

**Original: English****No.: ICC-01/14-01/21****Date: 8 June 2023****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 version of****Decision on the Defence's Request for Leave to Appeal the "Decision on the  
Prosecution Second Request for In-Court Protective Measures"**

**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 Osvaldo Zavala Giler

**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*, pursuant 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 Second Request for In-Court Protective Measures’.

## **I. PROCEDURAL HISTORY**

1. On 20 April 2023, the Chamber issued its decision on the Office of the Prosecutor’s (the ‘Prosecution’) second request for in-court protective measures (the ‘Impugned Decision’).<sup>1</sup>
2. On 1 May 2023, the Defence filed a request for leave to appeal the Impugned Decision, identifying four issues for appeal (the ‘Request’).<sup>2</sup>
3. On 5 May 2023, the Prosecution filed its response to the Request, arguing that it should be rejected because the ‘proposed issues do not constitute “appealable issues” and do not meet the cumulative requirements under article 82(1)(d) of the Statute’ (the ‘Prosecution Response’).<sup>3</sup>
4. On 5 May 2023, the Common Legal Representative of Victims (the ‘CLRv’) filed her response to the Request, arguing that the ‘Defence does not demonstrate that any of the four identified issues can be the subject of an interlocutory appeal’ and that the Request ‘does not satisfy the requirements of article 82(1)(d) of the Rome Statute’ (the ‘Victims’ Response’).<sup>4</sup>

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<sup>1</sup> Decision on the Prosecution Second Request for In-Court Protective Measures (ICC-01/14-01/21-605-Conf), 20 April 2023 (the ‘Impugned Decision’). A public redacted version was filed on 4 May 2023 ([ICC-01/14-01/21-605-Red](#)).

<sup>2</sup> Demande d’autorisation d’interjeter appel de la « Decision on the Prosecution Second Request for In-Court Protective Measures » (ICC-01/14-01/21-605-Conf), 1 May 2023, ICC-01/14-01/21-607-Conf (the ‘Request’). A public redacted version was filed on 10 May 2023 ([ICC-01/14-01/21-607-Red](#)).

<sup>3</sup> Prosecution Response to Defence Request for Leave to Appeal the ‘Decision on the Prosecution Second Request for In-Court Protective Measures’ (ICC-01/14-01/21-605-Conf), 5 May 2023, ICC-01/14-01/21-608-Conf, para. 1 (the ‘Prosecution Response’). A public redacted version was filed on 12 May 2023 ([ICC-01/14-01/21-608-Red](#)).

<sup>4</sup> Victims’ Response to the ‘Demande d’autorisation d’interjeter appel de la « Decision on the Prosecution Second Request for In-Court Protective Measures » (ICC-01/14-01/21-605-Conf’, 5 May 2023, ICC-01/14-01/21-609-Conf, paras 1-2 (the ‘Victims’ Response’). A public redacted version was filed on 11 May 2023 ([ICC-01/14-01/21-609-Red](#)).

## II. SUBMISSIONS

5. In the Request, the Defence submits that the principle of publicity of the proceedings constitutes a fundamental tenet of criminal procedure enshrined in international human rights instruments and in the Court's jurisprudence.<sup>5</sup> The Defence argues that the principle establishes that, in order to secure protective measures, the party requesting such measures must substantiate the precise circumstances that affect a witness's security.<sup>6</sup> The Defence further notes that general submissions with regard to the overall security situation, such as the fact that a witness resides in a particular geographic area, do not in and of themselves suffice to justify the granting of protective measures, and that such a practice would simply result in making the granting of such measures automatic.<sup>7</sup>

6. In this context, the Defence requests leave to appeal the Impugned Decision, and identifies four issues for appeal: (i) whether the Chamber erred in law by not articulating in the Impugned Decision the manner in which it considered the requirement relating to the principle of publicity of the proceedings;<sup>8</sup> (ii) whether the Chamber applied the appropriate evidentiary standard relating to the granting of protective measures;<sup>9</sup> (iii) whether the Chamber erred in law by not requiring the Prosecution to fulfil its obligation to demonstrate the need for protective measures;<sup>10</sup> and (iv) whether the Chamber erred in law by taking into consideration the views and concerns, as put forth by the CLRV, of persons who are no longer participating as victims in the proceedings.<sup>11</sup>

### A. First Issue

7. The Defence submits that the Chamber erred in law by failing to sufficiently explain the manner in which it took into consideration the principle of publicity of the proceedings with regard to each individual witness prior to granting the protective measures in the Impugned Decision.<sup>12</sup> In particular, the Defence argues that, other than

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<sup>5</sup> [Request](#), para. 6.

