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**No. ICC-01/14-01/21
Date: 1 June 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

Public

Second Decision on matters related to translation

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

The Office of the Prosecutor
 Ms Fatou Bensouda, Prosecutor
 Mr James Stewart
 Mr Eric MacDonald

Counsel for the Defence
 Ms Jennifer Naouri
 Mr Dov Jacobs

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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Language Services Section
 Mr Diederick Zanen

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 ‘Second Decision on matters related to translation’.

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 2021,⁵ Mr Said appeared before the Single Judge pursuant to article 60(1) of the Rome Statute (the ‘Statute’) and rule 121(1) of the Rules of Procedure and Evidence (the ‘Rules’).⁶
5. On 17 March 2021, following the recomposition of the Chambers by the Presidency,⁷ Judge Rosario Salvatore Aitala was designated by the Chamber as

¹ ICC-01/14-01/21-2-US-Exp (public redacted version filed on 17 February 2021 ([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 (confidential redacted, *ex parte* (only available to the Registry, the Prosecution and the Defence) version filed on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red); confidential, lesser redacted, *ex parte* (only available to the Registry, the Prosecution and the Defence) version filed on 18 March 2021 (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 [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

⁶ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG.

⁷ [Decision assigning judges to divisions and recomposing Chambers](#), 16 March 2021, ICC-01/14-01/21-40.

Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.⁸

6. On 31 March 2021, the Defence filed the ‘Information conjointe portant sur l’accord entre l’Accusation et la Défense concernant la langue dans laquelle seront divulgués les éléments de preuve à charge et les déclarations de témoins’ (the ‘Joint Information’).⁹

7. On 7 April 2021, the Single Judge issued the ‘Order on disclosure and related matters’, in which he, *inter alia*, ordered the Office of the Prosecutor (the ‘Prosecution’) to ‘submit a report detailing the [...] aspects of the investigation and the disclosure process in relation to the present proceedings [...]’ including on (i) ‘the estimated number and type of items of evidence and other material to be relied upon for the confirmation of charges hearing’ and (ii) ‘the progress made by the Prosecutor in translating the necessary evidence and other material into Sango and/or other languages’ by 16 April 2021 (the ‘Disclosure Order’).¹⁰

8. On the same day, upon instruction by the Single Judge,¹¹ the Prosecution filed the ‘Prosecution’s Agreement with Defence submission ICC-01/14-01/21-49-Conf’.¹²

9. On 16 April 2021, the Prosecution filed the ‘Prosecution’s First Report on Disclosure and Related Issues’ (the ‘First Disclosure Report’).¹³

10. On 23 April 2021, the Single Judge issued the ‘Decision on matters related to translation’, in which the Single Judge, *inter alia*, ordered the Prosecution to make the statements of the Prosecution’s witnesses available in Sango and that the document containing the charges shall be translated into Sango (the ‘Translation Decision’).¹⁴

⁸ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-42.

⁹ Dated 30 March 2021 and registered on 31 March 2021, ICC-01/14-01/21-49-Conf (public redacted version filed on 11 May 2021 ([ICC-01/14-01/21-49-Red](#))).

¹⁰ ICC-01/14-01/21-50-Conf, para. 29, p. 20 (public redacted version filed on 12 May 2021 ([ICC-01/14-01/21-50-Red](#))).

¹¹ Email from the Single Judge, at 13:51 hours.

¹² ICC-01/14-01/21-51-Conf (pursuant to the Single Judge’s instructions of 17 May 2021, this document was reclassified as public ([ICC-01/14-01/21-51](#))).

¹³ ICC-01/14-01/21-55-Conf, with four confidential, *ex parte* (only available to the Prosecution) annexes, and one confidential annex (public redacted version filed on 17 May 2021 ([ICC-01/14-01/21-55-Red](#))).

¹⁴ ICC-01/14-01/21-58-Conf (public redacted version issued on 18 May 2021 ([ICC-01/14-01-21-58-Red](#))), p. 10.

