

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No.: ICC-01/14-01/21  
Date: 28 November 2022**

**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**

**Decision on the Defence's Request for Leave to Appeal the 'Decision on the Prosecution's First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules' (ICC-01/14-01/21-507-Conf)**

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. Khan  
Ms Holo Makwaia

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

Ms Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

**The Office of Public Counsel  
for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Defence’s Request for Leave to Appeal the ‘Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules’ (ICC-01/14-01/21-507-Conf)’.

## I. PROCEDURAL HISTORY

1. On 20 October 2022, the Chamber filed its decision on the Office of the Prosecutor’s (the ‘Prosecution’) first, second and fourth requests pursuant to rule 68(2)(b) of the Rules and Procedure and Evidence (the ‘Rules’) (the ‘Impugned Decision’).<sup>1</sup>
2. On 2 November 2022, following a request for extension of time which the Chamber granted in part,<sup>2</sup> the Defence requested leave to appeal the Impugned Decision and identified five issues for appeal (the ‘Request’).<sup>3</sup>
3. On 7 November 2022, the Prosecution filed its response to the Request, arguing that it should be dismissed ‘because the proposed issues do not constitute “appealable issues” and do not meet the other requirements under article 82(1)(d) [of the Statute]’ (the ‘Response’).<sup>4</sup>
4. On 7 November 2022, the Common Legal Representative of Victims informed the Chamber that she did not intend to file a response to the Request.<sup>5</sup>

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<sup>1</sup> Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules, 20 October 2022, ICC-01/14-01/21-507-Conf. A public redacted version was filed on 21 October 2022 ([ICC-01/14-01/21-507-Red](#)).

<sup>2</sup> See Email from the Chamber to the Parties, dated 25 October 2022, at 14:10.

<sup>3</sup> Demande d’autorisation d’interjeter appel de la « Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules » (ICC-01/14-01/21-507-Conf), 2 November 2022, ICC-01/14-01/21-524-Conf. A public redacted version was filed on 9 November 2022 ([ICC-01/14-01/21-524-Red](#)).

<sup>4</sup> Prosecution Response to Defence Request for Leave to Appeal the “Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules” (ICC-01/14-01/21-507Conf), 7 November 2022, [ICC-01/14-01/21-534](#), para. 1.

<sup>5</sup> See Email from the Common Legal Representative of Victims to the Chamber, dated 7 November 2022, at 12:03.

## II. SUBMISSIONS

5. In the Request, the Defence makes reference to the principle of orality and that the use of rule 68 of the Rules challenges this principle, noting that there can be no trial without cross-examination.<sup>6</sup> The Defence further refers to article 67(1)(e) of the Statute and article 6(3)(d) of the European Convention on Human Rights and the accused's right to confront witnesses.<sup>7</sup> In this regard, the Defence highlights that any exceptions to these principles and rights must be exceptional and meet strict criteria, with the Chamber undertaking a case by case assessment of prior recorded testimony sought to be introduced.<sup>8</sup> Furthermore, the Defence notes that the first *viva voce* witnesses heard by the Chamber have provided clarifications and even contradicted their earlier statements.<sup>9</sup> In light of this, the Defence submits that there is a risk in introducing prior recorded testimony and there is a need to explore witnesses' testimony in court.<sup>10</sup>

### 1. *First Issue*

6. The Defence submits that the Chamber erred in law by balancing the right of the accused to cross-examine witnesses with his right to expeditious proceedings (the 'First Issue').<sup>11</sup> The Defence argues that the right to trial without undue delay relates to delay on the part of the Prosecution or the Chamber, not on the accused in the exercise of his right to cross-examination.<sup>12</sup> In this regard, the Defence notes that the accused cannot be asked to choose between rights or prevented from exercising his cardinal right to cross-examination due to a desire to speed up the procedure.<sup>13</sup> Furthermore, the Defence also makes reference to the accused's right under article 67(1)(e) of the Statute, noting that this right is also affected by the Chamber's alleged approach.<sup>14</sup>

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<sup>6</sup> [Request](#), paras 6-10.

<sup>7</sup> [Request](#), paras 11-13.

<sup>8</sup> [Request](#), paras 14-15.

<sup>9</sup> [Request](#), paras 16-17.

<sup>10</sup> [Request](#), para. 18.