<sup>6</sup> [Request](#), para. 7.

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

<sup>8</sup> [Request](#), paras 13-15.

<sup>9</sup> [Request](#), paras 16-27.

<sup>10</sup> [Request](#), paras 28-35.

<sup>11</sup> [Request](#), paras 36-39.

<sup>12</sup> [Request](#), para. 13.

referring generally to the principle of publicity of the proceedings at the outset of the Impugned Decision, the Chamber did not undertake an exercise that considered the weight that the principle should be afforded, thereby making it impossible for the Parties to concretely understand the manner in which the principle factored into the Chamber's reasoning.<sup>13</sup> The Defence submits that justifying the decision is all the more important because the protective measures that have been granted to witnesses in the present proceedings thus far have rendered the proceedings opaque to external observers.<sup>14</sup> As a result, the Defence submits that such an absence of justification on the part of the Chamber constitutes an error of law which invalidates the Impugned Decision.<sup>15</sup>

8. The Prosecution submits in its Response that the Defence mischaracterises the Impugned Decision and merely disagrees with the Chamber's exercise of its discretion in balancing competing interests, and therefore does not constitute an appealable issue.<sup>16</sup> The Prosecution notes that the Impugned Decision explicitly acknowledged the relevance of the principle of publicity of the proceedings, and 'explained that the principle was not dispositive and must be balanced with countervailing considerations such as the witnesses' safety and well-being.'<sup>17</sup> The Prosecution further submits that the fact that the Impugned Decision did not cite to the principle of publicity of the proceedings in each individual witness assessment does not mean that the Chamber did not take the factor into consideration when making its determination.<sup>18</sup> Indeed, the Prosecution observes that this is demonstrated by the fact that the Impugned Decision also did not specifically cite other countervailing factors in its analysis.<sup>19</sup>

9. The CLRV submits in the Victims' Response that the first issue represents a disagreement with the Impugned Decision and therefore does not constitute an appealable issue.<sup>20</sup> The CLRV argues that the Request attempts to relitigate questions that were already addressed in the Impugned Decision, and further notes that the Chamber previously 'took into account identical arguments submitted by the Defence

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<sup>13</sup> [Request](#), para. 14.

<sup>14</sup> [Request](#), para. 15.

<sup>15</sup> [Request](#), para. 14.

<sup>16</sup> [Prosecution Response](#), para. 5.

<sup>17</sup> [Prosecution Response](#), para. 6.

<sup>18</sup> [Prosecution Response](#), para. 6.

<sup>19</sup> [Prosecution Response](#), para. 6.

<sup>20</sup> [Victims' Response](#), para. 17.

prior to issuing its decision on the Prosecution's first request for in-court protective measures (the 'First ICPM Decision'),<sup>21</sup> which the Defence did not seek leave to appeal.<sup>22</sup> The CLRV further notes that 'the Chamber specifically referred to its First ICPM Decision in which it explained that the principle of the publicity of the proceedings, while being "a fundamental right of the accused and a necessary component of a fair and transparent trial", is "not absolute and subject to exceptions, including for the purposes of protecting victims and witnesses".'<sup>23</sup>

## **B. Second Issue**

10. The Defence submits that the Chamber applied the incorrect evidentiary standard when deciding to grant protective measures to the witnesses that are the subject of the Impugned Decision. In particular, the Defence argues that the Court's jurisprudence has established that granting protective measures is an exceptional measure that must be justified on a case-by-case basis and must be based on the existence of an objective risk.<sup>24</sup> The Defence raises four points in this regard.

