



Original: **English**

No.: **ICC-01/14-01/21**

Date: **9 December 2022**

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***

Public

Public Redacted Version of “Prosecution Response to Defence Request for reconsideration or, alternatively, request for leave to appeal the ‘Decision on the Prosecution’s Fifth Request Pursuant to Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280’ (ICC-01/14-01/21-551-Conf)”, ICC-01/14-01/21-561-Conf, dated 28 November 2022

Source: Office of the Prosecutor

Document 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 KC
Mr Mame Mandiaye Niang
Ms Holo Makwaia

Counsel for 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
Mr Tars Van Litsenborgh

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation
and Reparations Section**

Other

I. INTRODUCTION

1. The Defence's request for reconsideration or, in the alternative, for leave to appeal¹ the Trial Chamber's Decision on the Prosecution's Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280² should be dismissed. The Defence does not show that reconsideration of the Decision is warranted, nor that any of the three proposed issues are appealable within the meaning of article 82(1)(d) of the Statute.

II. CONFIDENTIALITY

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

III. SUBMISSIONS

1. Request for reconsideration

3. A chamber's reconsideration of its previous decision is an exceptional remedy which may only be granted in very limited circumstances. They include the existence of a clear error of reasoning on the part of a Chamber and a necessity to prevent injustice.³ New facts and arguments arising since the impugned decision was rendered may be relevant to this assessment.⁴ However, a request for reconsideration, being an exceptional remedy, cannot be used as an attempt to re-litigate points which have already been made before the Chamber.⁵ None of the Defence arguments warrant the Chamber's reconsideration. Rather, the Defence re-argues points already made before the Chamber.

¹ ICC-01/14-01/21-558-Conf ("Request").

² ICC-01/14-01/21-551-Conf ("Decision").

³ [ICC-02/04-01/15-1547](#), para. 7; [ICC-02/04-01/15-468](#), para. 4; [ICC-01/04-02/06-519](#), para. 12.

⁴ [ICC-02/04-01/15-1259](#), para. 12; [ICC-02/04-01/15-1210-Red](#), para. 6.

⁵ ICC-01/12-01/18-2414, para. 7, citing ICC-02/05-01/20-650-Red, para. 10 and ICC-01/04-02/06-2426, para. 6.

4. First, the Decision does not include a clear error of reasoning on the part of a Chamber. In its ruling, the Chamber considered both the Prosecution's and the Defence's submissions. It evaluated the corroborative nature of the prior recorded testimony of P-2280 in relation to the testimony of P-0547 and P-0338, who have both already testified before the Chamber and were cross-examined by the Defence. The Chamber also assessed that the statement of P-2280 does not pertain to the acts and conduct of the Accused.⁶ The Defence does not show that the Chamber's reasoning was erroneous.

5. Further, the "*precisions*" provided by the Defence are not based on new facts nor does the Defence present new arguments;⁷ rather, it merely reiterates previously made submissions regarding the [REDACTED] and [REDACTED], including on matters related to the [REDACTED].⁸ The Defence previously argued that the visits of members of the French government to OCRB and the overall engagement of France in different international intervention mechanisms during the time period of 2013 are crucial to the Defence case because - in their view - it proves that the OCRB was an "open place, visited by representatives of different nations and organisations".⁹ However, these submissions do not explain how the role of French authorities would be relevant to determining the criminal responsibility of the Accused in the present case.

6. In addition, a reconsideration of the Decision is not necessary to prevent an injustice. Not only the relevance of the Defence's argument is opaque but, the Defence is already in possession of the information it requires to make the argument it asserts is being denied. For example, the Defence has information that relates to visits of French authorities, including from the statement of [REDACTED] and other witnesses cited in the Request.¹⁰ Likewise, witnesses P-1429, P-0338 and P-0787 provide such

⁶ With reference to ICC-01/14-01/21-507-Red, para. 19.

⁷ Request, para. 10 – 16.

⁸ Request, para. 7-9.

⁹ Request, para. 11.

¹⁰ Request, para. 13.

information in their prior recorded testimony, which the Defence acknowledges.¹¹ In addition, the Defence questioned P-0787 and P-0338 when they appeared. The Prosecution notes, the Defence is in possession of a report issued by French authorities on this very matter.¹² Against this backdrop, P-2280 does not provide any unique information with respect to [REDACTED]. Further, the Defence is not prevented from calling its own witnesses on the matter.

2. Alternative request for leave to appeal

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

- 1) Whether the Chamber erred in fact by admitting item CAR-OTP-2116-0725-R01 as a prior recorded testimony;
- 2) Whether the Chamber erred in law by not allowing the Defence from exploring with P-2280 the important themes in the search of the truth;
- 3) Whether the Chamber erred in law when ruling that the prior recorded testimony does not relate to the acts and conducts of the Accused.

8. The three issues the Defence raises either misrepresent¹³ the Decision and/or simply disagree with it—including by reiterating prior arguments.¹⁴ For this reason, the Defence failed to demonstrate the existence of an appealable issue arising from the

¹¹ Request, fn. 20; P-0787: CAR-OTP-2036-0423 at 0424, 0431, 043, para. 61-65, 97, 101; P-0338: CAR-OTP-2036-0266, para. 127; Request, fn. 20.

¹² CAR-OTP-2102-0614 (CAR-OTP-2107-1224, engl.).

