



**Original: English**

**No. ICC-01/14-01/21  
Date: 30 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 order on disclosure and postponement of the confirmation hearing

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan, 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**

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**Registrar**

Mr Peter Lewis

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Language Services Section**

**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 order on disclosure and postponement of the confirmation hearing’.

## **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’) (‘Arrest Warrant’).<sup>1</sup>
2. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.<sup>2</sup>
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.<sup>3</sup>
4. On 29 January 2021, in accordance with the Single Judge’s decision dated 26 January 2021<sup>4</sup> and his further instructions dated 28 January 2021,<sup>5</sup> 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’).<sup>6</sup> The Single Judge, *inter alia*, scheduled the confirmation of charges hearing to commence on 5 October 2021.<sup>7</sup>

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<sup>1</sup> ICC-01/14-01/21-2-US-Exp (public redacted version filed on 17 February 2021 ([ICC-01/14-01/21-2-Red2](#))).

<sup>2</sup> 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)).

<sup>3</sup> [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-3.

<sup>4</sup> [Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-4.

<sup>5</sup> [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

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

<sup>7</sup> [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG, p. 11, lines 11-12.

5. On 17 March 2021, following the recomposition of the Chambers by the Presidency,<sup>8</sup> 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.<sup>9</sup>

6. On 7 April 2021, the Single Judge issued the ‘Order on disclosure and related matters’, in which it was, *inter alia*, ordered that the Office of the Prosecutor (the ‘Prosecution’) ‘submit a report detailing the [...] aspects of the investigation and the disclosure process in relation to the present proceedings [...]’ including on ‘the estimated number and type of items of evidence and other material to be relied upon for the confirmation of charges hearing’ with a provisional list of witnesses; and submit an updated report on the first working day of each month, commencing 1 June 2021 (the ‘Disclosure Order’).<sup>10</sup>

7. On 16 April 2021, the Prosecution filed the ‘Prosecution’s First Report on Disclosure and Related Issues’ (the ‘First Disclosure Report’).<sup>11</sup>

8. On 1 June 2021, the Prosecution filed the ‘Prosecution’s Second Report on Disclosure and Related Matters’.<sup>12</sup>

9. On the same day, the Single Judge issued the ‘Second Decision on matters related to translation’ (the ‘Second Translation Decision’) in which it was, *inter alia*, ordered that the statements of the Prosecution’s witnesses, the document containing the charges and the pre-trial brief shall be translated into French.<sup>13</sup> In addition, the Single Judge instructed 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,

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<sup>8</sup> [Decision assigning judges to divisions and recomposing Chambers](#), 16 March 2021, ICC-01/14-01/21-40.

<sup>9</sup> [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-42.

<sup>10</sup> ICC-01/14-01/21-50-Conf, paras 29-30, (public redacted version filed on 12 May 2021, [ICC-01/14-01/21-50-Red](#)).

<sup>11</sup> ICC-01/14-01/21-55-Conf, with four confidential, *ex parte* annexes (only available to the Prosecution), and one confidential annex (public redacted version filed on 17 May 2021 ([ICC-01/14-01/21-55-Red](#))).

<sup>12</sup> ICC-01/14-01/21-87-Conf-Exp (confidential redacted version filed on the same day (ICC-01/14-01/21-87-Conf-Red) and public redacted version filed on 4 June 2021 ([ICC-01/14-01/21-87-Red2](#))) together with two confidential annexes (ICC-01/14-01/21-87-Conf-AnxA and ICC-01/14-01/21-87-Conf-AnxB).

<sup>13</sup> [ICC-01/14-01/21-86](#), p. 12.

‘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. The Single Judge ordered the Prosecution to submit a report on its revised disclosure programme by no later than 8 June 2021.<sup>14</sup>

10. On 7 June 2021, the Prosecution filed the ‘Prosecution’s Response to the Second Decision on matters related to translation’ (the ‘Prosecution’s Submissions’).<sup>15</sup>

11. On 14 June 2021, pursuant to the Single Judge’s instruction,<sup>16</sup> the Defence filed the ‘Réponse de la Défense à la « Prosecution’s Response to the Second Decision on matters related to translation » (ICC-01/14-01/21-92-Conf) portant sur le processus de divulgation’ (the ‘Defence’s Response’).<sup>17</sup>

## **II. SUBMISSIONS**

### **A. The Prosecution’s Submissions**

12. The Prosecution submits that it is ‘on schedule to complete almost all of its disclosure of incriminatory evidence by mid-July 2021’ and that ‘around half of the evidence it intends to rely upon for the confirmation proceedings’ has been disclosed, most of which is also available in French. The Prosecution further indicates that it will ‘fully complete its disclosure, including the remaining French translations of its core incriminatory evidence by 5 September 2021’. In addition, the Prosecution specifies that it ‘intends to reduce the overall list of witnesses’ and avers that it ‘is only disclosing information that will be cited in the [pre-confirmation brief], included on the List of Evidence or that is important for the Defence to understand the origin of that information or the Prosecution’s interactions with the relevant witnesses’.