11. On 3 May 2021, the Defence filed the ‘Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel de la « Decision on matters related to translation» (ICC-01/14-01/21-58-Conf)’ (the ‘Request’).¹⁵

12. On 6 May 2021, upon instruction by the Single Judge,¹⁶ the Prosecution submitted the ‘Prosecution Response to Defence Request for Reconsideration or Alternatively Application for Leave to Appeal the Decision on Matters Related to Translation’ (the ‘Response to the Request’).¹⁷

13. On 7 May 2021, the Single Judge issued the ‘Order to conduct French and Sango language proficiency assessments of Mahamat Said Abdel Kani’, in which he ordered, *inter alia*, the Registry’s Language Services Section (the ‘LSS’) (i) to conduct ‘assessments as to the oral and written French and Sango language proficiency of Mr Said’; (ii) to ‘provide additional information on the feasibility of translating written documents into Sango and other possible means to provide such translations’; and (iii) to submit a report on these matters to the Chamber by 19 May 2021 (the ‘Language Assessment Order’).¹⁸

14. On 19 May 2021, the Registry filed the ‘Registry Transmission of French and Sango Language Proficiency Assessments of Mahamat Said Abdel Kani and Report on Feasibility of Translating Written Documents into Sango’ (the ‘Registry’s Report’).¹⁹ In this report, the Registry provides its conclusions on Mr Said’s language proficiency assessments that were conducted on 11 May 2021.²⁰

15. On 21 May 2021, the Defence filed its ‘Réponse de la Défense à la « Registry Transmission of French and Sango Language Proficiency Assessments of Mahamat

¹⁵ ICC-01/14-01/21-68-Conf (corrigendum dated 3 May 2021 and filed on 4 May 2021 (ICC-01/14-01/21-68-Conf-Corr); public redacted version filed on 17 May 2021 ([ICC-01/14-01/21-68-Corr-Red](#))).

¹⁶ Email from the Single Judge, 4 May 2021, at 17:30.

¹⁷ ICC-01/14-01/21-71-Conf, with three confidential annexes (public redacted version filed on 17 May 2021 ([ICC-01/14-01/21-71-Red](#))).

¹⁸ ICC-01/14-01/21-73-Conf (pursuant to the Single Judge’s instructions of 17 May 2021, this document was reclassified as public ([ICC-01/14-01/21-73](#))), p. 7.

¹⁹ [ICC-01/14-01/21-78](#), together with one confidential annex (ICC-01/14-01/21-78-Conf-Anx1) and one public annex ([ICC-01/14-01/21-78-Anx2](#)).

²⁰ [Registry’s Report](#), ICC-01/14-01/21-78, paras 3-4.

Said Abdel Kani and Report on Feasibility of Translating Written Documents into Sango » (ICC-01/14-01/21-78)’ (the ‘Defence’s Response to the Report’).²¹

16. On the same day, the Prosecution filed the ‘Prosecution’s Observations on the Registry’s French and Sango Language Proficiency Assessment of Mr Said (ICC-01/14-01/21-78)’ (the ‘Prosecution’s Response to the Report’).²²

II. SUBMISSIONS

A. The Registry’s observations

17. In its Report, the Registry concludes that ‘Mr Said is able to read and understand the main points of a relatively complex text such as a witness statement written in French’. In addition, it concludes that ‘Mr Said has a higher level of spoken Sango than French and that he prefers to express himself orally in Sango’. Nonetheless, the Registry indicates that, ‘[i]f the Chamber might [...] deem it necessary, the LSS could undertake the translation of a limited volume of written documents into Sango by means of Sango audio recordings’.

B. The Defence’s submissions

18. In the Request, the Defence submitted additional information regarding the languages that Mr Said understands and speaks. The Defence averred that Mr Said understands and speaks perfectly Sango but the language he understands ‘pour lire/écrire est le français’. In light of this information, the Defence sought reconsideration of the Translation Decision and requested the Single Judge to: (i) declare that the language that Mr Said fully understands and speaks is Sango; (ii) declare that the language, which Mr Said understands in written form, is French; and (iii) order that the witness statements, the document containing the charges and other important procedural documents be communicated to Mr Said in French.

