



**Original: English**

**No. ICC-01/14-01/21 OA5  
Date: 25 October 2022**

**THE APPEALS CHAMBER**

**Before:** Judge Gocha Lordkipanidze, Presiding  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**Public**

**Decision on the admissibility of the appeal**

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

**The Office of the Prosecutor**

Mr Karim A. A. Kahn, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**The Office of Public Counsel for Victims**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Use of Audio-Video Link Technology” of 4 August 2022 (ICC-01/14-01/21-442),

After deliberation,

*Renders*, unanimously, the following

## DECISION

The appeal against the decision of Trial Chamber VI entitled “Decision on the Use of Audio-Video Link Technology” of 4 August 2022 is dismissed as inadmissible.

## REASONS

### I. PROCEDURAL HISTORY

1. On 4 August 2022, Trial Chamber VI (hereinafter: “Trial Chamber”), by majority, granted the Prosecution’s request to allow witnesses to testify via audio- and video-link technology (hereinafter: “AVL”) from the Bangui field office (hereinafter: “4 August 2022 Decision”).<sup>1</sup> Judge Ugalde Godínez appended a dissenting opinion.<sup>2</sup>
2. On 10 August 2022, the Defence sought leave to appeal the 4 August 2022 Decision on three proposed issues.<sup>3</sup>
3. On 15 August 2022, the Prosecution submitted a response, arguing that the request must be dismissed, because the Defence misreads and/or merely disagrees with the 4 August 2022 Decision, without articulating a proper appealable issue or

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<sup>1</sup> Trial Chamber VI, [Decision on the Use of Audio-Video Link Technology](#), 4 August 2022, ICC-01/14-01/21-442.

<sup>2</sup> Trial Chamber VI, [Dissenting Opinion of Judge Sergio Gerardo Ugalde Godínez](#), 16 August 2022, ICC-01/14-01/21-442-Anx1 annexed to Decision on the Defence Request for Leave to Appeal the Decision on the Use of Audio-Video Link Technology.

<sup>3</sup> [Demande d’autorisation d’interjeter appel de la “Decision on the Use of Video Link Technology” \(ICC-0114-0121-442\)](#), 10 August 2022, ICC-01/14-01/21-447, paras 15-36.

demonstrating that the issues could significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial.<sup>4</sup>

4. The Common Legal Representative of Victims did not submit a response.<sup>5</sup>

5. On 16 August 2022, the Trial Chamber issued its decision granting leave to appeal (hereinafter: “Decision Granting Leave to Appeal”),<sup>6</sup> finding unanimously that none of the issues as formulated by the Defence fulfilled the requirements of article 82(1)(d) of the Statute.<sup>7</sup> However, the Trial Chamber found that the 4 August 2022 Decision “gives rise to questions which constitute a subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination and which could significantly affect the fair and expeditious conduct of the proceedings”.<sup>8</sup> In the exercise of “its discretion in this regard”, the Trial Chamber formulated the following issue for appeal:

Does the Court’s legal framework allow Trial Chambers to treat testimony given via audio-video technology as an equivalent alternative to in-court testimony, which can be resorted to whenever the conditions of rule 67 of the Rules are satisfied, or are there additional criteria that Trial Chambers should consider in exercising their discretion in general or on a case-by-case basis, before authorising the use of audio-video technology?<sup>9</sup>

6. On 29 August 2022, the Defence submitted its appeal brief, raising three grounds of appeal (hereinafter: “Appeal Brief”).<sup>10</sup> On 9 September 2022, the Prosecution submitted a response (hereinafter: “Prosecution Response”).<sup>11</sup>

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<sup>4</sup> [Prosecution response to the Defence’s ‘Demande d’autorisation d’interjeter appel de la “Decision on the Use of Video Link Technology” \(ICC-01/14-01/21-442\)’, 15 August 2022, ICC-01/14-01/21-450.](#)

<sup>5</sup> See email from the Office of Public Counsel for Victims to the Trial Chamber on 15 August 2022 at 9:47.

