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**No.: ICC-01/14-01/21
Date: 21 December 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 redacted version of

**Decision on the Defence's Request for Reconsideration of or Leave to Appeal the
Decision on the Prosecution's Fifth Request under Rule 68(2)(b)**

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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, pursuant to article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Defence’s Request for Reconsideration of or Leave to Appeal the Decision on the Prosecution’s Fifth Request under Rule 68(2)(b)’.

I. PROCEDURAL HISTORY

1. On 16 November 2022, the Chamber issued its decision on the Office of the Prosecutor’s (the ‘Prosecution’) fifth request pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) (the ‘Impugned Decision’).¹
2. On 22 November 2022, the Defence filed a request for reconsideration of the Impugned Decision, or, in the alternative, requested leave to appeal the Impugned Decision and identified three issues for appeal (the ‘Request’).²
3. On 28 November 2022, the Prosecution filed its response to the Request, arguing that it should be dismissed because the ‘Defence does not show that reconsideration of the Decision is warranted, nor that any of the three proposed issues are appealable within the meaning of article 82(1)(d) of the Statute’ (the ‘Response’).³
4. The Common Legal Representative of Victims did not file a response to the Request.

II. SUBMISSIONS

5. In the Request, the Defence refers to the principle of orality and argues that the use of rule 68 of the Rules challenges this principle and seriously impacts the fairness

¹ Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280 (ICC-01/14-01/21-551-Conf), 16 November 2022 (‘Impugned Decision’). A public redacted version was filed on the same day ([ICC-01/14-01/21-551-Red](#)).

² Demande de reconsideration ou, subsidiairement, demande d’autorisation d’interjeter appeal de la « Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280 » (ICC- 01/14-01/21-551-Conf).’, 22 November 2022, ICC-01/14-01/21-558-Conf. A public redacted version was filed on 28 November 2022 ([ICC-01/14-01/21-558-Red](#)).

³ Prosecution Response to Defence Request for Reconsideration or, Alternatively, Request for Leave to Appeal the ‘Decision on the Defence’s Request for Reconsideration of or Leave to Appeal the ‘Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280’ (ICC-01/14-01/21-551-Conf)’, 28 November 2022, ICC-01/14-01/21-561, para. 1. A public redacted version was filed on 9 December 2022 ([ICC-01/14-01/21-561-Red](#)).

of the proceedings.⁴ The Defence further notes that the first *viva voce* witnesses heard by the Chamber provided clarifications to and contradicted their original statements.⁵ In light of this, the Defence submits that there is a risk relating to the introduction of prior recorded testimony (including preventing the Defence from cross-examining such witnesses in court) which supports the importance of hearing witnesses' testimony in an adversarial context before the Chamber.⁶

6. In this context, the Defence requests that the Chamber reconsider its decision granting the Prosecution's application to introduce P-2280's prior recorded testimony pursuant to rule 68(2)(b) of the Rules.⁷ In the alternative, the Defence requests the Chamber's leave to appeal the Impugned Decision, and identifies three issues for appeal: (i) whether the Chamber erred in fact by granting the introduction of item of evidence CAR-OTP-2116-0725-R01 as prior recorded testimony;⁸ (ii) whether the Chamber erred in law in not permitting the Defence to question P-2280 regarding important issues relevant to the determination of the truth;⁹ and (iii) whether the Chamber erred in law by finding that P-2280's testimony did not relate to the acts and conduct of the accused.¹⁰

1. Defence Request for Reconsideration

7. In its request for reconsideration, the Defence submits that P-2280 is in a position to provide unique testimony because he is [REDACTED] that the Prosecution plans to rely on at trial.¹¹ The Defence argues that P-2280's testimony is important because [REDACTED].¹²

8. In the Request, the Defence provides additional context to establish how information regarding [REDACTED] may be relevant to the present criminal proceedings (particularly for the purpose of determining the accused's criminal

⁴ [Request](#), paras 2-3.

⁵ [Request](#), para. 4.

⁶ [Request](#), paras 4-5.

⁷ [Request](#), paras 6, 16.

⁸ [Request](#), paras 17-22.

⁹ [Request](#), paras 23-29.

¹⁰ [Request](#), para. 30.

¹¹ [Request](#), para. 7.

