



**Original: English**

**No. ICC-01/14-01/21  
Date: 14 September 2021**

**PRE-TRIAL CHAMBER II**

**Before: Judge Rosario Salvatore Aitala, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Tomoko Akane**

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

**Public**

**Order setting the schedule for the confirmation of charges 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**

Ms Sarah Pellet

**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**

**PRE-TRIAL CHAMBER II** of the International Criminal Court (the ‘Chamber’ and the ‘Court’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani* (‘Mr Said’), issues this ‘Order setting the schedule for the confirmation of charges 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’.<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 29 January 2021, Mr Said appeared before the Single Judge<sup>3</sup> 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>4</sup> The Single Judge, *inter alia*, scheduled the confirmation of charges hearing to commence on 5 October 2021.<sup>5</sup>
4. On 30 June 2021, the Single Judge issued the ‘Second order on disclosure and postponement of the confirmation hearing’, in which, *inter alia*, the confirmation hearing was set to commence on 12 October 2021.<sup>6</sup>
5. On 8 September 2021, the Office of the Prosecutor (the ‘Prosecution’), the Defence, and the Office of Public Counsel for Victims (the ‘OPCV’), pursuant to

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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* version (only available to the Registry, the Prosecution and the Defence) filed on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red); confidential, lesser redacted, *ex parte* version (only available to the Registry, the Prosecution and the Defence) filed on 18 March 2021 (ICC-01/14-01/21-6-Conf-Exp-Red2)).

<sup>3</sup> 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, *see* [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-3. *See also* [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-01/14-01/21-42.

<sup>4</sup> [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG. *See also* [Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-4; [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

<sup>5</sup> [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG, p. 11, lines 11-12.

<sup>6</sup> [ICC-01/14-01/21-112](#), p. 9.

instructions issued by the Single Judge via email,<sup>7</sup> submitted observations on the conduct of the confirmation of charges hearing.<sup>8</sup>

## II. SUBMISSIONS

### A. The Prosecution's Observations

6. The Prosecution requests to be allotted four hours during the confirmation hearing for its oral submissions on the merits, excluding time for its closing statement. It submits that it intends to use this time to present oral submissions on, *inter alia*, contextual elements of articles 7 and 8 of the Statute, the modes of liability and the crimes set out in the document containing the charges.

7. In addition, the Prosecution indicates that it will require 45 minutes for any final observations pursuant to rule 122(8) of the Rules, with such time being subject to variation depending on the nature and extent of the issues raised during the confirmation hearing. The Prosecution also indicates that, barring unforeseen circumstances, it does not intend to present objections or observations related to the proper conduct of the proceedings under rule 122(3) of the Rules.

8. Lastly, the Prosecution requests that (i) it be provided with adequate notice should the Defence intend to call witnesses as well as with a detailed summary of their anticipated testimony at least 15 days before the confirmation hearing; and (ii) that, pursuant to rule 121(6) of the Rules, it be notified 15 days before the confirmation hearing of the Defence's intention to raise the existence of an alibi or a ground excluding criminal responsibility.

### B. The Defence's Observations

9. The Defence indicates that it intends to raise certain objections or make observations on the proper conduct of the proceedings pursuant to rule 122(3) of the

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<sup>7</sup> See email of 2 September 2021 sent at 15:31.

<sup>8</sup> Prosecution's submissions regarding the conduct of the confirmation hearing, ICC-01/14-01/21-162 (the '[Prosecution's Observations](#)'); Corrigendum des « Observations de la Défense portant sur l'organisation de l'audience de confirmation des charges » déposées le 8 septembre 2021, ICC-01/14-01/21-164-Conf-Corr, 9 September 2021 (a public redacted version dated 9 September 2021 was registered on 10 September 2021 (ICC-01/14-01/21-164-Corr-Red)) (the '[Defence's Observations](#)'); OPCV Observations on the conduct of the confirmation of charges hearing, ICC-01/14-01/21-163 (the '[OPCV's Observations](#)').