<sup>11</sup> [Request](#), paras 20-21.

<sup>12</sup> [Request](#), para. 21.

<sup>13</sup> [Request](#), para. 21.

<sup>14</sup> [Request](#), para. 23.

7. In the Response, the Prosecution submits that the First Issue ‘misrepresents’ the Impugned Decision and that ‘contrary to the Defence’s understanding, the Chamber did not deprive [the accused] of his right to cross-examination.’<sup>15</sup> In support of this submission, the Prosecution highlights the Chamber’s reference to jurisprudence from the Appeals Chamber, noting that the Chamber ‘properly balanced the Accused’s right to confront witnesses against him with his right to an expedite conduct of the proceedings (one attribute of a fair trial).’<sup>16</sup> In addition, the Prosecution argues that ‘to the extent that the Defence submits that the Chamber should not have undertaken any balancing exercise’ this ‘merely expresses its disagreement with the well-grounded Chamber’s legal determination which is in turn fully consistent with the Appeals Chamber’s jurisprudence, and rule 68(2)(b).’<sup>17</sup>

## 2. *Second Issue*

8. The Defence submits that the Chamber erred in law by referring to the Appeals Chamber in the *Ntaganda* case (the ‘Second Issue’).<sup>18</sup> In particular, the Defence avers that the Chamber should not have relied on the conclusion of the Appeals Chamber that ‘a conviction may not rest solely, or in a decisive manner, on the evidence of witnesses whom the accused has had no opportunity to examine’ in order justify the introduction of the prior recorded testimony pursuant to rule 68(2)(b) of the Rules.<sup>19</sup> In this regard, the Defence submits that this holding from the Appeals Chamber relates to a different phase of the proceedings, namely that of the judgment, once the Prosecution has closed its case and the Chamber has all evidence before it.<sup>20</sup> At the present stage of the proceedings, the Defence avers that it is not possible for the Chamber to determine whether or not it is going to rely on the evidence of an individual that the Defence has not been able to cross-examine.<sup>21</sup> Furthermore, the Defence notes that such an approach

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<sup>15</sup> [Response](#), para. 5.

<sup>16</sup> [Response](#), para. 6.

<sup>17</sup> [Response](#), para. 7.

<sup>18</sup> [Request](#), para. 25.

<sup>19</sup> [Request](#), paras 25-26.

<sup>20</sup> [Request](#), para. 27.

<sup>21</sup> [Request](#), para. 27.

does not have a factual basis as the alleged oral corroborating witnesses have not yet testified and the Chamber is unable to know what they will say.<sup>22</sup>

9. In the Response, the Prosecution submits that the Second Issue ‘misrepresents the [Impugned Decision]’ and that the Chamber ‘did not rely on the Appeals Chamber’s jurisprudence in the *Ntaganda* case “to justify” the introduction of prior recorded testimony’.<sup>23</sup> Rather, the Prosecution avers, the Chamber made reference to this jurisprudence to ‘address the Defence’s general objections, and to make sure the principle of orality will not be undermined through the admission of prior recorded testimony.’<sup>24</sup> Furthermore, the Prosecution argues that ‘the Chamber has not determined yet whether and to which extent it will rely on testimonies introduced under rule 68(2)(b).’<sup>25</sup>

### 3. *Third Issue*

10. The Defence submits that the Chamber erred in law by relying on the previous statements of P-1640 and P-1421 when introducing the prior recorded testimony of P-0529 pursuant to rule 68(2)(b) of the Rules (the ‘Third Issue’).<sup>26</sup> Specifically, the Defence posits that the Chamber should not have relied upon the evidence of witnesses which the Prosecution has chosen not to rely on in order to consider whether the prior recorded testimony of P-0529 has a sufficient indicia of reliability within the meaning of rule 68(2)(b).<sup>27</sup> In this sense, the Defence argues that such an approach opens the door for the judgment to be based on evidence not used by the Prosecution, with the Chamber substituting the role of the Prosecution to create a case, which runs contrary to, *inter alia*, the principle that the burden of proof rests on the Prosecution.<sup>28</sup>

11. In the Response, the Prosecution argues that the ‘Third Issue as well misrepresents the [Impugned Decision]’ and ‘the Chamber did not rely upon the

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<sup>22</sup> [Request](#), para. 28.

<sup>23</sup> [Response](#), para. 8.

