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**International
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Court**

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TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerado Ugalde Godínez

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

Confidential

**Prosecution Response to Defence Request for Leave to Appeal
the “Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to
Rule 68(2)(b) of the Rules” (ICC-01/14-01/21-507Conf)**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Defence's request for leave to appeal ("Request")¹ the Trial Chamber's Decision on the Prosecution's First, Second and Fourth Requests under Rule 68(2)(b) ("Decision")² should be dismissed because the proposed issues do not constitute "appealable issues" and do not meet the other requirements under article 82(1)(d).

II. CONFIDENTIALITY

2. This Response is filed confidential as it relates to a filing of the same designation, regulation 23bis(2) of the Regulations of the Court. A public redacted version will be filed as soon as practical.

III. SUBMISSIONS

3. The Defence seeks leave to appeal the Decision in relation to five issues, which the Prosecution understands in summary as follows:

- a. Whether the Chamber erred in law in balancing between the Accused's right to confront the witnesses against him and the right to an expeditious conduct of proceedings ("First Issue");³
- b. Whether the Chamber erred in law by relying on the Appeals Chamber's Judgment in *Ntaganda* ("Second Issue");⁴
- c. Whether the Chamber erred in law by relying upon the testimony of P-1640 and P-1421 when assessing the prior recorded testimony of P-0529 ("Third Issue");⁵

¹ ICC-01/14-01/21-524-Conf ("Request").

² ICC-01/14-01/21-507-Conf ("Decision").

³ Request, paras. 20-24.

⁴ Request, paras. 25-29.

⁵ Request, paras. 30-32.

- d. Whether the Chamber erred in law by denying the Defence to cross-examine the witnesses on issues of importance in the case ("Fourth Issue");⁶
- e. Whether the Chamber erred in law by ruling that the Defence's submissions regarding the credibility of the witnesses and the plausibility of their accounts should not be considered when assessing the introduction of their prior recorded testimony ("Fifth Issue");⁷

4. All five issues the Defence raises either misrepresent⁸ the Decision and/or simply disagree with it—including by reiterating prior arguments.⁹ For this reason, the Defence failed to demonstrate the existence of an appealable issue genuinely arising from the Decision. Further, and in any event, the Defence fails to establish the other requirements for article 82(1)(d) interlocutory appeal, that is, that any of the proposed issues (1) would significantly affect both the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) that immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁶ [Request](#), paras. 33-39.

⁷ [Request](#), paras. 40-42.

⁸ *Prosecutor v. Bemba*, Public Redacted Version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines'", [ICC-01/05-01/08-2487-Red](#), 11 January 2013, para. 19; *Prosecutor v. Mbarushimana*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'", [ICC-01/04-01/10-487](#), 1 March 2012, paras. 32-33; *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Defence Requests for Leave to Appeal Decision ICC-01/05-01/13-1188, [ICC-01/05-01/13-1278](#), 21 September 2015, para. 9; *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Request for Leave to Appeal 'Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible', [ICC-01/05-01/13-1489](#), 20 November 2015, para. 9.

⁹ *Prosecutor v. Gbagbo and Blé Goudé*, Decision on the request for leave to appeal the "Decision on the mode of testimony of Rule 68(3) witnesses", [ICC-02/11-01/15-756](#), 15 November 2016, para. 8; *Prosecutor v. Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', [ICC-01/12-01/18-734](#), 9 April 2020, para. 14; *Prosecutor v. Ali Kushayb*, Decision on requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438- Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf), [ICC-02/05-01/20-517](#), 15 November 2021, para. 16

First Issue – Whether the Chamber erred in law in balancing between the Accused's right to confront the witnesses against him and the right to an expeditious conduct of proceedings.

5. The First Issue¹⁰ misrepresents the Decision and therefore does not genuinely arise from it. Contrary to the Defence's submission,¹¹ the Chamber did not decide to "*accélérer la procédure, par principe*" nor it imposed an expedited proceeding that "*serait par définition inequitable*".¹² Ultimately, contrary to the Defence's understanding,¹³ the Chamber did not deprive Mahamat Said Abdel Kani ("Mr. Said") of his right to cross-examination.

6. The Chamber first recalled the Appeals Chamber's warning i) that rule 68(2) of the Rules should be applied with due care since its legitimate aim of facilitating expeditious trial proceedings constitutes a limitation on the right to confront a witness,¹⁴ and ii) that before ruling in favour of admission of prior recorded testimony "a chamber must satisfy itself that doing so would not be prejudicial to or inconsistent with the rights of the accused".¹⁵ The Chamber then properly balanced the Accused's right to confront the witnesses against him with his right to an expedite conduct of the proceedings (one attribute of a fair trial).¹⁶ Thus, to the extent that the Defence argues that the Chamber ignored the Accused's right to cross-examination and imposed a proceeding that is "unfair by definition",¹⁷ the First Issue misrepresents (thus does not arise from) the Decision. Further, the submission that the proceeding will be unfair by definition is merely speculative and does not constitute an appealable issue.¹⁸

¹⁰ [Request](#), paras. 20-24.

