

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 November 2023**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**Public redacted version of “Prosecution’s Reply to “Réponse de la Défense à la
« Prosecution’s request to summon a witness », 13 November 2023, ICC-01/14-01/21-
641-Conf”, ICC-01/14-01/21-646-Conf, dated 17 November 2023**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution replies to the “Réponse de la Défense à la « Prosecution’s request to summon a witness” (“Defence Response”).¹
2. The Defence Response is a misrepresentation of the express instruction given to the Prosecution by Trial Chamber VI (“Chamber”) in its “Decision on the Prosecution’s requests under Rule 68(2)(c) to introduce the prior recorded testimony of two witnesses” (“impugned decision”),² and on this premise should be rejected entirely by the Chamber.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(2) of the Regulations of the Court, this reply is classified as confidential since it refers to a document with the same classification. The Prosecution will file a public redacted version as soon as practicable.

III. APPLICABLE LAW

4. Article 64(6) (b) of the Rome Statute (“Statute”) provides:

[in] performing its functions prior to trial or during the course of the trial, the trial Chamber may, as necessary: [...] (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.
5. As previously submitted in the Prosecution’s Request to Summon a Witness (“Prosecution’s Request”),³ the Chambers of this Court have the power to compel the testimony of witnesses pursuant to article 64(6)(b) of the Statute.⁴ Pursuant to a Chamber’s request, States Parties also have a legal obligation to, *inter alia*, serve

¹ ICC-01/14-01/21-641-Conf.

² ICC-01/14-01/21-637-Conf, para.17.

³ ICC-01/14-01/21-638-Conf, para. 5.

⁴ ICC-01/09-01/11-1598, paras. 107, 113.

summons and compel witnesses to appear in domestic courts to give testimony before a Trial Chamber *in situ* or via video-link, pursuant to article 93(1)(b).⁵

6. To come to an assessment regarding the necessity of such summons and of compelling the person in question to appear before the Court, either sitting *in situ* in the territory of a State Party or appearing via video-link, the Chamber must be satisfied that the request fulfils the three criteria of relevance, specificity and necessity.⁶ These criteria were pleaded in the Prosecution's Request and the tripartite requirements duly met.⁷

IV. SUBMISSIONS

7. The Chamber in the impugned decision, regarding the Prosecution's request to introduce into evidence the prior testimony of P-0975 pursuant to rule 68(2)(c), concluded that "while the information provided by the Prosecution explains the attempts it made to locate the witness, it does not explain why it believes that further efforts, including through requesting cooperation of the CAR authorities or a summons for the witness' appearance, would not be reasonably likely to succeed".⁸
8. On the basis of this conclusion, the Chamber then instructed the Prosecution to take further steps to ascertain the whereabouts of Witness P-0975 including by requesting a summons or state cooperation, as appropriate, and to report to the Chamber by 20 November 2023.⁹ By filing the Prosecution's Request on 19 October 2023, this express instruction was duly complied with by the Prosecution.

⁵ ICC-01/09-01/11-1598, paras. 2, 128, 132; *see also* para 123; ICC-01/05-01/13-1343-Red, para 17.

⁶ ICC-01/14-01/18-804-Conf, para 14.

⁷ ICC-01/14-01/21-638-Conf, paras. 8-20.

⁸ ICC-01/14-01/21-637-Conf, para. 15.

⁹ ICC-01/14-01/21-637-Conf, para.17.

9. Summons requests by the Prosecution have been granted by the Chambers of this Court before.¹⁰ In the *Yekatom and Ngaïssona* case, [REDACTED],¹¹ [REDACTED].¹² [REDACTED].¹³
10. In the *Gicheru* case, the Trial Chamber granted the request and in reaching its determination that the standard criteria of relevance, specificity and necessity were met, noted that the Prosecution had interviewed the witness in relation to the proceedings and that as such their expected testimony would be relevant to the proceedings.¹⁴ The Chamber similarly found that the cooperation request was sufficiently specific in stating the identity of the witness that the Prosecution requested to be summoned, as well as identifying the Country of Residence.¹⁵ The Chamber also found, in addition to the witness' previous interactions with the Court and on the basis of the Prosecution having explained its limited means of communication and that the witness seemed to have ceased all communication, that the request was necessary in order to obtain the testimony of the witness.¹⁶
11. Paragraphs 18-33 of the Defence Response are predominantly a repetition of the findings of the Chamber in the impugned decision. The Defence's allegations regarding doubt as to whether or not the witness is currently in CAR,¹⁷ and that the specificity and necessity criteria for a summons request are not met,¹⁸ are unfounded. As previously submitted in the Prosecution's Request, P-0975's last known whereabouts are [REDACTED] where it is believed he resided in 2022.¹⁹