<sup>24</sup> [Response](#), para. 8.

<sup>25</sup> [Response](#), para. 8.

<sup>26</sup> [Request](#), para. 30.

<sup>27</sup> [Request](#), paras 30-31.

<sup>28</sup> [Request](#), para. 32.

corroborating testimony of P-1640 and P-1421 who the Prosecution decided not to call'.<sup>29</sup> Rather, the Prosecution avers that 'the Chamber considered the testimony of P-1640 and P-1421 because they were raised by the Defence and only to address and dismiss the Defence's argument that their statements are inconsistent with, and raise reliability issues of, the testimony of P-0529.'<sup>30</sup> In this sense, the Prosecution submits that '[t]here is no suggestion that the Chamber's decision rests solely on P-1640 and P1421's corroborating evidence.'<sup>31</sup> In any event, the Prosecution argues that the Defence's submission that the judgment may be based on evidence not used by the Prosecution is 'speculative and hypothetical'.<sup>32</sup>

#### 4. *Fourth Issue*

12. The Defence argues that the Chamber erred in law by allowing the introduction of prior recorded testimony under rule 68(2)(b), which deprives the Defence of the opportunity to explore important themes for its case with Prosecution witnesses (the 'Fourth Issue').<sup>33</sup> The Defence submits that it must be able to cross examine a witness on all themes that are useful to the Defence's case, even when those themes do not emerge from the direct questioning by the Prosecution.<sup>34</sup> In this regard, the Defence notes that when the Prosecution questions a witness for the preparation of their statements it will focus on themes it considers useful for its case.<sup>35</sup> Accordingly, per the Defence, allowing the introduction of prior recorded testimony without the Defence being able to test this evidence means it is prohibited from obtaining any information that may be useful for the Defence's case.<sup>36</sup> In support of this submission, the Defence makes reference to the cross-examination of the first four *viva voce* witness which discussed new issues not contained in their statements.<sup>37</sup>

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<sup>29</sup> [Response](#), para. 9.

<sup>30</sup> [Response](#), para. 9 [emphasis removed].

<sup>31</sup> [Response](#), para. 9.

<sup>32</sup> [Response](#), para. 10.

<sup>33</sup> [Request](#), para. 39.

<sup>34</sup> [Request](#), para. 35.

<sup>35</sup> [Request](#), para. 36.

<sup>36</sup> [Request](#), para. 37.

<sup>37</sup> [Request](#), para. 38.

13. In the Response, the Prosecution submits that the Impugned Decision ‘does not deny the right to cross-examination, but did in fact balance all relevant factors crucial to a determination under rule 68(2)(b) – for each witness the Chamber has evaluated the prior recorded testimony against the backdrop of the issues in the case.’<sup>38</sup> Furthermore, the Prosecution submits that, in any event, the Defence has ‘failed to identify an appealable issue by merely reiterating previous objections and submissions’.<sup>39</sup>

#### 5. *Fifth Issue*

14. Last, the Defence submits that the Chamber erred in law by considering that the arguments raised by the Defence regarding the credibility of witnesses and the plausibility of their narrative did not militate against the introduction of their prior recorded testimony and that such arguments would only be taken into account during the deliberation of the judgment (the ‘Fifth Issue’).<sup>40</sup> The Defence argues that if it raises *prima facie* objections regarding the credibility of witnesses or the plausibility of their accounts, and the Chamber recognises this, then the witness should be heard orally so that the Defence can have an opportunity to explore this.<sup>41</sup> In this regard, the Defence posits that the Chamber will have all the information necessary to evaluate the credibility of the witness only when the witness is confronted with evidence relating to his or her credibility or contradictions in his or statement.<sup>42</sup>

15. In its Response, the Prosecution submits that ‘the Chamber did not find that the Defence’s objections regarding the credibility of the witnesses and the plausibility of their accounts should not be taken into account in its determination under [rule] 68(2)(b).’<sup>43</sup> Rather the Prosecution notes that the Chamber limited ‘its reliability

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<sup>38</sup> [Response](#), para. 11.

<sup>39</sup> [Response](#), para. 12.

<sup>40</sup> [Request](#), paras 40, 42.

<sup>41</sup> [Request](#), para. 41.

<sup>42</sup> [Request](#), para. 41.

