

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 May 2023

TRIAL CHAMBER VI

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF *THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI*

Public

Public Redacted Version of "Victims' response to the '*Demande d'autorisation d'interjeter appel de la 'Decision on the Prosecution Second Request for In-Court Protective Measures' (ICC-01/14-01/21-605-Conf)' (ICC-01/14-01/21-607-Conf)'",
No. ICC-01/14-01/21-609-Conf, dated 5 May 2023*

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel representing participating victims and applicants in the proceedings, as well as the collective interests of future applicants (the “Common Legal Representative”)¹ submits that the Defence request (the “Request”)² for leave to appeal the “Decision on the Prosecution Second Request for In-Court Protective Measures” (the “Impugned Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute (the “Statute”) and must be rejected in its entirety.

2. The Defence does not demonstrate that any of the four identified issues (the “Purported Issues”) can be the subject of an interlocutory appeal. Instead, the Defence either reiterates its disagreement with, or merely misconstrues, the Impugned Decision. Since conflicts of opinion are not appealable issues, the Request must fail on that basis alone. Even if, by extraordinary, Trial Chamber VI (the “Chamber”) were to find that appealable issues do arise from the Impugned Decision, the Defence fails to show how those significantly affect the fair and expeditious conduct of the proceedings and how their immediate resolution would materially advance the proceedings.

II. PROCEDURAL BACKGROUND

3. On 8 March 2022, the Chamber issued the Directions on the Conduct of Proceedings setting out the procedure to request protective or special measures pursuant to rules 87 and 88 of the Rules of Procedure and Evidence.⁴

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#) and [No. ICC-01/14-01/21-T-007-Red-ENT CT WT](#), p. 47, lines 12-24; the “Decision on matters relating to the participation of victims during the trial” (Trial Chamber VI), [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; and the “Decision authorising 20 victims to participate in the proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-331](#), 27 May 2022.

² See the “*Demande d’autorisation d’interjeter appel de la ‘Decision on the Prosecution Second Request for In-Court Protective Measures’* (ICC-01/14-01/21-605-Conf)”, [No. ICC-01/14-01/21-607-Conf](#), 1 May 2023 (the “Request”).

³ See the “Decision on the Prosecution Second Request for In-Court Protective Measures” (Trial Chamber VI), [No. ICC-01/14-01/21-605-Conf](#) and [No. ICC-01/14-01/21-605-Red](#), 20 April 2023.

⁴ See the “Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-251](#), 9 March 2022, paras. 47-48.

4. On 21 September 2022, the Chamber issued its first decision on in-court protective measures (the “First ICPM Decision”).⁵

5. [REDACTED].⁶

6. On 16 December 2022, the Prosecution filed its second request for in-court protective measures (the “Prosecution Request”).⁷

7. On the same day, the Chamber extended the time limit and directed any responses to the Prosecution Request to be filed no later than 4pm on 11 January 2023.⁸

8. On 11 January 2023, the Common Legal Representative and the Defence filed their responses to the Prosecution Request.⁹

9. [REDACTED].¹⁰

10. On 20 April 2023, the Chamber issued the Impugned Decision.¹¹

11. On 1 May 2023, the Defence submitted its Request,¹² seeking leave to appeal the Impugned Decision on the following Purported Issues:

- i. The Chamber erred in law by failing to motivate in which way it took into account the principle of the publicity of the proceedings (the “First Issue”);¹³

⁵ See the “Decision on the Prosecution’s Request for In-Court Protective Measure”, [No. ICC-01/14-01/21-481-Conf](#) and [No. ICC-01/14-01/21-481-Red](#), 21 September 2022 (“First ICPM Decision”).

⁶ [REDACTED].

⁷ See the “Prosecution’s Second Request for In-Court Protective Measures”, with confidential [annex](#), [No. ICC-01/14-01/21-577-Conf](#), 16 December 2022.

⁸ See the email from Trial Chamber VI to the parties and participants entitled “Suspension of Time Limits during the Winter Recess & Extension of Time Limit for responses to Filings 574 and 577”, 16 December 2022 at 16:54.

⁹ See the “Victims’ response to the ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)”, [No. ICC-01/14-01/21-581-Conf](#) and [No. ICC-01/14-01/21-581-Red](#), 11 January 2023; and the “Réponse de la Défense à la ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)”, [No. ICC-01/14-01/21-580-Conf](#) and [No. ICC-01/14-01/21-580-Red](#), 11 January 2023.

¹⁰ [REDACTED].

¹¹ See the Impugned Decision, *supra* note 3.

¹² See the Request, *supra* note 2.

