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**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  
with Confidential A**

**Public Redacted Version of “Prosecution’s Response to «*Demande déposée en vertu de la Règle 121(7) du Règlement de procédure e de preuve afin d’assurer le respect du droit fondamental de la Défense a disposer du temps et des facilités nécessaires a la préparation de l’audience de confirmation des charges pur pouvoir y contester les charges et les éléments de preuve présentes par l’Accusation* », (ICC-01/14-01/21-175-Conf-Red) “, ICC-01/14-01/21-185-Conf, dated 28 September 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 Office of the Prosecutor (“Prosecution”) hereby responds to the “*Demande déposée en vertu de la Règle 121(7) du Règlement de procédure e de preuve afin d’assurer le respect du droit fondamental de la Défense a disposer du temps et des facilités nécessaires à la préparation de l’audience de confirmation des charges pur pouvoir y contester les charges et les éléments de preuve présentes par l’Accusation*” (“Request”).<sup>1</sup>

2. The Request to postpone the confirmation hearing is unfounded and should be rejected. Neither the argument that the Prosecution allegedly withheld evidence, nor that it allegedly disclosed too many documents support the Request to postpone the confirmation hearing until at least 22 November 2021. Since 14 April 2021, the Prosecution has disclosed on a rolling basis and according to a clear and defined schedule as set by the Single Judge all relevant evidence for the confirmation hearing. Further, the Defence has been in possession of the core incriminating evidence since July 2021. The Defence also received the narrowly tailored List of Evidence (“LoE”), together with the Document Containing the Charges (“DCC”), on 16 August 2021 and has had sufficient time to analyse all disclosed items. Last, the Defence has had ample time to plan and conduct any investigative activities in Bangui deemed necessary ahead of the confirmation hearing.

## II. CONFIDENTIALITY

3. This response is filed as *Confidential* in accordance with regulation 23bis(2) of the Regulations of the Court since the Defence’s Request is of the same designation. A public redacted version will be filed as soon as practicable.

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<sup>1</sup> ICC-01/14-01/21-175-Conf-Red.

### III. SUBMISSIONS

4. The Prosecution submits that the Request should be rejected and the confirmation hearing proceed as scheduled on 12 October 2021. The Defence arguments can be grouped under the following three justifications:

- a. The Prosecution has withheld certain information and should be ordered to disclose further materials.
- b. The Defence needs more time to analyse all the disclosed items of evidence, including items on the List of Evidence (“LoE”) that are not cited in the Pre-Confirmation Brief (“PCB”). The Defence argues that considering the amount of pages disclosed, it will require a total of 14 months to review and analyse all of the evidence disclosed.
- c. They could not plan and conduct an investigation mission to the Central African Republic (“CAR”) before receiving the Pre-Confirmation Brief (“PCB”) and all disclosed materials.

#### A. Disclosure issues should be raised *inter partes*

5. All alleged non-disclosed items of evidence were disclosed to the Defence. The Prosecution can only reiterate the importance of *inter partes* discussions to resolve possible disclosure issues.<sup>2</sup>

6. It is well within the Defence’s right to seek additional time to prepare for the confirmation hearing. However, it is disingenuous to avoid *inter partes* disclosure

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<sup>2</sup> See also ICC-01/14-01/21-166-Conf., para. 4.

discussions and base part of its Request on a misrepresentation of the disclosure practice of the Prosecution, including of material allegedly not disclosed.

**B. The Prosecution has met its disclosure obligations**

7. The Defence alleges in its Request a number of disclosure violations which can be summarised as follows :

- a. The Prosecution withheld information which is potentially exonerating under article 67(2) (“PEXO”);<sup>3</sup>
- b. 12 videos were provided without transcripts;<sup>4</sup>
- c. The Prosecution withheld Rule 77 information related to witnesses;<sup>5</sup>
- d. the Prosecution has withheld information “useful” to the Defence;<sup>6</sup>
- e. the Prosecution did not disclose the statements of witnesses related to 53 items of evidence,<sup>7</sup> and
- f. the Defence has not received transcripts of the testimony of common CARIIB trial witnesses.<sup>8</sup>

As will be demonstrated below, these alleged disclosure violations are unfounded.

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<sup>3</sup> Request, para. 23.

<sup>4</sup> Request, para. 21.

<sup>5</sup> Request, para. 25.

<sup>6</sup> Request, para. 27.

<sup>7</sup> Request, para. 29.

<sup>8</sup> Request, para. 32. This request is now formally moot, see decision ICC-01/14-01/21-182.

