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No.: **ICC-01/14-01/21**
Date: **24 September 2021**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

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

Public

Public Redacted Version of “Prosecution’s Response to « Requête de la Défense visant à ce que lui soient communiqués tous les éléments de l’affaire connexe *Yekatom et Ngaissona* utiles à la préparation de l’audience de confirmation des charges dans l’affaire *Said* » ”, ICC-01/14-01/21-166-Conf, dated 10 September 2021

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I. INTRODUCTION

1. The Prosecution hereby responds to the « Requête de la Défense visant à ce que lui soient communiqués tous les éléments de l’affaire connexe *Yekatom et Ngaissona* utiles à la préparation de l’audience de confirmation des charges dans l’affaire *Said* » (“Request”).¹ The Defence seeks what it defines as evidence “useful” to the preparation of Mr SAID’s case which, however, is akin to an open file request of the evidence presented and disclosed in the *Yekatom and Ngaissona* case.²

2. The Defence’s request should be rejected in *toto*. Only the transcripts of the witnesses the Prosecution intends to rely upon for the confirmation hearing³ and who have testified in the *Yekatom and Ngaissona* case should be considered material to the preparation of the Defence. The Prosecution has already agreed, *inter partes*, that the Defence should receive access to the *Yekatom and Ngaissona* transcripts of witnesses on a rolling basis, insofar, they concern witnesses relied upon by the Prosecution in the case against Mr SAID. The Prosecution will submit a request for that purpose before Trial Chamber V. The Defence’s request to access these transcripts should therefore be considered moot. The remaining requests should also be rejected as the Defence fails to demonstrate how the information requested is *material* to their preparation under rule 77 of the Rules of Procedure and Evidence (“Rules”) or potentially exculpatory under article 67(2) of the Statute.

II. CONFIDENTIALITY

3. This response is filed as confidential in accordance with regulation 23*bis*(2) of the Regulations of the Court (“Regulations”) as it relates to the Request and previous decisions of the same designation.

¹ ICC-01/14-01/21-161-Conf.

² Such open file disclosure request has been reject by the Single Judge in the past, see ICC-01/14-01/21-50-Conf, para. 32.

³ These are the witnesses which have been disclosed as INCRIM *and* that are on the Prosecution’s List of Evidence in its case against Mr SAID, see ICC-01/14-01/21-144-Conf-AnxB-Corr.

SUBMISSIONS

A. Preliminary remarks

4. As previously recognised by Chambers of this Court, disclosure should first and foremost be handled *inter partes*.⁴ If and when *inter partes* communications have failed, the parties may seize the Chamber, who will then make a determination, and if necessary, order disclosure.⁵ [REDACTED]. The Prosecution reiterates its invitation to the Defence to send requests regarding any disclosure related issues via E-Mail or by letter on an *inter partes* basis before seizing the Single Judge. This will not only help to avoid misunderstandings but contribute to the efficiency of the proceedings.

B. Request to indicate which witnesses and related items were also disclosed in *Yekatom & Ngaïssona*

5. First, the Defence requests that the Prosecution be ordered to indicate:

- 1) *qui sont, dans la liste des témoins dont elle a divulgué les déclarations antérieures à la Défense dans l'affaire Said (qu'il s'agisse de témoins INCRIM, PEXO ou R77), les témoins qui ont fait l'objet d'une divulgation dans l'affaire Yekatom et Ngaïssona*

6. This request should be rejected since it does not trigger a disclosure obligation. As recently reiterated in the *Al Hassan* case, disclosure is to be granted if the request is (a) specific, (b) demonstrates materiality of the information sought pursuant to article 67(2) of the Statute or rule 77 of the Rules, and (c) relates to information that has a direct connection to the charges or relates to a live issue in the case.⁶ The Prosecution recalls that the Appeals Chamber in the *Bemba et al.* case ruled that “the right to disclosure is not unlimited and which objects are ‘material to the preparation of the defence’ will depend upon the specific circumstances of the case”.⁷ It further confirmed that materials collected during the same investigation but unrelated to the

⁴ ICC-01/09-02/11-465, para. 9; ICC-02/04-01/15-457, para. 5.

⁵ ICC-01/12-01/18-859-Red, para. 9. See also ICC-01/05-01/08-3336, para.51.

⁶ ICC-01/12-01/18-859-Red, para. 10.

⁷ ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42.

Prosecution's case can be withheld from disclosure.⁸ Lastly, the Appeals Chamber also reiterated that the obligation to disclose is determined on a case-by-case basis and always against the defined parameters of the Prosecution's case.⁹

7. Second, the defence requests that the Prosecution to be ordered to indicate:

- 2) *parmi les éléments de preuve divulgués à la Défense dans l'affaire Said (qu'il s'agisse d'éléments de preuve divulgués sous la catégorie INCRIM, PEXO ou R77) les éléments qui ont aussi fait l'objet d'une divulgation dans l'affaire Yekatom et Ngaïssona.*

8. The Single Judge should also reject this second request since it does not meet the criteria enumerated above in paragraph 6.¹⁰ The Prosecution has reviewed its CARII evidence collection¹¹ and disclosed on a rolling basis the materials relevant - either under the heading of INCRIM, Rule 77 or PEXO - to the Defence of Mr SAID. Regarding the witnesses identified in paragraph 38 of the Request, the Defence has already received disclosure of the relevant evidence in so far as the materials related to these witnesses fall under one of the applicable disclosure categories. That a witness or a document has also been disclosed in the *Yekatom and Ngaïssona* case, does not demonstrate materiality nor does the Defence establish how this information relates to a live issue in the case against Mr SAID. There is also no reason to assume that the Prosecution has withheld information of relevance to the Defence in the case against Mr SAID.¹² The Defence seems to overlook that the case against Mr SAID has been framed as set out in the DCC¹³ and as further detailed in the Pre-Confirmation Brief.¹⁴ It is *this frame* (charges) that sets the scope for disclosure, not the case as framed against *Yekatom and Ngaïssona*.