¹² [Request](#), para. 7.

responsibility). To this end, the Defence's assertions include, *inter alia*, the following: (i) several witnesses who have appeared before the Chamber in the proceeding thus far testified about [REDACTED];¹³ (ii) [REDACTED] met with the members of the Prosecution to assist with its investigation, which demonstrates that [REDACTED] possess pertinent information;¹⁴ and (iii) [REDACTED].¹⁵

9. In support of its arguments, the Defence cites to a recent decision issued by the Trial Chamber in the case of *The Prosecutor v. Ali Muhammad Ali Abd Al Rahman* in which the Trial Chamber rejected a request to introduce a witness's prior recorded testimony pursuant to rule 68(2)(c) of the Rules because the witness provided 'evidence that is unique and cannot be supplemented by that of other witnesses who will testify *viva voce*'.¹⁶ The Defence also argues that it must be able to properly address and challenge all aspects of the Prosecution's case (including the alleged existence of a common plan or a state or organisational policy), and that it is essential to consider key information that would enable an understanding of the complexity of the situation in CAR at the time.¹⁷

10. In the Response, the Prosecution submits that a request for reconsideration cannot be used to re-litigate points that have already been made, which it argues the Request attempts to do in the present situation.¹⁸ In support of this submission, the Prosecution highlights that the Request fails to establish that the Chamber's reasoning in the Impugned Decision was erroneous, and does not put forth new arguments or facts.¹⁹ In particular, the Prosecution notes that the Defence previously submitted that information pertaining to [REDACTED] are crucial to its case but fails to adequately 'explain how [REDACTED] would be relevant to determining the criminal responsibility of the accused in the present case.'²⁰

¹³ [Request](#), para. 10.

¹⁴ [Request](#), para. 13.

¹⁵ [Request](#), para. 12.

¹⁶ [Request](#), para. 15, referring to Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Prosecution's second application to introduce a prior recorded testimony under Rule 68(2)(c), 2 May 2022, [ICC-02/05-01/20-680-Red](#) (the '*Abd Al Rahman* Decision'), para. 14.

¹⁷ [Request](#), para. 14.

¹⁸ [Response](#), para. 3.

¹⁹ [Response](#), paras 4-5.

²⁰ [Response](#), para. 5.

11. Last, the Prosecution argues that a reconsideration of the Impugned Decision is not necessary to prevent an injustice because the Defence is already in possession of the information it claims it needs, yet claims it does not possess.²¹ In this regard, the Prosecution points out that among such items of information already available to the Defence is P-2280's prior recorded testimony as well as that of other witnesses, the in-court testimony of two witnesses who have appeared before the Chamber,²² and [REDACTED].²³ In any event, the Prosecution further submits that the Defence may call its own witnesses on the matter.²⁴

2. *First Issue*

12. The Defence submits that the Chamber erred in fact by granting the introduction of P-2280's witness interview statement (CAR-OTP-2116-0725-R01) as prior recorded testimony under rule 68(2)(b) of the Rules (the 'First Issue').²⁵ In support of its position, the Defence notes that the interview statement does not indicate that P-2280 gave explicit consent for his statement to be used in proceedings before this Court (or that he was clearly and explicitly informed that his statement could be used), or that he could be called to testify before this Court.²⁶ The Defence submits that it is standard procedure to explain to a potential witness how their statement may eventually be used (e.g. in judicial proceedings before the Court), citing the process generally followed by the Prosecution's investigators when taking a witness's prior recorded testimony.²⁷

13. Additionally, the Defence argues that: (i) the witness statement does not indicate [REDACTED]; (ii) [REDACTED], and; (iii) [REDACTED].²⁸

14. The Prosecution submits in the Response that the First Issue only articulates disagreement with the reasoning the Chamber put forth in the Impugned Decision and does not give rise to any appealable issues.²⁹ In support of this assertion, the Prosecution

²¹ [Response](#), para. 6.

²² Referring to witnesses P-0787 and P-0338.

²³ [Response](#), para. 6, referring to CAR-OTP-2102-0614.

²⁴ [Response](#), para. 6.

²⁵ [Request](#), para. 17. [REDACTED].

²⁶ [Request](#), para. 18.

²⁷ [Request](#), para. 20.

²⁸ [Request](#), para. 19.