<sup>6</sup> [Decision Granting Leave to Appeal](#), paras 7-9.

<sup>7</sup> [Decision Granting Leave to Appeal](#), paras 7-9.

<sup>8</sup> [Decision Granting Leave to Appeal](#), para. 10.

<sup>9</sup> [Decision Granting Leave to Appeal](#), para. 10.

<sup>10</sup> [Mémoire de la Défense relative à l’encontre de la « Decision on the Use of Video Link Technology » \(ICC-01/14-01/21-442\) rendue le 4 août 2022, 29 August 2022, ICC-01/14-01/21-464.](#)

<sup>11</sup> [Prosecution response to the Defence appeal against the Decision on the Use of Audio-Video Link Technology, 9 September 2022, ICC-01/14-01/21-475.](#)

## II. ADMISSIBILITY OF THE APPEAL

### A. Background

7. In its Decision Granting Leave to Appeal, the Trial Chamber found unanimously that none of the issues as formulated by the Defence fulfilled the requirements of article 82(1)(d) of the Statute.<sup>12</sup>

8. More specifically, the Trial Chamber found that the first issue does not arise from the 4 August 2022 Decision since the Defence mischaracterised the 4 August 2022 Decision, which, contrary to the Defence's claim, clearly states that testimony via AVL is only permissible when this is not prejudicial to, or inconsistent with, the rights of the accused and in accordance with the Statute and the Rules of Procedure and Evidence (hereinafter: "Rules").<sup>13</sup> Concerning the second issue, the Trial Chamber found that the issue constitutes a mere disagreement with the 4 August 2022 Decision and an attempt to continue litigation on this matter as the decision clearly states and considers the practical conditions that must be in place in determining whether or not there is a qualitative difference between in-court testimony and testimony via AVL.<sup>14</sup> The Trial Chamber noted that the Defence had failed to explain in which way the Trial Chamber erred in this regard, and that "it would be entirely pointless to ask the Appeals Chamber to entertain abstract and speculative questions on this point".<sup>15</sup> Lastly, the Trial Chamber found that the third issue relates primarily to the use of rule 68(3) of the Rules, which is not the subject of the 4 August 2022 Decision and, thus, does not arise from it.<sup>16</sup> The Trial Chamber considered that the Defence failed to explain how the issue is specific to the use of AVL, and seemingly attempted to litigate the purpose and appropriateness of rule 68(3) of the Rules through the 4 August 2022 Decision.<sup>17</sup>

9. Subsequently, the Trial Chamber recalled the Court's jurisprudence regarding the application of article 82(1)(d) of the Statute,<sup>18</sup> and added that "the Appeals Chamber has confirmed the Chamber's authority to formulate issues for appeal".<sup>19</sup> In exercising such

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<sup>12</sup> [Decision Granting Leave to Appeal](#), paras 7-9.

<sup>13</sup> [Decision Granting Leave to Appeal](#), para. 7.

<sup>14</sup> [Decision Granting Leave to Appeal](#), para. 8.

<sup>15</sup> [Decision Granting Leave to Appeal](#), para. 8.

<sup>16</sup> [Decision Granting Leave to Appeal](#), para. 9.

<sup>17</sup> [Decision Granting Leave to Appeal](#), para. 9.

<sup>18</sup> [Decision Granting Leave to Appeal](#), paras 5-6.

<sup>19</sup> [Decision Granting Leave to Appeal](#), para. 6.

“discretion”, the Trial Chamber relied on two judgments of the Appeals Chamber in *The Situation in the Democratic Republic of the Congo*.<sup>20</sup> Notwithstanding the above findings, the Trial Chamber stated the following:

[...] the Chamber agrees that the [4 August 2022 Decision] gives rise to questions which constitute a subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination and which could significantly affect the fair and expeditious conduct of the proceedings. In exercise of its discretion in this regard, the Chamber therefore formulates the following issue for appeal:

