project would be around 350,803 euros. The estimated time to produce draft translations is 3.5 pages per day. Consequently, 6,701 pages multiplied by 3.5 pages per day makes for a total of 1,915 person days.¹⁸

¹⁶ See ICC-01/14-01/21-55-Conf, para. 5. This number is excluding any additional witnesses that may be interviewed prior to confirmation.

¹⁷ For instance, where a transcript concerns an interpreted bilingual English/French interview, only one side of the interview is translated, reducing the page count by half.

¹⁸ This estimate excludes the time required for all other work processes around managing and administering the project, as well as the time needed for sourcing, vetting, contracting and training the language staff (see below).

As a hypothetical, if the Prosecution was able to hire a team of four translators, this component of the work would then take approximately 22 months.¹⁹

16. Further time and Sango-language resources would then be needed to redact these materials in preparation of their disclosure. It is also to be noted that this cost and time estimate makes no allowance for even minimal quality assurance against translations which would essentially be produced by inexperienced linguists with little or no knowledge or expertise in matters of international criminal law.

iii. Transcription

17. This estimate does not include the transcription of interviews into Sango, which would require an additional month, assuming the same parameters and conditions.²⁰

iv. Current Sango translation resources

18. The Prosecution presently has no staff capable of translating into Sango. [REDACTED], the Prosecution's Language and Services Unit ("LSU") [REDACTED]. However, they are not professional linguists in the sense understood, for instance, for full-time certified French-English translators. Instead they have been interpreting or translating into Sango along other core occupations. After many years of interacting with the Sango-speaking community and attempting to source competent Sango speakers with even the basic technical language skills, LSU is acutely conscious that the pool of capable individuals even with the needed potential is very limited.

19. [REDACTED].²¹ [REDACTED] LSU's [REDACTED]. [REDACTED].

20. As well as determining the potential interest and availability of any of the above persons to work for the Prosecution on these translations, their basic competence to translate into Sango and their knowledge of the officially codified form of Sango would first need to be verified.

¹⁹ 479 person days per individual translating full-time 5 days per week = 95.8 work weeks per individual.

²⁰ 33.5 hours of interviews at 1 hour every 2.5 days = 84 person days. The same team of four staff members would take 21 person days per staff members, transcribing full-time 5 days per week (4.2 work weeks per staff members).

²¹ The OTP has not up until this point been requested or required to translate significant volumes into Sango in any case, only occasional press releases for which Sango audio translations were also provided.

21. Further, any individuals found to be linguistically suitable will need to be IT-capable and also have the required hardware, which is difficult to guarantee especially in the CAR. One further critical consideration is whether these individuals have or are able to install on their computers the needed Sango character set for their keyboards to be able to type the officially codified form of Sango (e.g. to reproduce the tonal diacritics).

22. Should any of the current contractors with some knowledge and expertise in ICC subject matters be available and project-ready, it is anticipated that a two- to four-week project start-up period would be required before translation can begin in earnest.

23. Failing the above, time will be required to source, test, security-clear, contract and induct translators. This process typically takes several weeks if not months. Additionally, this translation project is situated against the current background of the Covid-19 pandemic, which may introduce additional delays in the project time-line unexpectedly at any point.

24. The above are only estimates based on a scenario of four translators working full time five days a week. Even if eight Sango translators could be hired and trained, it nevertheless would take around 12 months to translate all the material to be disclosed pursuant to the Decision. Additional time would then be needed to prepare the disclosure, including applying standard redactions.

e. Conclusion on the Defence's request for reconsideration

25. The Prosecution submits that considering the stipulation of Mr SAID that his reading language is French, and the anticipated time, logistical constraints and costs to translate the identified volume of material, the test for reconsideration referred to above is met. In particular, reconsideration is warranted due to information that was not previously before the Single Judge. In addition, reconsideration is also in the interest of Mr SAID and in the interest of the administration of justice.

B. Application for leave to appeal

26. Alternatively, if the Request for reconsideration were to be rejected, the Prosecution supports the Defence's Application for leave to appeal the Decision.

27. The Prosecution submits that the issue for which the Defence seeks leave to appeal meets all requirements under article 82(1)(d) for granting leave to appeal.

a. The issue identified by the Defence arises from the Decision

28. The Defence identifies the following issue "*l'erreur de fait dans l'appréciation du Juge Unique de la connaissance écrite de Monsieur Said du Sango*".²² This is an appealable issue within the meaning of article 82(1)(d) and arises out of the Decision:²³ The issue constitutes "an identifiable subject or topic requiring a decision for its resolution",²⁴ and its resolution is "essential for the determination of matters arising under the judicial cause under examination".²⁵ The Decision is based on the assumption that a person's fluency in Sango, implies that one can read, write and speak it.²⁶ However, as demonstrated in the Request and in the above submissions, in the CAR Sango is mainly a spoken language, while the prevalent language of writing—and accordingly reading—is French. Consequently, the Decision is based on mistake of fact.²⁷ However, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.²⁸

²² Request, part 2.1, p. 11.

