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Date: **12 May 2023**

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’s Response to Defence Request for leave to appeal the “Decision on the Prosecution Second Request for In-Court Protective Measures” (ICC-01/14-01/21-605-Conf)”, ICC-01/14-01/21-608-Conf, dated 5 May 2023

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution respectfully requests that the Chamber reject the Defence's request for leave to appeal¹ the Decision on the Prosecution Second Request for In-Court Protective Measures.² The Defence's proposed issues do not constitute "appealable issues" and do not meet the cumulative requirements under article 82(1)(d) of the Statute.

II. CONFIDENTIALITY

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

III. SUBMISSIONS**A. The Issues are not appealable issues within the terms of article 82(1)(d).**

3. The Defence identifies four alleged issues (collectively, "Issues") for which it seeks leave to appeal. None of the Issues are appealable issues, and the Request should be rejected. For the purposes of article 82(1)(d),³ an issue constitutes "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."⁴ No appealable issue arises if a party misreads or misrepresents the decision or record.⁵ Moreover, the issue's resolution must be "essential for the determination of matters arising under the judicial cause under examination".⁶

4. As set out below, the Defence has failed to demonstrate the existence of any appealable issue genuinely arising from the Decision. Instead, the Defence either misrepresents the Decision and/or simply disagrees with it—including by reiterating prior arguments. Given that the article 82(1)(d) requirements are cumulative, and since failure to fulfil one of the

¹ ICC-01/14-01/21-607-Conf ("Request").

² ICC-01/14-01/21-605-Conf ("Decision").

³ ICC-01/04-168 OA3, paras. 9-10. *See also* ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

⁴ ICC-01/04-168 OA3, para. 9.

⁵ *See e.g.*, ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1489, paras. 9, 10; ICC-01/05-01/08-75, para. 32.

⁶ ICC-01/04-168 OA3, para. 9.

requirements is fatal to an application for leave to appeal,⁷ the Defence's Request may be rejected on this basis alone.

i. The First Issue mischaracterises the Decision and disagrees with the Chamber's exercise of discretion

5. The Defence argues that the Chamber erred in law by failing to provide a properly reasoned decision by purportedly failing to explain how it took into account the requirement of respect for the publicity of proceedings ("First Issue").⁸ The Defence mischaracterises the Decision and simply disagrees with the Chamber's exercise of its discretion in balancing competing interests. Contrary to the Defence submission,⁹ the Decision was adequately reasoned, including by identifying the relevant factors, taking account of the Parties' submissions, and assessing the risk to each witness on a case-by-case basis.

6. The Chamber explicitly acknowledged the relevance of the principle of publicity of proceedings, and noted the Defence's submissions,¹⁰ but explained that this principle was not dispositive and must be balanced with countervailing considerations such as the witnesses' safety and well-being.¹¹ The Chamber also adopted by reference¹² its previous decision on the Prosecution's request for protective measures ("First Protective Measures Decision"),¹³ where it stated that "the principle of the publicity of the proceedings [is] a fundamental right of the accused and a necessary component of a fair and transparent trial [but that] this general principle is not absolute and subject to exceptions, including for the purposes of protecting victims and witnesses".¹⁴ The Chamber then listed in its individual assessment for each witness the factors that militated in favour of granting protective measures.¹⁵

⁷ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

⁸ Request, heading 1.1, paras. 13-15.

⁹ Request, para. 14.

¹⁰ Decision, para. 31.

¹¹ Decision, para. 31 ("not[ing] the Defence's submissions with regard to the publicity of the proceedings" and "repeat[ing] that the publicity of the proceedings is one factor in the decision on whether to grant protective measures"); see also Decision, para. 7 (recalling the Defence's arguments).

¹² Decision, para. 10.

¹³ First Protective Measures Decision, ICC-01/14-01/21-481-Conf.

¹⁴ First Protective Measures Decision, ICC-01/14-01/21-481-Conf, para. 12.

¹⁵ Decision, paras. 38, 42, 47, 51, 55, 58, 61, 64, 67, 70, 74, 77, 80, 83, 86.