19. Alternatively, the Defence requested leave to appeal the Translation Decision on the ground that the Single Judge erred in fact when assessing Mr Said’s understanding of written Sango documents.

²¹ ICC-01/14-01/21-82-Conf (public redacted version filed on 24 May 2021 ([ICC-01/14-01/21-82-Red](#))).

²² ICC-01/14-01/21-81-Conf (public redacted version dated 21 May 2021 and filed on 24 May 2021 ([ICC-01/14-01/21-81-Red](#))).

20. In its Response to the Report, the Defence submits that the parties had engaged in *inter partes* discussions, leading to the submission of the Joint Information, with a view to ensure Mr Said's rights under article 67 of the Statute. However, the Defence acknowledges that, following the issuance of Translation Decision, it provided the Single Judge with 'éléments complémentaires' regarding Mr Said's oral and written understanding of Sango and French. The Defence adds that the results of Mr Said's language proficiency assessments confirm that he requires two languages to fully exercise his rights: that the language, which Mr Said 'comprend et parle parfaitement à l'oral est le sango', and that the language, which Mr Said understands in written form is French.

21. With regard to a potential translation of written documents into Sango by means of audio recordings, the Defence avers that (i) it is unnecessary; (ii) it would result in practical challenges, such as the communication with the Defence team, which could have an impact on Mr Said's rights and the expeditiousness of the proceedings; and (iii) the Registry's Report does not offer sufficient information on the format that such translated audio recordings would take.

22. Accordingly, the Defence reiterates the relief sought in the Joint Information, as further clarified in its Request. Furthermore, it recalls its request that the hearings be interpreted into Sango to allow Mr Said to follow the debates and to express himself in Sango, should the need arise.

C. The Prosecution's submissions

23. In its Response to the Request, the Prosecution submitted that it supports the Request. The Prosecution averred that Mr Said understands oral and written French and that indeed his 'first language' when reading is French, not Sango. Accordingly, the Prosecution averred that the ordered translations of the Prosecution witnesses' statements and the document containing the charges in Sango 'are not necessary'.

24. In its Response to the Report, the Prosecution submits that the 'Registry's assessment of Mr Said's oral and written language proficiency is consistent with the Parties' joint position that the statements of Prosecution witnesses' and the document containing the charges should be made available in French rather than in Sango. According to the Prosecution, 'an order requiring the core documents to be provided in

French would be fully consistent with Mr Said's rights', in particular given that Mr Said requested to receive the core documents in that language. However, the Prosecution 'does not take a position on whether the Single Judge should order the Registry to arrange for an interpreter to support Mr Said's review of the witness statements, on an *ad hoc* basis, if he so wishes'.

25. With regard to the provision of Sango audio translations, the Prosecution submits that such translation of witness statements 'is not necessary or proportionate in this case', given the Registry's conclusions.

26. Accordingly, the Prosecution requests the Single Judge to (i) reconsider his Translation Decision by ordering that statements of Prosecution witnesses should be disclosed in French and that the document containing the charges should be made available also in French; and (ii) '[i]f deemed necessary, order the Registry to provide, on an *ad hoc* basis, the assistance of a French-Sango interpreter when Mr Said reads the witness statements, if he so wishes'.

III. DETERMINATION BY THE SINGLE JUDGE

27. The Single Judge notes articles 50(2), 67(1)(a), (b), (c) and (f), 69 of the Statute and rules 76(3) and 121 of the Rules.

28. At the outset, the Single Judge notes that the parties failed to provide accurate and complete information in the Joint Information regarding Mr Said's understanding of French and Sango in oral and written form. The Joint Information does not, for example, indicate Mr Said's accurate level of written Sango and merely states that he can read and understand French documents, to a certain extent. The parties' submissions in the Joint Information did not state in an unambiguous manner that Mr Said *requires* French translations of core documents. Rather, the Joint Information used equivocal formulations, including that Mr Said and his Defence team are open to the idea of receiving French translations or that they would be ready to accept the communication of core documents in French.

