

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 20 March 2025

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba , Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godinez
Judge Keebong Paek , Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Confidential

Prosecution's response to Defence's request for leave to appeal the "Decision on the Prosecution's Request for an Order to Exclude Defence Counsel from the Defence's List of Witnesses and Evidence" (ICC-01/14-01/21-935)

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

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

Mr Zavala Giler, Osvaldo

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") respectfully requests the Chamber to reject the Defence's request (the "Request")¹ for leave to appeal the Decision on the Prosecution's Request for an Order to Exclude Defence Counsel from the Defence's List of Witnesses and Evidence (the "Decision").²
2. The Prosecution submits that none of the four issues proposed for certification constitutes "appealable issues" nor do they satisfy the cumulative criteria for leave to appeal under article 82(1)(d) of the Rome Statute of the International Criminal Court ("Statute").

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is filed as confidential since it responds to a request filed confidentially. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The issues raised by the Defence are not appealable issues within the terms of article 82(1)(d) of the Statute.

4. For the purposes of article 82(1)(d) of the Statute,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

¹ ICC-01/14-01/21-940-Conf. A public redacted version of the Request was filed on 18 March 2025.

² ICC-01/14-01/21-935.

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.

issue arises if a party misreads or misrepresents the decision or record.⁵ Moreover, the resolution of the issue must be “essential for the determination of matters arising under the judicial cause under examination”.⁶

5. The Defence identifies four issues (collectively referred to as the “Issues”) for which it seeks leave to appeal: (i) *“la Chambre a-t-elle erré en fait en ignorant la réalité du rapport hiérarchique entre le Conseil principal et le Conseil associé et les instructions données”*; (ii) *“la Chambre a-t-elle erré en fait en ce qui concerne la teneur anticipée du témoignage du Conseil Associé”*; (iii) *“la Chambre a-t-elle erré en droit en ne concluant pas que la valeur probante accordée au témoignage d’un Conseil Associé est indépendante de la mise en œuvre du code de déontologie”*; and *“la Chambre a-t-elle erré en droit en interdisant la soumission des rapports d’enquête de la Défense”*.
6. As set forth below, the Defence fails to identify any appealable issue arising from the Decision. Instead, the Defence reiterates arguments previously presented in support of its request to add Associate Counsel to its List of Witnesses and merely disagrees with the Decision. Considering that the requirements of article 82(1)(d) of the Statute are cumulative and that failure to fulfil one of the requirements is fatal to an application for leave to appeal,⁷ the Prosecution respectfully submits that the Request be rejected on this basis.

i. The First Issue - La Chambre a-t-elle erré en fait en ignorant la réalité du rapport hiérarchique entre le Conseil principal et le Conseil associé et les instructions données?

7. The Defence argues that the Chamber erred in fact by ignoring the reality of the hierarchical and supervisory link between Lead and Associate Counsel.⁸ The

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, 13 July 2006, para. 9.

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, para. 22.

Defence simply reiterates its previous submission and merely disagrees with the Decision.⁹ The Decision on this aspect is well reasoned and explicitly identifies the factors taken into consideration, including the applicable legal framework, considerations about the external professional role of Mr. Dov Jacobs ("Mr Jacobs"), and his activities and representational functions during the trial.¹⁰ In light of these considerations, the first Issue is not an appealable issue arising from the Decision.

ii. The Second Issue - La Chambre a-t-elle erré en fait en ce qui concerne la teneur anticipée du témoignage du Conseil Associé?

8. The Defence contends that the Chamber erred in fact in its assessment of the subject-matter of the testimony of Associate Counsel.¹¹ In this regard, the Defence claims that at no point ("*à aucun moment*")¹² did it indicate that Mr. Jacobs would testify about the analysis of the criminal procedure executed by judicial authorities in Bangui at the time of the charges or record-keeping practices in the Central African Republic.¹³ The Defence subsequently put forward a convoluted explanation that its summary of Mr. Jacobs' anticipated testimony had been submitted pursuant to a Chamber's request but that its content was now used against the Defence, hereby suggesting that it did not correctly summarize Mr. Jacobs' potential evidence.¹⁴ The Prosecution respectfully submits that the Defence's argument is unfounded and misleading as the subject-matter of Mr. Jacobs' testimony as identified by the Chamber in its Decision mirrors the contents of the aforementioned summary of Mr. Jacobs as provided by the Defence.¹⁵ Again, the Defence's contention illustrates a mere disagreement with the Decision. Accordingly, the second issue is not an appealable issue arising from the Decision.

⁹ Decision, paras. 36-19.

¹⁰ Decision, paras. 37-38.

¹¹ Request, paras. 23-25.

¹² *Ibid* 11.