⁸ ICC-01/05-01/13-2275-Red, para.55.

⁹ ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42.

¹⁰ See the Single Judge's decision ICC-01/14-01/21-50-Conf, para. 32 as to similar blanket requests.

¹¹ The CARII evidence collection contains all material collected in its investigation of the "Seleka", known as the CARIIA investigation, and the "anti-Balaka", known as the CARIIB investigation.

¹² See for instance the allegations of the Defence in paras. 35-38 of the Request.

¹³ ICC-01/14-01/21-144-Conf+Conf-Anxs.

¹⁴ ICC-01/14-01/21-155-Conf + Conf-Anxs.

C. Request to be permitted access to the indicated items¹⁵

9. So far, 8 witnesses, which have testified in the *Yekatom and Ngaissona* case, are on the Prosecution List of Evidence (“LoE”) for the confirmation hearing.¹⁶ The Prosecution submits that only the transcripts of the witnesses the Prosecution intends to rely upon for confirmation hearing *and* that have testified in the *Yekatom and Ngaissona* case should be considered material to the preparation of the Defence and therefore disclosed. It is also understood that the Prosecution will inform the Defence of the testimony of any witness that testifies in the *Yekatom and Ngaissona* case that may provide rule 77 or potentially exonerating evidence of relevance to their client’s case.

10. As indicated before,¹⁷ including in recent *inter partes* communications, the Prosecution bears the primary responsibility to ensure disclosure under the ICC legal framework. This includes providing the Defence with information that may come from sources outside the Prosecution’s own investigation so far as these are in the Prosecution’s possession and control. Judicial records are not materials in the Prosecution’s possession or control, nor are they subject to the Prosecution’s decisions. Rather, as mandated in the Rules of Procedure and Evidence, those records, including transcripts, are in the possession of the Registry (Rule 15), and subject to the authority of a Chamber of the Court (Trial Chamber V in the *Yekatom and Ngaissona* case).

11. The Prosecution accordingly considers it unnecessary for the Single Judge to take any measures to facilitate the access to the transcripts. For the transcripts of the _ witnesses, the Prosecution will file the necessary request before Trial Chamber V, copying Pre-Trial Chamber II. As soon as authorised to do so, the said transcripts will be promptly disclosed to the Defence. This request will focus on the transcripts of the

¹⁵ Request, p. 15 *in fine* and p. 16.

¹⁶ These are P-0291, P-0884, P-0965, P-1847, P-2027, P-2251, P-2328, P-2841.

¹⁷ See ICC-01/14-01/21-48-Conf-Red, paras. 4-5.

8 witnesses and will include parts of closed sessions in line with the applicable jurisprudence.¹⁸ For future common trial witnesses, the Prosecution considers their testimony before Trial Chamber V as evidence material to the preparation of the Defence of Mr SAID. The Prosecution will also seek the necessary authorisation to disclose their transcripts.

12. Aside from these transcripts, the Defence has already received all core and related materials to these witnesses, where they exist. This includes « *les déclarations témoins ayant un lien avec les témoins en commun (...) et les éléments de preuve en lien avec les témoins commun aux deux affaires* »¹⁹ where they are relevant to the scope of the case against Mr SAID. If the Prosecution has overlooked the evidence of a witness, it invites the Defence to submit an *inter partes* request respecting the criteria applicable to disclosure as outlined above in paragraph 6.

13. Any other materials from the record of the case in the *Yekatom* and *Ngaissona* case such as evidence led by the victims, Defence or added by the Chamber, fall outside of the Prosecution's statutory disclosure obligations. The Defence can still submit a request before the Trial Chamber V to be permitted access to additional materials.

D. Request to be permitted access to all disclosed items in the *Yekatom* and *Ngaissona* case

14. The Defence requests to have access to all items disclosed in the *Yekatom* and *Ngaissona* case "connected" to the case against SAID.²⁰ This request is not justified as it also does not meet the criteria enumerated in paragraph 6 above. The request is too broad and unspecified. Additionally, the Prosecution has already disclosed the

¹⁸ See paras. 51-52 of the Request.

¹⁹ Request, para. 44.

²⁰ Request, p. 16.

information the Defence enumerates in their Request insofar as it is linked directly to the case against Mr SAID. Otherwise, this amounts to a blanket open file disclosure of the information in the *Yekatom and Ngaissona* case. The Single Judge has previously rejected a similar open file disclosure request of the Defence.²¹

15. The Prosecution is aware of its disclosure obligation and continues to review its collection with the aim of providing information when it identifies *proprio motu* or the Defence shows materiality of information to its preparation.

III. RELIEF SOUGHT

16. For the above reasons, the Prosecution requests the Single Judge to reject the Request in *toto*.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 24th day of September 2021
At The Hague, The Netherlands

²¹ ICC-01/14-01/21-50-Conf, para. 32.