<sup>43</sup> [Response](#), para. 13.



assessment to the formal requirements unless, based on the Defence objections, it identifies manifest issues as to the [reliability].<sup>44</sup>

### III. APPLICABLE LAW

16. The Chamber recalls its previous decisions,<sup>45</sup> as well as prior jurisprudence of the Court,<sup>46</sup> regarding the application of article 82(1)(d) of the Statute. Accordingly, in its determination of the Request, the Chamber will have regard to whether: (i) the matter is an ‘appealable issue’; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>47</sup>

17. Regarding the first criterion, the Appeals Chamber has held:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>48</sup>

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<sup>44</sup> [Response](#), para. 13 [emphasis removed].

<sup>45</sup> See Decision on Defence Request for Leave to Appeal (ICC-01/14-01/21-440) and Reasons for Decision Rejecting Leave to Appeal (ICC-01/14-01/21-425), 6 September 2022, [ICC-01/14-01/21-473](#), paras 11-13; Decision on Defence Request for Reconsideration or Leave to Appeal the ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251), [ICC-01/14-01/21-275](#), paras 9-11; Decision on Defence Request for Leave to Appeal the ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’ (ICC-01/14-01/21-243), 15 March 2022, [ICC-01/14-01/21-258](#), paras 11-15.

<sup>46</sup> See Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Demande d’autorisation d’interjeter appel de la ‘Decision on the request for suspension of the time limit to respond to the Prosecutor’s Trial Brief submitted by the Defence for Mr Gbagbo’ (ICC-02-11-01/15-1141), 13 April 2018, [ICC-02/11-01/15-1150](#), para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence request for leave to appeal the decision appointing experts on reparations, 29 June 2017, [ICC-01/05-01/08-3536](#), paras 4-7 (the ‘Bemba Decision’); Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, [ICC-02/04-01/15-1331](#), para. 8 and references therein (the ‘Ongwen Decision’).

<sup>47</sup> See, for example, [Bemba Decision](#), para. 4; [Ongwen Decision](#), para. 8.

<sup>48</sup> Appeals Chamber, *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](#), para. 9.

18. As noted in previous decisions, the three criteria under article 82(1)(d) of the Statute are cumulative.<sup>49</sup> Therefore, failure to fulfil one or more of the criteria will result in dismissal of the Request.<sup>50</sup>

#### IV. ANALYSIS

19. For the reasons set out below, the Chamber finds that the issues identified in the Request do not satisfy the requirements of article 82(1)(d) of the Statute.

20. In respect of the First Issue, namely whether the Chamber erred in law by balancing the right of the accused to cross-examine witnesses with his right to expeditious proceedings, the Chamber finds that this issue does not arise from the Impugned Decision for the reasons set out below.

21. First, the Chamber did not balance the accused's rights against each other and come to the conclusion that the right to trial without undue delay supersedes his right to cross examine witnesses. Rather, in the Impugned Decision, the Chamber noted at paragraph 14 that 'one of the purposes of rule 68(2)(b) of the Rules is to streamline the presentation of evidence and thus expedite the proceedings'. Similarly, the Chamber recalled the Appeals Chamber's holding that 'the expeditious conduct of proceedings in one form or another constitutes an attribute of a fair trial.'<sup>51</sup> In this regard, the Chamber also observes that the need to conduct proceedings in an expeditious manner reflects a broader public interest in the proper administration of justice.<sup>52</sup>

22. Second, the Chamber considers that the question of whether it is permissible or appropriate to restrict the accused's right to examine witnesses in order to promote expeditiousness of proceedings has already been addressed and resolved both in the adoption of the amended version rule 68 itself and in the rulings of the Appeals Chamber. Specifically, the Appeals Chamber has determined that the right to confront

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<sup>49</sup> See, for example, [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

<sup>50</sup> See, for example, [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

<sup>51</sup> [Impugned Decision](#), para. 14.