¹⁰ *Yekatom and Ngaïssona* Decision on the Prosecution Requests to Summon witnesses P-2602 and P-2269, ICC-01/14-01/18-1738-Conf; *Gicheru* Decision on the Request for a Summons for a Prosecution Witness, ICC-01/09-01/20-279-Red; *Gicheru* Decision on the Prosecution Request for a Summons for P-0743, ICC-01/09-01/20-272-Red; *Yekatom and Ngaïssona* Decision on the Prosecution Request to Summon a Witness, ICC-01/14-01/18-804-Conf.

¹¹ ICC-01/14-01/18-1738-Conf, paras. 9 & 13.

¹² ICC-01/14-01/18-1738-Conf, paras. 10, 12 & 14.

¹³ ICC-01/14-01/18-1738-Conf, para. 11.

¹⁴ ICC-01/09-01/20-279-Red, para. 13.

¹⁵ ICC-01/09-01/20-279-Red, para. 14.

¹⁶ ICC-01/09-01/20-279-Red, para. 15.

¹⁷ ICC-01/14-01/21-641-Conf, paras. 26 & 29.

¹⁸ ICC-01/14-01/21-641-Conf, paras. 29-32.

¹⁹ ICC-01/14-01/21-638-Conf, para. 10.

Moreover the Prosecution has explained what further efforts it has made to establish communication with and locate the witness since that time and why those efforts have all been unfruitful.²⁰ Furthermore, the Prosecution has sufficiently submitted at paragraphs 8 to 20 of the Prosecution's Request in this case, that the tripartite principles of relevance, specificity and necessity are met in relation to the summons request for witness P-0975.²¹

12. The Defence Response thus takes issue with the instruction given to the Prosecution in the impugned decision, and wants the Prosecution to disregard the express instruction of the Chamber. It also misrepresents the Chamber's instruction as limiting the Prosecution to merely taking further steps to ascertain the whereabouts of Witness P-0975 and reporting to the Chamber by 20 November 2023.²² Given its narrow reading of the Chamber's instruction, it appears the Defence is not satisfied with the impugned decision, the appropriate remedy therefore was an application for a reconsideration of the impugned decision shortly after it was issued, in October 2023.
13. This Court has consistently held that "reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. **New facts** (emphasis added) and arguments arising since the decision was rendered may be relevant to this assessment. A request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber. However if new facts are matters which the Chamber would have taken into account when arriving at the impugned decision, then it is clearly in the interests of justice that the Chamber considers whether those facts would provide good and sufficient reason to alter that

²⁰ ICC-01/14-01/21-638-Conf, paras. 11-19.

²¹ ICC-01/14-01/21-638-Conf, paras. 8-20.

²² ICC-01/14-01/21-641-Conf, para. 4.

decision.”²³ In *Katanga* the Chamber also determined that “reconsideration of a decision is appropriate when such a decision is manifestly unsound and its consequences manifestly unsatisfactory (...). It is for the requesting party to demonstrate the appropriateness of such measure.”²⁴

14. The Defence Response does not present any new facts and arguments arising since the decision was rendered that may merit the Chamber’s rejection of the Prosecution’s Request. The Defence neither demonstrated that the impugned decision was manifestly unsound and its consequences manifestly unsatisfactory, nor that the decision was a clear error of reasoning and that its reconsideration is necessary to prevent an injustice. The Defence Response should therefore be dismissed in its entirety by the Chamber.

V. RELIEF REQUESTED

15. The Prosecution respectfully requests the Chamber to dismiss the Defence Response in its entirety.



Karim A. A. Khan KC, Prosecutor

Dated this 20th day of November 2023
At The Hague, The Netherlands

²³ *Abd-Al-Rahman* (‘*Ali Kushayb*’) Decision on the Defence’s Request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, ICC-02/05/01/20-650-Conf, para 10; ICC-02/05-01/20-1024-Conf, paras. 4, 10-11; *Al Hassan* Reconsideration Decision, ICC-01/12-01/18-734, para. 11; *Ntaganda* Reconsideration Decision, ICC-01/04-02/06-2241, para. 4; *Ongwen* Reconsideration Decision, ICC-02/04-01/15-468, para. 4.

²⁴ *Katanga*, Decision on ‘Defence application for reconsideration of the Presidency “Decision pursuant to article 108(1) of the Rome Statute” (ICC-01/04-01/07-3821-Red), ICC-01/04-01/07-3833, para.25.