

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **19 November 2024**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba
Judge María del Socorro Flores Liera
Judge Sergio Gerardo 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 the Defence "Application for leave to appeal the 'Decision on the Prosecution's Third Request for In-Court Protective Measures, ICC-01/14-01/21-714-CONF'", ICC-01/14-01/21-723-Conf, dated 15 March 2024

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I. INTRODUCTION

1. The Defence application (“Defence Application”)¹ for leave to appeal Trial Chamber VI’s (“Chamber”) “Decision on the Prosecution’s Third Request for In-Court Protective Measures” (“Decision”)² should be denied because it fails to identify any appealable issues arising from the Decision.
2. Instead, the Defence Application repeats arguments that have already been considered and rejected by the Chamber. Assertions of errors in law or fact that are merely arguments disagreeing with the Chamber’s reasoning and conclusions. The Defence Application is further based on an erroneous understanding of the law which results in a misunderstanding of the Court’s duties regarding the implementation of protective measures.
3. In addition, the Defence Application fails to satisfy the criteria for leave to appeal under article 82(1)(d) of the Rome Statute (“Statute”).

II. CONFIDENTIALITY

4. Pursuant to regulation 23(2)*bis* of the Regulations of the Court, this submission is classified as confidential since it responds to a filing with the same classification. A public-redacted version will be filed as soon as reasonably practicable.

III. SUBMISSIONS

5. The Appeals Chamber has held that “only an issue may form the subject matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of

¹ ICC-01/14-01/21-718-Conf.

² ICC-01/14-01/21-714-Conf.

which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”³

The first issue identified does not arise from the Decision since the Chamber provided reasons for reaching its conclusion

6. The first issue is whether the Chamber erred in law by failing to provide reasons when considering the principle of public hearings. This issue does not arise from the Decision since the Chamber provided sufficient reasons underpinning its Decision.
7. As acknowledged by the Defence, the Chamber explained that “the publicity of the proceedings is a factor to be taken into consideration on whether to grant protective measures, however, the Chamber cannot neglect its duty with regard to the protection of witnesses’ safety and well-being”.⁴
8. In so doing, the Chamber correctly recognised that in determining whether or not to apply protective measures to P-2504, two competing interests needed to be balanced against each other. These interests are the right to a public hearing as set out under articles 64(7) and 67(1) of the Statute and the duty, under article 68, to protect victims and witnesses by, if necessary, taking measures that impact “the principle of public hearings”.
9. The Chamber then expressly set out its reasons for concluding that the balance fell in favour of granting protective measures for P-2504. These reasons include “(i) the security situation in the Central African Republic; (ii) the content and nature of P-2504’s anticipated testimony; and (iii) the fact that P-2504 [REDACTED], and finds

³ ICC-01/04-168 OA3, para. 9. *See also* ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. *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-01/14-01/21-714-Conf, para. 21.

that there is an objectively justifiable risk to this Witness and his family should his identity become public.”⁵

10. Therefore, the Defence’s contention that the Chamber failed to provide sufficient reasons is not supported by the Decision and therefore, does not arise from it. It amounts to nothing more than a disagreement with the Chamber’s rationale.
11. The Defence’s reading of the Decision is further inaccurate and flawed in a number of other respects. First, the Defence’s criticism that the Chamber’s approach results in the systematic or automatic granting of protective measures is unfounded. The Decision clearly establishes that the Chamber adopted a bespoke approach. Not only did the Chamber state the need to “make a case by case assessment”⁶, but it also differentiated its treatment of P-2504 from other witnesses sharing a [REDACTED].⁷
12. Second, the claim that protective measures impact the Defence’s ability to test the evidence or credibility of P-2504 through cross-examination is untenable. Protective measures shield a witness’s identity from members of the public at large not from the Defence. As such, the Defence is aware of the Witness’s identity and is free to ask P-2504 any question. P-2504’s protective measures have no impact on the Defence’s ability to test his evidence.
13. Third, the argument that “from the moment that protective measures have been assigned to a witness the majority of his testimony will be in camera”⁸ is illogical and speculative. There is no foundation for such a claim. Parties to proceedings may, and often do, craft and sequence questions in a manner that limits the need for private session. With respect to P-2504, the Defence Application

⁵ ICC-01/14-01/21-714-Conf, para. 24.

⁶ ICC-01/14-01/21-714-Conf, para. 22.

⁷ ICC-01/14-01/21-714-Conf, para. 22.

⁸ ICC-01/14-01/21-718-Conf, para. 17.

makes no attempt to advance why this approach cannot be adopted or why the Defence is unable to ask the majority of its questions in public session. Indeed, it is up to the Defence to organise and structure its questioning of the Witness in a manner that limits the need for private sessions.