11. First, the Defence argues that the Chamber based its decision on a position that was never proven, or, in other words, that individuals in the Central African Republic (hereinafter 'CAR') may want to attack the integrity of the proceedings.<sup>25</sup> The Defence notes the Impugned Decision's language, namely 'the fact that [REDACTED] must be taken into consideration', would result in the granting of protective measures to all witnesses appearing before the Court [REDACTED].<sup>26</sup> The Defence further argues that the applicable standard of proof requires predictions to be founded upon concrete and reasonable facts to justify the granting of protective measures and that, without concrete facts, no objective risk can be established.<sup>27</sup>

12. Second, the Defence argues that, in the Impugned Decision, the Chamber accepted the witnesses' descriptions of threats at face value in lieu of conducting an

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<sup>21</sup> See Decision on the Prosecution's Request for In-Court Protective Measures (ICC-1/14-01/21-481-Conf), 21 September 2022 (the 'First ICPM Decision'). A public redacted version was filed on 26 September 2022 ([ICC-1/14-01/21-481-Red](#)).

<sup>22</sup> [Victims' Response](#), para. 17.

<sup>23</sup> [Victims' Response](#), para. 19.

<sup>24</sup> [Request](#), para. 16.

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

<sup>26</sup> [Request](#), para. 19.

<sup>27</sup> [Request](#), para. 19.

independent inquiry into the truthfulness of the events alleged by the witnesses.<sup>28</sup> In particular, the Defence notes that the Chamber affirmed that ‘[r]eliance on information provided by the person in this framework is fundamentally different from the assessment of evidence provided by a witness for the purposes of the judgment.’<sup>29</sup> In the Defence’s view, such a statement amounts to determining that there is no standard to meet when it comes to assessing whether to grant protective measures and argues that following such a standard does not satisfy the requirement that a decision to grant protective measures be supported by the existence of a real and objective risk.<sup>30</sup>

13. Third, the Defence argues that the Impugned Decision is based on allegations that, in most cases, do not relate to [REDACTED].<sup>31</sup> The Defence provides the example of witness P-0622, where the Impugned Decision notes that ‘the fact that the event is [REDACTED] does not preclude the Chamber from considering it.’<sup>32</sup> The Defence states that, in order to grant protective measures, it is not enough for a witness located in CAR to have experienced general security issues but rather the witness must experience an objective risk specifically due to their participation as a witness in an ICC proceeding.<sup>33</sup>

14. Last, with regard to the second appealable issue, the Defence argues that the Impugned Decision relies almost entirely on allegations submitted by the Prosecution that date back a number of years, and therefore fails to establish the existence of a current objective risk faced by the witnesses.<sup>34</sup> The Defence further submits that the standard applied means that it would simply suffice for a witness to have experienced fear at some moment in their life to justify the granting of protective measures.<sup>35</sup>

15. The Prosecution argues that the second issue is not an appealable issue arising from the Impugned Decision.<sup>36</sup> In particular, the Prosecution submits that the Defence asserts that the Chamber’s approach to the standard of proof is inconsistent with the Court’s jurisprudence, but ‘fails to identify any case law at all to support this

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<sup>28</sup> [Request](#), para. 21.

<sup>29</sup> [Request](#), para. 22.

<sup>30</sup> [Request](#), para. 22.

<sup>31</sup> [Request](#), para. 23.

<sup>32</sup> [Request](#), para. 23.

<sup>33</sup> [Request](#), para. 24.

<sup>34</sup> [Request](#), para. 25.

<sup>35</sup> [Request](#), para. 26.