¹³ *Idem*, paras. 13-15.

- ii. The Chamber did not apply the correct standard of proof for the granting of protective measures by relying on claims that are unproven, not current, and unrelated to the proceedings (the “Second Issue”);¹⁴
- iii. The Chamber erred in law by not requiring the Prosecution to meet its obligation to demonstrate the need for protective measures, thereby discharging its burden of proof (the “Third Issue”);¹⁵ and
- iv. The Chamber erred in law by taking into account the views and concerns, as presented by the Common Legal Representative, of persons who are no longer participating victims in the proceedings (the “Fourth Issue”).¹⁶

III. CLASSIFICATION

12. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the present filing is classified as “confidential”, since it refers to a document filed with the same classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

13. Article 82(1)(d) of the Statute provides for the possibility for the parties to seek leave to appeal *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

14. The jurisprudence of the Court has clarified the various requirements of article 82(1)(d) of the Statute.¹⁷ In this regard, the Appeals Chamber ruled that

¹⁴ *Idem*, paras. 16-27.

¹⁵ *Idem*, paras. 28-35.

¹⁶ *Idem*, paras. 36-39.

¹⁷ See the “Decision on Defence Request for Leave to Appeal (ICC-01/14-01/21-415)” (Trial Chamber VI), [No. ICC-01/14-01/21-435](#), 27 July 2022, paras. 5-6. See also the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21; and the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s

“[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁸ The Appeals Chamber further stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁹ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²⁰ The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.²¹

15. Consequently, it must first be determined whether the purported “issue” identified in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.²²

1. The Purported Issues do not arise from the Impugned Decision

16. As a preliminary matter, the Common Legal Representative notes that the Chamber, in the Impugned Decision, made reference to its First ICPM Decision and the applicable law contained therein, explaining that it “[saw] no reason to deviate from

31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8, and 14.

¹⁸ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 8.

¹⁹ *Idem*, para. 9.

²⁰ *Ibid.*

²¹ *Idem*, para. 10.

²² See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 29 November 2012, para. 70.

*its previous decision and [would] apply the statutory framework in the same manner”.*²³

Throughout the Impugned Decision, further reference is made to the First ICPM Decision on numerous occasions.²⁴ The Common Legal Representative recalls that the Defence did not seek leave to appeal the First ICPM Decision, thus seemingly accepting the Chamber’s reasoning contained therein, and finds it therefore remarkable that the Defence now takes issue with said reasoning applied in the same manner in the Impugned Decision.

17. Regarding the Purported Issues, the Common Legal Representative submits that they do not constitute appealable issues under article 82(1)(d) of the Statute, but instead represent mere disagreements with the Impugned Decision. Said disagreements are revealed by the Defence’s attempt to relitigate questions that were already addressed and dismissed by the Chamber in the Impugned Decision. Indeed, the Common Legal Representative notes that the Defence, in its Request, merely reiterates arguments advanced at length before the Chamber in its response to the Prosecution Request, more specifically regarding the publicity of the proceedings,²⁵ the standard of proof required for the Prosecution to demonstrate the existence of an objectively justifiable risk and for the Chamber to grant protective measures,²⁶ as well as with regard to the need to seek the current views of participating victims.²⁷ In the Impugned Decision, the Chamber considered, and expressly disagreed with, said arguments.²⁸ Similarly, the Chamber took into account identical arguments submitted

²³ See the Impugned Decision, *supra* note 3, para. 10.

²⁴ *Idem*, footnotes 42, 46-48, 50, 53, 55, 78, 88-89, and 91.

²⁵ See the Request, *supra* note 2, paras. 6-7, 10-11, and 15; and the “*Réponse de la Défense à la ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)*”, *supra* note 9, paras. 9-13, 15, 18, 21-22, and 24.

²⁶ See the Request, *supra* note 2, paras. 16, 19, 21-25, and 31-34; and the “*Réponse de la Défense à la ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)*”, *supra* note 9, paras. 12-15, 19, 23, and 45-47.

²⁷ See the Request, *supra* note 2, paras. 37-38; and the “*Réponse de la Défense à la ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)*”, *supra* note 9, para. 30.

²⁸ See the Impugned Decision, *supra* note 3, paras. 14-33.

by the Defence prior to issuing its First ICPM Decision,²⁹ which the Defence did not seek to appeal, as mentioned *supra*.³⁰

18. The Common Legal Representative further posits that the Purported Issues, in addition to constituting mere disagreements, also misconstrue the Impugned Decision.