### **B. The Defence’s Response**

13. The Defence submits that it has received 3261 items of disclosure at the moment of filing, and that it cannot currently estimate the time it will need to analyse the remaining rule 77 information and PEXO material to be disclosed without an estimation

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<sup>14</sup> [Second Translation Decision](#), ICC-01/14-01/21-86, paras. 36-37.

<sup>15</sup> ICC-01/14-01/21-92-Conf (public redacted version filed on 8 June 2021 ([ICC-01/14-01/21-92-Red](#))).

<sup>16</sup> Email from Single Judge of Thursday 9 June 2021 at 12:28.

<sup>17</sup> ICC-01/14-01/21-99-Conf (public redacted version dated 27 June 2021 and registered on 28 June 2021 ([ICC-01/14-01/21-99-Red](#))).

as to the total number of such items, but that, in any case, it must have adequate time to do so. Further, the Defence provides information on the state of its investigations in order to analyse the evidence disclosed so far by the Prosecution and to collect exculpatory evidence.

### III. DETERMINATION BY THE SINGLE JUDGE

14. The Single Judge notes articles 61(3), 67, 68(1) of the Statute, rules 63(1), 76 to 83, 121 of the Rules and regulation 38 of the Regulations of the Court (the ‘Regulations’).

15. The Single Judge notes that the confirmation hearing is currently set to commence on Tuesday, 5 October 2021, a date which has been decided upon during Mr Said’s first appearance before the Court on 29 January 2021. Developments having since occurred in the schedule of the Judiciary, the Court’s calendar and the concurrent responsibilities of the Judges of the Chamber in other proceedings make it necessary to reschedule this date, whilst preserving the expeditiousness of the proceedings by limiting this postponement to the minimum: accordingly, the commencement of the confirmation hearing is set for 12 October 2021.

16. The Single Judge recalls that, in accordance with rule 121(3) of the Rules, the Prosecution shall provide the Chamber and the Defence with a document containing the charges and a final list of evidence ‘*no later than 30 days before the date of the confirmation hearing*’.<sup>18</sup> As previously stated by the Court, the deadlines referred to in rule 121(3), (4), (5) and (6) of the Rules ‘are only indicative of the *minimum* notice period a party may avail itself to comply with its disclosure obligations. They serve the purpose of allowing the suspect to prepare adequately for the confirmation hearing as guaranteed in article 67(1)(b) of the Statute’.<sup>19</sup>

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<sup>18</sup> Emphasis added.

<sup>19</sup> Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom*, [Public Redacted Version of “Decision on Disclosure and Related Matters”](#), 23 January 2019, ICC-01/14-01/18-64-Red, para. 13 (footnotes omitted). See also *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#), 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 20; *The Prosecutor v. Dominic Ongwen*, [Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#), 27 February 2015, ICC-02/04-01/15-203, para. 17.

17. In light of this, the Single Judge adopts the disclosure calendar for the confirmation hearing, as specified hereinafter, having taken into account: (i) the Prosecution's submission that it is 'on track to complete the vast majority of its disclosure by mid-July 2021'; (ii) the considerable volume of the evidence disclosed thus far and the remaining items of evidence to be disclosed, including the large number of witnesses the Prosecution intends to rely upon for the purpose of the confirmation hearing; and (iii) the Defence's submission on the need to obtain the entirety of disclosed items in order to understand the concrete nature of the charges against Mr Said for the preparation of his defence.

18. Therefore, in order to allow for 'the sufficient and meaningful preparation of the Defence and the Chamber',<sup>20</sup> the Single Judge finds it appropriate to order the Prosecution to submit the document containing the charges, together with the list of evidence the Prosecution intends to present at the confirmation hearing by Monday, 16 August 2021 at the latest.<sup>21</sup> The Prosecution is also instructed to submit the English and French versions of the document containing the charges on the same day. Furthermore, the Prosecution is ordered to disclose all evidence it intends to rely upon at the confirmation hearing, including the totality of the witness statements by 16 August 2021 at the latest. Any items of evidence submitted after that date will not be taken into account for the purposes of the confirmation hearing. This finding is without prejudice to the Prosecution's ongoing duty to provide the Defence with potentially exonerating evidence in accordance with article 67(2) of the Statute.

19. Furthermore, the Single Judge adopts, *mutatis mutandis*, the structure and format of the document containing the charges as instructed in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*.<sup>22</sup> With respect to the page limit of

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<sup>20</sup> See Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines, 2 November 2020, ICC-02/05-01/20-196 (the '[Abd-Al-Rahman Confirmation Hearing Postponement Decision](#)'), para. 41.

<sup>21</sup> See in that regard, Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238, para. 43, p. 15.