Does the Court’s legal framework allow Trial Chambers to treat testimony given via audio-video technology as an equivalent alternative to in-court testimony, which can be resorted to whenever the conditions of rule 67 of the Rules are satisfied, or are there additional criteria that Trial Chambers should consider in exercising their discretion in general or on a case-by-case basis, before authorising the use of audio-video technology?<sup>21</sup>

10. Following the Decision Granting Leave to Appeal, the Defence submitted its appeal brief, referring to the three grounds of appeal that were rejected in the Decision Granting Leave to Appeal.<sup>22</sup>

11. In response, the Prosecution requested that the Appeals Chamber dismiss the appeal, confirm the 4 August 2022 Decision, and address the issue certified by the Trial Chamber to provide greater legal certainty, “given the importance of the issue to this case and others at the Court”.<sup>23</sup>

## **B. Determination by the Appeals Chamber**

12. At the outset, the Appeals Chamber observes that the Trial Chamber granted leave to appeal an issue that the Trial Chamber itself formulated following its rejection of all appeal issues presented by the Defence. The Appeals Chamber further notes that the

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<sup>20</sup> [Decision Granting Leave to Appeal](#), para. 6, fns 14-15, referring to *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168 (OA3), para. 20; *Situation in the Democratic Republic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#), 19 December 2008, ICC-01/04-556, para. 38.

<sup>21</sup> [Decision Granting Leave to Appeal](#), para. 10.

<sup>22</sup> See [Appeal Brief](#), paras 23-64.

<sup>23</sup> [Prosecution response to the Defence appeal against the Decision on the Use of Audio-Video Link Technology](#), 9 September 2022, ICC-01/14-01/21-475, paras 2, 8.

grounds of appeal brought by the Defence in its appeal brief relate to the very issues that were expressly rejected in the Decision Granting Leave to Appeal. Thus, given the manner in which this appeal has come before the Appeals Chamber, the Chamber will first consider the matter of admissibility. In this context, the Appeals Chamber recalls that it does not accept, at face value, the decision of a pre-trial or trial chamber granting leave to appeal.<sup>24</sup> The Appeals Chamber has the power to determine the admissibility of an appeal by examining the relevant criteria under article 82(1)(d) of the Statute, ensuring that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis.<sup>25</sup>

13. The Appeals Chamber notes that only a decision that contains 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” may be appealed under article 82(1)(d) of the Statute.

14. Recalling its recent holding in the *Mokom* OA2 Judgment, the Appeals Chamber notes that proceedings pursuant to article 82(1)(d) of the Statute are initiated exclusively by a party’s written application for leave to appeal to the chamber that rendered the impugned decision.<sup>26</sup> Rule 155(1) of the Rules, read together with regulation 65(2) of the Regulations of the Court (hereinafter: “Regulations”), instructs that “[w]hen a party wishes to appeal a decision under article [82(1)(d)], that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons”<sup>27</sup> that “[warrant] immediate resolution” by the Appeals Chamber of the matter at issue”.<sup>28</sup> Hence, the framework places the onus on the party to identify one or more

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<sup>24</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011](#), 26 August 2011, ICC-01/04-01/06-2799 (OA19), para. 8; *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings](#), 14 December 2012, ICC-01/04-01/06-2953 (A1, A2, A3, OA21).

<sup>25</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings](#), 14 December 2012, ICC-01/04-01/06-2953 (A1 A2 A3 OA21), para. 50.

<sup>26</sup> See *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Decision on the admissibility of the appeal](#), 27 September 2022, ICC-01/14-01/22-91 (OA2), para. 18.

<sup>27</sup> Rule 155(1) of the Rules.