*i. The Prosecution has not withheld evidence*

8. The Defence alleges that the Prosecution has withheld statements of witnesses for whom it has disclosed related materials.<sup>9</sup> To demonstrate this allegation, the Defence provides in Annex 1 of its Request, a list of ERNs with corresponding P-numbers.<sup>10</sup>

9. [REDACTED],<sup>11</sup> the “related to witness” field has been used more extensively by the Prosecution to assist the Parties with linking documents to a source of origin. The items noted by the Defence are either related to persons who have provided documents purely as a *source*, or who were only *screened*, or who were interviewed but the statement they provided bears no connection to the case against Mr. SAID. Since these persons provided items of evidence to the Prosecution, they received a witness number (or P-number). Some of these persons were also interviewed by the national authorities (not the Prosecution) and when relevant, they were disclosed to Mr SAID.

10. The Prosecution sets out in Annex 1 of its Response a detailed review of the Defence’s list of ERNs. The Prosecution notes that in three limited instances, clerical errors were made. Witness P-numbers of witnesses not related to the case were mistakenly added. They are also identified in Annex 1 to this Response.<sup>12</sup>

11. The Defence further submits that 12 videos on the LoE were provided without transcripts.<sup>13</sup> The Prosecution has 16 video items of evidence on its LoE. The transcripts for *all* the videos that contain the sounds of persons speaking have been transcribed and disclosed.<sup>14</sup>

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<sup>9</sup> Request, para. 29.

<sup>10</sup> Request, Annex 1.

<sup>11</sup> [REDACTED].

<sup>12</sup> These are P-0451, P-0590 and P-0767.

<sup>13</sup> Request, para. 21.

<sup>14</sup> Of these 16 videos, 9 videos are the drone footage of the OCRB detention site produced by OTP - FSS. One additional video was provided by P-0500, which also has no person speaking in it [CAR-ORP-2016-0229]. All

12. The Defence also alleges that it has not received the materials foreseen in packages PEXO 002 and 003.<sup>15</sup> The Prosecution had forecast these additional PEXO packages at the outset of its preliminary disclosure schedule. However, the secondary review of the documents identified for disclosure resulted in their final disclosure classification as INCRIM or Rule 77 evidence. Where an item classified as INCRIM, also included PEXO or Rule 77 evidence, this was highlighted in the Ringtail/eCourt disclosure notes. Therefore, no potentially exonerating evidence was withheld from the Defence.

*ii. The Prosecution has met its disclosure deadlines*

13. The Prosecution rejects the Defence's contention that it waited until 30 August 2021 to disclose the items "*nécessaire à la préparation de la défense de l'Accusé*",<sup>16</sup> thereby allegedly hampering their ability to prepare for the confirmation hearing.

14. The Prosecution met the disclosure deadlines set by the Single Judge.<sup>17</sup> The schedule was ordered by the Single Judge to accommodate the Suspect's right to a timely and complete disclosure of the evidence.<sup>18</sup> For this reason, the Single Judge extended the minimum notice period of four weeks to almost eight weeks by setting the disclosure deadline for incriminatory evidence to 16 August 2021. The notice period for the Defence to receive article 67(2) and Rule 77 evidence was extended to 30 August 2021, almost 6 weeks prior to the confirmation hearing.<sup>19</sup> In addition, the Prosecution organised its disclosure on a rolling basis, in weekly disclosure packages

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other videos have been disclosed with transcripts and where necessary with translations, see [CAR-OTP-2060-0623, CAR-OTP-2060-0678; CAR-OTP-2130-9389; CAR-OTP-2122-7378; CAR-OTP-2130-9392; CAR-OTP-2107-6924; CAR-OTP-2107-7058; CAR-OTP-2122-2292; CAR-OTP-2107-6939; CAR-OTP-2107-7079; CAR-OTP-2122-2313].

<sup>15</sup> Request, para. 23.

<sup>16</sup> Request, para. 22.

<sup>17</sup> See ICC-01/14-01/21-112, pages 9-10.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

and provided detailed disclosure reports to the Defence and the Chamber including overview lists of the witness materials disclosed.<sup>20</sup>

15. The Prosecution kept both the Single Judge as well as the Defence informed of its disclosure schedule. For example, it had indicated that certain types of information classified as Rule 77 would only be available towards the end of the set deadlines.<sup>21</sup>

16. Last, the necessary protective measures for some witnesses had to be in place before their Rule 77 or article 67(2) evidence could be disclosed. As outlined previously,<sup>22</sup> this protection process is challenging as it requires responsible and well informed assessments while operating in a volatile security environment and during a pandemic. The Prosecution had to prioritise the disclosure of the witnesses it intended to rely upon for the purposes of the confirmation hearing. That is because the Prosecution had to ensure Mr. SAID was informed at the earliest opportunity of the evidence in support of the charges and within the deadline of 16 August 2021. The result was that Mr. SAID received the bulk of the incriminating evidence already by the end of July 2021.<sup>23</sup>