Rules and that, should it decide not to do so, it will inform the Chamber. The Defence estimates that it will need 30 minutes to make any such objections or observations.

10. Moreover, the Defence estimates that it will need 30 minutes for its opening statement and 30 minutes for its closing statement. It also indicates that it will require a total of 15 hours for oral arguments on the merits, and a total of one hour for its response to the OPCV and legal representatives of victims.

11. Lastly, the Defence requests that it be allowed to file, after the confirmation hearing, a document containing its oral submissions including all references to evidence, noting that providing such references during oral submissions may impact on the clarity of the presentation and lead to errors (the ‘Defence’s Request’).

### **C. The OPCV’s Observations**

12. The OPCV requests to be allotted one hour for both its opening and closing statements, and 30 minutes to present oral requests, responses and submissions on any preliminary matters that may affect the interests of victims. The OPCV also indicates that it reserves the right to intervene, if necessary, on the issue of admissibility and relevance of evidence.

13. Moreover, the OPCV indicates that it reserves the right to make additional submissions on the conduct of the confirmation hearing based on future decisions from the Chamber on victims’ participation.

## **III. DETERMINATION BY THE CHAMBER**

14. The Chamber recalls articles 61 and 68 of the Statute, rules 79, 91, 121, and 122 of the Rules, and regulation 37(1) of the Regulations of the Registry.

## A. Hearing on the confirmation of charges

15. The Chamber recalls the principle of fairness which encompasses the notion of equality of arms and requires that the parties be placed on equal footing, and that the Defence should have the last word, as prescribed under rule 122(8) of the Rules.<sup>9</sup>

16. The Chamber further notes the second sentence of rule 122(1) of the Rules, which states that:

The Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented.

17. The Chamber underlines that, in light of the principle of expeditiousness and to ensure the efficiency of the proceedings, the oral submissions of the parties and participants must be concise in nature, and repetition should be avoided. It notes in this respect that the Prosecution has already had the opportunity to present to the Chamber its submissions, amounting to a total of 145 pages on the merits of the case. The Prosecution is therefore invited to ensure that it does not repeat its written arguments during the confirmation hearing. The Chamber is also mindful that the hearing will be the first opportunity for the Defence to present its arguments on the merits of the case and that it is therefore appropriate to grant more time to the Defence.

18. The Chamber further takes note of the Defence's submissions concerning the challenges it faces in light of the amount of material it needs to examine, and the list of matters which it wishes to raise at the hearing. The Chamber appreciates that the Defence's tasks are challenging. However, the Chamber emphasizes that, early on in the course of the proceedings, measures have been taken in order to ensure sufficient and meaningful preparation for the Defence. Noting that 'it is not reasonable to expect that the suspect reads and understand such large volume of witnesses and disclosed items'<sup>10</sup> within the short time frame of the pre-trial proceedings, and with a view to

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<sup>9</sup> See e.g. Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, [Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention](#), 5 May 2021, ICC-02/05-01/20-378, para. 12.

<sup>10</sup> Second Decision on matters related to translation, 1 June 2021, ICC-01/14-01/21-86 (the '[Second Decision Regarding Translation](#)'), para. 35.

streamlining the disclosure process, the Single Judge instructed 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’.<sup>11</sup>

19. In addition, the Prosecution was ordered to file the document containing the charges, together with the list of evidence on 16 August 2021, well in advance of the deadline provided in rule 121(3) of the Rules.<sup>12</sup> The Chamber notes in this respect that although the Prosecution has disclosed a rather large number of items overall, the list of evidence on which the Prosecution intends to rely upon during the confirmation hearing contains a significantly lower number of items.