29. The Single Judge notes that, pursuant to articles 54(1)(c) and 67(1)(a) of the Statute and rule 76(3) of the Rules, the Prosecution has the duty to respect the rights of the suspect, and it is the Defence's primary duty to protect and represent the suspect's interest. The Single Judge finds that the parties did not adequately fulfil that duty by

presenting incomplete and inaccurate information on the issue of the languages that Mr Said understands, in oral and written form. In that regard, the parties acknowledged, in their subsequent submissions, the necessity to provide the Single Judge with additional information on that matter following the issuance of the Translation Decision.

30. Nonetheless, considering the Chamber's obligation to ensure that Mr Said's rights to receive core documents in a language he '*fully understands and speaks*' under article 67(1)(a) of the Statute and rule 76(3) of the Rules are respected,²³ the Single Judge has considered the Registry's Report, which concludes that 'Mr Said is able to read and understand the main points of a relatively complex text such as a witness statement written in French' while this is not the case for documents in Sango. Therefore, the Single Judge considers that the conclusions of the Registry's Report on Mr Said's oral and written language proficiency in French and Sango constitute new information relevant to the matter of translation in the present case. Furthermore, the Single Judge notes the parties' submissions that Sango is mainly a spoken language.²⁴

31. In light of these conclusions, the Single Judge orders that the statements of the Prosecution's witnesses shall be translated into French and orders the Prosecution to make these statements available in French, to the extent it has not already done so. The Single Judge further orders that the document containing the charges and the pre-trial brief shall be translated into French. In light of the information currently available to him, the Single Judge decides that the order in the Translation Decision for the translation into Sango of Prosecution witness statements and core documents is set aside, and does not deem it necessary that the LSS undertake any translations into Sango by means of Sango audio recordings.

32. In light of these findings, the Single Judge rejects the Defence's Request.

33. The Single Judge now turns to the evidentiary disclosure approach adopted by the Prosecution in the present case. The Single Judge notes the considerable volume of items disclosed thus far and those expected to be disclosed in the next few months. In

²³ Emphasis added.

²⁴ See [Request](#), ICC-01/14-01/21-68-Corr-Red, para. 19; [Response to the Request](#), ICC-01/14-01/21-71-Red, para. 28.

its First Disclosure Report, the Prosecution indicated that it intends to rely on an estimated 6,000 items, which includes well over a hundred witness statements for the purposes of the confirmation of charge hearing and that, as its investigative activities and review of evidence are still ongoing, this ‘figure is likely to rise’.²⁵ Considering this information and balancing the rights of the Defence, the Single Judge is of the view that the Prosecution’s current evidentiary disclosure process at the pre-trial stage goes well beyond and defeats the remit of the very purpose of pre-trial proceedings, which is to ‘determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’ or to decline the confirmation of those charges, for which there is insufficient evidence.²⁶

34. The Single Judge notes that, in other cases before this Court, including most recently in *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (*‘Ali Kushayb’*), the Prosecution has, for the purposes of the confirmation hearing, used a minimal amount of the evidence disclosed. In order to prevent that such situation occurs in the present case, the Single Judge urges the Prosecution to only disclose evidence intended to be used for the purposes of the confirmation hearing and to avoid disclosing statements that contain repetitive information about same events or incidents. The Single Judge notes in that regard that the translation of witness statements is time-consuming and costly and that, therefore, the disclosure of items that are repetitive, not truly relevant to the present case and that the Prosecution does not intend to rely on for the purposes of the confirmation hearing could negatively impact on the suspect’s right to be tried without undue delay, in particular considering that Mr Said is currently in pre-trial detention.

