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Date: **8 June 2021**

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

Public Redacted Version of “Prosecution’s Response to the Second Decision on matters related to translation”, ICC-01/14-01/21-92-Conf, dated 7 June 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 Second Decision on matters related to translation (“Decision”).¹

2. As outlined in its Second Disclosure Report,² the Prosecution is on schedule to complete almost all of its disclosure of incriminatory evidence by mid-July 2021, well in advance of the confirmation hearing. Thereafter, the Prosecution will disclose, by 5 September 2021, a limited number of incriminatory items, including any outstanding French translations of incriminatory statements of witnesses.

3. At present, the Prosecution has already disclosed around half of the evidence it intends to rely upon for the confirmation proceedings. Most of the evidence disclosed to date is already available in French, either because it has been translated or because the original item was in French. Therefore, much of the core incriminatory evidence is already fully accessible to Mr SAID.

II. CONFIDENTIALITY

4. This Response is classified confidential in accordance with regulation 23*bis*(2) of the Regulations of the Court (“Regulations”) as it relates to previous filings of the same designation. A public redacted version will be filed concurrently.

¹ ICC-01/14-01/21-86 filed on the same day as the Decision.

² Prosecution’s Second Report on Disclosure and Related Matters (“Second Disclosure Report”), ICC-01/14-01/21-87.

SUBMISSIONS

A. Request for a revised disclosure programme

5. The Prosecution provides the following clarifications as per paragraphs 33–37 of the Decision³ and the Single Judge’s instruction to revise its approach to disclosure of evidence.

6. As outlined in the First⁴ and Second Disclosure Report,⁵ the Prosecution’s current schedule provides for the disclosure of almost all of the core incriminatory evidence and associated information by 12 July 2021, which is well ahead of the confirmation hearing. Thereafter, the only outstanding material to be disclosed will be the material relating to [REDACTED] as outlined in the disclosure schedule.⁶

7. Most of the evidence is already fully accessible to Mr SAID since it is comprised of French documents or statements taken in French.⁷ Furthermore, as outlined in the Second Disclosure Report, the Prosecution has already started the process of disclosing French translations of the core incriminatory documents that require translation.⁸ Only a small number of items to be relied upon for the confirmation proceedings requires translation which is being progressed by the OTP Language Services Unit on the basis of the current disclosure schedule. These translations will be completed well in advance of the confirmation hearing.

8. The Prosecution recently reviewed the priority of its outstanding translations. As a result, the French translations of the most important outstanding material will be

³ ICC-01/14-01/21-86.

⁴ Prosecution’s First Report on Disclosure and Related Issues (“First Disclosure Report”), ICC-01/14-01/21-55-Conf, Confidential Annex E.

⁵ See Second Disclosure Report, Confidential Annex B, ICC-01/14-01/21-87-Conf-AnxB (setting out the Prosecution’s updated disclosure schedule).

⁶ *Ibid.*

⁷ [REDACTED].

⁸ Second Disclosure Report, para. 20.

disclosed first, followed by the translations of the less critical material, further facilitating the preparation of the Defence.

9. The Prosecution's disclosure schedule is narrowly tailored to the Prosecution's case against Mr SAID but also includes all information aligned with the evidence that enables the evidence to be understood, including investigation reports where necessary. To be clear, the schedule does not entail "making everything in [the Prosecution's] possession or control available to the Defence."⁹ Rather, the Prosecution has taken careful account of what is truly relevant for Mr SAID. Furthermore, to the extent that any disclosed statements "contain repetitive information about [the] same events or incidents,"¹⁰ those statements corroborate the accounts of the relevant witnesses and are thus important for meeting the Prosecution's burden of proof and establishing the truth. The Prosecution seeks to provide its evidence to the Defence at the earliest opportunity, including ahead of a potential future trial.