<sup>36</sup> [Prosecution Response](#), para. 10.

proposition, thus failing to properly substantiate its request for leave to appeal [...].<sup>37</sup> The Prosecution further notes that the Defence makes no reference to the Chamber's express consideration of highly individualised factors such as the witness's knowledge of and interaction with [REDACTED].<sup>38</sup> The Prosecution notes that the Chamber itself acknowledged that the reliance on information provided by witnesses in the context of protective measures is fundamentally different from the assessment of evidence provided by a witness for the purposes of the judgment, and that the Chamber's analysis of risk was consistent with that elaborated in the First ICPM Decision.<sup>39</sup>

16. The CLRV submits in the Victims' Response that, contrary to the Defence's assertion that the Chamber automatically granted protective measures to all witnesses concerned, the Chamber conducted a detailed assessment of the existence of an objectively justifiable risk for all witnesses concerned, based on their respective situations.<sup>40</sup> The CLRV observed that the Chamber highlighted the [REDACTED] and acknowledged that while 'not directly linked to the current proceedings, the Chamber finds that such information may still be of importance when assessing whether an objectively justifiable security risk warrants the granting of protective measures.'<sup>41</sup> As a result, the CLRV argues that the Chamber applied the correct standard of proof in granting protective measures.<sup>42</sup>

### C. Third Issue

17. The Defence submits that the Chamber erred in law by failing to require the Prosecution to fulfil its obligation to demonstrate the need for protective measures.<sup>43</sup> In particular, the Defence points to the Impugned Decision which states that '[t]he Chamber does not consider it prudent to investigate claims by witnesses that they have been threatened for the purposes of determining whether protective measures should be granted as this may expose the witness further' and that the Chamber 'does not have reason to doubt the veracity of the information provided by the Prosecution.'<sup>44</sup> The Defence argues that such an approach results in taking the Prosecution at its word and

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<sup>37</sup> [Prosecution Response](#), para. 8.

<sup>38</sup> [Prosecution Response](#), para. 9.

<sup>39</sup> [Prosecution Response](#), para. 9; *see also* [First ICPM Decision](#).

<sup>40</sup> [Victims' Response](#), para. 20.

<sup>41</sup> [Victims' Response](#), para. 20.

<sup>42</sup> [Victims' Response](#), para. 20.

<sup>43</sup> [Request](#), paras 28-35.

<sup>44</sup> [Request](#), paras 29-30.



relieving the Prosecution of its burden, adding that, in a fair judicial proceeding, a party must substantiate allegations it puts forth.<sup>45</sup> The Defence further notes that, in its mind, such an approach is particularly problematic because the Impugned Decision relates to witnesses whose prior recorded testimony will be introduced pursuant to rule 68(3) of the Rules of Procedure and Evidence.<sup>46</sup> The Defence argues that, in a number of cases, information relating to the security risk in question emanated from the witnesses' prior recorded testimony and, as such, is information that must be tested and challenged during the course of the trial.<sup>47</sup>

18. The Prosecution submits that the third issue is not appealable because the Defence fails to substantiate its claims regarding the applicable burden of proof and merely disagrees with the Chamber's application of the criteria governing the granting of protective measures.<sup>48</sup> The Prosecution notes that the Chamber's finding of an objectively justifiable risk was not based on mere assertions, but a number of factors, including public information relating to the CAR security situation, the Chamber's previous findings of witness intimidation attempts, victims' fears and concerns, and the activities of armed groups to which Mr Said may have links.<sup>49</sup>

19. The CLRV submits that the Chamber did not discharge the Prosecution from its burden of proof regarding the need for protective measures.<sup>50</sup> The CLRV recalls the Chamber's First ICPM Decision in which the Chamber stated that the question of whether an objectively justifiable risk exists must be based on an assessment of the possibility of future harm in light of all the general and specific circumstances and that it is unnecessary to demonstrate that a risk has already manifested in the form of a specific and concrete threat.<sup>51</sup>

#### **D. Fourth Issue**

20. The Defence submits that the Chamber erred in law by taking into consideration the views and concerns of persons who are no longer participating as victims in the

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<sup>45</sup> [Request](#), para. 30.

<sup>46</sup> [Request](#), para. 31.

<sup>47</sup> [Request](#), paras 32-34.

<sup>48</sup> [Prosecution Response](#), para. 11.

<sup>49</sup> [Prosecution Response](#), para. 12.

<sup>50</sup> [Victims' Response](#), para. 21.

