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No. ICC-01/14-01/18

Date: 7 June 2022

TRIAL CHAMBER V

Before: Judge Bertram 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Second Prosecution Request for Authorisation to Disclose
Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani*
concerning witnesses 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, and P-2843**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 64(2)(6)(c), (e), 67 and 68(1) of the Rome Statute (the ‘Statute’), and Regulation 42(2) of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Second Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani* concerning witnesses 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, and P-2843’.

I. Procedural history and submissions

1. On 12 April 2022, the Chamber received the Office of the Prosecutor’s (the ‘Prosecution’) request for authorisation to disclose transcripts of the testimony of 14 witnesses in this case to the Defence in the case of *The Prosecutor v. Mahamat Said Abdel Kani* (the ‘Said Defence’), pursuant to Regulation 42(2) of the Regulations (the ‘Request’).¹ It seeks authorisation to disclose the transcripts of ten witnesses who already testified (the ‘First Request’),² as well as advance authorisation to disclose the transcripts of four witnesses who are yet to testify (the ‘Second Request’).³
2. On the same day, the Yekatom Defence informed the Chamber that it does not intend to file a response.⁴

¹ 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-2658, P-2843 to the Defence in the case of *Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/18-1358 (with confidential Annex A, which lists the witnesses and transcripts concerned). A corrected version of the filing was notified on 5 May 2022, see 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, 5 May 2022, ICC-01/14-01/18-1358-Corr (with confidential Annex A, which specifies the corrections made, notably that witness P-2658 was removed), paras 1-3, 11-15, 17.

² P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-1521, P-2232 and P-2843. See Annex A to the Request, ICC-01/14-01/18-1358-Conf-AnxA, pp. 2-4.

³ P-0975, P-1339, P-1719 and P-2269. See Annex A to the Request, ICC-01/14-01/18-1358-Conf-AnxA, pp. 4-5.

⁴ Email from the Yekatom Defence to the Chamber, 12 April 2022, at 16:09.

3. On 9 May 2022, following an extension of time,⁵ the Ngaissona Defence (the ‘Defence’) responded to the Request. It defers to the Chamber’s discretion with regard to the First Request. Furthermore, it asks the Chamber to reject the Second Request, or, in the alternative, to put a procedure in place ‘which would allow the parties, VWU and the Chamber to propose redactions and raise security-related concerns after the testimony of [the witnesses subject to the Second Request]’.⁶

II. Analysis

4. At the outset, the Chamber observes that only some of the transcripts in question concern witnesses for whom protective measures have been ordered and/or who have⁷ or will⁸ partly testify in private session.
5. No protective measures are in place for witnesses P-0287, P-0801, P-0808, P-0992 and P-0966 who already testified, or P-0975 and P-2269 who are yet to be heard. That said, the Chamber notes that private sessions were, or might be used during these witnesses’ testimonies and it will thus assess them jointly with the witnesses for whom protective measures apply.
6. The Chamber recalls that the disclosure of transcripts to participants in different proceedings before the Court would not vary the protective measures in this case, since they will remain in place towards the public. The Chamber therefore considers that Regulation 42(2) of the Regulations is applicable.⁹

⁵ Following the Ngaissona Defence’s request for an extension of time to respond to the Request until at least 15 June 2022 (*see* email from the Ngaissona Defence, 13 April 2022, at 16:54), the Single Judge extended the deadline until 9 May 2022 (*see* email from the Chamber, 19 April 2022, at 15:46).

⁶ 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”, ICC-01/14-01/18-1399 (the ‘Defence Response’), paras 1-2, 16-17.

⁷ **P-0876, P-1521, P-2232, and P-2843**: Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses, 9 March 2021, ICC-01/14-01/18-906-Conf-Exp (confidential redacted version notified the same day, public redacted version notified on 19 April 2021, ICC-01/14-01/18-906-Red2) (the ‘ICPM Decision’); **P-0889**: Decision on the Prosecution Request for Reconsideration regarding In-Court Protective Measures for P-0889, 13 January 2022, ICC-01/14-01/18-1245-Conf.

⁸ **P-1339 and P-1719**: ICPM Decision, ICC-01/14-01/18-906-Red2.

⁹ *See* Decision on the Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, 5 October 2021, ICC-01/14-01/18-1129, para. 7, *with further references to the jurisprudence of the Court* (the ‘First Authorisation Decision’).

7. Noting that the disclosure of the transcripts to the *Said* Defence would not negatively impact on the security and safety of the concerned witnesses and that the *Said* Defence is bound by confidentiality obligations pursuant to Article 8 of the Code of Professional Conduct for counsel and a protocol on the handling of confidential information,¹⁰ the Chamber authorises the Prosecution to disclose the transcripts subject to the First Request as requested,¹¹ pursuant to Regulation 42(2) of the Regulations. The Prosecution is instructed to inform the *Said* Defence of the nature of the protective measures of the concerned witnesses¹² and/or the confidentiality of transcripts of hearings held in private session.
8. With regard to the Second Request, the Chamber takes note of the Defence's objections.¹³ The Chamber is of the view that its determination of a request for authorisation to disclose transcripts to an accused in another case pursuant to Regulation 42(2) of the Regulations necessarily requires that such transcript already exists. At this point, it cannot be anticipated what the relevant four witnesses subject to the Second Request will testify about. Advance authorisation to disclose the relevant transcripts would thus prevent not only the Chamber from examining the material, but also the defence from providing its views thereon. In light of the above, the Chamber rejects the Second Request. This is without prejudice to a new request pursuant to Regulation 42(2) of the Regulations, once these witnesses subject to the Second Request have testified.

¹⁰ Request, ICC-01/14-01/18-1358-Corr, paras 12, 15 *with further reference to* Prosecution's urgent request for authorisation to access and disclose transcripts of the testimony of eight witnesses in the case *Prosecutor v. Mahamat Said Abdel Kani*, 29 September 2021, ICC-01/14-01/18-1122, para. 10. *See also* Trial Chamber III, *The Prosecutor v. Jean Pierre Bemba Gombo*, Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 27 May 2014, ICC-01/05-01/08-3074, para. 17.

¹¹ *See* Annex A to the Request ICC-01/14-01/18-1358-Conf-AnxA.

¹² *See also* First Authorisation Decision, ICC-01/14-01/18-1129, para. 8, *with further references*.

¹³ Defence Response, ICC-01/14-01/18-1399, paras 9-14.

FOR THESE REASONS, THE CHAMBER HEREBY**GRANTS** the First Request;**REJECTS** the Second Request;**ORDERS** the Prosecution to inform the *Said* Defence of the nature of the protective measures of the concerned witnesses and/or the confidentiality of transcripts of hearings held in private session.

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



Judge Péter Kovács

Judge Bertram Schmitt**Presiding Judge**

Judge Chang-ho Chung

Dated 7 June 2022

At The Hague, The Netherlands