

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No: *ICC-01/14-01/18*

Date: **9 May 2022**

**TRIAL CHAMBER V**

**Before:**

**Judge Bertrand Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Chang-ho Chung**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD  
NGAISSONA***

**Public**

**Defence response to the “Corrigendum of ‘Prosecution’s Request for Authorisation to Disclose Transcripts of the Testimony of P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-0975, P-1339, P-1521, P-1719, P-2232, P-2269, P-2843 to the Defence in the case of Prosecutor v. Mahamat Said Abdel Kani’, 11 April 2022, ICC-01/14-01/18-1358”**

**Source: Defence of Patrice-Edouard Ngaïssona**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*****to:****The Office of the Prosecutor**

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## I. Introduction

1. The Defence for Mr Ngaïssona (“Defence”) requests Trial Chamber V (“Chamber”) to partially reject the “Corrigendum of ‘Prosecution’s Request for Authorisation to Disclose Transcripts of the Testimony of P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-0975, P-1339, P-1521, P-1719, P-2232, P-2269, P-2843 to the Defence in the case of Prosecutor v. Mahamat Said Abdel Kani’” (“Request”).<sup>1</sup>
2. The Defence defers to the Chamber’s discretion as it concerns the Prosecution’s request to disclose the transcripts of testimony of ten witnesses who have already testified.<sup>2</sup> However, the Defence opposes the Prosecution’s request for authorisation to disclose the testimony of four witnesses who have not yet testified.<sup>3</sup>

## II. Relevant Procedural History

3. On 29 September 2021, the Prosecution submitted the “Urgent request for authorisation to access and disclose transcripts of the testimony of eight witnesses in the case Prosecutor v. Mahamat Said Abdel Kani” in which it requested the Chamber’s authorisation to disclose unredacted transcripts of eight trial witnesses common to the Saïd case. The Chamber granted the request on 5 October 2021.<sup>4</sup>
4. On 11 April 2022, the Prosecution filed the Request, along with Annex A.<sup>5</sup>

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<sup>1</sup> ICC-01/14-01/18-1358-Corr.

<sup>2</sup> P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-1521, P-2232, P-2843.

<sup>3</sup> P-0975, P-1339, P-1719 and P-2269.

<sup>4</sup> ICC-01/14-01/18-1129.

<sup>5</sup> ICC-01/14-01/18-1358-Conf and ICC-01/14-01/18-1358-Conf-AnxA.

5. On 13 April 2022, the Defence requested an extension of time to respond to the Request.<sup>6</sup> On 19 April 2022, the Chamber granted an extension until 9 May 2022.<sup>7</sup>
6. On 5 May 2022, the Prosecution filed a corrigendum to the Request.<sup>8</sup>

### **III. Applicable Law**

7. While article 67(1) of the Rome Statute provides for the right of an accused to a public trial, article 68(1) provides that the “Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.<sup>9</sup>
8. Regulation 42 of the Regulations of the Court (“Regulations”) also governs the application and variation of protective measures. Of particular relevance is regulation 42(2) which provides that when “the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures”. Regulation 42(3) provides that any application to vary protective measures shall first be made to the Chamber which issued the order to the extent possible. Before making such a determination, “the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made”.<sup>10</sup>

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<sup>6</sup> Email from the Defence to Trial Chamber V, 13 April 2022 at 16:54.

<sup>7</sup> Email from Trial Chamber V to the parties, 19 April 2022 at 15:46.

<sup>8</sup> ICC-01/14-01/18-1358-Corr. See also Email from the Prosecution to Trial Chamber V, 5 May 2022, at 9:42.

<sup>9</sup> See also inter alia Rule 87 of the Rules of Procedure and Evidence, which provides further modalities for the application of protective measures for a witness or victim.

<sup>10</sup> Regulation 42(4), Regulations of the Court.

#### IV. Submissions

*A. The Defence opposes the portion of the Request relating to the disclosure of the transcripts of testimony of witnesses P-0975, P-1339, P-1719 and P-2269*

9. The portion of the Request relating to the disclosure of the prospective transcripts of witnesses P-0975, P-1339, P-1719 and P-2269, which cannot be said to be within the Prosecution's "possession or control", is premature and procedurally unsound.<sup>11</sup> The Defence opposes the Request insofar as the Prosecution is seeking advance authorisation to disclose evidence which does not yet exist.
10. This portion of the Request is procedurally unsound and incompatible with article 68(1) of the Statute. Allowing advance authorisation to disclose future evidence would prevent the parties from scrutinising the material, consulting with VWU if necessary, proposing potential redactions, and raising security-related concerns pursuant to regulation 42(3), based on circumstances existing at the time the evidence materialises.
11. Moreover, the Prosecution's proposed approach is inconsistent with judicial economy since the Chamber may be forced to review its decision on disclosure between cases based on future circumstances that will only be known once the transcripts are available. Issues relating to confidentiality and witness protection may arise later on, once P-0975, P-1339, P-1719 and P-2269 testify, which could be in several months, if at all.
12. It is telling that the Prosecution has not cited any precedent to support its Request for disclosure of future evidence. In a similar request in *Prosecutor v. Krajišnik* at the ICTY, where the defence team for Mr Janković had requested disclosure of confidential past and future evidence from the *Krajišnik* trial, the

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<sup>11</sup> See rule 77, Rules of Procedure and Evidence.