²³ The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one." ICC-01/04-168 OA3, paras. 9-10. *See also* ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

²⁴ ICC-01/04-168 OA3, para. 9.

²⁵ ICC-01/04-168 OA3, para. 9.

²⁶ Decision, para. 24.

²⁷ The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits an error of fact if it misappreciates facts, disregards relevant facts, or takes into account facts extraneous to the *sub judice* issues (ICC-01/04-01/10-283 OA, para. 16 ; ICC-01/05-01/08-1626-Red OA7, para. 45; ICC-02/11-01/11-278-Red OA, para. 51).

²⁸ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

b. The issue affects the fair conduct of the proceedings

29. “Fairness” within the terms of article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.²⁹

30. The Prosecution agrees that the issue affects the fairness of the proceedings, as it concerns the question whether Mr SAID can understand the evidence and charges brought against him.³⁰ Critically, Mr SAID stated that he cannot read Sango.³¹ Additionally, Mr SAID is currently detained. Considering the time that would be needed to translate the witness statements the Prosecution intends to rely on for the purposes of the confirmation of the charges proceedings, this would necessarily result in a delay of the proceedings and therefore impact on Mr SAID’s right to be tried without undue delay.

31. The issue also impacts on the fairness of the proceedings for the Prosecution. As indicated above, these translations would have significant implications on the Court’s budget, thereby requiring the Prosecution to divert investigative resources to comply with its duties imposed by the Decision. This would be unfair to the Prosecution, while it would not result in any benefit for the fairness of the proceedings for Mr SAID, since he does not read Sango and is fully fluent in reading in French.

²⁹ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

³⁰ Request, para. 47.

³¹ Request, Conf-Corr-Anx1.

c. The issue affects the expeditious conduct of the proceedings

32. The expeditious conduct means timely and efficient conduct of proceedings.³²

This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.³³

33. Considering the time necessary to translate into Sango the evidence identified in the Decision, this would necessarily affect the expeditious conduct of the proceedings. As indicated above, it will be very difficult to retain and train qualified translators to generate the written translations of the relevant evidence. In addition, the translation itself will require substantial time. All of this will unavoidably result in delaying the confirmation of charges hearing, and the overall proceedings in this case.

d. The issue affects the outcome of the trial

34. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”³⁴

35. As noted above, Mr SAID stated that he cannot read Sango. If as a result of the Decision, all witness statements relied on by the Prosecution, as well as the Document Containing the Charges were made available to him in Sango, it would affect his rights to a fair trial under article 67(1). The Trial Chamber, having a duty to ensure the fairness of the proceedings under article 64(2), may find that the proceedings cannot be continued on that basis, since Mr SAID was not informed of the Document Containing the Charges and the incriminating witness statements in a language that he fully understands.

³² Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 (“Norman Decision on Application for Stay”): “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”.

³³ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

³⁴ ICC-01/04-168 OA3, para. 13.

e. Immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings

36. Immediate resolution of the issue will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³⁵ Otherwise, a wrong decision on an issue in the context of article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³⁶

37. The issue concerning the translation into Sango of the witness statements relied upon by the Prosecution has a direct impact on the conduct of the pre-trial proceedings. In particular, it impacts on whether the confirmation hearing can take place on the date that is currently scheduled or whether the proceedings must be substantially delayed without providing any benefit for the Suspect or the fairness of the proceedings.³⁷

38. By permitting the Appeals Chamber to immediately resolve the issue, a more substantial delay of the confirmation proceedings, and therefore any further impact on Mr SAID’s right to a fair and expeditious trial can be avoided. At the same time, the immediate intervention by the Appeals Chamber may determine whether the substantial financial expenditure required would be justified by considerations of fairness of the proceedings.

39. Requiring that all witness statements relied upon by the Prosecution and the Document Containing the Charges are made available to Mr SAID in Sango—a language that he does not read—also means that the Confirmation of Charges decision

³⁵ ICC-01/04-168, paras. 14-15, 18.

³⁶ ICC-01/04-168 OA3, para. 16.

³⁷ ICC-02/05-03/09-428, para. 19.

or any decision by the Trial Chamber may later be overturned by the Appeals Chamber. To avoid this outcome, the Appeals Chamber should be granted an opportunity to ensure that the proceedings follow the right course and remove doubts about the correctness of a decision.³⁸

IV. RELIEF SOUGHT

40. For the above reasons, the Prosecution requests the Single Judge to:

- a. Reconsider his Decision by ordering that statements of Prosecution witnesses should be disclosed in French and that the Document Containing the Charges should be made available in French;
- b. Subsidiarily, if deemed necessary to assess the merits of the Request and these submissions, order an independent language assessment of Mr SAID's understanding of both written and oral French;
- c. Alternatively, grant leave to appeal on the issue as identified by the Defence in its Request.



Fatou Bensouda, Prosecutor

Dated this 17th day of May 2021
At The Hague, The Netherlands

³⁸ ICC-01/04-168, paras. 14-15, 18.