19. Regarding the First Issue, the Chamber specifically referred to its First ICPM Decision in which it explained that the principle of the publicity of the proceedings, while being “*a fundamental right of the accused and a necessary component of a fair and transparent trial*”, is “*not absolute and subject to exceptions, including for the purposes of protecting victims and witnesses*”.³¹ As such, the Chamber did not fail to motivate in which way it took said principle into account, contrary to the Defence’s submissions.³²

20. As regards the Second Issue, the Chamber did not automatically grant protective measures to all witnesses concerned, as put forward by the Defence.³³ Instead, the Chamber conducted a detailed assessment of the existence of an objectively justifiable risk for each individual witness, based on their respective situation.³⁴ In addition to taking into account these specific factors for each witness, the Chamber generally noted the security situation in the CAR and the fact that [REDACTED].³⁵ In this regard, the Chamber held that “*there is public information available which clearly indicates that the security situation in CAR is reason for serious concern*”, and that “[the] Registry equally indicate[d] that [REDACTED].³⁶ The Chamber

²⁹ See the First ICPM Decision, *supra* note 5, para. 9, referring to the “*Réponse de la Défense à la ‘Prosecution’s Request for In-Court Protective Measures’ (ICC-01/14-01/21-356-Conf) et à la demande du BCPV dans la ‘response to the ‘Prosecution’s Request for In-Court Protective Measures’ (ICC-01/14-01/21-356-Red)’ (ICC-01/14-01/21-377-Conf.)*”, [No. ICC-01/14-01/21-407-Conf](#) and [No. ICC-01/14-01/21-407-Red](#), 13 July 2022, paras. 20, and 26-51.

³⁰ See *supra* para. 16.

³¹ See the Impugned Decision, *supra* note 3, para. 31, referring to the First ICPM Decision, *supra* note 5, paras. 12, and 14.

³² See the Request, *supra* note 2, paras. 13-15.

³³ *Idem*, paras. 19-20, and 27.

³⁴ See the Impugned Decision, *supra* note 3, paras. 34-86.

³⁵ See, *inter alia*, the Impugned Decision, *supra* note 3, para. 38.

³⁶ *Idem*, para. 20.

further explained that, while *“not directly linked to the current proceedings, the Chamber finds that such information may still be of importance when assessing whether an objectively justifiable security risk warrants the granting of protective measures”*.³⁷ Based on these reasons, the Common Legal Representative posits that the Chamber applied the correct standard of proof for the granting of protective measures, contrary to the Defence’s submissions.³⁸

21. Similarly, with regard to the Third Issue, the Chamber did not discharge the Prosecution from its burden of proof to demonstrate the need for protective measures, but instead based itself on the Prosecution’s submissions, as well as on the Defence’s submissions in response thereto, when conducting its detailed assessment of the existence of an objectively justifiable risk for each individual witness.³⁹ Indeed, the Chamber explicitly stressed that, as with the First ICPM Decision, its *“rulings are based on the submissions of the parties”*.⁴⁰ As to the non-investigation of claims by witnesses that they have been threatened for the purposes of determining whether protective measures should be granted,⁴¹ the Common Legal Representative recalls that this is fully in line with the Chamber’s approach in its First ICPM Decision, according to which *“the question of whether an objectively justifiable risk exists must be based on an assessment of the possibility of future harm in light of all the general and specific circumstances”*, and it is therefore *“unnecessary to demonstrate that a risk has already manifested in the form of a specific and concrete threat against a witness due to their cooperation with the Court”*.⁴² This, in no way, discharges the Prosecution from its obligation to prove the existence of an objectively justifiable risk, as incorrectly argued by the Defence.⁴³

³⁷ *Idem*, para. 19.

³⁸ See the Request, *supra* note 2, paras. 16-27.

³⁹ See the Impugned Decision, *supra* note 3, paras. 35-37, 40-41, 43-46, 48-50, 52-54, 56-57, 59-60, 62-63, 65-66, 68-69, 71-73, 75-76, 78-79, 81-82, and 84-85.

⁴⁰ *Idem*, para. 33, referring to the First ICPM Decision, *supra* note 5, para. 15.

⁴¹ See the Request, *supra* note 2, paras. 29-30.

⁴² See the First ICPM Decision, *supra* note 5, para. 19. See also the Impugned Decision, *supra* note 3, para. 30, referring to the First ICPM Decision, *supra* note 5, para. 31.

⁴³ See the Request, *supra* note 2, para. 30: *“Cette approche a pour conséquence de libérer complètement l’Accusation de son obligation de démontrer quoique ce soit et puisqu’elle est crue sur parole”*.