²⁹ [Response](#), para. 9.

argues that ‘P-2280’s statement was taken in accordance with the procedure required [REDACTED].³⁰ Further, the Prosecution notes that the statement fulfils the criteria set out in both rule 68 and rule 111 of the Rules and the past jurisprudence of this Court and that the ‘standard advocated by the Defence would render impossible any rule 68 submission which relates to witness statements taken [REDACTED] and in adherence *also* of [REDACTED].’³¹

3. *Second Issue*

15. The Defence argues that the Chamber erred in law in not permitting the Defence to question P-2280 regarding important issues relevant to the determination of the truth (the ‘Second Issue’).³² In support of its position, the Defence submits that it should be able to cross-examine witnesses on any issues relevant to understanding the truth even if the Prosecution does not address such topics during its direct examination.³³ The Defence argues that [REDACTED] during the period relating to the charges are relevant to the present case and to understanding the scope of P-2280’s testimony,³⁴ and that introducing such testimony without permitting the Defence to challenge its substance amounts to preventing the Defence from obtaining, during cross examination, information that may help its case and further its own investigation.³⁵

16. Last, the Defence submits that the fact that it has not yet revealed all or part of its case strategy should not lean in favour of introducing prior recorded testimony under rule 68(2)(b) of the Rules, and that the Impugned Decision erred in law by requiring the Defence to divulge confidential strategic information in order to vindicate its right to confront Prosecution witnesses.³⁶

17. The Prosecution submits that the Second Issue only articulates the Defence’s disagreement with the Chamber’s ruling in the Impugned Decision, and thus does not

³⁰ [Response](#), para. 11.

³¹ [Response](#), para. 11.

³² [Request](#), para. 23.

³³ [Request](#), para. 24.

³⁴ [Request](#), para. 24.

³⁵ [Request](#), paras 25-26.

³⁶ [Request](#), para. 27.

constitute an appealable issue.³⁷ The Prosecution argues that, contrary to the Defence's submission, the Impugned Decision does not prevent the Defence from exploring the theme it seeks to understand and that the Chamber allowed the introduction of P-2280's prior recorded testimony after considering all relevant factors, including its corroborative nature with regards to two other witness statements.³⁸ The Prosecution also notes that the Defence had the opportunity to cross-examine those two witnesses when they appeared before the Chamber.³⁹

4. *Third Issue*

18. The Defence submits that the Chamber erred in law by finding that P-2280's testimony did not relate to the acts and conduct of the accused (the 'Third Issue').⁴⁰ In support of its argument, the Defence notes that P-2280 provides information relating to incident (o) of the charges and that the eighteen confirmed incidents constitute the direct factual basis for the charges against Mr Said as a result of his alleged role at the OCRB.⁴¹ Additionally, the Defence alleges that the testimony of P-0547 and P-0338 cast doubt on [REDACTED].⁴² As a result, the Defence argues that rejecting the possibility that P-2280's testimony could potentially relate to the acts and conduct of the accused, in light of the doubt that exists as to whether [REDACTED], amounts to an error of law by the Chamber.⁴³

19. The Prosecution submits that the Third Issue is not appealable because the Defence fails to demonstrate the existence of an appealable issue and merely disagrees with the Chamber's initial assessment of P-2280's prior recorded testimony.⁴⁴ The Prosecution notes that P-2280's testimony is corroborative of the testimony provided by P-0547 and P-0338 in that P-2280 describes [REDACTED].⁴⁵ The Prosecution argues that the Defence itself acknowledges that P-2280 does not mention the accused

³⁷ [Response](#), para. 12.

³⁸ [Response](#), para. 13.

³⁹ [Response](#), para. 13.

⁴⁰ [Request](#), para. 30.

⁴¹ [Request](#), para. 30.

⁴² [Request](#), para. 30.

⁴³ [Request](#), para. 30.

⁴⁴ [Response](#), para. 14.

⁴⁵ [Response](#), para. 14.

in his testimony and merely speculates that information P-2280 would provide during in-court testimony may potentially relate to the acts and conduct of the accused, and that as a result, no appealable issue exists.⁴⁶

III. APPLICABLE LAW

20. While not explicitly provided for in the Statute, the Chamber has followed the jurisprudence of previous Chambers in considering that it has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of articles 64(2) and 67 of the Statute.⁴⁷ The Chamber notes that reconsideration remains an exceptional remedy and should only be done if there is a clear error of reasoning or in order to prevent an injustice. During this assessment, a chamber will also consider whether new facts or arguments have arisen since the decision in question was rendered.

21. The Chamber recalls its previous decisions,⁴⁸ as well as prior jurisprudence of the Court,⁴⁹ regarding the application of article 82(1)(d) of the Statute. Accordingly, in its

⁴⁶ [Response](#), para. 14.

⁴⁷ 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](#), para. 8. *See, for example*, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, [ICC-01/04-01/06-2705](#); Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, [ICC-01/09-02/11-863](#); Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, [ICC-01/05-01/13-10851](#); Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, [ICC-01/12-01/18-734](#) or Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Decision on the Defence’s request for reconsideration of the Decision on victims’ participation, 29 September 2022, [ICC-02/05-01/20-759](#).