¹³ *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, para. 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.

¹⁴ *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

Decision. Further, 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.

First Issue – Whether the Chamber erred in fact in admitting the item CAR-OTP-2116-0725-R01 as a prior recorded testimony (“First Issue”)

9. The First Issue simply disagrees with the Chamber’s assessment that item CAR-OTP-2116-0725-R01 is a prior recorded testimony within the meaning of rule 68. It does not arise from the Decision. The Defence argues that the witness statement CAR-OTP-2116-0725 does not fulfil the criteria of rule 68 and asserts that additional requirements would have to be met other than those correctly applied by the Chamber.¹⁵

10. However, the Chamber ruled to the contrary and found that P-2280’s statement constitutes a prior recorded testimony within the meaning of rule 68 because it is “a *witness interview recorded in the context of a preliminary investigation conducted by the [REDACTED], in the presence of Prosecution investigators and was signed by the witness, who, having read over it, declared that he stood over its contents. Therefore, the Chamber is satisfied that the statement was given to an official authorised to collect evidence for use in judicial proceedings and that the witness understood that he was providing information that could be relied upon in the context of legal proceedings.*”¹⁶

11. P-2280’s statement was taken in accordance with the procedure required [REDACTED]. It not only fulfils the criteria of rule 111 of the Rules but also those set out in rule 68 and developed by past jurisprudence of the Court. Conversely, the

¹⁵ Request, para. 17-20.

¹⁶ See also Decision, fn. 27.

standard advocated by the Defence would render any rule 68 submission which relates to witness statements taken in cooperation with national authorities and in adherence *also* of national procedural requirements and formalities impossible. This approach is not envisaged by rule 68 and is not reflected in any case law.

Second Issue – Whether the Chamber erred in law by forbidding the Defence from exploring with P-2280 the important themes for the search of the truth (“Second Issue”)

12. The Second Issue¹⁷ also disagrees with the Chamber’s decision to allow the prior recorded testimony under rule 68(2)(b) and thus not to allow the Defence’s oral cross-examination of the witness. The issue thus does not arise from the Decision.

13. Contrary to the Defence’s submission,¹⁸ the Chamber did not decide to deprive the Defence of the possibility to explore the theme. It simply decided to allow the prior recorded testimony of P-2280 under rule 68(2)(b) after balancing all relevant factors and considering, *inter alia*, that P-2280’s statement corroborates the testimony of P-0338 and P-0547 regarding [REDACTED] - and that the Defence was able to cross-examine P-0338 and P-0547. Based on the above, the Second Issue is not an appealable issue under article 82(1)(d).

Third Issue – Whether the Chamber erred in law when ruling that the prior recorded testimony does not relate to the acts and conducts of the Accused (“Third Issue”)

14. The Third Issue¹⁹ is also not appealable as the Defence merely disagrees with the Chamber’s assessment that the prior recorded testimony of P-2280 does not relate to the acts and conducts of the Accused. The Chamber correctly held that P-2280 *corroborates* the testimony of P-0547 and P-0338 in one central aspect, which is [REDACTED], but that P-2280 does not mention the Accused.²⁰ In fact, the Defence

¹⁷ Request, para. 20-24.

¹⁸ Request, para. 23-29.

¹⁹ Request, para. 30.

²⁰ Decision, para. 19, 20-22.

acknowledges that P-0547 and P-0338 are the witnesses who provide information on the acts and conducts of Mr SAID in relation to the alleged imprisonment and torture of P-0547 and not P-2280 and merely speculates that the live testimony of P-2280 could “*potentiellement relever des actes et compartements de l’Accuse*”. Based on the above, the Third Issue is not an appealable issue under article 82(1)(d).

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

15. 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 submissions that the final judgement would be rendered without the Defence having had the opportunity to contest the evidence of the Prosecution, and that if not addressed now Mr. Said will not enjoy his rights under article 67(1)²¹ are misplaced, unsubstantiated and entirely speculative.²² Further, it repeats previous submissions dismissed by the Chamber.

16. Indeed, the Chamber has previously ruled that the principle of orality is respected in this case allowing 18 witnesses to testify in person, *viva voce* and 26 to appear before the Chamber under rule 68(3).²³ It has also noted that whether the principle of orality is respected in a case is a qualitative rather than quantitative issue and requires a careful balancing of the accused’s right to confront the evidence against him and the need to ensure that the proceedings are streamlined and efficient.²⁴ It further noted that it will keep its assessment under review and may always make a

²¹ Request, para. 31-32.

²² *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.”).

²³ ICC-01/14-01/21-506-Red, para. 28.

²⁴ ICC-01/14-01/21-507-Red, para. 37-38.

determination to call one or more witnesses whose statements have been introduced under rule 68(2)(b) to testify in person at a later stage.²⁵

17. The Prosecution submits that, the Defence has not demonstrated how the role of the [REDACTED] (the theme that it wishes to explore [REDACTED]) is relevant to the Accused's criminal responsibility. The Defence assertion that they will in future not be able to submit a request pursuant to rule 68 for a comparative statement of another witness is misplaced, speculative as well as hypothetical.

IV. CONCLUSION

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



Karim A. A. Khan KC, Prosecutor

Dated this 9th day of December 2022
At The Hague, The Netherlands

²⁵ ICC-01/14-01/21-507-Red, para. 41.