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

Date: **7 June 2022**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

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

**Public
with Confidential Annex A**

**Public Redacted Version of “Prosecution’s request for the trial be held partially in
Bangui”, ICC-01/14-01/21-337-Conf, dated 30 May 2022**

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. Pursuant to rule 100 of the Rules of Procedure and Evidence (“Rules”), the Office of the Prosecutor (“Prosecution”) requests that the Chamber recommend to the Presidency to hold the trial of Mahamat Said Abdel Kani (“Mr SAID”) partially in Bangui (“Request”). The Prosecution submits that it is in the interests of justice that the proceedings be partially held in Bangui as it would bring the Court closer to the victims and the communities affected and concerned by the charged crimes. Alternatively, the Prosecution requests that only the opening statements be held in whole or in part in Bangui.

2. The Prosecution has consulted the Defence who agrees with the principle of holding the opening of the trial in Bangui. The Office of the Public Counsel for Victims (“OPCV”) agrees with the Prosecution that the Court should conduct *in situ* proceedings, which should include the opening and witness testimony. The Registry stands ready to conduct the necessary assessment as to the feasibility of the Request.¹

3. The Prosecution also consulted with the relevant Central African Republic (“CAR”) and [REDACTED]. They welcome the suggestion to hold the opening statements in Bangui, and have reaffirmed their willingness to accommodate the Request if so decided and to provide their full support and cooperation in its implementation.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court the Request is filed as confidential since it relates to *inter partes* and inter organ discussions and

¹ See rule 100(2) of the Rules.

cooperation matters with both the CAR authorities and [REDACTED]. A public redacted version will be filed as soon as possible.

III. SUBMISSIONS

A. Request to hold the trial partially in Bangui

1. *It is in the interests of justice to hold hearings in Bangui*

5. The Prosecution proposes to hold the trial partially in Bangui, which would mean that opening statements would be held, and the first witnesses heard, [REDACTED]. Pursuant to rule 100(1) of the Rules, the Court may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part, where the Court considers that it would be in the interests of justice (*in situ* proceedings).

6. The Prosecution submits that it is in the interests of justice to hold proceedings in Bangui. The alleged crimes were committed in Bangui. The victims and the Accused are from the CAR. Holding proceedings in Bangui would bring the Court closer to the victims, the affected communities and also the communities concerned by the charged crimes. The ability to attend proceedings in person would render justice more accessible for many. *In situ* proceedings would reinforce the importance of justice to the population of the CAR, and the role of the ICC in the establishment of truth in the cases it prosecutes. Additionally, *in situ* proceedings would serve “a range of important objectives for the Court in relation to the affected communities: media coverage of the Court’s activity, focus and debate on the Court’s work, a sense of what the proceedings involve, and greater respect for the rule of law and human rights”.²

² <https://www.hrw.org/report/2008/07/11/courting-history/landmark-international-criminal-courts-first-years>, See C, *In situ* proceedings. See also <https://www.hrw.org/legacy/backgrounder/ij/memo0706/3.htm>. Last accessed on 25 April 2022.

2. *It is logistically feasible to hold hearings in Bangui*

7. While two Trial Chambers of this Court have previously conducted crime site visits,³ hearings have never been held outside the seat of the Court in The Hague. Technological and logistical advances now make it possible to hold *in situ* hearings, in whole or in part, including simultaneously between Bangui and The Hague. Secure means of communications for an accused person to adequately communicate with his lawyers are also available, including by video link/conference. Currently, trial chambers hear by video link witnesses who may be testifying from another country. The Court possesses extensive experience in this field. [REDACTED].

8. On 14 April 2022 and subsequently during a high level visit to Bangui in the second half of April 2022, the Prosecution held consultations [REDACTED].

9. Based on the above consultations, the Prosecution is of the view that several options are open to hold the trial partially in Bangui and thus ensure that justice could be brought closer to the victims and the affected communities. For example, it would be logistically possible for the Chamber to sit in Bangui [REDACTED] to hear the opening statements of the Parties and Participants and the evidence of the first witnesses. Alternatively, the Chamber, while present at the seat of the Court, could hear the opening statements of the Parties and Participants and the evidence of the first witnesses, while the latter are present in Bangui and appear by video link from [REDACTED].