⁴⁸ *See* 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), 28 November 2022, [ICC-01/14-01/21-562](#), paras 16-18; 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.

⁴⁹ *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

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.⁵⁰

22. 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.⁵¹

23. As noted in previous decisions, the three criteria under article 82(1)(d) of the Statute are cumulative.⁵² Therefore, failure to fulfil one or more of the criteria will result in dismissal of the Request.⁵³

IV. ANALYSIS

A. Request for Reconsideration

24. Concerning the request for reconsideration, the Chamber notes that the Defence’s submissions – [REDACTED] – are in large part a reiteration of arguments that it advanced in the litigation considered in the Impugned Decision.⁵⁴ Equally, the Chamber observes that the Defence repeats the jurisprudence it previously relied upon in its initial

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 (the ‘Ongwen Decision’).

⁵⁰ See, for example, [Bemba Decision](#), para. 4; [Ongwen Decision](#), para. 8.

⁵¹ 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.

⁵² See, for example, [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

⁵³ See, for example, [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

⁵⁴ See Réponse de la Défense à la “Prosecution fifth request to introduce prior recorded testimony pursuant to Rule 68(2)(b)” (ICC-01/14-01/21-323-Conf) déposée le 20 mai 2022, 8 July 2022, ICC-01/14-01/21- 395-Conf (the ‘Initial Response’). A public redacted version was filed on 18 July 2022 ([ICC-01/14-01/21-395-Red](#)).

response to the Prosecution's fifth request pursuant to rule 68(2)(b) in order to substantiate the Request.⁵⁵

25. Furthermore, the Chamber notes that the Defence presents limited new information to support its argument for reconsideration. For example, the Defence notes that [REDACTED] and that P-1167's testimony mentions [REDACTED].⁵⁶ The Defence further highlights that P-0787's testimony states that [REDACTED].⁵⁷ Lastly, the Chamber notes that the Defence submits that P-2280 is [REDACTED].⁵⁸

26. The Chamber finds that the Defence has not indicated how [REDACTED] could be relevant to determining the guilt or innocence of the accused in the present case. If these matters are of relevance to the Defence's case and it is of the view that [REDACTED], it may call its own witnesses to testify on these issues. The Chamber is not persuaded that P-2280 should be made available for cross-examination by the Defence on matters that are entirely distinct from the limited purpose for which his testimony is presented by the Prosecution. The Chamber also notes that the *Abd Al Rahman* decision cited by the Defence dealt with a potential rule 68(2)(c) witness who provided evidence regarding the identity and the individual criminal responsibility of the accused in that case, including information specifically relating to the accused's authority over a militia group, his command in areas of operation, and his alleged involvement in funding and supplying weapons.⁵⁹ The Chamber finds that the nature and weight of P-2280's prior recorded testimony is significantly different than that of the witness who was the subject of Trial Chamber I's decision and therefore does not rise to the level of requiring the witness to testify in person (either as a rule 68(3) or as a *viva voce* witness).⁶⁰

⁵⁵ [Initial Response](#), para. 27; which is almost verbatim repeated in [Request](#), para. 15.

⁵⁶ [Request](#), para. 10.

⁵⁷ [Request](#), para. 10.

⁵⁸ [Request](#), para. 11.

⁵⁹ [Abd Al Rahman Decision](#), para. 6.

⁶⁰ For example, P-2280 is not [REDACTED], does not offer evidence that goes to the acts and conduct of the accused and does not provide evidence that is unique such that the interests of justice would be best served by its introduction or otherwise go to issues that are materially in dispute.

27. Considering the above, the Chamber does not find that the conditions for the exceptional remedy of reconsideration are fulfilled. Accordingly, the Chamber rejects the request for reconsideration.

B. Request for Leave to Appeal

28. Turning to the alternative request, the Chamber finds that the issues identified in the Request do not satisfy the requirements of article 82(1)(d) of the Statute.

29. Regarding the First Issue, namely whether the Chamber erred in fact by granting the introduction of P-2280's witness interview statement as prior recorded testimony under rule 68(2)(b) of the Rules, the Chamber finds that this issue does not meet the requirements of article 82(1)(d) of the Statute for the reasons set out below.

