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No.: **ICC-01/14-01/18**
Date: **29 September 2021**

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 *PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

**Public
with Confidential Annex A**

**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***

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the authorisation of Trial Chamber V (“Chamber”) to disclose, on an urgent basis, the transcripts of testimony of eight trial witnesses in the *Prosecutor v. Yekatom and Ngaissona* to the Defence in the case of the *Prosecutor v. Mahamat Said Abdel Kani* (“SAID case”),¹ pursuant to Regulation 42(2) of the Regulations of the Court (“Regulations”).

2. The Prosecution, in the SAID case, is relying on the evidence of these eight witnesses for the purpose of the confirmation of charges hearing to be held on 12 October 2021.² Pursuant to its disclosure obligations, the Prosecution now seeks the Chamber’s authorisation to disclose to Mr SAID the entirety of the transcripts of the testimony of these eight witnesses since they are either the subject of protective measures or the transcripts of their testimony are confidential in part (see Annex A).

II. CONFIDENTIALITY

1. This Request is filed public with confidential Annex A in accordance with regulation 23*bis*(2) of the Regulations as the Annex refers to information which is the subject of protective measures and which is otherwise confidential.

III. URGENCY

2. The confirmation of charges hearing will be held in the SAID case on 12 October 2021. The Chamber’s urgent disposition of this Request would serve the interest of

¹ These are eight witnesses which have been disclosed as INCRIM and that are on the Prosecution’s List of Evidence in the *Said* case (see ICC-01/14-01/21-144-Conf-AnxB-Corr) in common with Trial witnesses who have testified in the *Yekatom and Ngaissona* case.

² These are Witnesses P-0291, P-0884, P-0965, P-1847, P-2027, P-2251, P-2328 and P-2841.

justice by allowing the Defence of Mr SAID to review this material for their preparation of the confirmation hearing.

IV. BACKGROUND

3. On 7 September 2021, the SAID Defence filed its *“Requête de la Défense visant à ce que lui soient communiqués tous les éléments de l’affaire connexes Yekatom et Ngaissona utiles à la préparation de l’audience de confirmation des charges dans l’affaire Said”* (“Request”).³ The Defence was requesting access to what it defined as evidence from the *Yekatom and Ngaissona* case “useful” to the preparation of the confirmation of the charges hearing scheduled on 12 October 2021.⁴

4. On 10 September 2021, the Prosecution responded that it would provide the transcripts of those witnesses it intends to rely upon for the confirmation hearing⁵ and who also have testified or will testify in the Prosecution’s presentation of evidence in the *Yekatom and Ngaissona* case (“common trial witnesses”) since they are considered material to the preparation of the Defence of Mr SAID.⁶ Furthermore, the Prosecution communicated that it would submit a request for that purpose before Trial Chamber V copying Pre-Trial Chamber II.⁷

5. On 27 September 2021, the Presiding Judge of Pre-Trial Chamber II, acting in his capacity of Single Judge, rejected Mr SAID’s request. The Single Judge, taking note of the Prosecution’s intended request to be filed before the Chamber (see paragraph 6 above *in fine*), ordered the Prosecution to submit a report on its efforts to secure the

³ ICC-01/14-01/21-161-Red, pages 15-16.

⁴ ICC-01/14-01/21-172.

⁵ 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.

⁶ ICC-01/14-01/21-166-Red, paras. 2 and 9-11.

⁷ ICC-01/14-01/21-166-Red, paras. 2 and 11.

transcripts of the testimony of the eight common trial witnesses by 29 September 2021.⁸

V. SUBMISSIONS

A. Request for authorisation to disclose the testimony of eight witnesses

6. The Prosecution submits that the transcripts of eight witnesses called to testify by the Prosecution in the *Yekatom and Ngaïssona* case and identified as disclosable in the SAID case should be made available to the Defence of Mr SAID. This encompasses the entire transcripts of their testimony, including those parts delivered in private sessions. Pursuant to Regulation 42(2) of the Regulations, any protective measures ordered by the Chamber shall be respected and the Defence shall be informed of the nature of these measures.⁹ Regulation 42(2) recognises the Prosecution's obligation to disclose materials in related cases and the security interests of affected victims or witnesses in requiring that the Defence, in subsequent proceedings, be notified of any pre-existing protective measures, by which they are bound under Regulation 42(1) of the Regulations.