20. In its observations, the Defence also states that it must analyse the totality of the evidence disclosed by the Prosecution in the context of its preparation for the confirmation hearing. The Chamber reminds the Defence that the scope of the confirmation of charges phase is limited and that therefore, with a view to ensuring the expeditiousness and efficiency of the pre-trial proceedings, its preparation should be focused on the items of evidence upon which the Prosecution intends to rely during the hearing, namely those referred to in the list of evidence and cited in the Prosecution’s pre-confirmation brief. The Chamber invites the Defence to consider focusing on the matters which are most relevant to Mr Said’s individual criminal responsibility, bearing in mind that the review of evidence for purposes of the confirmation of charges must be seen in light of the standard of review provided for in article 61(7) of the Statute and is considered to be a ‘light review’.<sup>13</sup>

21. Furthermore, the Chamber wishes to emphasize that parties and participants may not raise new arguments in their final statements; however, they may use this opportunity to respond to arguments and questions raised during the hearing.

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<sup>11</sup> [Second Decision Regarding Translation](#), ICC-01/14-01/21-86, para. 36.

<sup>12</sup> [Second order on disclosure and related matters](#), 30 June 2021, ICC-01/14-01/21-112, para. 18, p. 9.

<sup>13</sup> Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 1 July 2021, ICC-01/12-01/18-1562-Red (OA3), para. 92.

22. In light of the above, and having considered the observations of the parties and participants as well as the scope of the present case, the Chamber hereby allocates the following time for oral presentations:

- The Prosecutor is granted one and a half hours and the Defence is granted three and a half hours to present their arguments on the merits, 20 minutes each for their opening statements and 30 minutes each for their closing statements;
- The OPCV is granted one hour to present its arguments on the merits, 20 minutes for its opening statement and 30 minutes for its closing statement.

23. The Chamber recalls that should the Defence intend to present evidence pursuant to article 61(6) of the Statute, it shall provide a list of evidence to the Chamber no later than 15 days before the confirmation hearing, in accordance with rule 121(6) of the Rules. It also notes the Defence's concern about the accuracy of quoting evidence reference numbers during oral submissions and the potential impact which such quoting may have on the clarity and length of the presentation. One possible way to practically address the Defence's concern might consist in presenting tables of evidence to which the Defence intends to refer during the hearing. To that end, the Defence may consider preparing tables containing shorter references, such as consecutive numbers, rather than having to refer to the full ERN numbers of each item of evidence. Such tables may be shared with the Chamber, the Prosecution and the OPCV in advance of the hearing.

24. Concerning the possible invocation of an alibi defence and grounds for excluding criminal responsibility under article 31(1) of the Statute, the Chamber sees no reason to vary the three-day time limit provided in rule 121(9) of the Rules. However, the Chamber recalls that rule 79(2) of the Rules obliges the Defence to notify the Prosecutor of its intent 'sufficiently in advance to enable the Prosecutor to prepare adequately and to respond'. Further, to the extent that the Defence is already in possession of evidence supporting any claimed alibi or other defence, which it intends to present during the confirmation hearing, this must be disclosed to the Prosecutor at least 15 days prior to the commencement of the confirmation hearing.

25. Regarding rule 122(3) of the Rules, the Chamber notes the Defence's intention to raise objections or make observations on the proper conduct of the proceedings, and the



Prosecution's intention not to do so, barring unforeseen circumstances. The Chamber encourages the parties to make submissions on these issues, if any, to the Chamber in writing in advance of the hearing, by no later than 16:00 on Friday, 1 October 2021. The Chamber reminds the parties that rule 122(3) of the Rules provides an opportunity for raising issues or objections that were not previously brought to the Chamber's attention. The parties shall therefore refrain from repeating or reformulating previous submissions during the hearing.