¹¹ [Request](#), paras. 20-24.

¹² [Request](#), para. 23.

¹³ [Request](#), para. 22 ("*demandé à Monsieur Said, au nom de la célérité de la procédure, de renoncer à son droit cardinal de contre-interroger les témoins*").

¹⁴ [Decision](#), para. 38, citing [ICC-01/12-01/18-2222 OA4](#), para. 78.

¹⁵ [Decision](#), para. 13, citing [ICC-01/12-01/18-2222 OA4](#), para. 48, fn. 88.

¹⁶ [Decision](#), para. 38, citing [ICC-01/12-01/18 OA 4](#), para. 78.

¹⁷ [Request](#), para. 23.

¹⁸ *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, [ICC-01/05-01/08-75](#), 25 August 2008, para. 11 ("the appealable issue, as defined by the Appeals Chamber, has to be an issue that emanates from the rule of the decision concerned and does not merely

7. Alternatively, to the extent that the Defence submits that the Chamber should not have undertaken any balancing exercise and rejected the Prosecution's request based on the Accused's right to cross examination alone, it merely expresses its disagreement with the well-grounded Chamber's legal determination¹⁹ which is in turn fully consistent with the Appeals Chamber's jurisprudence,²⁰ and rule 68(2)(b).

Second Issue – Whether the Chamber erred in law by relying on the Appeals Chamber's Judgment in Ntaganda.

8. The Second Issue²¹ also misrepresents the Decision and therefore does not genuinely arise from it. Contrary to what the Defence appears to submit,²² the Chamber did not rely on the Appeals Chamber's jurisprudence in the *Ntaganda* case "to justify" the introduction of prior recoded testimony under Rule 68(2)(b). Rather, to address the Defence's general objections,²³ and to make sure the principle of orality will not be undermined through the admission of prior recorded testimony,²⁴ the Chamber merely recalled the general legal principle that "as reflected in international human rights law, a conviction may not rest solely, or in a decisive manner, on the evidence of witnesses whom the accused has had no opportunity to examine".²⁵

represent an abstract question or a hypothetical concern"); *Prosecutor v. Mahamat Said Abdel Kani*, Decision on Defence Request for Reconsideration or Leave to Appeal the "Directions on the Conduct of Proceedings"(ICC - 01/14-01/21-251), [ICC-01/14-01/21-275](#), 8 April 2022, para. 10.

¹⁹ [Decision](#), paras. 14, 38-39.

²⁰ *Prosecutor v. Bemba*, Public Redacted Version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines'" of 11 January 2013," 16 January 2013, [ICC-01/05-01/08-2487-Red](#), para. 28; *Prosecutor v. Kushayb*, Decision on the Defence request for leave to appeal the Decision on the Prosecution's applications to add witnesses and items OTP2016/038519 Confidential - Office of the Prosecutor Only 1763 to its List of Witnesses and List of Evidence and to rely on recently collected evidence, [ICC-02/05-01/20-682](#), 4 May 2022, para. 7 ("The Defence fails to identify an appealable issue. Instead, it reiterates its previous general objections and submissions, making general and vague allegations that clearly fail to meet the criteria of Article 82(1)(d) of the Statute. Moreover, as noted by the Prosecution, the Defence seeks to litigate a legal principle already determined by the Appeals Chamber, namely that in general, the Prosecution may continue investigations after the confirmation hearing").

²¹ [Request](#), paras. 25-29.

²² [Request](#), para. 26.

²³ [Decision](#), paras. 34-42.

²⁴ [Decision](#), para. 37.

²⁵ [Decision](#), para. 39.

Contrary to the Defence's wrongful assumption,²⁶ the Chamber has not determined yet whether and to which extent it will rely on testimonies introduced under rule 68(2)(b). As such the issue does not arise and is in any event wholly speculative.

Third Issue – Whether the Chamber erred in law by relying upon the testimony of P-1640 and P-1421 when assessing the prior recorded testimony of P-0529

9. The Third Issue²⁷ as well misrepresents the Decision and therefore does not genuinely arise from it. Contrary to the Defence's submission, the Chamber did not rely upon the corroborating testimony of P-1640 and P-1421 who the Prosecution decided not to call, to allow the introduction of P-0529's prior recorded testimony about the PK9 Minibus Incident.²⁸ Rather, the Chamber considered the testimony of P-1640 and P-1421 because they were raised by the Defence and *only* to address and dismiss the Defence's argument that their statements are inconsistent with, and raise reliability issues of, the testimony of P-0529.²⁹ It is in this context that the Chamber dismissed the Defence's allegation and found that "their evidence, in particular P-1640's, is generally consistent with that of P-0529".³⁰ There is no suggestion that the Chamber's decision rests solely on P-1640 and P1421's corroborating evidence.

10. In any event, the Defence's submission that "[s]uch an approach would open the door for the Final Judgment to be based on evidence not retained by the Prosecution"³¹ is not only misplaced, but also speculative and hypothetical. As such it does not constitute an appealable issue.³²

²⁶ [Request](#), para. 27.