*iii. The Prosecution is not circumventing the Rule 77 deadline*

17. The Prosecution rejects the Defence allegation that it is circumventing the disclosure calendar.<sup>24</sup> The deadlines have passed and the Prosecution has met the disclosure scheduled as ordered. However, the Prosecution is under an ongoing obligation to disclose new information in its possession as soon as practicable and within the Court's permissible exceptions.<sup>25</sup> Due to the Prosecution's ongoing investigation, as well as its ongoing translation obligations, additional evidence is

<sup>20</sup> See ICC-01/14-01/21-87-Conf-Red.; ICC-01/14-01/21-114-Conf-Red.; ICC-01/14-01/21-135-Conf-Red.

<sup>21</sup> For example, see ICC-01/14-01/21-135-Conf-AnxC.

<sup>22</sup> ICC-01/14-01/21-55-Conf.

<sup>23</sup> See ICC-01/14-01/21-135, Annex A.

<sup>24</sup> Request, para. 24.

<sup>25</sup> Rule 81(2) or 81(4) for example.

currently being collected. In its disclosure notifications, the Prosecution has made clear that it will not rely on the evidence disclosed after the set deadlines.<sup>26</sup> However, the Prosecution's disclosure obligations continue. The alternative would be to withhold disclosure until after the confirmation of charges hearing has been held or the confirmation decision issued, which would run counter to the Prosecution's obligations.

18. The Prosecution classifies the materials it discloses as INCRIM, Rule 77, PEXO or OTHER in order to provide notice to the Defence. The category OTHER has been utilised where the Prosecution cannot clearly ascertain whether the information may be *material* to the preparation of the Defence or not but is, on a preliminary and *prima facie* review, assessed as likely not relevant.<sup>27</sup>

19. The Prosecution rejects the Defence's notion that documents shown to a witness, mentioned by, or commented on by a witness are *per se* Rule 77 and cannot be classified as "OTHER". This may be argued for materials related to witnesses the Prosecution intends to *rely* on to support the charges because assessing the reliability and credibility of such "INCRIM" witnesses becomes paramount. However, there is no basis to argue such a blanket notion or categorisation for all materials related to witnesses whose information has been disclosed under Rule 77 or PEXO. For example, while a witness's statement may include exonerating information, photos he or she provided to the Prosecution with no link to *that* PEXO part of the statement or the case against Mr SAID are themselves not *per se* exonerating or material and thus do not have to be classified as PEXO or R77.

20. Again, not all information obtained during an investigation, becomes automatically *material* to the preparation of the Defence.<sup>28</sup> The jurisprudence of the

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<sup>26</sup> See for example ICC-01/14-01/21-174.

<sup>27</sup> For example, this category has been used in the case against *Yekatom and Ngaissona*, see Disclosure Notification dated 26 February 2021, ICC-01/14-01/18-894.

<sup>28</sup> See ICC-01/12-01/18-859-Red., para. 10. See also ICC-01/14-01/21-182, para. 13.

Court is also quite clear that disclosure classifications do not apply to whole *categories* of documents but are always dependent on a document's content and determined on a case-by-case basis.<sup>29</sup> Utilising the category "OTHER" - where applicable - is not a means to circumvent the judicial deadline but a means to ensure complete disclosure to the benefit of the Mr SAID.

21. Contrary to the Defence contention,<sup>30</sup> the Prosecution is only disclosing the fruits of its on-going investigation as per its statutory obligations.

*iv. The Defence has been in possession of the core evidence since July 2021*

22. The Defence overlooks that the core evidence of the Prosecution's case has been in their possession since 14 April 2021 with the disclosure of the underlying evidence of the Arrest Warrant.<sup>31</sup> As stated above, the bulk of the incriminating evidence was completed by the end of July 2021 and redactions to the identity of witnesses were requested for a very limited number of witnesses.<sup>32</sup> Further, the case against Mr SAID has remained the same as first set out in 2018 in the Prosecution's Arrest Warrant Application and the Pre-Trial Chamber's decision issuing the Arrest Warrant and finally, in 2021, in the DCC.

23. The Single Judge ordered the Prosecution to submit its LoE at the same time as the DCC on 16 August 2021. This allowed the Defence to put into context and make the necessary links between the evidence and the charges ahead of receiving the PCB.

