



Original: English

**No. ICC-01/14-01/21
Date: 27 September 2021**

PRE-TRIAL CHAMBER II

**Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane**

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

Public

Decision on the Defence's request for disclosure of material from *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* case

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Ms Sarah Pellet

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Language Services Section

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Chamber’ and the ‘Court’) in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, issues this ‘Decision on the Defence’s request for disclosure of material from *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* case’.

I. PROCEDURAL HISTORY

1. On 7 January 2019, Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of the Chamber, issued the ‘Warrant of arrest for Mahamat Said Abdel Kani’.¹
2. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.²
3. On 29 January 2021, Mr Said appeared before the Single Judge³ pursuant to article 60(1) of the Rome Statute (the ‘Statute’) and rule 121(1) of the Rules of Procedure and Evidence (the ‘Rules’).⁴ The Single Judge, *inter alia*, scheduled the confirmation of charges hearing to commence on 5 October 2021.⁵
4. On 30 June 2021, the Single Judge issued the ‘Second order on disclosure and postponement of the confirmation hearing’, in which, *inter alia*, the confirmation hearing was postponed to 12 October 2021.⁶
5. On 7 September 2021, the Defence filed the ‘Requête de la Défense visant à ce que lui soient communiqués tous les éléments de l’affaire connexe *Yekatom et Ngaïssona* utiles à la préparation de l’audience de confirmation des charges dans

¹ ICC-01/14-01/21-2-US-Exp (public redacted version filed on 17 February 2021 ([ICC-01/14-01/21-2-Red2](#))).

² Registry, Report of the Registry on the Arrest and Surrender of Mr Mahamat Said Abdel Kani and Request for Guidance, 27 January 2021, ICC-01/14-01/21-6-US-Exp, paras 13-27 (confidential redacted, *ex parte* version (only available to the Registry, the Prosecution and the Defence) filed on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red); confidential, lesser redacted, *ex parte* version (only available to the Registry, the Prosecution and the Defence) filed on 18 March 2021 (ICC-01/14-01/21-6-Conf-Exp-Red2)).

³ On 25 January 2021, Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided, *see* [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-3. *See also* [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-01/14-01/21-42.

⁴ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG. *See also* [Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-4; [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

⁵ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG, p. 11, lines 11-12.

⁶ [ICC-01/14-01/21-112](#), p. 9.

l'affaire *Said*' (the 'Defence's Request'),⁷ in which it seeks disclosure of evidence presented or disclosed in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the '*Yekatom and Ngaïssona* case').

6. On 10 September 2021, the Prosecution filed its response to the Defence's Request,⁸ in which it submits that the Defence's Request should be rejected (the 'Prosecution's Response').

7. On 13 September 2021, the Office of Public Counsel for Victims (the 'OPCV') informed the Chamber that it fully concurs with the Prosecution's Response and that it does not have anything to add.⁹

II. SUBMISSIONS

A. The Defence's Request

8. The Defence requests that the Prosecution be directed to indicate which of the witnesses, whose statements were disclosed in this case, are also subject to disclosure in the *Yekatom and Ngaïssona* case, and which items of evidence disclosed in this case have been disclosed in that latter case. On the basis of this indication provided by the Prosecution, the Defence seeks access to material, including transcripts of hearing, from the *Yekatom and Ngaïssona* case, which is relevant to witnesses common to both cases, as well as access to material related to evidence common to both cases. The Defence also seeks access to all evidence presented in the *Yekatom and Ngaïssona* case which is related to issues in the present case, but has not yet been disclosed to the Defence.

9. The Defence further submits that there are connections between the present case and the *Yekatom and Ngaïssona* case, as evidenced by an overlap between topics covered by witnesses in their statements given in the two cases, such as the structure and organisation of the Seleka and of the anti-Balaka. The Defence also argues that a number of witnesses are common to both cases and that the Defence must thus analyse

⁷ ICC-01/14-01/21-161-Conf (public redacted version dated 26 September 2021, was registered on 27 September 2021 (ICC-01/14-01/21-161-Red)).

⁸ Prosecution's Response to « Requête de la Défense visant à ce que lui soient communiqués tous les éléments de l'affaire connexe *Yekatom et Ngaïssona* [sic] utiles à la préparation de l'audience de confirmation des charges dans l'affaire *Said* », ICC-01/14-01/21-166-Conf (public redacted version dated 24 September 2021, was registered on 27 September 2021 (ICC-01/14-01/21-166-Red)).

⁹ Email from OPCV Counsel sent at 9:50.

all material relevant to these witnesses in order to be able to verify the reliability of the Prosecution's evidence. The Defence submits that it only has access to public documents and transcripts in the *Yekatom and Ngaïssona* case. In addition, the Defence avers that granting it access to the relevant material from the *Yekatom and Ngaïssona* case will not necessitate any variation of protective measures that may be in place in that case.