The second issue is not an appealable issue: The assertion that an “objectively justifiable risk” must be proved to a standard of proof is wrong in law

14. The second issue raised by the Defence is whether the Chamber applied a correct standard of proof regarding protective measures. It argues that in this case, the reasons for granting protective measures for P-2504 were not substantiated, were not current and that they were unrelated to the proceedings at hand.
15. The second issue is not an appealable issue arising from the Decision, but is the result of the Defence’s misunderstanding of the applicable law. The Defence’s assertion that protective measures be proved to a specified “standard of proof” is legally wrong. This is highlighted by the Defence’s failure to articulate the “standard of proof” it claims applies.
16. Specifically, the jurisprudence of the Court does not require that an objectively justifiable risk be proved to a standard of proof. While the Chamber must be satisfied that there is an objectively justifiable risk, it has broad discretion in determining what information to rely on and how to come to that conclusion.⁹
17. In this regard, the Chamber correctly articulated the law when it stated that “the need for in-court protective measures must be assessed on a case-by-case basis in

⁹ See e.g. in the context of redactions under rule 81(4): ICC-01/04-01/07-475 OA, para. 71-72.

order to determine whether such measures are necessary in light of an objectively justifiable risk to individual witnesses.”¹⁰

18. In light of the above, the Defence’s assertions on the Chamber’s consideration of the security situation in the Central African Republic (“CAR”); information that “P-2504 [REDACTED]”¹¹; and “the [REDACTED]”¹² is misplaced. This is because the Chamber is duty bound to consider all factors it deems relevant in exercising its discretion. All factors considered by the Chamber were proper and relevant since they all impacted the objective risk to P-2504.
19. The Defence’s submission that the Chamber failed to identify “risks that [were] linked to [P-2504’s] participation in the proceedings”¹³ is also misconceived and wrong. The Chamber expressly listed the risks as being: “that P-2504 [REDACTED].”¹⁴
20. Viewed in this context, the Defence Application amounts to no more than a mere disagreement of the Chamber's conclusions.

The third issue does not arise from the Decision: The Chamber did not base its Decision on the subjective desires of P-2504

21. The third issue raised in the Defence Application is whether the Chamber erred in law by basing its decision on the Witness’s subjective desire to seek protective measures. This issue is predicated on a misunderstanding of the Decision and does therefore not arise from it.

¹⁰ ICC-01/14-01/21-481, para. 16.

¹¹ ICC-01/14-01/21-714-Conf, para. 22.

¹² ICC-01/14-01/21-714-Conf, para. 22.

¹³ ICC-01/14-01/21-714-Conf, para. 26.

¹⁴ ICC-01/14-01/21-714-Conf, para. 23.

22. The Defence's assertion that the Decision allows "the witnesses themselves who could decide, for their personal convenience, because that would reassure them personally, on the basis of personal feelings, not to be heard publicly"¹⁵ misrepresents the approach that was taken by the Chamber.
23. The Chamber did not apply a "subjective test" as alleged. Rather, it is submitted that the Chamber's Decision clearly explained that information concerning P-2504's "[REDACTED]"; that "P-2504 [REDACTED]"¹⁶ were factors taken into account when assessing the presence of an objectively justifiable risk to P-2504.
24. The Defence's suggestion that the Chamber's approach was wrong is therefore misguided. Further confirmation that the Chamber's determination was based on objective factors, establishing an objectively justifiable risk to P-2504 is expressed in paragraph 24 of the Decision: "Taking the foregoing together, the Chamber finds that protective measures are warranted in this particular instance. Specifically, the Chamber takes note of: (i) the security situation in the Central African Republic; (ii) the content and nature of P-2504's anticipated testimony; and (iii) [REDACTED]." ¹⁷ (emphasis added).

The proposed issues do not satisfy the cumulative article 82(1)(d) requirements.

25. In any event, even if *arguendo* any of the above issues were appealable issues arising from the Decision, they nevertheless fail to meet the cumulative requirements for leave to appeal under article 82(1)(d) of the Statute.
26. Specifically, the Defence fails to establish that any of the issues it identified significantly affects the fair and expeditious conduct of the proceedings and requires an immediate resolution by the Appeals Chamber. In particular, the

¹⁵ ICC-01/14-01/21-718-Conf, para. 31.

¹⁶ ICC-01/14-01/21-714-Conf, para. 22.

¹⁷ ICC-01/14-01/21-714-Conf, para. 24.

Defence Application fails to credibly demonstrate that Mr Said will suffer any prejudice by the imposition of protective measure to P-2504. Additionally, the Defence does not show how the protective measures impact its ability to effectively cross-examine the Witness.

27. Furthermore, the outcome of the trial cannot be affected by protective measures being applied, since P-2504's identity is not being shielded from the Defence, Parties or the Court and because the Chamber will consider P-2504's testimony in full.
28. Finally, immediate resolution of the issues by the Appeals Chamber would not materially advance proceedings, because the proposed issues relate only to the public revelation of P-2504's identity and not to the Trial Chamber's consideration of evidence that it is anticipated he will give.

IV. CONCLUSION

29. For the reasons set out above, the Defence Application should be denied.



Karim A. A. Khan KC, Prosecutor

Dated this 19th day of November 2024
At The Hague, The Netherlands