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7. That the Chamber did not cite the principle of publicity in its individual assessment for each witness does not mean it did not consider this factor in its assessment. To the contrary, the Chamber clearly stated it would pay due consideration “to all factors” in its decision.¹⁶ It is clear from its reasoning that it only listed in the individual assessments the factors that it considered in favour of granting protective measures. Given that neither the principle of publicity, nor any other countervailing factors are cited demonstrates that the Chamber found these countervailing factors did not outweigh those in favour of granting protective measures. The Defence merely disagrees with the Chamber’s exercise of discretion in its weighing and balancing of the relevant factors. This does not give rise to an appealable issue.

ii. The Second Issue mischaracterises the Decision and disagrees with the Chamber’s approach

8. The Defence argues that the Chamber applied an incorrect standard of proof to protective measure requests (“Second Issue”).¹⁷ The Defence again mischaracterises the Decision and disagrees with the Chamber’s assessment that the object and purpose of protective measures entails the assessment of an “objectively justifiable risk”— but does not require such a risk to have “already manifested in the form of a specific and concrete threat against a witness”.¹⁸ While asserting that the Chamber’s approach to the standard of proof was inconsistent with the Court’s case law,¹⁹ the Defence fails to identify any case law at all to support this proposition, thus failing to properly substantiate its request for leave to appeal on the Second Issue. Moreover, the Defence overlooks key aspects of the Chamber’s reasoning²⁰

¹⁶ Decision, para. 31.

¹⁷ Request, heading 1.2, paras. 16-27.

¹⁸ First Protective Measures Decision, ICC-01/14-01/21-481-Conf, para. 19. *See also* Decision, para. 10 (The Chamber recalls its first decision pertaining to in-court protective measures and the applicable law contained therein at paras. 12-19), para. 34 (The Chamber’s assessment is guided by the general considerations, especially its approach to the consideration of risk as explained in its first in-court protective measures decision at paras. 17-19).

¹⁹ Request, paras. 17-20.

²⁰ Decision, para. 13 (noting that in ruling on the Request, “the Chamber will first discuss the general points raised by both parties and then assess each of the Witnesses individually”), paras. 14-33 (“General considerations”), paras. 14-17, 20-21 (the general security situation in CAR and attempts at witness intimidation), paras. 18-19 (the victims’ fears and concerns), paras. 23-24, 26 (the possibility of retaliation of Mr ADAM and/or his supporters against witnesses as well as Mr ADAM’s announcements and available resources), paras. 25-26 (Mr SAID’s links with former associates and the activities of armed groups to which Mr SAID may be linked), para. 27 [REDACTED], paras. 28-29 (content and nature of witnesses’ anticipated testimonies), para. 31 (the principle of the publicity of the proceedings), para. 32 (any relevant information even if related to incidents that occurred years ago), para. 33 (“the Chamber stresses that the present rulings are based on the submissions of the parties”), para. 34 (The Chamber’s assessment is guided by the general considerations, especially its approach to the consideration of risk as explained in its first in-court protective measures decision at paras. 17-19).

and repeats criticisms of the Chamber's approach which have previously been raised and rejected.²¹

9. Notably, the Defence makes no reference to the Chamber's express consideration of highly individualised factors, such as the witness's knowledge of and interaction with [REDACTED].²² Nor does it address the Chamber's assessment of specific [REDACTED].²³ Indeed, as the Chamber explained, the allegations [REDACTED] by witnesses contained in prior statements may be "crucial information",²⁴ while acknowledging that the "[r]eliance on information provided by the person in this framework is fundamentally different from the assessment of evidence provided by a witness for the purposes of the judgment".²⁵ This reference is not only further evidence that the Chamber *did* conduct the particularised analysis of the risk, but was also entirely consistent with its previous practice in its First Protective Measures Decision²⁶ (which, notably, the Defence did not challenge).

10. Furthermore, the Chamber also emphasised the significance of "the volatile security situation in CAR and the potential threats from former associates of Mr SAID or Mr ADAM", and the [REDACTED].²⁷ Misapprehending the significance of witnesses' prior testimony, the Defence merely disagrees with the Chamber's "view that this risk is sufficiently defined to be taken into consideration".²⁸ The Second Issue is thus not an appealable issue arising from the Decision.

iii. The Third Issue constitutes a mere disagreement with the Chamber's approach

11. The Defence argues that the Chamber erred in law by failing to hold the Prosecution to its obligation to demonstrate the need for protective measures, thereby relieving the

²¹ Decision, para. 13 (stating that in ruling on the Request, "the Chamber will first discuss the general points raised by both parties and then assess each of the Witnesses individually") and para. 33 ("the Chamber stresses that the present rulings are based on the submissions of the parties"). See Request, paras. 16-27.