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<sup>29</sup> ICC-01/04-02/06-1330 OA3, 20 May 2016, para. 23; ICC-02/05-03/09-501 OA4, 28 August 2013, para. 39 ; ICC-02/05-03/09-501 OA4, 28 August 2013, paras. 2, 42 ; ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 10 ( "The legal framework of the Court does not contain any provision stipulating that requests for assistance must be disclosed to the accused person. Rather, such material *may* fall within the Prosecutor's residual obligation under rule 77 of the Rules to disclose any document and other objects in her possession or control "which are material to the preparation of the defence". Whether this is the case necessarily depends on the content, context and purpose of any individual re-quest for assistance in the specific circumstances of each case, and no general and abstract definition can be given as to the type of requests for assistance which may fall within rule 77 of the Rules.")

<sup>30</sup> So alleged in Request, para. 27.

<sup>31</sup> ICC-01/14-42-US-Exp, para. 27.

<sup>32</sup> ICC-01/14-01/21-138-Conf-Exp.

For the majority of the charged sub-incidents in the DCC, the Prosecution indicates the victim's identity using their witness code. Consequently, the Defence did not need to wait for the PCB to be filed to begin their analysis of the evidence supporting the charges.

24. Additionally, the Defence's submission that there are English sources in the French translation of the PCB also does not justify a postponement of the confirmation hearing.<sup>33</sup> On 30 August 2021, the Prosecution submitted the PCB within the set deadline. Concurrently, it provided the French translation. All witness statements the Prosecution is relying upon have also been translated and disclosed within the set deadlines. If the Defence wishes to check the citations in French it can easily do so through eCourt as the paragraph numbers between the original statement and its translation are the same.

25. Furthermore, the Defence argues that 69 items on the LoE are not cited in the PCB.<sup>34</sup> This simply indicates that the Prosecution is relying on less evidence than it initially anticipated. Of the 844 items on the Prosecution's LoE, 92 % are cited in the PCB. Of the 69 documents listed in the Annex 2 of the Request, 17 are translations or original English versions of statements. Their corresponding version has been cited in the PCB.

26. The remaining 52 documents which are not cited in the PCB represent less than 5 % of the materials on the LoE. For these, the disclosed meta-data notes include which pages and paragraphs the Prosecution is relying upon and therefore identify their relevance to the case. [REDACTED]. Should the meta-data of the disclosure notes be unclear as to the relevance of the item to the charges, the Prosecution is available to provide further details or clarifications. The analysis of these very few items on the

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<sup>33</sup> Request, para. 44.

<sup>34</sup> Annex 2 of the Request.

LoE, which had not been cited in the PCB and which have all been disclosed by 16 August 2021, does not warrant a postponement of the confirmation hearing.

27. The Defence also alleges that the Prosecution did not pursue an issue raised in a prior screening of witness P-1289.<sup>35</sup> Contrary to the Defence's assertion, the issue was raised during the interview of P-1289 and was recorded accordingly in his statement.<sup>36</sup>

28. Last, the Defence's allegation that the Prosecution is not providing correct or insufficient chain of custody information is also unfounded.<sup>37</sup> The examples described by the Defence are not sourced. While the Prosecution is available to address these issues or provide the necessary clarifications, it is unable to do so.<sup>38</sup>

### **C. The investigation request comes too late**

29. The Defence's request to also postpone the confirmation hearing on the ground that they could not conduct investigative activities in the field, should also be rejected.<sup>39</sup> Contrary to the Defence's argument that they had insufficient time to analyse the disclosed materials in order to plan and conduct such mission to Bangui, the Prosecution recalls that the core evidence has been in the possession of the Defence since 16 August 2021 at the latest, with the majority available since the end of July. Also, the Prosecution has notified the Defence on a rolling basis that it was disclosing evidence only in relation to the charged incidents of the OCRB and CEDAD, meaning that it was clear to the Defence that the case against Mr SAID would not be expanded to include other previously unknown incidents.

30. As set out above, the DCC and the LoE were submitted at the same time providing the Defence two full months ahead of the confirmation hearing to conduct

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<sup>35</sup> Request, para. 36.

<sup>36</sup> [REDACTED].

<sup>37</sup> Request, para. 46.

<sup>38</sup> [REDACTED].

<sup>39</sup> Request, paras. 47-57..

investigative activities in Bangui, if so required. The field office in Bangui is operational and advance planning, including during the COVID pandemic, was possible.

31. Finally, the Prosecution can only note that the requested postponement of six weeks (until 22 November 2021) seems to be in contradiction with the Defence's assertion that they require 14 months to analyse the disclosed materials and be adequately prepared to challenge the charges and the evidence relied upon by the Prosecution.<sup>40</sup>

#### IV. RELIEF SOUGHT

32. For the above reasons, the Prosecution requests the Single Judge to reject the Request of the Defence *in toto*.



**Karim A. A. Khan QC, Prosecutor**

Dated this 29<sup>th</sup> day of September 2021  
At The Hague, The Netherlands

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<sup>40</sup> Request, see title 2.1.1 *in fine* and para. 33.