<sup>51</sup> [Victims' Response](#), para. 21; *see* [First ICPM Decision](#), para. 19.

proceedings.<sup>52</sup> In addition, the Defence argues that the Prosecution's submissions with regard to the concerned victims' fears date back to October 2021, which in the Defence's view, is not sufficiently up-to-date information.<sup>53</sup> The Defence further submits that the Prosecution's submissions are themselves based on submissions made by the CLRV that include the views and concerns of victims who are no longer participating in the proceedings because they related to allegations that were ultimately not confirmed.<sup>54</sup> As a result, the Defence argues that the Chamber's decision should be invalidated.<sup>55</sup>

21. The Prosecution submits that the fourth issue is not appealable because the Defence merely disagrees with the Chamber's reference to the views and concerns of persons who are no longer admitted as participating victims and that the Defence fails to substantiate the reason for which it assumes that the Chamber's approach is procedurally improper.<sup>56</sup> In particular, the Prosecution argues that the Defence fails to demonstrate that the Chamber did not subject the views of such persons to critical scrutiny and falls short of explaining how the Impugned Decision's reasoning gives rise to an appealable issue.<sup>57</sup>

22. The CLRV argues that the Defence's stance amounts to a disagreement with, or misinterpretation of, the Impugned Decision and therefore does not constitute an appealable issue.<sup>58</sup> Specifically, the CLRV submits that she is in regular contact with her clients and, as such, the victims' views and concerns presented in her submissions 'originate from participating victims and applicants, and are always up to date, contrary to the Defence's erroneous assertions.'<sup>59</sup>

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<sup>52</sup> [Request](#), paras 36-39.

<sup>53</sup> [Request](#), para. 37.

<sup>54</sup> [Request](#), para. 37.

<sup>55</sup> [Request](#), para. 39.

<sup>56</sup> [Prosecution Response](#), para. 13.

<sup>57</sup> [Prosecution Response](#), para. 13.

<sup>58</sup> [Victims' Response](#), para. 23.

<sup>59</sup> [Victims' Response](#), para. 22.

### III. APPLICABLE LAW

23. The Chamber recalls its previous decisions,<sup>60</sup> as well as prior jurisprudence of the Court,<sup>61</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>62</sup>

24. The abovementioned requirements are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.<sup>63</sup> There is no prescribed order in which the requirements must be considered.

25. 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.

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<sup>60</sup> See 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) (ICC-01/14-01/21-575-Conf), 16 December 2022, paras 20-23. A public redaction version of the decision was published on 21 December 2022 ([ICC-01/14-01/21-575-Red](#)); 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), 8 April 2022, [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>61</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 (the ‘Ongwen Decision’).

<sup>62</sup> See, for example, [Bemba Decision](#), para. 4; [Ongwen Decision](#), para. 8.

<sup>63</sup> Trial Chamber II, *Prosecutor v. Yekatom and Ngaïssona*, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, 24 May 2019, [ICC-01/14-01/18-206](#), para. 11; Pre-Trial Chamber I, *Situation in Democratic Republic of the Congo*, Decision On The Prosecution’s Application For Leave To Appeal The Chamber’s Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6, 31 March 2006, [ICC-01/04-135-tEN](#), para. 28; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, [ICC-01/04-01/06-1191](#), para. 10 (the ‘Lubanga Decision’).

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>64</sup>

26. The Chamber emphasises that ‘the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.’<sup>65</sup>

27. The Chamber observes that the Appeals Chamber has stated that ‘the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.’<sup>66</sup> The Appeals Chamber has clarified that a ‘wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.’<sup>67</sup>

28. In addition, it is relevant to stress that the term ‘proceedings’ in the second part of article 82(1)(d) of the Statute refers to the proceedings in their entirety.<sup>68</sup> Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage – as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.<sup>69</sup> Indeed, such interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.<sup>70</sup>

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<sup>64</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 (the ‘Appeals Chamber Decision of 13 July 2006’).

<sup>65</sup> Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58, 19 August 2008, [ICC-02/04-01/05-20-US-Exp](#) (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21.

<sup>66</sup> [Appeals Chamber Decision of 13 July 2006](#), para. 19.

<sup>67</sup> [Appeals Chamber Decision of 13 July 2006](#), para. 16.