22. Finally, regarding the Fourth Issue, the Common Legal Representative recalls her response – on 11 January 2023 – to the Prosecution Request, in which she informed the Chamber and the parties that, as a result of the highly volatile security situation in the CAR, “*victims continue to report on their fear that their cooperation with the Court become known*”.⁴⁴ In line with her professional duties, the Common Legal Representative is in very regular contact with her clients, who are participating victims in the present case or awaiting a decision by the Chamber on their request for participation. As such, the victims’ views and concerns as presented by the Common Legal Representative in her submissions originate from participating victims and applicants, and are always up to date, contrary to the Defence’s erroneous assertions.⁴⁵

23. Since disagreements with, or misinterpretations of, the Impugned Decision are not appealable issues, the Request must fail on that basis alone.

2. The Purported Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings

24. Even if, by extraordinary, the Chamber were to find that appealable issues do arise from the Impugned Decision, the Defence fails to demonstrate how they significantly affect the fair and expeditious conduct of the proceedings and how their immediate resolution would materially advance the proceedings.

25. In analysing whether an appealable issue would “*significantly affect*” the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on*

⁴⁴ See the “Victims’ response to the ‘Prosecution’s Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-577-Conf)”, *supra* note 9, para. 13.

⁴⁵ See the Request, *supra* note 2, paras. 37-38.

the observations and evidence submitted to the Court that might influence its decision".⁴⁶ In turn, 'expeditiousness' must be read as "*closely linked to the concept of judicial proceedings 'within a reasonable time' [...], namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".⁴⁷ The Appeals Chamber stated that in order to determine whether an issue would significantly affect the 'outcome of the trial' under article 82(1)(d) of the Statute, "[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".⁴⁸

26. Contrary to the requirements of article 82(1)(d) of the Statute,⁴⁹ the Defence does not articulate how each of the Purported Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial. Instead, it makes vague claims as to the alleged 'demands of an unimpeachable international justice',⁵⁰ and explains in similar vague terms that the non-disclosure of the witnesses' identities to the public would complicate its cross-examination of said witnesses, and that it would thus not be able to fully challenge the Prosecution's evidence, thereby violating the fundamental rights of the accused under article 67 of the Statute.⁵¹ Therefore, the Common Legal Representative submits that the general assertions by the Defence, sparse and void of specificity, clearly fall short of demonstrating that the fairness and

⁴⁶ See, *inter alia*, the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

⁴⁷ *Idem*, paras. 17-18.

⁴⁸ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 13.

⁴⁹ See the "Decision on the 'Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility'" (Trial Chamber II), [No. ICC-01/04-01/07-1958](#), 11 March 2010, para. 20. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" (Trial Chamber III), [No. ICC-01/05-01/08-2925-Red](#), 20 December 2013, para. 34.

⁵⁰ See the Request, *supra* note 2, para. 40: "En particulier, les conditions dans lesquelles l'exception au principe de la publicité des débats est posée par le biais de la décision attaquée ne peut satisfaire les exigences d'une justice internationale irréprochable".

⁵¹ *Idem*, paras. 41-42.

expeditiousness of the proceedings or the outcome of the trial is affected by the Purported Issues.

27. The Legal Representative further recalls the Dissenting Opinion of Judge Eboe-Osuji regarding mere disagreements and their impact on the fairness or expeditiousness of the proceedings, or the outcome of the trial:

*“Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that ‘would significantly’ affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue ‘would’ affect the fair conduct of the case or its outcome, without considering how ‘significantly’ so. Nor is the question whether the issue ‘may’ —not would— affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue would significantly affect the outcome of the trial or the fair and expeditious conduct of the proceedings. Both words— ‘would significantly’ —must be given their juristic values”.*⁵²

28. The Common Legal Representative submits that, as demonstrated *supra*,⁵³ none of the Purported Issues affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Entertaining mere disagreements or incorrect readings of the Impugned Decision would significantly delay the proceedings and thus prejudice the very essence of said principles. She therefore submits that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these Issues may materially advance the proceedings, inasmuch as such a resolution would lead to undue delays of the proceedings.⁵⁴

⁵² See the “Dissenting Opinion of Judge Eboe-Osuji”, [No. ICC-01/09-01/11-817-Anx](#), 18 July 2013, para. 3; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

⁵³ See *supra* para. 26.

⁵⁴ See the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-530](#), 8 October 2013, para. 42.

FOR THESE REASONS, the Common Legal Representative respectfully requests the Chamber to dismiss the Request in its entirety as it does not meet the legal criteria set out in article 82(1)(d) of the Statute.

A handwritten signature in black ink, appearing to read 'Pellet', followed by a period.

Sarah Pellet

Dated this 11th day of May 2023

At The Hague, The Netherlands