B. The Prosecution's Response

10. The Prosecution submits that the Defence's Request should be rejected, in part as being moot, since the Prosecution has already agreed, *inter partes*, to the disclosure of some of the items to which the Defence seeks access. It notes that the Defence should have addressed part of its request to the Prosecution, as it is only when *inter partes* communications have failed, that the parties may seize the Chamber of such a request. Regarding the request for a list of witnesses common to both cases, the Prosecution contends that this request does not trigger a disclosure obligation, since requests of this nature must (i) be specific; (ii) demonstrate materiality of the information sought; and (iii) have a direct connection to the charges or relate to a live issue in the case. Regarding the request for access to evidence disclosed in the *Yekatom and Ngaïssona* case, the Prosecution argues that this request should be rejected for the same reason, as the Prosecution has reviewed its evidence collection and disclosed all material relevant to the Defence. As regards the request for access to all items disclosed in the *Yekatom and Ngaïssona* case, the Prosecution contends that this request should be rejected as being too broad and unspecified.

11. Regarding the request for access to transcripts, the Prosecution submits that eight witnesses from the Prosecution's list of evidence in the present case have testified in the *Yekatom and Ngaïssona* case and that their testimony should be considered material to the preparation of the defence. The Prosecution undertakes to file a relevant request before Trial Chamber V and disclose those transcripts as soon as it is authorised to do so. As regards other material from the record of the *Yekatom and Ngaïssona* case, such as evidence led by victims, the defence or added by Trial Chamber V, the Prosecution argues that it falls outside of its disclosure obligations and that the Defence can make a relevant request to that chamber.

III. DETERMINATION BY THE CHAMBER

12. The Chamber notes articles 61(3), 67(1)(b) and 67(2) of the Statute, and rules 76, 77 and 121(2) of the Rules.

13. The Chamber notes at the outset that the Defence appears to argue that due to a number of topics common to both the present case and the *Yekatom and Ngaïssona* case, the evidence disclosed or presented in the latter case is automatically material to the preparation of the defence in the present case. However, the Chamber recalls that in order to demonstrate that evidence to which the Defence seeks access is ‘material to the preparation of the defence’, within the meaning of rule 77 of the Rules, it must make a request which (i) is specific;¹⁰ and (ii) shows that such evidence has a direct connection to the charges or a live issue in the case.¹¹ It is therefore insufficient for the Defence to merely argue that some topics are common to both cases. The Chamber finds that the Defence’s Request is not specific and does not demonstrate how the items it wishes to receive have a direct connection to the charges or a live issue in the present case. Therefore, the Chamber rejects this aspect of the Defence’s Request.

14. The Chamber also takes note of the Prosecution’s submission that it has reviewed its evidence collection and disclosed the relevant material to the Defence. The Chamber has no reason, nor does the Defence present one, to question this submission. The Chamber therefore rejects the Defence’s Request in this respect.

15. In addition, the Chamber observes that some of the items to which the Defence seeks access are not ‘in the possession or control’ of the Prosecution, within the meaning of rule 77 of the Rules, as they appear to be evidence led by the victims or the defence in the *Yekatom and Ngaïssona* case, or added by Trial Chamber V. For this reason, the Chamber rejects the Defence’s Request in this regard.

16. Finally, the Chamber takes note of the Prosecution’s undertaking to seek authorisation from Trial Chamber V to disclose transcripts of the testimony of witnesses in the *Yekatom and Ngaïssona* case who are also witnesses in the present case, and

¹⁰ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Public redacted version of Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities](#), 5 January 2021, ICC-01/12-01/18-768-Red (confidential version filed on 23 April 2020 (ICC-01/12-01/18-768-Conf)), para. 13.

¹¹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request for Remedies in Light of Disclosure Violations](#), 22 April 2020, ICC-02/04-01/15-1734, para. 22.

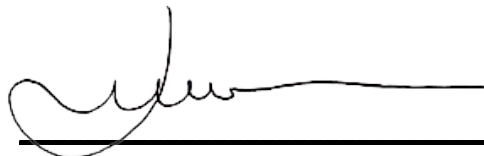
instructs the Prosecution to submit, by Wednesday, 29 September 2021, a report to the Chamber on the steps undertaken and progress made regarding this matter. The Chamber considers that the Defence's Request is moot in so far as it concerns the disclosure of said transcripts. In this regard, the Chamber recalls that requests for disclosure should first be addressed to the Prosecution.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence's Request; and

INSTRUCTS the Prosecution to submit, by Wednesday, 29 September 2021, a report to the Chamber on steps undertaken and progress made regarding the disclosure of the transcripts of the testimony of witnesses in the *Yekatom and Ngaïssona* case who are also witnesses in the present case.

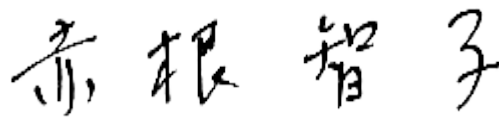
Done in both English and French, the English version being authoritative.



**Judge Rosario Salvatore Aitala,
Presiding Judge**



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 27 September 2021

At The Hague, The Netherlands