

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **3 June 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**

**Public Redacted Version of ‘Defence response to the “Prosecution’s Request for Authorisation to Disclose Materials from Transcripts of the Testimony of Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328 to the Defence in the case of Prosecutor v. Mahamat Said Abdel Kani” (ICC-01/14-01/18-1435)’, 3 June 2022**

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

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

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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

Trial Chamber VI  
 Ms Jennifer Naouri  
 Ms Sarah Pellet

## I. Introduction

1. The Defence for Mr Ngaïssona (“Defence”) requests Trial Chamber V (“Chamber”) to partially reject the “Prosecution’s Request for Authorisation to Disclose Materials from Transcripts of the Testimony of Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328 to the Defence in the case of *Prosecutor v. Mahamat Said Abdel Kani*” (“Request”) filed on 25 May 2022.<sup>1</sup>
2. The Defence objects to the disclosure of Defence document CAR-D30-0007-0672, used during the testimony of Witness P-2328, given it is a document for which Mr Ngaïssona has a reasonable expectation of privacy. Moreover, this document is irrelevant to case *Prosecutor v. Mahamat Said Abdel Kani* case (“Saïd case”). The Defence also opposes the Prosecution’s request for advance authorisation to disclose documents associated with the testimony of the three witnesses who have yet to testify.<sup>2</sup> Allowing advance disclosure would be prejudicial to the fundamental fair trial rights of Mr Ngaïssona and would be procedurally unsound.
3. The Defence defers to the Chamber’s discretion as it concerns the disclosure of all other documents disclosed by the Defence (“D30 documents”) used during the testimony of the six witnesses who have testified (“associated documents”).<sup>3</sup> The Defence further defers to the Defence of Mr Yekatom as it concerns the disclosure of documents it has disclosed (“D29 documents”).<sup>4</sup>

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<sup>1</sup> ICC-01/14-01/18-1435 (“Request”).

<sup>2</sup> P-0975, P-1339 and P-2269.

<sup>3</sup> P-2251, P-0291, P-0884, P-2328, P-0966, and P-2232.

<sup>4</sup> See ICC-01/14-01/18-1435-Conf-AnxA.

## II. Relevant Procedural History

4. On 29 September 2021, the Prosecution filed an urgent request to disclose the transcripts of the testimony of eight witnesses into the *Saïd* case listed in a confidential annex.<sup>5</sup> On 5 October, the Prosecution filed a request for the disclosure of additional transcripts to the *Saïd* Defence.<sup>6</sup> On the same day, the Chamber granted the requests.<sup>7</sup>
5. On 11 April 2022, the Prosecution filed a second request for disclosure of the transcripts of testimonies of 14 witnesses from the present case into the *Saïd* case, with a confidential annex listing the transcripts.<sup>8</sup>
6. On 9 May 2022, the Defence filed its response to the Prosecution's request ICC-01/14-01/18-1358-Corr. The Defence deferred to the Chamber as it concerned the disclosure of the confidential transcripts of witnesses who had testified but opposed the request insofar as the Prosecution requested advance disclosure of future transcripts.<sup>9</sup>
7. On 19 May 2022, the Chamber held that 'associated exhibits' linked to witness testimony were not automatically included in the Prosecution requests for disclosure of transcripts. The Chamber instructed the Prosecution to file a request on the record should it wish to include 'associated exhibits' to its inter-case disclosure requests.<sup>10</sup>
8. On 25 May 2022, the Prosecution filed the Request, with confidential Annex A, in which it requests authorisation to disclose D29 and D30 documents into the

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<sup>5</sup> ICC-01/14-01/18-1122 and ICC-01/14-01/18-1122-Conf-AnxA.

<sup>6</sup> Email from the Prosecution to the Chamber and parties, 5 October 2021, at 13:34.

<sup>7</sup> ICC-01/14-01/18-1129.

<sup>8</sup> ICC-01/14-01/18-1358-Corr and ICC-01/14-01/18-1358-AnxA.

<sup>9</sup> ICC-01/14-01/18-1399.