²² Decision, para. 38 (P-0358), para. 47 (P-0510), para. 58 (P-1180), para. 61 (P-1289), para. 64 (P-1524), para. 74 (P-2172), para. 77 (P-2179), para. 83 (P-2519), para. 86 (P-3047).

²³ Decision, para. 51 (P-0622), para. 52 (P-0662), para. 67 (P-1808), para. 70 (P-1967), para. 80 (P-2263).

²⁴ Decision, para. 29.

²⁵ Decision, para. 29.

²⁶ Decision, para. 30. See also First Protective Measures Decision, ICC-01/14-01/21-481-Conf, para. 31 ("the Chamber does not consider it prudent to investigate claims by witnesses that they have been threatened for the purposes of determining whether protective measures should be granted as this may expose the witness further.").

²⁷ Decision, para. 27.

²⁸ Decision, para. 27.

Prosecution of meeting its burden of proof (“Third Issue”).²⁹ The Defence again fails to substantiate its claims regarding the applicable burden of proof under the Court’s legal framework, and merely disagrees with the Chamber’s application of the governing criteria to the granting of protective measures. The Defence fails to identify any distinction between the applicable law and the Chamber’s approach,³⁰ and instead relies on mischaracterisations of the Chamber’s reasoning.

12. In particular, the Chamber’s finding of an objectively justifiable risk was not based on mere assertions, but rather also took into account: the “public information available which clearly indicates that the security situation in CAR is reason for serious concern”,³¹ the Registry’s [REDACTED] indicating that the [REDACTED];³² the Chamber’s previous findings of attempts at witness intimidation;³³ the victims’ fears and concerns;³⁴ Mr ADAM’s own announcements and resources assessed to be available to him;³⁵ and the activities of armed groups to which Mr SAID may be linked.³⁶ The Defence merely disagrees with the Chamber’s conclusions.³⁷

iv. The Fourth Issue constitutes a mere disagreement with the Chamber’s reasoning

13. The Defence argues that the Chamber erred in law by taking account of the views and concerns of persons who are no longer admitted as participating victims in these proceedings (“Fourth Issue”).³⁸ The Defence merely disagrees with the Chamber’s reference to the views and concerns of persons who are no longer admitted as participating victims in these proceedings. While the Defence assumes that this is procedurally improper, it fails to substantiate why this is so, especially in light of the Chamber’s broad discretion under article 64(9)(a) of the Statute, and thus fails to identify an appealable issue.³⁹ In particular, the Defence fails to show that the Chamber did not subject the views of such persons to critical scrutiny,

²⁹ Request, heading 1.3, paras. 28-35.

³⁰ *Contra* Request, paras. 28-30.

³¹ Decision, para. 20.

³² Decision, para. 20.

³³ Decision, para. 20.

³⁴ Decision, para. 18.

³⁵ Decision, paras. 23-24, 26.

³⁶ Decision, paras. 25-26.

³⁷ Request, para. 33.

³⁸ Request, heading 1.4, paras. 36-39.

³⁹ *Contra* Request, paras. 37-39.

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but merely disagrees with its conclusion.⁴⁰ Rather, as the Chamber expressly found, “these concerns should [not] be disregarded simply because they date back to 2021. While such information may become less relevant over time, it cannot be assumed that the victims’ fears will have dissipated merely because one year has passed. This is particularly true when the conditions which gave rise to such fear have not changed significantly, as is the case in this instance.”⁴¹ The Defence merely raises disagreement with this approach, without explaining how it gives rise to an issue under the Court’s legal framework that requires appellate resolution.

B. The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

14. Even assuming, *arguendo*, that any of the Issues are appealable issues arising from the Decision, the Request should still be rejected as the Defence has failed to substantiate how any of the proposed Issues impact on the fair and expeditious conduct of the proceedings or the outcome of the trial.