35. The Single Judge recalls that ‘in order to fully realise the right of the suspect to have adequate time to prepare his defence and to facilitate the Chamber’s own preparation of the confirmation hearing, the relevance of the evidence disclosed should be clear, since disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the

²⁵ See [First Disclosure Report](#), ICC-01/14-01/21-55-Red, paras 4-6.

²⁶ See article 61(7) of the Statute.

proceedings’.²⁷ In this regard, it is not reasonable to expect that the suspect reads and understands such large volume of witness statements and disclosed items, which the Prosecution intends to disclose, within the short timeframe of the pre-trial proceedings and, as such, this could impede Mr Said’s right to have adequate time and facilities for the preparation of the defence.

36. Hence, in order to streamline the evidence disclosure process, the Single Judge instructs the Prosecution to revise its approach to the selection of its evidence by focusing on quality rather than quantity of items disclosed, with a view to substantially reduce the amount of evidence it intends to disclose. In line with this approach, the Prosecution is instructed to review all evidence disclosed so far in order to establish which evidence is, in the view of the Prosecution, specifically relevant to the present case and necessary for the purposes of the confirmation of charges and to indicate which evidence may be excluded. Furthermore, the Single Judge notes that, under rule 77 of the Rules, it is expected that the Prosecution only makes those items available to the Defence that are ‘material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing [...] or were obtained from or belonged to the person’. Accordingly, the Prosecution must select those items that fulfil these criteria and its responsibility cannot be discharged by simply making everything in their possession or control available to the Defence.

37. Therefore, the Single Judge orders the Prosecution to report on its revised disclosure programme, including on any potential impact that the translation into French may have on its new disclosure programme, by no later than 8 June 2021 at 16:00 hours.

38. In addition, the Single Judge instructs the Prosecution to be more specific in its disclosure notes. In this regard, the Single Judge notes that, at times, the Prosecution refers to the entirety of a witness statement or audio/video material as ‘INCRIM’,

²⁷ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, [Second Order on disclosure and related matters](#), 2 October 2020, ICC-02/05-01/20-169, para. 23, referring to Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#), 19 October 2018, ICC-01/12-01/18-31-tENG-Corr, para. 25; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#), 31 July 2008, ICC-01/05-01/08-55, para. 67.

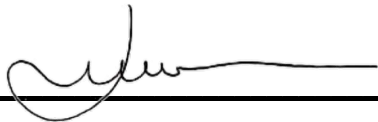
without further specifying the relevance to the present case. The Single Judge recalls that, in particular '[f]or visual evidence, if the relevance and significance is not immediately apparent from the exhibit, the Prosecutor shall include a brief note in the metadata field, explaining what is depicted and how it is relevant to the Prosecutor's case'.²⁸ The Prosecution is further instructed to include information in its disclosure notes on the link between different exhibits, *inter alia*, by specifying the ERN number of annexes related to witness statements, where this information is currently missing.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **ORDERS** that the statements of the Prosecution's witnesses shall be translated into French;
- b) **ORDERS** that the document containing the charges and the pre-trial brief shall be translated into French;
- c) **DECIDES** that the order in the Translation Decision for the translation into Sango of Prosecution witness statements and core documents is set aside;
- d) **REJECTS** the Defence's Request;
- e) **INSTRUCTS** the Prosecution to revise its approach to disclosure of evidence with a view to substantially reduce the volume of all items so far disclosed and the items it intends to disclose, by only disclosing those that are, in the view of the Prosecution, specifically relevant to the present case and necessary for the purposes of the confirmation of charges, and/or otherwise must be disclosed according to the statutory framework;
- f) **ORDERS** the Prosecution to submit a report on its revised disclosure programme, as specified in the present decision, by no later than 8 June 2021 at 16:00 hours; and
- g) **INSTRUCTS** the Prosecution to include more specific and detailed information in its disclosure notes.

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

²⁸ [Disclosure Order](#), ICC-01/14-01/21-50-Red, para. 28.



**Judge Rosario Salvatore Aitala,
Single Judge**

Dated this Tuesday, 1 June 2021

At The Hague, The Netherlands