²⁷ [Request](#), paras. 30-32.

²⁸ *Contra* [Request](#), para. 31.

²⁹ [Decision](#), para. 109, addressing the Defence Second Response, paras. 59-62.

³⁰ [Decision](#), para. 110.

³¹ [Request](#), para. 33 ("Une telle démarche ouvrirait la porte à ce que le Jugement final s'appuie sur des éléments de preuve pourtant non-retenus par l'Accusation.")

³² *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, [ICC-01/05-01/08-75](#), 25 August 2008, para. 11; *Prosecutor v. Mahamat Said Abdel Kani*, Decision on Defence Request for Reconsideration or Leave to Appeal the "Directions on the Conduct of Proceedings"(ICC-01/14-01/21-251), [ICC-01/14-01/21-275](#), 8 April 2022, para. 10.

Fourth Issue - Whether the Chamber erred in law by denying the Defence to cross-examine the witnesses on issues of importance in the case.

11. The Fourth Issue³³ as well misrepresents the Decision and therefore does not genuinely arise from it. Contrary to the Defence's submission, the Decision does not deny the right to cross-examination, but did in fact balance all relevant factors crucial to a determination under rule 68(2)(b)—for each witness the Chamber has evaluated the prior recorded testimony against the backdrop of the issues in the case. For instance, when addressing P-1563, the Chamber emphasised that “this witness provides important information regarding the alleged Seleka policy and their treatment of the civilian population and notes that these issues are materially in dispute in the present case. [...] Given the significance of the information contained in his statement, the Chamber considers that it would be prejudicial to the Defence to allow introduction of the prior recorded testimony of this witness...”.³⁴

12. In any event, the Defence failed to identify an appealable issue by merely reiterating previous general objections and submissions³⁵ that intruding evidence under article 68(2)(b) deprived him of his right to cross-examine these witnesses.³⁶

³³ [Request](#), paras. 33 - 39.

³⁴ [Decision](#), para. 68.

³⁵ See [Request](#), para. 37-38. *Prosecutor v. Kushayb*, Decision on the Defence request for leave to appeal the Decision on the Prosecution's applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, [ICC-02/05-01/20-682](#), 4 May 2022, para. 7.

³⁶ [Decision](#), paras. 25-27.

Fifth Issue - Whether the Chamber erred in law by ruling that the Defence's submissions regarding the credibility of the witnesses and the plausibility of their accounts should not be considered when assessing the introduction of their prior recorded testimony.

13. The Fifth Issue³⁷ as well misrepresents the Decision and therefore does not genuinely arise from it. Contrary to the Defence's suggestion,³⁸ the Chamber did not find that the Defence's objections regarding the credibility of the witnesses and the plausibility of their accounts should not be taken into account in its determination under article 68(2)(b). Rather, the Chamber found that for its determination under article 68(2)(b) it will limit its reliability assessment to the formal requirements *unless*, based on the Defence objections, it identifies manifest issues as to the reliability.³⁹ For each witness, the Chamber analysed the testimony *in light of* the Defence's arguments related to credibility and probability of the testimony.⁴⁰

14. In any event, the Defence fails to identify an appealable issue as it merely reiterates⁴¹ his prior general objections and submissions.⁴²

The proposed issues do not meet the other requirements under article 82(1)(d)

15. Further, the Defence has not established that any of the proposed issues would affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that their immediate resolution would materially advance the proceedings. The Defence's submissions that the issues would result in a Judgment "*rendu sans que la Défense ait pu pleinement contester la preuve de l'Accusation*"⁴³ and that if not addressed

³⁷ [Request](#), paras. 40 - 42.

³⁸ [Request](#), paras. 40 - 42.

³⁹ [Decision](#), para. 27.

⁴⁰ For example, P-0100, [Decision](#), para. 46.

⁴¹ [Request](#), paras. 42.

⁴² *Prosecutor v. Kushayb*, Decision on the Defence request for leave to appeal the Decision on the Prosecution's applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, [ICC-02/05-01/20-682](#), 4 May 2022, para. 7.

⁴³ [Request](#), para. 43.

now Mr. Said will not enjoy his rights under article 67(1)(b)⁴⁴ are misplaced, unsubstantiated and in any event entirely speculative.⁴⁵ For instance, the Chamber “emphasises that, given the information available regarding the evidence at this stage of proceedings, its assessment in this respect will be preliminary and may be subject to change as the evidence unfolds.”⁴⁶

IV. CONCLUSION

16. For the foregoing reasons, the Trial Chamber should reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 7th day of November 2022

At The Hague, The Netherlands

⁴⁴ [Request](#), para. 44.

⁴⁵ *Prosecutor v. Gbagbo & Blé Goudé*, Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor, [ICC-02/11-01/15-524](#), 13 May 2016, para. 16 (“It is not the duty of the Chamber to identify specific issues to appeal from broadly formulated requests. A broad reference to the fundamental rights of the accused and how the alleged violation necessarily has an impact on the fairness of the proceedings, without more, cannot satisfy the leave to appeal.”).

⁴⁶ [Decision](#), para. 44.