¹³ Request, para. 24.

¹⁴ Request, para. 25.

¹⁵ Decision, para. 44; Summary of Anticipated Testimony, ICC-01/14-01/21-921-Conf-Anx3, p. 11.

iii. The Third Issue - La Chambre a-t-elle erré en droit en ne concluant pas que la valeur probante accordée au témoignage d'un Conseil Associé est indépendante de la mise en œuvre du code de déontologie ?

9. The Defence refers to paragraph 47 of the Decision to argue that the Chamber erred in law in not finding that the probative value of the proposed testimony of Mr Jacobs is independent from the obligations under the Code of Professional Conduct for Counsel (the "Code of Conduct"). The Prosecution submits that under paragraph 47, the Chamber addressed counsel's obligation, as per the Code of Conduct, to put the interest of his client before his own interest and held that should Mr Jacobs be allowed to testify, his personal interests in bolstering his credibility "could lead to tension in the discharge of their duty to the Court and to their client". The Chamber was not required to determine whether the probative value of Mr Jacobs' proposed testimony is independent from the obligations under the Code of Conduct to render its decision on the issue. The Defence is hence inaccurately interpreting the Decision.

10. The Prosecution therefore submits that the third Issue is unfounded, is a mere disagreement of the Chamber's determination, and not appealable.

iv. The Fourth Issue - La Chambre a-t-elle erré en droit en interdisant la soumission des rapports d'enquête de la Défense ?

11. Under the fourth Issue, the Defence inaccurately presupposes that the Chamber has prohibited by all ways and means, the admission of the two reports sought to be admitted by Mr. Jacobs. The Defence further argues that even though the Chamber prohibited Mr. Jacobs from testifying, "il n'existe aucun fondement juridique

permettant à la Chambre d'interdire à la Défense de soumettre au dossier des rapports d'enquête rédigés par ceux qui ont enquêté, même quand il s'agit des Conseils".¹⁶

12. The Prosecution respectfully submits that at paragraph 55 of the Decision, the Chamber has provided the possibility to the Defence to make a request for a limited amount of additional time to propose alternative means to authenticate relevant items/information collected at the TGI and/or the OCRB currently contained in the reports prepared by counsel. The Defence's submissions regarding this purported appealable issue is therefore premised on an incorrect interpretation of the Decision, and is not appealable.

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

13. Even if the Chamber were to consider that the Issues identified by the Defence are appealable, the Defence fails to substantiate how any of the Issues impacts the fair and expeditious conduct of the proceedings or the outcome of the trial.
14. With regard to fairness, the Defence contends that "[la] décision attaquée, en ce qu'elle interdit à une personne qui exerce les fonctions d'enquête de témoigner sur les résultats de ses enquêtes"¹⁷ affects the principle of equality of arms and overall the fairness of the proceedings. The Defence reiterates an argument previously submitted and the related claim reflects as a result a mere disagreement with the Decision.¹⁸ Further, the contention, as formulated, is broad and falls short of distinctly linking this criteria to the specific Issues, as required by the jurisprudence.¹⁹

¹⁶ Request, para. 31.

¹⁷ Request, para. 35.

¹⁸ Decision, paras. 50-54.

¹⁹ Request, para. 35; ICC-02/11-01/15-524, 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.").

15. The Defence further argues that preventing the Defence from tendering into evidence its conclusions on the topography of the OCRB could affect the outcome of the trial.²⁰ The Prosecution respectfully submits that this claim is unfounded as the Chamber has explicitly indicated that the Defence *could* "propose alternative means to authenticate relevant items/information collected at the TGI and/or the OCRB currently contained in the reports prepared by counsel"²¹, hereby leaving the door open to the Defence to identify a suitable way to tender into evidence the information collected during its mission. As a result, the Defence's arguments on fairness should be rejected.

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

16. The Prosecution respectfully submits that the immediate resolution of any of the Issues by the Appeals Chamber will not materially advance the proceedings. The Defence argues that issuing a Judgement without providing the Defence with an opportunity to present the findings from its own investigations could affect the fundamental rights of the Accused and in particular his right to a fair trial.²² This contention is unfounded and based on a mischaracterization of the Decision. As previously discussed, the Decision gives due consideration to the fairness of the proceedings and notifies the Defence that it can propose an alternative means to present the findings of its investigations. Consequently, the Defence's arguments on the need for an immediate appellate resolution of the Issues should be rejected.

²⁰ Request, para. 35.

²¹ Decision, para. 55.

²² Decision, paras. 36-37.

IV. CONCLUSION

17. In light of the foregoing, the Prosecution respectfully requests the Chamber to deny the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 20th day of March 2025

At The Hague, The Netherlands