30. The Chamber observes that P-2280 gave a statement to [REDACTED], which he ultimately read over, signed, and declared that he stood over its contents.⁶¹ It is the settled jurisprudence of this Court that a statement can be considered prior recorded testimony suitable for introduction into evidence under rule 68 of the Rules if the person providing the statement understands that he or she is providing information which may be relied upon in the context of legal proceedings (i.e. when an individual is being questioned in the capacity as a witness in the context of or in anticipation of legal proceedings).⁶² Further, this Court's jurisprudence has also established that it is not necessary for the person to know against whom an investigation is initiated or the precise contours and the alleged crimes for which the investigations are conducted.⁶³ The Chamber concluded on this basis that it was clear that P-2280 understood that his statement might be used in judicial proceedings, including before the Court. The Defence does not explain why this factual finding would be erroneous. In particular,

⁶¹ CAR-OTP-2135-3728-R01, at 3737.

⁶² Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, [ICC-02/04-01/15-596-Red](#), para. 9; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, [ICC-01/04-01/07-2635](#), para. 49; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum of Public Redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, [ICC-01/05-01/13-1478-Red-Corr](#), para. 32.

⁶³ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, [ICC-01/04-01/07-2635](#), para. 49.

the Defence does not point to any evidence or information that the Chamber would have missed or misinterpreted.

31. Under these circumstances, the Chamber does not consider that the Defence has identified a potential error of fact that would require immediate appellate review.

32. In respect of the Second Issue, which relates to whether the Chamber erred in law in not permitting the Defence to question P-2280 regarding issues relevant to the determination of the truth, the Chamber notes that the Impugned Decision determined that it would not ‘be prejudicial to the Defence if it were not allowed to cross-examine P-2280 in relation to matters extraneous to the information provided in his prior recorded testimony.’⁶⁴ In the Request, the Defence repeats submissions to the effect that introducing P-2280’s statement as prior recorded testimony would prevent it from exploring issues [REDACTED] with P-2280 and from uncovering information that could be used to challenge the Prosecution’s case (citing in part the Chamber’s separate finding in the Impugned Decision to have witness P-1967 testify as a rule 68(3) witness).⁶⁵ For the avoidance of doubt, the Chamber clarifies that it considers the situation of P-1967 to be distinct from that of P-2280 as the Defence seeks to question P-2280 not only on matters already covered in his testimony, but about information that is *not* contained in his statement and relates to more general matters of unclear relevance to the present case [REDACTED]. The Chamber underlines that, although questioning by the non-calling party is not only limited to issues raised during questioning by the calling party, such questioning does not represent an opportunity for the non-calling party to conduct a wholesale investigation and inquiry into matters not addressed by the calling party. Apart from repeating its arguments as to why it should be permitted to cross-examine P-2280, the Defence does not show any error in the Chamber’s determination that it would not be prejudicial to allow the introduction of this testimony under rule 68(2)(b) of the Rules.

⁶⁴ [Impugned Decision](#), para. 23.

⁶⁵ [Request](#), paras 27-29.

33. Therefore, in light of the foregoing, the Chamber finds that the second issue identified by the Defence represents a mere disagreement with the findings of the Chamber and is not an appealable issue.

34. Last, in respect of the Third Issue, namely whether the Chamber erred in law by finding that P-2280's testimony did not relate to the acts and conduct of the accused, the Chamber considers that the Third Issue amounts merely to a disagreement with the Impugned Decision, and does not constitute an 'appealable issue' under article 82(1)(d) of the Statute. In this regard, the Chamber recalls that, in the Impugned Decision, it reviewed P-2280's prior recorded testimony and found that it met the requirements stipulated by rule 68(2)(b) of the Rules.⁶⁶ In doing so, the Chamber explained the basis on which it made its determination and engaged in an analysis prior to reaching its finding [REDACTED],⁶⁷ and noted that P-2280's prior recorded testimony 'does not mention the accused and does not pertain to his acts and conduct.'⁶⁸ The Chamber accordingly considers that the Defence merely expresses its disagreement with the Chamber's ultimate reasoning and conclusion. For this reason, the Chamber finds that the Third Issue does not constitute an appealable issue.

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

⁶⁶ [Impugned Decision](#), paras 21-22.

⁶⁷ [Impugned Decision](#), paras 21-22.

⁶⁸ [Impugned Decision](#), para. 19.

FOR THESE REASONS, THE CHAMBER HEREBY

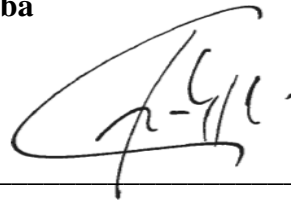
REJECTS the Request.



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 21 December 2022

At The Hague, The Netherlands