<sup>68</sup> *Situation in the Democratic Republic of Congo*, Judgement 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. 17.

<sup>69</sup> [Lubanga Decision](#), para. 12.

<sup>70</sup> [Lubanga Decision](#), paras 12-13.

#### IV. ANALYSIS

29. The Chamber finds that the issues identified in the Request do not satisfy the cumulative requirements of article 82(1)(d) of the Statute. The Chamber notes that, even if the Impugned Decision contained the alleged errors as outlined by the Defence, the outcome of the Impugned Decision would have been the same, and would not constitute a setback to the proceedings so as to leave the Impugned Decision fraught with error to cloud or unravel the judicial process.

30. The Chamber notes that the Defence advances two arguments to demonstrate that immediate resolution of the issues would concretely affect the fair and expeditious conduct of the proceedings or the outcome of the trial. First, the Defence submits that granting anonymity to the witnesses makes it more difficult for it to conduct investigations.<sup>71</sup> In this regard, the Defence explains that if the witnesses' identities are not kept confidential, the Defence will be in a better position to broach various topics of the witnesses' testimony more freely and without fear of exposing them as persons of interest in the context of the proceedings.<sup>72</sup> Second, the Defence argues that if it is not able to cross-examine witnesses under appropriate conditions, any judgment ultimately rendered will have been done so without the Defence being able to fully challenge the Prosecution's evidence.<sup>73</sup>

31. The Chamber is not convinced by either of the Defence's arguments.

32. In respect of the Defence's first argument, the Chamber notes that the Defence made a similar submission in its response to the Prosecution's second request for in-court protective measures,<sup>74</sup> which the Chamber took into consideration when rendering the Impugned Decision. While the Chamber acknowledges that the granting of in-court protective measures may require the parties to exercise more caution when questioning witnesses, the procedural inconvenience caused (to both the Defence and the Prosecution) is outweighed by the importance of warranting protection of the witnesses' identity, particularly in light of the objectively justifiable risks that exist in

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<sup>71</sup> [Request](#), paras 40-41.

<sup>72</sup> [Request](#), paras 40-41.

<sup>73</sup> [Request](#), para. 42.

<sup>74</sup> Réponse de la Défense à la « Prosecution's Second Request for In-Court Protective Measures » (ICC01/14-01/21-577-Conf), ICC-01/14-01/21-580-Conf, para. 20. A public-redacted version was filed on 23 January 2023 ([ICC-01/14-01/21-580-Red](#)).

the present case. The Chamber notes, in this regard, that the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant does not prohibit the disclosure of the identity of protected witnesses during the investigation if there is a genuine need for this.<sup>75</sup> The Chamber acknowledges that the prohibition on disclosing the witnesses' involvement with the activities of the Court could make the Defence's task more challenging, but it does not find that this raises an insurmountable obstacle for the Defence to conduct effective investigations which may affect the rights of the accused. The Chamber also notes that the Defence failed to explain how the investigative limitations will in fact impede its ability to identify and collect evidence that is essential to its case.

33. With regard to the Defence's second argument, the Chamber notes that its decision to grant protective measures to the witnesses that are the subject of the Impugned Decision does not in and of itself affect the substance of said witnesses' eventual testimony nor does it dictate the manner in which parties are to conduct themselves at trial or the topics they choose to discuss with the witnesses. As such, the Chamber rejects the Defence's argument.

34. Therefore, the Chamber is of the view that the Defence has failed to demonstrate at least two of the requirements necessary under article 82(1)(d) of the Statute, namely: that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and, that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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<sup>75</sup> See Chambers Practice Manual, 6<sup>th</sup> edition, Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, para. 11.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.



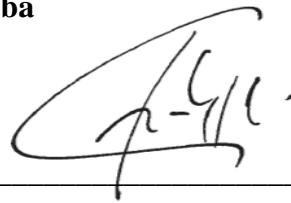
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**Judge Miatta Maria Samba**  
**Presiding Judge**



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**Judge María del Socorro Flores Liera**



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**Judge Sergio Gerardo Ugalde Godínez**

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

Dated 8 June 2023

At The Hague, The Netherlands