10. The Prosecution directs the Single Judge to the Overview of Disclosed Materials (Annex A)¹¹ and the updated Disclosure Schedule (Annex B),¹² to the Second Disclosure Report, which was filed—pursuant to the deadline set by the Single Judge—on the same day the Decision was issued. These two annexes show that almost all of the core incriminatory evidence relevant to the crimes allegedly committed at OCRB and CEDAD as well as the evidence linking Mr SAID to the commission of these crimes has already been disclosed or will have been disclosed by 7 June 2021. As noted above, the overwhelming majority of the evidence has already been disclosed in French, either because the original document was in French or because it has

⁹ The Prosecution has also expressly rejected such an approach in the past, see ICC-01/14-01/21-48-Conf-Red., paras. 4-9.

¹⁰ Decision, para. 34.

¹¹ ICC-01/14-01/21-87-Conf-AnxA.

¹² ICC-01/14-01/21-87-Conf-AnxB.

already been translated.¹³ Thus, Mr SAID and the Defence will have around four months to process this core evidence.

11. Apart from the [REDACTED] mentioned above, and also identified in the Disclosure Reports,¹⁴ the other outstanding incriminatory material for disclosure relates to the chapeau elements of articles 7 and 8 of the Rome Statute. This material will be disclosed by mid-July 2021. In respect to the chapeau elements evidence, which will be the main subject of upcoming disclosure packages,¹⁵ the Prosecution has further prioritised the witnesses and documents it intends to rely upon for the purposes of the confirmation proceedings. This additional review has resulted in a reduction of witnesses formerly listed in the Preliminary Witness List of Annex B of the First Disclosure Report.¹⁶

12. Specifically, the Prosecution intends to reduce the overall list of witnesses it seeks to rely on [REDACTED]. [REDACTED]. Therefore, the Defence should not be overburdened by the disclosure of items.¹⁷ The Prosecution will provide the updated list of witnesses it intends to rely upon for the confirmation proceedings in its third disclosure report due on 1 July 2021.¹⁸

13. All information disclosed as incriminatory evidence will be cited and sourced in the Pre-Confirmation Brief ("PCB"). The Prosecution is only disclosing information that will be cited in the PCB, included on the List of Evidence or that is important for the Defence to understand the origin of that information or the Prosecution's

¹³ See para.7 above, fn. 7.

¹⁴ See para.6 above, fns. 4 and 5.

¹⁵ See ICC-01/14-01/21-87-Conf-AnxB, p. 2 (describing the planned composition of the June and early July 2021 disclosure packages).

¹⁶ ICC-01/14-01/21-55-Conf-Exp-AnxB.

¹⁷ Decision, para. 34.

¹⁸ While the Prosecution may not seek to rely on some witnesses, it will uphold its duty to disclose under rule 77 where necessary.

interactions with the relevant witnesses.¹⁹ In relation to the latter category, the Prosecution has already identified the necessary documents for the Defence to understand where and how information was obtained during the course of the Investigation. As requested by the Single Judge in the Order on disclosure and related matters,²⁰ the Prosecution aims to disclose such information together with the evidence to better facilitate the Defence's preparation. For this reason, the Prosecution is providing witness statements together with all the related annexes, previous screenings, reports about contacts with the witness, and information received from a witness wherever possible.

14. In addition, documents to be relied upon in the PCB are provided with the investigation collection reports detailing how and when the Prosecution obtained the evidence, including the source. This type of information is important to the Defence,²¹ and therefore it does not constitute an unduly burdensome "volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case" or an unnecessary dump of information that "puts the defence in a position where it cannot genuinely exercise its rights" or "serves to hold back the proceedings."²²

15. True to its approach outlined in the First Disclosure Report,²³ and in line with the Decision, the Prosecution has taken a focused approach to the disclosure of rule 77 information. To date only two packages totalling 106 documents containing information directly related to incriminatory evidence such as interview of witnesses to be relied upon for confirmation have been disclosed. The Prosecution will continue to uphold its obligation under the rule 76 of the Rules of Procedure and Evidence, but

¹⁹ Contrary to the Single Judge's assumption that information "not truly relevant to the present case" may be disclosed, Second Decision, para. 34.