<sup>52</sup> See Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, [Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence \(Prior Recorded Testimony\)](#), Annex II.A, paras 8, 18. See also [Impugned Decision](#), fns 30-31.

a witness is not absolute and is subject to restrictions such as those envisaged by rule 68 of the Rules - which has the legitimate aim of facilitating expeditious trial proceedings.<sup>53</sup> The Chamber also observes that this holding, as referenced<sup>54</sup> and applied<sup>55</sup> by the Chamber, has been reiterated by the Appeals Chamber on several occasions<sup>56</sup> and is also supported in the *travaux préparatoires* of the rule itself.<sup>57</sup>

23. Third, the Chamber notes that the Defence arguments do not contest the manner in which this balance was struck in the Impugned Decision, but rather appear to challenge the very legality of rule 68(2)(b) of the Rules, which was brought in specifically to ensure that the proceedings are expeditious, whilst at the same time respecting the accused's right to cross examine witnesses against him.<sup>58</sup> As such, the Chamber finds that the First Issue does not arise from the Impugned Decision.

24. Regarding the Second Issue, namely whether the Chamber erred in law by relying on the Appeals Chamber's judgment in the *Ntaganda* case, the Chamber finds that the Defence's submissions misrepresent the Impugned Decision. The Chamber did not rely on the Appeals Chamber's holding in *Ntaganda* to justify the introduction of prior recorded testimony. Rather, in its assessment of the Defence's general objections regarding the use of rule 68(2)(b) and the principle of orality, and whether the latter is being respected in a particular case, the Chamber recalled, *inter alia*, that one of the

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<sup>53</sup> See [Impugned Decision](#), para. 38 referring to Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, [ICC-01/12-01/18-2222](#), (the '*Al Hassan* OA 4 Judgment'), para. 78.

<sup>54</sup> See [Impugned Decision](#), para. 38.

<sup>55</sup> See [Impugned Decision](#), paras 94, 132, 145.

<sup>56</sup> See, for example, [Al Hassan OA 4 Judgment](#), para.78; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, [ICC-02/11-01/15-744 \(OA8\)](#), paras 58-61.

<sup>57</sup> Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, [Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence \(Prior Recorded Testimony\)](#), Annex II.A, para. 8: "The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation"

<sup>58</sup> See Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, [Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence \(Prior Recorded Testimony\)](#), Annex II.A, paras 18-19. See also [Al Hassan OA 4 Judgment](#), para.78.

considerations to be taken into account is the general principle that a conviction may not rest solely, or in a decisive manner, on the evidence of witnesses whom the accused has had no opportunity to examine.<sup>59</sup> Conscious that it had not yet heard the evidence of the oral witnesses in question, the Chamber further emphasised ‘that, given the information available regarding the evidence at this stage of proceedings, its assessment in this respect will be preliminary and may be subject to change as the evidence unfolds.’<sup>60</sup> Accordingly, the Chamber considers that the Defence has misrepresented the Impugned Decision and thus the Second Issue does not constitute an appealable issue, because it does not arise from the Impugned Decision.

25. Turning to the Third Issue, the Chamber finds that the Defence misrepresents the Impugned Decision. The Chamber did not rely on the prior recorded testimony of P-1640 and P-1421 when deciding to introduce the prior recorded testimony of P-0529. Rather, the Chamber took note of the statements of these two witnesses, which were brought to the Chamber’s attention by the Defence itself,<sup>61</sup> in the consideration of the Defence’s objections to the introduction of the prior recorded testimony of P-0529.<sup>62</sup> Furthermore, the Chamber observes that the Defence fails to make reference to the fact that the Chamber’s assessment of the criteria of rule 68(2)(b) of the Rules and its determination as to whether to introduce P-0529’s prior recorded testimony is set out in paragraphs 127-133 of the Impugned Decision, which in turn makes no reference to these particular witnesses.<sup>63</sup> Accordingly, the Chamber considers that the Defence has failed to engage with the overall reasoning of the Chamber and misrepresented the Impugned Decision. Therefore, the Third Issue does not constitute an appealable issue.

26. Regarding the Fourth Issue, namely whether the Chamber erred in law by allowing the introduction of prior recorded testimony under rule 68(2)(b), which deprives the Defence of the opportunity to explore important themes for its case with

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<sup>59</sup> See [Impugned Decision](#), paras 37-41.

<sup>60</sup> [Impugned Decision](#), para. 41.

<sup>61</sup> Réponse de la Défense à la « Prosecution second request to introduce prior recorded testimony pursuant to Rule 68(2)(b) » (ICC-01/14-01/21-307-Conf), déposée le 13 mai 2022. 23 June 2022, ICC-01/14-01/21-372-Conf. A public redacted version was filed on 1 July 2022 ([ICC-01/14-01/21-372-Red](#)), paras 57-63.