7. The Prosecution submits that the transcripts identified in Annex A are to be disclosed to the Defence in the SAID case as these are additional statements made by witnesses the Prosecution is relying upon in support of its charges in the case against Mr Said. The transcripts of the testimony of the eight common trial witnesses should be disclosed without redactions to ensure that the Defence in the SAID case has full access to such evidence.

⁸ ICC-01/14-01/21-182, para. 16.

⁹ Regulation 42(2) of the Regulations; see also ICC-01/05-01/13-338, page 4, para. 3 ("Considering that the [Defence's use of material in another case] is without prejudice to Jean-Pierre Bemba's and his Counsel's duties to fully comply with any and all protective measures which are applicable and in force *vis-à-vis* the materials to be accessed").

8. In past cases, it has been decided that the disclosure of transcripts from one case to another does not amount to a variation of protective measures under Regulation 42(3) of the Regulations.¹⁰ However, it is in the Chamber's discretion to vary protective measures should this be required in individual cases.¹¹

9. Although Regulation 42(2) of the Regulations foresees a change in the scope of access to protected material in subsequent proceedings, it imposes no obligation to petition a Trial Chamber to vary existing protective measures under Regulation 42(3) for this purpose. This is because the disclosed materials remain entirely within the context of proceedings before, and fully regulated and controlled by, the Court.

10. The Defence team of Mr SAID 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.¹² The Prosecution also submits that the disclosure of the unredacted transcripts of evidence to Mr SAID would not negatively impact the security and safety of the witnesses.

¹⁰ ICC-01/05-01/08-3098-Red, para. 14 ; The *Bemba* Pre-Trial Chamber III specified that “protective measures ordered under Rule 87(3) of the Rules are directed at preventing protected information from release *to the public, press and information agencies*. The Chamber is satisfied that as long as the protective measures remain unchanged in case ICC-01/05-01/13, disclosure of the transcripts to Pre-Trial Chamber II and the parties and participants in case ICC-01/05-01/13, all of whom are bound to respect confidentiality of the transcripts and the information contained therein, would not have a negative impact on the ‘safety, physical and psychological well-being, dignity and privacy of [the] witnesses’ concerned”, see ICC-01/05-01/08-3098-Red, para. 15 (*italic in original*); see also ICC-01/04-02/06-0806, paras. 6-7.

¹¹ Regulation 42(1) of the Regulations.

¹² See also Annex to Chambers Practice Manual, 29 November 2019 at <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf> ; see also Annex 2 to the Abd-Al-Rahman First Disclosure Order, ICC-02/05-01/20-116-Anx2; ICC-01/05-01/08-3014, para. 15; The *Bemba* Pre-Trial Chamber III observed that “by virtue of the requested disclosure only a limited number of individuals would be permitted to view the transcripts; all of these individuals are bound by confidentiality obligations.”, see ICC-01/05-01/08-3098-Red, para. 14. The *Bemba* Pre-Trial Chamber III specified that “Pre-Trial Chamber II and the parties and participants in case ICC-01/05-01/13, all of whom are bound to respect confidentiality of the transcripts and the information contained therein”, see ICC-01/05-01/08-3098-Red, para. 15; see also Regulation 42(1) of the Regulations. The Defence should be reminded of their specific obligations pursuant to the Code of Professional Conduct for counsel and in particular Article 8 “Respect for professional secrecy and confidentiality” and its paragraph 3 “Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.”, see <https://www.icc-cpi.int/resource-library/Documents/COPCEng.pdf>.

B. Modalities of implementation

11. Should the Chamber grant the Request, the Prosecution proposes that access - and thereby disclosure - be implemented via Records Manager by the Registry as soon as possible. In this way, the material in the case record can quickly and easily be made available to the Defence in the SAID case.

VI. RELIEF SOUGHT

12. For the above reasons, the Prosecution requests the Chamber to allow disclosure of the unredacted transcripts of the eight common trial witnesses listed in confidential Annex A.



Karim A. A. Khan QC, Prosecutor

Dated this 29th day of September 2021
At The Hague, The Netherlands