Trial Chamber rejected the portion of the request which related to future confidential material. The Trial Chamber held that “extending the reach of the order beyond the date of this Decision, as has been requested by the Applicant, would be inappropriate as it would impose a constraint upon the Trial Chamber's flexibility in responding appropriately to protection issues which may arise in respect of future material in this case.”<sup>12</sup>

13. The same reasoning should apply here. The Prosecution should be permitted to file a new request for authorisation to disclose at the relevant time, i.e. once the transcripts are available, should P-0975, P-1339, P-1719 and P-2269 ultimately testify.<sup>13</sup>

14. In the alternative, should the Chamber reject the above relief and decide to issue an advance ruling on the Request for witnesses P-0975, P-1339, P-1719 and P-2269, the Defence requests that a procedure be put in place to address any witness protection concerns after the witness testifies and before disclosure to the *Saïd* case. The Chamber could establish a timeframe, for instance 15 working days after a witness has testified, within which the parties, VWU, and the Chamber *proprio motu* can seek additional redactions or raise witness-related security concerns before disclosure.<sup>14</sup> Such a mechanism would prevent

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<sup>12</sup> Prosecutor v. *Krajišnik*, Decision on Jankovic's Defence Motion for Access to Confidential and Under Seal material in the *Krajišnik* Case relating to the Municipality of Foca, Case No. IT-00-39-T, T. Ch. I, 14 July 2005, p. 4.

<sup>13</sup> See ICC-01/14-01/18-1273-Conf, para. 9.

<sup>14</sup> See for instance *Prosecutor v. Blagojevic and Jokic*, Decision on Motion by Radivoje Miletic for Access to Confidential Information, Case No. IT-02-60-A, App. Ch., 9 September 2005, p. 4: “*ORDERS that: the Prosecution, Vidoje Blagojevic and Dragan Jokic apply to the Appeals Chamber for additional protective measures or redactions, if required, within fifteen working days from this decision; where no additional protective measures or redactions are requested either by the Prosecution, Vidoje Blagojevic or Dragan Jokic within fifteen working days, the Registry shall provide the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel, with all inter partes confidential material described above, in electronic format where possible; where additional protective measures or redactions are requested for any of the inter partes confidential material described above, either by the Prosecution, Vidoje Blagojevic or Dragan Jokic within fifteen working days, the Registry shall withhold that material until the Appeals Chamber has issued a decision on the request(s):*”); *Prosecutor v. Naletilic and Martinovic*, Decision on “Slobodan Prljak's Motion for Access to Confidential Testimony and Documents in Prosecutor v. Naletilic and Martinovic” and “Jadranko Prlic's Notice of Joinder to Slobodan Prljak's Motion for Access”, Case No. IT-98-34-A, , 13 June 2005, p. 6: “*ORDERS that:*

automatic disclosure of potentially sensitive testimonial evidence to third-parties and ensure the evidence is vetted by the parties and the Chamber before disclosure.

*B. The Defence defers to the Chamber's discretion as it concerns the portion of the Request relating to witnesses P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-1521, P-2232 and P-2843*

15. The Defence defers to the Chamber's assessment as it concerns the portion of the Prosecution's request seeking authorisation to disclose the transcripts of the ten witnesses who have already testified, provided that the disclosure would not have a negative impact on the safety, physical and psychological well-being, dignity and privacy of the witnesses. The protective measures applied to witnesses P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-1521, P-2232 and P-2843 should therefore apply *mutatis mutandis* in the Saïd case.

## **V. Relief sought**

16. The Defence respectfully requests the Chamber to REJECT the Prosecution's Request as it concerns witnesses P-0975, P-1339, P-1719 and P-2269.

17. In the alternative, the Defence requests the Chamber to ORDER that a procedure be put in place which would allow the parties, VWU and the Chamber to propose redactions and raise security-related concerns after the testimony of P-0975, P-1339, P-1719 and P-2269, as described in paragraph 14, above.

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*(a) the Prosecution, Mladen Naletilić and Vinko Martinović apply to the Appeals Chamber for additional protective measures or redactions, if required, within fifteen working days from this decision and identify 1) which, if any, of the material falls under Rule 70 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and therefore should not be disclosed unless prior consent is obtained from the relevant sources; and 2) which, if any, evidence or information concerns "sensitive witnesses" and therefore, should not be disclosed").*

Respectfully submitted,



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Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 9 May 2022,

At The Hague, the Netherlands