<sup>62</sup> See [Impugned Decision](#), paras 109-110.

<sup>63</sup> See [Impugned Decision](#), paras 127-133.

Prosecution witnesses, the Chamber finds this constitutes a challenge to rule 68(2)(b) of the Rules more generally, rather than the manner in which it was applied in the Impugned Decision.<sup>64</sup> The Chamber notes that the Defence's submissions in support of the Fourth Issue are largely similar to submissions made in respect of the First Issue.<sup>65</sup> Indeed, as noted in its analysis of the First Issue, the Appeals Chamber has held that the right to cross examine a witness is not absolute and subject to the restrictions such as those set out by rule 68 of the Rules.<sup>66</sup>

27. Furthermore, the Chamber notes that the Defence fails to engage with the fact that the Chamber, in its assessment of whether the prior recorded testimony should be introduced pursuant to rule 68(2)(b), did consider the materiality of the issues in dispute and whether the Defence should be provided with an opportunity to explore such issues with specific Prosecution witnesses. Indeed, the Chamber rejected a number of Prosecution witnesses sought to be introduced pursuant to rule 68(2)(b) so as to receive further oral evidence on particular topics.<sup>67</sup>

28. As a result, the Chamber finds that the Defence fails to properly engage with the overall reasoning of the Chamber by claiming that the Impugned Decision – on a general basis – ignores potential lines of questioning of the Defence when deciding on the introduction of prior recorded testimony. Accordingly, the Fourth Issue does not arise from the Impugned Decision.

29. Last, in respect of the Fifth Issue, namely whether the Chamber erred by considering that the arguments raised by the Defence regarding the credibility of witnesses and the plausibility of their narrative did not militate against the introduction of their prior recorded testimony, the Chamber finds that the Defence misrepresents the Impugned Decision. In the course of its assessment as to whether the prior recorded testimony should be introduced pursuant to rule 68(2)(b), the Chamber considered the

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<sup>64</sup> See [Request](#), paras 6-18.

<sup>65</sup> See [Request](#), paras 20-22.

<sup>66</sup> See paragraph 22 above and references therein.

<sup>67</sup> See [Impugned Decision](#), paras 94, 103, 106, 138, 145.

Defence's objections and whether the objections raised by the Defence were of such a nature or degree so as to preclude the introduction of the prior recorded testimony.<sup>68</sup>

30. Furthermore, the Chamber observes that the Defence appears to suggest that the Chamber should automatically reject Prosecution requests under rule 68(2)(b) whenever the Defence raises an objection and should not evaluate the nature of the objection.<sup>69</sup> The Chamber finds the Defence's submissions misguided and contrary to the assessment envisaged by rule 68(2)(b) of the Rules. In this sense, to follow the Defence's logic would lead to the situation whereby any objection to the introduction of testimony pursuant to rule 68(2)(b) of the Rules would result in a witness having to be heard orally. The Chamber finds this to be plainly incorrect; rather when an objection is raised, the Chamber must evaluate that objection in order to determine whether that witness's prior recorded testimony has sufficient indicia of reliability for introduction pursuant to rule 68(2)(b) of the Rules. This is precisely what the Chamber did in the Impugned Decision.<sup>70</sup> In this regard, the Chamber finds that the Defence simply disagrees with the determinations made by the Chamber in respect of its objections, misrepresents the Impugned Decision and thus fails to identify a legal or factual error which would warrant immediate resolution by the Appeals Chamber.

31. As the five issues identified for appeal do not fulfil the criteria under article 82(1)(d) of the Statute, the Chamber therefore rejects the Request.

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<sup>68</sup> See, for example, [Impugned Decision](#), paras 27, 46, 49, 52, 59, 64, 71, 76, 85, 110, 124, 159, 160.

<sup>69</sup> [Request](#), para. 41.

<sup>70</sup> See, for example, [Impugned Decision](#), paras 27, 46, 49, 52, 59, 64, 71, 76, 85, 110, 124, 159, 160.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.



**Judge Miatta Maria Samba**  
**Presiding Judge**



**Judge María del Socorro Flores Liera**



**Judge Sergio Gerardo Ugalde Godínez**

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

Dated 28 November 2022

At The Hague, The Netherlands