²⁰ ICC-01/14-01/21-50-Conf., para. 33. The Single Judge called on the "professionalism of the Prosecutor to exercise all possible efforts" in order to disclose "at the same time, all pieces of information relevant and related to the main material being disclosed".

²¹ *see also* ICC-01/14-01/21-29-Conf., para. 29.

²² Decision, para. 35.

²³ ICC-01/14-01/21-55-Conf, para. 8.

also to make available rule 77 and article 67(2) information (“PEXO”) to Mr SAID at the earliest opportunity.²⁴

B. Instruction to update external disclosure notes

16. The Prosecution takes note of the Single Judge’s instructions in para. 38 of the Decision on disclosure notes. The Prosecution will revisit the external disclosure notes relating to audio/video materials and strive to provide more information. However, it is to be noted that for witness statements disclosed as incriminatory evidence where the external disclosure notes encompass the entirety of the statement, this should be understood to mean that the Prosecution considers the entirety of the statement as incriminatory. It will be clear from the forthcoming Document Containing the Charges (“DCC”) and PCB why the full statement is incriminating. One frequently applicable reason is that certain portions of these statements bolster the overall credibility of the witness, even if they do not relate specifically to the incidents or Mr SAID’s involvement. The Prosecution considers that identifying only specific paragraphs in these circumstances would carry the risk of misleading the Defence about the relevance or importance of the statement.

²⁴ See for example *The Prosecutor v. Lubanga*, ICC-01/04-01/06-1433 OA11 (11 July 2008), para. 55 [The Defence is entitled to full disclosure in relation to the case as a whole as known by the Prosecutor...]; *The Prosecutor v. Banda & Jerbo*, ICC-02/05—/09 295 OA2 (17 February 2021), para 23; *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-1330 OA3 (20 May 20216), paras. 27-28.

C. Instruction to include a link between exhibits

17. The Prosecution also takes note of the instruction “to include information in its 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.”²⁵ First, the Prosecution wishes to stress that it disclosed witness statements together with their relevant Annexes. The ERNs of both witness statements and the documents comprising Annexes are provided already in the list of disclosed items annexed to the disclosure communication with each disclosure. Furthermore, all documents are linked to each other via the metadata, especially the “1 Related to Witness”, “ICC-01/14-01/21 Related to Witness” and “1 Source Identity” fields, which are received by the Single Judge together with the documents. Additionally, as required by the e-Court Protocol, a relationship is created between the source document and all its disclosed attachments via the Host Reference metadata containing the information in two fields: Source and Attachment. In response to the Single Judge’s instruction, the Prosecution has conducted a *review* of all disclosed materials so far. It has found that only very few disclosed documents are missing such source or Host Reference information at the time of the disclosure. In some instances this happened as the attachment needed to be disclosed prior to the statement,²⁶ for example for protection purposes. The Prosecution will soon issue a Metadata Update package for all the documents missing the link between source and attachment. In addition, to the relevant metadata, the Prosecution will continue to provide descriptive information about what it is disclosing in the disclosure notifications as well as in its monthly disclosure reports.

²⁵ Decision, para. 38.

²⁶ [REDACTED].

III. CONCLUSION

18. The Prosecution is on track to complete the vast majority of its disclosure by mid-July 2021 and will fully complete its disclosure, including the remaining French translations of its core incriminatory evidence by 5 September 2021. As has previously been the case, and in conformity with the Decision, the Prosecution will continue to disclose only items that are specifically relevant to the present case and necessary for the purpose of the confirmation of charges, and/or otherwise must be disclosed according to the statutory framework.



Fatou Bensouda, Prosecutor

Dated this 8th day of June 2021
At The Hague, The Netherlands