10. Pursuant to rule 100(2), before a recommendation to hold *in situ* hearings is transmitted to the Presidency of the Court, the Chamber “shall take account of [...] an assessment prepared by the Registry”. On 13 April 2022, the Prosecution consulted the relevant Registry services and they confirmed their readiness to conduct the

³ Site visits were conducted in the *Katanga & Ngudjolo* case and the *Ongwen* case.

required assessment on the feasibility of holding *in situ* proceedings and for it to be annexed to the recommendation to be transmitted to the Presidency.

3. *Positions of the Parties, the Participants and the CAR authorities*

11. The CAR authorities have indicated that holding the opening statements in Bangui would be positively perceived. [REDACTED].⁴

12. The OPCV has expressed its support for the initiative taken by the Prosecution in this Request, and has reiterated its position as already expressed before the Chamber of “the importance of holding judicial proceedings in the country where the crimes were committed – thereby providing maximum access to a large public, including victims and affected communities. This also contributes to the transparency and accessibility of the proceedings, as well as to a wide dissemination of information and a more visible justice to the victims”.⁵

13. On 14 April, 2 May 2022, and 25 May 2022, the Prosecution held *inter partes* discussions with the Defence. Their position remains that the opening (and closing) statements could be held in Bangui.⁶ However, the Defence only consents to the opening statements being held in Bangui if Mr SAID can be physically present during the hearings.

4. *Options for the presence of the Accused*

14. During the first status conference, the Prosecution stated that the Chamber should only conduct a site visit before the start of the trial.⁷ However, the Prosecution recently conducted an internal security assessment (Annex A), including for victims

⁴ See also by analogy, the Registry’s submission on the presence of the Accused for a site visit, ICC-01/14-01/21-241-Conf, para. 8.

⁵ ICC-01/14-01/21-228, para. 46.

⁶ See ICC-01/14-01/21-231-Conf-Red, para. 72, *in fine*. See also ICC-01/14-01/21-T-007-CONF-ENG CT, p. 40.

⁷ ICC-01/14-01/21-T-007-CONF-ENG CT, p. 38.

and witnesses, which concludes that holding proceedings such as the opening statements in Bangui would not compromise the security and protection of certain witnesses. However, the presence of Mr SAID in Bangui for such proceedings is not recommended due to an identified risk of absconding.

15. In making this Request, the Prosecution is conscious that pursuant to article 68(1) of the Statute only witnesses with the appropriate protection and security profile could be heard *in situ* in Bangui. The Prosecution would organise the presentation of its case accordingly.

16. Based on the above, the Prosecution considers that the options for holding a partial trial in Bangui could be the following: One option could be for the Chamber, Parties and Participants to be physically present in Bangui, except for the Accused, who would follow the proceedings via video link from the seat of the Court with one of his counsel, while the other counsel (perhaps the lead counsel) would be in Bangui. As the video link and other necessary communication technology is stable, Mr SAID would be participating in the proceedings as if the Chamber, Parties and Participants were present with him at the seat of the Court in one court room.

17. The other option could be for the Chamber and the Accused to remain at the seat of the Court, with a member of the Defence team, if that were the preference of the Defence. The Parties and Participants would make their opening statements and question the first witnesses before the Chamber from Bangui connected via video link.

18. In both scenarios it would need to be ensured that the Accused can communicate freely and fully with his counsel. If these options could be agreed on in principle, then other consequential modalities could be determined by the Chamber as necessary.

19. The Prosecution submits that these options would ensure that the Accused is present at his trial within the meaning of article 63(1) and 67(1)(d) of the Statute. An

accused's right to be present at trial can be guaranteed by his virtual or remote participation as long as the Chamber can ensure that the modalities adopted protect his fundamental rights enshrined in the Statute. This would be the case if the Accused is at the seat of the Court and can hear and see the proceedings in real time, and can make interventions and communicate freely with his counsel as necessary at all relevant times. The Chamber, Parties and Participants would be connected by the means of audio-video technology as if they would be physically in one court room together.