<sup>28</sup> Regulation 65(2) of the Regulations.

issues containing alleged legal or factual errors that arise directly from the impugned decision, in its written application for leave to appeal. An issue has been defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>29</sup>

15. Upon the party’s identification of such an “issue” in its request for leave to appeal, the first instance chamber must subsequently determine whether the issue, as identified by the party requesting leave, has a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, and leave to appeal shall be granted only if, in the chamber’s opinion, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Appeals Chamber reiterates that a pre-trial or trial chamber shall grant leave only when the criteria under article 82(1)(d) of the Statute are fulfilled.<sup>30</sup>

16. As a corollary, for the Appeals Chamber to exercise its jurisdiction to review the correctness of the impugned decision in accordance with the applicable standard of review, and to confirm, reverse or amend the decision appealed, pursuant to rule 158 of the Rules,<sup>31</sup> it is required that an error is identified by the party seeking leave to appeal, and an “issue” containing the alleged error is certified by the first instance chamber, when and if the criteria set forth in article 82(1)(d) are met. This is so, given that such appellate review is conducted on the basis of the grounds of appeal raised in relation to which leave to appeal has been granted or that are intrinsically linked to the issue as certified by the chamber granting leave, and the errors alleged thereunder.<sup>32</sup>

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<sup>29</sup> *Situation in the Democratic Republic of Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 9. See also Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on request for leave to appeal the Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016](#), 4 May 2017, ICC-02/11-01/15-901, para. 11.

<sup>30</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011](#), 26 August 2011, ICC-01/04-01/06-2799 (OA19).

<sup>31</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”](#), 8 August 2016, ICC-01/05-01/13-1964, para. 22.

<sup>32</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”](#), 8 August 2016, ICC-01/05-01/13-1964, paras 22-23.



17. In the present appeal, the Appeals Chamber observes that the Trial Chamber granted leave to appeal on the basis of its own issue for appellate review notwithstanding its findings that none of the issues presented in the application for leave to appeal fulfilled the requirements of article 82(1)(d) of the Statute. As a result, the question arises as to whether and, if so, to what extent a chamber may reformulate an issue presented in a party's application under article 82(1)(d) of the Statute, including whether a first instance chamber may formulate its own issue.

18. In support of its "authority to formulate issues for appeal",<sup>33</sup> the Trial Chamber relied on the Appeals Chamber's judgments in *The Situation in the Democratic Republic of the Congo* (hereinafter: "DRC OA3 Judgment" and "DRC OA4 Judgment").<sup>34</sup> In the DRC OA4 Judgment, the Appeals Chamber provided as follows:

A right to appeal arises if the Chamber itself is of the opinion that an issue arising from a decision or an aspect of it merits, for the reasons indicated in article 82(1)(d) of the Statute, immediate resolution by the Appeals Chamber. [...] [T]he Pre-Trial or Trial Chamber may, on its own motion, certify the *existence* of an appealable issue.<sup>35</sup>

19. The Appeals Chamber is not persuaded that the abovementioned findings confirm the first instance chamber's authority to identify and formulate its own issues for appeal. On the contrary, the Appeals Chamber considers that the findings reflect the framework set forth in the applicable law before the Court: the pre-trial or trial chamber may "certify the *existence* of an appealable issue" upon its determination that the issue identified and presented by the party, or an aspect of it, merits, for the reasons indicated in article 82(1)(d) of the Statute, immediate resolution by the Appeals Chamber. The Appeals Chamber further notes that the DRC OA4 Judgment concerned Pre-Trial Chamber I's decision granting leave to appeal in which the Chamber merely "re-fashioned" the issues presented by the party, and that the issues certified by the

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<sup>33</sup> [Decision Granting Leave to Appeal](#), para. 6.

<sup>34</sup> [Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168 (OA3); [Situation in the Democratic Republic of the Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial](#), 19 December 2008, ICC-01/04-556 (OA4 OA5 OA6).

<sup>35</sup> [DRC OA4 Judgment](#), para. 38 (emphasis added), referring to [DRC OA3 Judgment](#), para. 20.

chamber incorporated the substance of the questions raised by the party.<sup>36</sup> In any event, the Appeals Chamber considers that the abovementioned findings in the *DRC* OA3 Judgment, as recently held in the *Mokom* OA2 Judgment,<sup>37</sup> as well as in the *DRC* OA4 Judgment constitute *obiter dictum* and thus are of little precedential value.