<sup>22</sup> [Abd-Al-Rahman Confirmation Hearing Postponement Decision](#), ICC-02/05-01/20-196, para. 41.

the document containing the charges, the Single Judge stresses that, in accordance with regulation 38(3)(g) of the Regulations, it shall not exceed 30 pages.

20. In addition to the document containing the charges, the Prosecution shall present, in a separate pre-confirmation brief, the material in support of the charges. The Single Judge adopts, *mutatis mutandis*, the structure and format of the pre-confirmation brief as instructed in the *Abd-Al-Rahman* Confirmation Hearing Postponement Decision.<sup>23</sup> In particular, each statement of fact made in the pre-confirmation brief should have ‘a corresponding footnote referring specifically, with hyperlinks, to the most probative supporting evidence, duly explaining which evidence is believed to support each charge and the reason why that would be the case’.<sup>24</sup> The Prosecution is ordered to submit its pre-confirmation brief by Monday, 30 August 2021 at the latest. The Prosecution is also instructed to submit the English and French versions of the pre-confirmation brief on the same day. With respect to the page limit of the pre-confirmation brief, the Single Judge stresses that, in accordance with regulation 38(1)(a) of the Regulations, it shall not exceed 120 pages.

21. The Single Judge further notes the Prosecution’s submissions in its First Disclosure Report that it will ‘file requests for identity redactions pursuant to rule 81(4) of the Rules at the earliest opportunity, and at the latest by 1 June 2021’<sup>25</sup> and that its ‘review completed thus far has identified only a few documents for which non-standard redactions under rule 81(2) of the Rules will be sought’.<sup>26</sup> The Single Judge therefore understands that the Prosecution has completed its review and further observes that it has not submitted any such requests thus far. Therefore, and in case the Prosecution still intends to submit such requests for redactions not falling into the standard categories, or requests for the non-disclosure of witnesses’ identities or the non-disclosure of entire items of evidence, such requests need to be submitted in advance of the final deadline on disclosure, and by Friday, 6 August 2021 at the latest. Furthermore, the Prosecution

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<sup>23</sup> See [Abd-Al-Rahman Confirmation Hearing Postponement Decision](#), ICC-02/05-01/20-196, para. 42.

<sup>24</sup> [Abd-Al-Rahman Confirmation Hearing Postponement Decision](#), ICC-02/05-01/20-196, para. 42.

<sup>25</sup> [First Disclosure Report](#), ICC-01/14-01/21-55-Red, para. 15.

<sup>26</sup> [First Disclosure Report](#), ICC-01/14-01/21-55-Red, para. 16.

must conclude the risk assessments and implementation of measures to protect witnesses and persons at risk by that date at the latest.

22. Lastly, the Single Judge notes the Defence's submissions that part of the disclosed items on E-Court are currently not searchable,<sup>27</sup> in contradiction with the E-Court Protocol adopted in the Disclosure Order.<sup>28</sup> In this regard, the Single Judge instructs the Prosecution to ensure compliance with the E-Court Protocol at all times and to remedy, as soon as practicable, this specific situation.

## **FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**SETS** the date for the confirmation hearing to commence on Tuesday, 12 October 2021;

**ORDERS** the Prosecution to, by

- a) Friday, 6 August 2021 at the latest:
  - Conclude risk assessments and implementation of measures to protect witnesses and persons at risk;
  - Submit any and all applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence, and requests for non-standard redactions under rule 81(2) or rule 81(4) of the Rules, if any;
- b) Monday, 16 August 2021 at the latest:
  - Submit the document containing the charges as specified at paragraph 18 of the present order in English as well as in French;
  - Disclose the totality of evidence, including all witness statements, intended to be relied upon at the confirmation hearing;
  - and
  - Submit the list of evidence intended to be presented at the confirmation hearing;
- c) Monday, 30 August 2021 at the latest:

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<sup>27</sup> [Defence's Response](#), ICC-01/14-01/21-99-Red, paras 46-49.

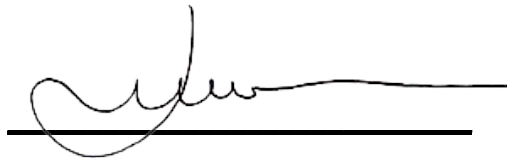
<sup>28</sup> [Disclosure Order](#), ICC-01/14-01/21-50-Red, para. 26.

- Submit the pre-confirmation brief as specified at paragraph 20 of the present order in English as well as in French; and
- Disclose all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules;

**ORDERS** the Prosecution to structure the document containing the charges and the pre-confirmation brief in accordance with paragraphs 19 and 20 of the present order; and

**INSTRUCTS** the Prosecution to ensure compliance with the E-Court Protocol at all times and to remedy, as soon as practicable, the matter referred to in paragraph 22.

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 Wednesday, 30 June 2021

At The Hague, The Netherlands