20. As demonstrated during the COVID-19 pandemic, virtual hearings or partially virtual hearings have become the "new normal". The ICC has shown that it can hold hearings with full or partial remote participation, and that the presence of an accused and the guarantee of his fundamental rights, as well as other fundamental legal principles such as public access to the proceedings, can be achieved with the help of modern technology.⁸ If the requirement for the accused's presence in article 63(1), and the accused's right to be present in article 67(1)(d) were to preclude a video link presence at the seat of the Court, *in situ* proceedings would never be a viable option at the ICC in cases where an accused cannot physically join the other parties and participants at the *in situ* location due to a high risk of absconding or other comparable risks.

21. The options for a partial trial outlined above would cause no unfair prejudice to Mr SAID as his right to be present at trial, and to communicate freely and in confidence with his counsel, can be fully respected through the adoption of

⁸ For instance, Mr SAID appeared via video link from the ICC Detention Center on 28 and 29 January 2021 for the first appearance and some participants took part in the hearing via video-link due to the Covid-19 pandemic, see <https://www.icc-cpi.int/news/mahamat-said-abdel-kani-makes-first-appearance-icc-confirmation-charges-hearing-scheduled-5>. See also on virtual hearings in the *Al Hassan* case, ICC-01/12-01/18-824 (Registry's Observations on methods of work to minimise the impact of COVID-19), para. 19 and 20 (with a recommendation for Mr Al-Hassan to participate via video-link from the Detention Centre). See also ICC-02/11-01/15-1341, para. 14, as well as ICC-02/11-01/15-1340-Red, ICC-02/11-01/15-1352. In the *Gbagbo* and *Ble Goude* case a partially virtual appeal hearing was held on 22-24 June 2020. In the *Ntaganda* case a partially virtual hearing was held on 12-14 October 2020. See further *The Prosecutor v. Ratko Mladic*, MICT-13-56-A, 19 June 2020, with references to the extensive use of virtual hearings in national jurisdictions during the COVID pandemic at para. 12.

appropriate audio-video technology and other modalities. Moreover, even aside from the Court's recent use of communication and video link technology to hold remote or partially remote hearings, an accused's physical (in person) attendance at trial is not absolute. Rather, upon the request of an accused who is subject to a summons to appear, a Trial Chamber may allow his or her presence at trial (or part thereof) through the use of video technology, or even excuse his or her presence at trial (or part thereof) in exceptional circumstances and where necessary and proportionate.⁹ Here, the interests of justice set out above, meaning the interests of the affected communities, victims and the Court as a whole, must be balanced against the dire security situation in Bangui, which only further justifies Mr SAID's virtual connection to the proceedings *in situ* from the seat of the Court.

22. In sum, the Prosecution's proposal only relates to the opening statements and a small number of witnesses to be heard from Bangui, and not the full trial proceedings. Mr SAID's rights could be fully guaranteed by a stable audio-video connection and other appropriate modalities, thereby ensuring his ability to freely communicate with his counsel, continuous legal representation and his ability to make interventions in the proceedings. As such, there would be no prejudice to the Accused.

B. Alternative request to hold at least the opening statements in Bangui

23. In the alternative, the Prosecution requests that at least the opening statements be held in Bangui. Again, there are several possibilities to consider which should be assessed by the Registry pursuant to rule 100(2) of the Rules. Similar to the above, one option would be for the entire Chamber, the Parties and the Participants, with the exception of Mr SAID, to be physically present in Bangui. Mr SAID would remain at the seat of the Court together with one of his counsel, and follow the proceedings through a stable audio-video link and with free and confidential communication to

⁹ See 134*bis* and 134*ter* of the Rules.

his lead counsel ensured as necessary at all relevant times. Another option would be for only the Parties and Participants to be present in Bangui, including the lead counsel if preferred by the Defence, while the Chamber and Mr SAID and one of his counsel remain at the seat of the Court and are connected to the *in situ* proceedings via audio-video link.

24. Here again, there would be no prejudice to the rights of Mr SAID as the Chamber, Parties, and Participants would be joined by the means of stable modern technology as if they were in one court room together.

IV. RELIEF SOUGHT

25. For the above reasons, the Prosecution requests the Chamber to make a recommendation pursuant to rule 100 of the Rules to hear the opening statements and the first witnesses in whole or in part in Bangui. Alternatively, the Prosecution requests that, at least, the opening statements be held in whole or in part in Bangui.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 7th day of June 2022

At The Hague, The Netherland