20. More generally, the Appeals Chamber recalls that in other cases in which the chambers granting leave merely divided, consolidated or grouped the issues presented by the parties in order to rectify imprecision or repetition, the Appeals Chamber assessed the merits of the appeals without questioning the manner in which leave was granted.<sup>38</sup> In other words, unlike in the present appeal, the reformulation by the chambers granting leave in these appeals simply clarified the issues already presented without interfering with the substance. Similarly, while the Appeals Chamber has grouped or reordered the sequence of the appellant's arguments presented, it has done so without making modifications to the substance of those issues.

21. Furthermore, bearing in mind its *Bemba et al.* OA13 Judgment in which it was unable to review the correctness of an issue reformulated by Trial Chamber VI as the appellant requested that the Appeals Chamber decline to address that issue,<sup>39</sup> as well as the withdrawal of the appeal by the appellant in *Banda and Jerbo* OA3 following Trial Chamber IV's decision granting leave to appeal, explaining that the remedy it had originally requested could not result from the resolution of the issue as formulated by

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<sup>36</sup> See [DRC OA4 Judgment](#), paras 10, 27.

<sup>37</sup> See [Mokom OA2 Judgment](#), para. 16. See also [Mokom OA2 Judgment](#), para. 17 (“[T]he Appeals Chamber observes that the *DRC* OA3 Judgment was issued in 2006 and since that time the chambers of this Court have not taken that judgment to mean that there lies a *proprio motu* path to the Appeals Chamber under article 82(1)(d) of the Statute”).

<sup>38</sup> See Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Decision on the Defence Application for Leave to Appeal the “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”](#), 21 March 2013, ICC-02/05-03/09-457, para. 14; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”](#), 26 January 2011, ICC-01/05-01/08-1169, para. 37; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 10 September 2015, ICC-01/09-01/11-1953-Red, para. 20; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on request for leave to appeal the Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016](#), 4 May 2017, ICC-02/11-01/15-901, para. 21.

<sup>39</sup> *The Prosecutor v. Bemba et al.*, [Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”](#), 8 August 2016, ICC-01/05-01/13-1964 (OA13), paras 20, 22-23.

the chamber,<sup>40</sup> the Appeals Chamber considers that a first instance chamber must take a cautious approach in its reformulation of issues presented by the party in the interest of the good administration of justice.

22. As a result, and as illustrated above, the framework set forth in the applicable law and the jurisprudence of the Court provide that the identification of an “issue” by the party is a prerequisite for the first instance chamber’s certification of that issue. It follows that under this party-driven appellate process, the first instance chamber’s discretion to reformulate issues is necessarily limited: while chambers granting leave may make terminological corrections to the wording of issues identified for appeal or reformulations that are warranted by partial rejections of a request for leave to appeal, they may not make reformulations in substance of the issue identified by the party seeking leave to appeal or *proprio motu* formulate a new issue for appellate review.<sup>41</sup> In light of its *Mokom OA2 Judgment*,<sup>42</sup> the Appeals Chamber considers that a reformulation interfering with the substance of the issues presented by the party, essentially equivalent to a *proprio motu* appeal by the first instance chamber, does not fall within the realm of the first instance chamber’s discretion when granting leave to appeal.

23. The Appeals Chamber recalls that even if the *proprio motu* formulation and certification of an issue for appeal may appear necessary or appropriate to the Trial Chamber, this does not justify departing from the legal framework of the Court.<sup>43</sup> If the Appeals Chamber were to examine the issue concerned, it would be tantamount to rendering advisory opinions on issues that are not properly before it. In this context, the Appeals Chamber notes that the Court, founded by the Rome Statute, which is itself an international treaty, in principle, has the power to pronounce on general matters of interpretation and application related to the Statute. However, for this to take place by

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<sup>40</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Defence Notice to the Registrar of the Discontinuance of the Defence appeal against the Decision on the defence request for a temporary stay of proceedings](#), 21 December 2012, ICC-02/05-03/09-435 (OA3), para. 11.

<sup>41</sup> See also *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Partly dissenting opinion of Judge Cuno Tarfusser](#), 4 May 2017, ICC-02/11-01/15-901-Anx, para. 7.

