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**No. ICC-01/14-01/18
Date: 17 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 Third Prosecution Request for Authorisation to Disclose Certain
Materials in the Case of *The Prosecutor v. Mahamat Said Abdel Kani* concerning
Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and
P-2328**

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 Ngaïssona*, having regard to Articles 64(2)(6)(c), (e), 67 and 68(1) of the Rome Statute, and Regulation 42(2) of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Third Prosecution Request for Authorisation to Disclose Certain Materials in the Case of *The Prosecutor v. Mahamat Said Abdel Kani* concerning Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328.’

I. Procedural history and submissions

1. On 5 October 2022, the Chamber authorised the Office of the Prosecutor (the ‘Prosecution’) to disclose certain transcripts to the defence in the case of *The Prosecutor v. Mahamat Said Abdel Kani* (the ‘Said Defence’ and the ‘First Said Decision’, respectively).¹
2. On 19 May 2022, following a request for guidance from the Prosecution,² the Chamber clarified that the First *Said* Decision was limited to the transcripts subject to the underlying Prosecution request. It further clarified that if the Prosecution intends to seek authorisation to disclose ‘associated documents’ to the transcripts subject to the First *Said* Decision and/or subject to the then-pending³ request ICC-01/14-01/18-1358-Corr, it is instructed to file a request on the record.⁴
3. On 25 May 2022, as instructed, the Prosecution filed a request for authorisation to disclose certain ‘associated documents’ (the ‘Request’).⁵ Specifically, it seeks

¹ Decision on the Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/18-1129.

² Email from the Prosecution, 18 May 2022, at 16:04. *See also* the response from the Ngaïssona Defence, email from the Ngaïssona Defence, 18 May 2022, at 16:53 and the Prosecution’s reply, email from the Prosecution, 18 May 2022, at 19:05.

³ The Chamber notes that a decision has meanwhile been rendered on this request, *see* 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, 7 June 2022, ICC-01/14-01/18-1448 (the ‘Second *Said* Decision’).

⁴ Email from the Chamber, 19 May 2022, at 10:35.

⁵ 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

the Chamber’s authorisation to disclose (i) ‘materials referenced during the oral testimony’ of witnesses P-0291, P-0884, P-0966, P-2232, P-2251 and P-2328 (the ‘First Request’);⁶ and (ii) advance authorisation, ‘if necessary’, for the ‘same types of Associated Items’ used with witnesses P-0975, P-1339 and P-2269 during their ‘future oral testimony’ (the ‘Second Request’).⁷

4. On 3 June 2022, the Ngaissona Defence responded to the Request, asking the Chamber to partially reject it. In particular, it opposes the First Request with regard to item CAR-D30-0007-0672, and the Second Request in its entirety.⁸
5. On 6 June 2022, the Yekatom Defence informed the Chamber that it does not intend to respond to the Request and defers to the Chamber’s discretion.⁹
6. On the same day, the Chamber issued its ‘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’ (the ‘Second *Said* Decision’). In this decision, the Chamber authorised disclosure of certain transcripts in relation to witnesses who had already testified, but rejected disclosure in relation to witnesses who were yet to be heard.¹⁰

II. Analysis

7. The Chamber recalls that the disclosure of documents to participants in different proceedings before the Court would not vary the protective measures in this case,

in the case of *Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/18-1435 (with confidential Annex A, ICC-01/14-01/18-1435-Conf-AnxA, listing the associated documents) (the ‘Request’).

⁶ Request, ICC-01/14-01/18-1435, paras 2, 15.

⁷ Request, ICC-01/14-01/18-1435, paras 3, 15-18.

⁸ 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), ICC-01/14-01/18-1445-Conf (public redacted version notified the same day, ICC-01/14-01/18-1445-Red) (the ‘Response’), paras 1-3, 22.

⁹ Email from the Yekatom Defence, 6 June 2022, at 09:58.