## **B. Schedule**

26. In light of the above, and taking into consideration the scope of the present case and the pre-trial proceedings in general, the Chamber has determined that the hearing on the confirmation of charges will commence on the morning of Tuesday, 12 October 2021, and will be organised as follows:

### **Tuesday 12 October 2021**

#### **First session: 9:30 – 11:00**

- 9:30 – 10:00: Opening of the hearing by the Judges and reading of the charges under rule 122(1) of the Rules (30 minutes)
- 10:00 – 10:20: Prosecution's opening statement (20 minutes)
- 10:20 – 10:40: OPCV's opening statement (20 minutes)
- 10:40 – 11:00: Defence's opening statement (20 minutes)
- 11:00 – 11:30: Break (30 minutes)

#### **Second session: 11:30 – 13:00**

- 11:30 – 13:00: Parties' observations under rule 122(3) of the Rules, if any, and responses thereto (90 minutes)
- 13:00 – 14:30: Lunch break (90 minutes)

Third session: 14:30 – 16:00

- 14:30 – 16:00: Prosecution’s submissions on the merits (90 minutes)

**Wednesday, 13 October 2021**First session: 9:30 – 11:00

- 9:30 – 10:30: OPCV’s submissions on the merits (60 minutes)
- 10:30 – 11:00: Defence’s submissions on the merits (30 minutes)
- 11:00 – 11:30: Break (30 minutes)

Second session: 11:30 – 13:00

- 11:30 – 13:00: Defence’s submissions on the merits (90 minutes)
- 13:00 – 14:30: Lunch break (90 minutes)

Third session: 14:30 – 16:00

- 14:30 – 16:00: Defence’s submissions on the merits (90 minutes)

**Thursday, 14 October 2021**First session: 9:30 – 11:00

- 9:30 – 10:00: Prosecution’s closing statement (30 minutes)
- 10:00 – 10:30: OPCV’s closing statement (30 minutes)
- 10:30 – 11:00: Defence’s closing statement (30 minutes)
- 11:00 – 11:30: Break (30 minutes)

Second session: 11:30 – 13:00

- This session is reserved in the calendar in the event that any further time is required.

27. The Chamber specifies that the schedule for the confirmation hearing is subject to change if warranted by developments in the proceedings.

28. Moreover, the Chamber underlines that for the sake of efficiency, in the event that a party or participant does not fully use the time allotted to it in the schedule, the Chamber will automatically move to the next presentation, even if that presentation is scheduled for the following day. Thus, the Chamber expects the parties and participants to be flexible and fully prepared to present their submissions at any time. In the event that the parties wish to use audio or video material, the Chamber expects that they will liaise with the Registry ahead of time.

29. The Defence submits that the filing, after the confirmation hearing, of a document containing its oral submissions would enable its oral presentation to be more fluid, clear and expeditious, whilst allowing it to use all items of evidence supporting its presentations. The Chamber considers that the filing of such a document would unnecessarily delay the timely delivery of the confirmation decision, which in turn adversely affects the suspect's right to expeditious proceedings.

30. As stated at paragraph 23 of the present order, the Chamber is of the view that there are other alternative means available to the Defence that could address the concerns it has raised and enable it to present its arguments on the merits during the hearing in a concise, clear and efficient manner. Accordingly, the Chamber rejects the Defence's Request and decides that it shall present all its arguments orally, including all the material in support of these arguments, at the confirmation hearing during the time it has been allotted for this purpose as specified above. Nonetheless, should it wish to do so, the Defence is allowed to file submissions on the merits of the case not exceeding 30 pages by no later than 16:00 on Monday, 4 October 2021. The Prosecution and the OPCV will be allowed to respond to these submissions, if any, during the time allotted for their oral submissions on the merits.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**ESTABLISHES** the schedule for the confirmation hearing, as set out in the present order;

**REJECTS** the Defence's Request;

**ALLOWS** the Defence, should it wish to do so, to file written submissions on the merits of the case by no later than 16:00 on Monday, 4 October 2021, as specified at paragraph 30 of the present order; and

**ENCOURAGES** the parties to provide any rule 122(3) submissions to the Chamber in writing by no later than 16:00 on Friday, 1 October 2021.

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



**Judge Rosario Salvatore Aitala,  
Presiding Judge**



**Judge Antoine Kesia-Mbe Mindua**



**Judge Tomoko Akane**

Dated this Tuesday, 14 September 2021

At The Hague, The Netherlands