<sup>10</sup> Email from the Chamber to the parties, 19 May 2022, at 10:35,

*Saïd* case associated with the testimonies of six witnesses who have testified, and three witnesses who have not yet testified.<sup>11</sup>

### III. Applicable Law

9. Article 67(1) of the Rome Statute enshrines the fundamental fair trial rights of accused persons, including the right to be heard.
10. Article 64(2) provides that the “Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.
11. Article 21(3) Statute provides that the application and interpretation of the Statute “must be consistent with internationally recognized human rights”, which includes the right to privacy.
12. 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”.
13. Regulation 42 of the Regulations of the Court (“Regulations”) governs the application and variation of protective measures. Regulation 42(2) 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

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<sup>11</sup> ICC-01/14-01/18-1435 and ICC-01/14-01/18-1435-Conf-AnxA.

consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made”.<sup>12</sup>

#### **IV. Confidentiality**

14. The present response is filed confidentially pursuant to regulation 23*bis*(1) of the Regulations, as it refers to confidential information. A public redacted version is filed simultaneously.

#### **V. Submissions**

##### **A. The Defence opposes the disclosure of document CAR-D30-0007-0672 into the *Saïd* case**

15. The Defence opposes the disclosure into the *Saïd* case of document CAR-D30-0007-0672. *First*, this is a document containing personal data relating to Mr Ngaïssona, towards which he has a reasonable expectation of privacy. Although a group of individuals has access to this information in the current case, making it available to a wider group implicates the right to privacy. This document should therefore not be disclosed to a third party in unredacted form.

16. CAR-D30-0007-0672 contains [REDACTED], which is personal and private information. The Defence incorporates by reference its submissions as to Mr Ngaïssona’s right to privacy, which is guaranteed by the statutory framework of the Court.<sup>13</sup>

17. *Second*, document CAR-D30-0007-0672 is irrelevant to the case against Mr Saïd. It ascertains that [REDACTED]. There is no link between the document and the

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<sup>12</sup> Regulation 42(4), Regulations of the Court.

<sup>13</sup> ICC-01/14-01/18-1427-Conf, paras 31-34.

charges brought against Mr Saïd. It should therefore be excluded from disclosure.

**B. The Defence opposes the portion of the Request relating to the disclosure of future documents**

18. The portion of the Request relating to the disclosure of prospective documents relating to witnesses P-0975, P-1339 and P-2269 is prejudicial to Mr Ngaïssona's fundamental rights as guaranteed by article 67(1) of the Statute and is premature. It is also incompatible with article 68(1) of the Statute. The Defence incorporates by reference its previous submissions as it concerns the disclosure of future materials.<sup>14</sup>

19. Requesting advance disclosure of a list of currently unknown documents is prejudicial to Mr Ngaïssona's fair trial rights, including his right to be heard. The Defence cannot make observations now on potential confidentiality-related or fair trial issues that do not yet exist.<sup>15</sup> This approach is also highly speculative. As the Prosecution concedes, the associated documents relating to the three witnesses who have not yet testified "*may* be material to the preparation of the SAID Defence pursuant to rule 77".<sup>16</sup> In addition, as held by the Trial Chamber in the ICTY *Krajišnik* case, "extending the reach of the order beyond the date of this Decision, [...], 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>17</sup>

<sup>14</sup> ICC-01/14-01/18-1427-Conf, paras 20-21; ICC-01/14-01/18-1399, paras 9-13.

<sup>15</sup> On the right to be heard comprised in the general right to a fair trial under Article 67(1) and 64(2) see *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2297, 28 July 2010, para. 56.

<sup>16</sup> Request, para. 17.

<sup>17</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, No. IT-00-39-T, 14 July 2005, p. 4.

20. In sum, the portion of the Request relating to the documents associated with the prospective testimony of witnesses P-0975, P-1339, and P-2269 should be rejected. The Prosecution would not be prevented from requesting the disclosure of the associated documents at the opportune time.

**C. The Defence defers to the Chamber's discretion as it concerns the disclosure of the remaining D30 documents and defers to the Defence for Mr Yekatom as it concerns D29 documents**

21. The Defence defers to the Chamber's discretion as it concerns the disclosure of the remaining D30 documents associated with the testimonies of witnesses P-0291, P-0884, P-0966, P-2232, P-2251 and P-2328 into the *Saïd* case.<sup>18</sup> The Defence defers to the position of the Defence team for Mr Yekatom as it concerns the portion of the Request relating to the disclosure of D29 associated documents.

**VI. Relief sought**

22. The Defence respectfully requests the Chamber to

- REJECT the disclosure of document CAR-D30-0007-0672 into the *Saïd* case;
- REJECT the Prosecution's request for advance authorisation to disclose documents associated with the prospective testimony of witnesses P-0975, P-1339 and P-2269.

Respectfully submitted,




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<sup>18</sup> ICC-01/14-01/18-1435-AnxA.



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 3 June 2022,

At The Hague, the Netherlands