<sup>42</sup> See [Mokom OA2 Judgment](#).

<sup>43</sup> See [Mokom OA2 Judgment](#), para. 21; *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011](#), 26 August 2011, ICC-01/04-01/06-2799 (OA19), para. 8.

way of an advisory opinion, the relevant procedure would have to be enacted by the Assembly of the State Parties (hereinafter: “ASP”). Absent such action by the ASP, the Appeals Chamber may not exercise a power to provide advisory opinions. The Appeals Chamber further notes that the issue formulated by the Trial Chamber does not identify which type of error the Appeals Chamber is expected to review and thereafter, confirm, reverse or amend the decision, pursuant to rule 158 of the Rules.<sup>44</sup> The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law in the abstract as it is not an advisory body.<sup>45</sup> This is not a role vested in the Appeals Chamber by the applicable law before the Court.

24. Furthermore, the Appeals Chamber notes that the procedural error by the Trial Chamber in the manner in which this appeal was brought before the Appeals Chamber was compounded by the grounds of appeal submitted by the Defence, which directly recall and re-litigate the issues expressly rejected by the Trial Chamber in the Decision Granting Leave to Appeal upon its finding that they do not fulfil the requirements of article 82(1)(d) of the Statute.<sup>46</sup> In this regard, the Appeals Chamber recalls that it is for the pre-trial or trial chamber to determine not only whether a decision may be appealed, but also to what extent.<sup>47</sup> Consequently, the scope of appellate review is determined by the issues certified by the first instance chamber. The Appeals Chamber, thus, has

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<sup>44</sup> The Appeals Chamber notes that the issues for appellate review are generally presented as “whether the [Pre-Trial or Trial Chamber] properly exercised its discretion when [...]”; “whether the [Pre-Trial or Trial Chamber] erred in [law and/or fact] when [...]”.

<sup>45</sup> See *Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute”](#), 16 December 2013, ICC-02/11-01/11-572 (OA 5), paras 54, 65; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 38. See also *Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 68.

<sup>46</sup> See [Decision Granting Leave to Appeal](#), paras 7-9.

<sup>47</sup> *Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute”](#), 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 63; *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled “Decision on the ‘Prosecution’s Extension of Contact Restrictions”](#), 17 May 2022, ICC-01/14-01/21-111-Red2 (OA), para. 37; *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute”](#), 16 December 2013, ICC-02/11-01/11-572 (OA5), para. 63.

consistently declined to consider arguments of an appellant that go beyond the issue in relation to which leave to appeal has been granted or that are not intrinsically linked to the issue as defined by the chamber granting leave.<sup>48</sup> In light of the foregoing, the Appeals Chamber will not consider the arguments raised under the grounds of appeal submitted by the Defence.

25. In addition, the Appeals Chamber reiterates that the first instance chamber's discretion when granting leave to appeal shall be exercised in compliance with the statutory framework of the Court, and emphasises that, in accordance with article 82(1)(d) of the Statute, the parties are not precluded from seeking the leave of the Trial Chamber to appeal any decision in respect of a specific witness providing testimony via AVL. Furthermore, either party may also bring a challenge to the manner in which the testimony took place and the weight assigned to the evidence in a final appeal.

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<sup>48</sup> See *Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute"](#), 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 63; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU"](#), 8 October 2010, ICC-01/04-01/06-2582 (OA18), para. 45; *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 of Pre-Trial Chamber II"](#), 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA2), para. 32.

26. For the above reasons, the Appeals Chamber finds that the appeal is inadmissible. It is, therefore, dismissed.

Done in both English and French, the English version being authoritative.



**Judge Gocha Lordkipanidze**  
**Presiding**



**Judge Piotr Hofmański**



**Judge Luz del Carmen Ibáñez**  
**Carranza**



**Judge Marc Perrin de Brichambaut**



**Judge Solomy Balungi Bossa**

Dated this 25<sup>th</sup> day of October 2022

At The Hague, The Netherlands