¹⁰ Second *Said* Decision, ICC-01/14-01/18-1448, paras 7-8, p. 6.

since they will remain in place towards the public. The Chamber therefore considers that Regulation 42(2) of the Regulations is applicable.¹¹

8. Before assessing the Request at hand, the Chamber observes at the outset that a number of associated items are public and/or publicly available.¹² By way of general guidance, it clarifies that where such items are discussed with a witness in public session and are publicly displayed, the Chamber sees no need for authorisation under Regulation 42(2) of the Regulation. It is therefore of the view that in such instances the Prosecution, going forward, may disclose the items to the *Said* Defence without submitting a request.
9. Turning to the First Request, the Chamber notes that only some associated documents concern witnesses for whom protective measures have been ordered and/or who have¹³ or are expected to¹⁴ partly testify in private session. No protective measures are in place for witnesses P-0291, P-2328 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 when discussing certain associated documents with these witnesses and it will thus assess them jointly with the witnesses for whom protective measures apply.
10. Noting that no associated documents have been identified by the Prosecution in relation to P-2251,¹⁵ the First Request in relation to this witness is moot.
11. The Chamber further takes note of the Ngaïssona Defence's objections to disclose item CAR-D30-0007-0672, arguing that Mr Ngaïssona has a reasonable expectation of privacy in relation to this document and that it is 'irrelevant to the case against Mr Said'.¹⁶ The Chamber notes that the item contains personal

¹¹ See for example First *Said* Decision, ICC-01/14-01/18-1129, para. 7, with further references to the jurisprudence of the Court.

¹² See for example CAR-D29-0002-0013.

¹³ **P-1232, P-2251 and P-0884**: 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 *ex parte*, only available to the Prosecution and the Registry (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').

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

¹⁵ The Chamber notes that Annex A to the Request, ICC-01/14-01/18-1122-Conf-AnxA, p. 1 states 'N/A' under the column 'Associated Documents' and that transcripts T-043 and T-044 pertaining to P-2251 have already been dealt with in the First *Said* Decision, ICC-01/14-01/18-1129.

¹⁶ Response, ICC-01/14-01/18-1445-Red, paras 2, 15-17.

information regarding Mr Ngaïssona and sees no obvious link to the case against Mr Said. Moreover, it observes that the item was ultimately not discussed with the witness during his testimony. Consequently, it does not form an integral part of the testimony itself.¹⁷ In light of these circumstances, the Chamber considers that disclosure of this item to the *Said* Defence would infringe disproportionately on Mr Ngaïssona's right to privacy. Accordingly, the First Request in relation to this item is rejected.

12. With regard to the remainder of the First Request, the Chamber observes that no objection was received from the Yekatom or the Ngaïssona Defence and that a large number of the items are public and/or publically available. Further noting that the disclosure of the materials 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, the Chamber authorises the Prosecution to disclose the associated documents subject to the First Request.¹⁸ The Prosecution is instructed to inform the *Said* Defence of the nature of the protective measures of the concerned witnesses¹⁹ and/or the confidentiality of items and hearings, where applicable.
13. With regard to the Second Request, the Chamber takes note of the Ngaïssona Defence's objections and recalls its previous findings regarding 'advance authorisation'.²⁰ Accordingly, 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.

¹⁷ See similar in the context of Rule 68(3) of the Rules, Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926's Evidence, 10 March 2022, ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021), para. 13.

¹⁸ Annex A to the Request, ICC-01/14-01/18-1435-Conf-AnxA, pp. 1-4, with the exception of the items subject to the Second Request (P-0975, P-1339, P-2269).

¹⁹ See also First *Said* Decision, ICC-01/14-01/18-1129, para. 8, with further references.

²⁰ Second *Said* Decision, ICC-01/14-01/18-1448, para. 8.


FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the First Request;


REJECTS the Second Request; and

ORDERS the Prosecution to inform the *Said* Defence of the nature of the protective measures of the concerned witnesses and/or the confidentiality of items and hearings, where applicable.


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



Judge Péter Kovács



Judge Bertram Schmitt
Presiding Judge



Judge Chang-ho Chung

Dated 17 June 2022

At The Hague, The Netherlands