15. As a preliminary matter, the Defence has failed to substantiate its request since it argues broadly, in general terms, that the Decision⁴² affects the fair and expeditious conduct of the proceedings or the outcome of the trial but fails to expressly link the relevant criteria to the specific Issues, as is required.⁴³

16. In relation to fairness, the Defence argues that the protective measures granted may impact on its ability to conduct its investigation, and ultimately result in a final judgment being rendered without the Defence having had the opportunity to contest the evidence of the Prosecution.⁴⁴ However, this submission is unfounded and speculative. The Defence does not identify any concrete instance in which it has/or will have difficulty in conducting its investigations while the protective measures are in place.

⁴⁰ *Contra* Request, para. 37.

⁴¹ Decision, para. 18.

⁴² Request, paras. 40, 45.

⁴³ Request, paras. 40-45. *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.”).

⁴⁴ Request, paras. 41-42.

17. The Defence also appears to argue that the Chamber's decision to grant protective measures to a substantial number of witnesses, in and of itself, impacts on the fairness of the trial, in light of the principle of publicity.⁴⁵ However, this claim is unfounded, since the granting of protective measures is not unfair, in and of itself, so long as the proper case-by-case assessment has been conducted—as the Chamber did in this case. Furthermore, the protective measures ordered—use of a pseudonym, and voice and face distortion—do not themselves substantially interfere with the ability of the public to hear the evidence given. Although the public will not know the identities of the affected witnesses, a large amount of their testimony will still be given in open session.⁴⁶ The Defence's arguments on fairness should therefore be rejected.

C. The immediate resolution of the proposed Issues by the Appeals Chamber will not materially advance the proceedings.

18. Immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings. The Defence's submission to the contrary is speculative and once again based on the incorrect premise that the Decision allows the proceedings to be conducted in violation of the principle of publicity.⁴⁷ As discussed above,⁴⁸ the Decision takes into account this principle but balances it appropriately against other relevant factors also enshrined in the legal framework of the Court.

19. In particular, the Defence's apparent suggestion that witnesses testifying without protective measures are more likely to testify honestly⁴⁹ is unfounded and highly speculative,

⁴⁵ Request, para. 40.

⁴⁶ Of note, use of private session does not arise from this Decision. Use of private session during witness testimony is considered by Trial Chambers on a case-by-case at a later date, again with reference to the principle of publicity. See, e.g., ICC-01/04-02/06-824-Red, para. 17 ("The Chamber will determine on a case-by-case basis, at the relevant time, whether private or closed sessions or redactions to public records are necessary in order to protect the identity of the Witness from being disclosed to the public. The Chamber will ensure that these protective measures, if ordered, are necessary to ensure adequate protection and do not cause undue prejudice to the Defence or undermine the fairness of the trial. The Chamber will again consider, in this connection, the arguments of the Defence regarding the publicity of the proceeding, noting at this stage that, unless the Chamber orders a private or closed session, the public will be able to hear the evidence presented and follow the testimony of this witness.").

⁴⁷ Request, paras. 43-44.

⁴⁸ See *supra*, paras. 6-7.

⁴⁹ Request, para. 43 ("*les témoins pourraient venir témoigner avec des mesures de protection [...] et donc cela créerait une situation où des personnes témoigneraient en sachant que leur témoignage n'est pas accessible au public, notamment en RCA, ce qui impacte nécessairement leur positionnement et pourrait avoir un impact sur la sincérité de leur témoignage*").

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and it may be said that the contrary is equally if not more likely to be true.⁵⁰ The Defence's arguments on the need for immediate appellate resolution of the Issues should therefore be rejected.

IV. CONCLUSION

20. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 12th day of May 2023
At The Hague, The Netherlands

⁵⁰ See, e.g., *Gbagbo and Blé Goudé*, ICC-02/11-01/15-T-57, p. 47, lns. 1-9 (“[T]he Chamber sees no merit in the argument of the Defence that the broadcasting of witness testimony makes witnesses more responsible and more likely to tell the truth, thereby contributing to the fairness of the proceedings. There is no basis for this argument in the legal text[s] of the Court. The Chamber is concerned by the mere suggestion that these proceedings should profit from the exertion of pressure of any kind of witnesses that appear before the Chamber. Witnesses must be able to speak free, free of any pressure.”).