

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 March 2024

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 Third 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

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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*, having regard to articles 64(2), 64(6)(e), 64(7), 67(1), 68 and 82(1)(d) of the Rome Statute (the ‘Statute’), and rules 87 and 88 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Defence’s Request for Leave to Appeal the “Decision on the Prosecution’s Third Request for In-Court Protective Measures”’.

I. PROCEDURAL HISTORY

1. On 1 May 2023, the Defence filed a request for leave to appeal the Decision on the Prosecution Second Request for In-Court Protective Measures (the ‘Defence Request for Leave to Appeal the Second Protective Measures Decision’).¹
2. On 7 June 2023, the Chamber issued its Decision on the Defence’s Request for Leave to Appeal the Decision on the Prosecution Second Request for In-Court Protective Measures (the ‘Decision on Leave to Appeal the Second Protective Measures Decision’).²
3. On 5 March 2024, the Chamber issued the Decision on the Prosecution’s Third Request for In-Court Protective Measures (the ‘Impugned Decision’).³
4. On 11 March 2024, the Defence filed a request for leave to appeal the Impugned Decision, identifying three issues for appeal (the ‘Request’).⁴

¹ Version publique expurgée de la « 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) » (ICC-01/14-01/21-607-Conf), 10 May 2023, [ICC-01/14-01/21-607-Red](#). A confidential version was filed on 1 May 2023 (ICC-01/14-01/21-607-Conf).

² 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”, 8 June 2023, [ICC-01/14-01/21-614-Red](#). A confidential version was filed on 7 June 2023 (ICC-01/14-01/21-614-Conf).

³ Public Redacted version of the Decision on the Prosecution’s Third Request for In-Court Protective Measures, 5 March 2024, [ICC-01/14-01/21-714-Red](#). A confidential version was filed simultaneously (ICC-01/14-01/21-714-Conf).

⁴ Version publique expurgée de la « Demande d’autorisation d’interjeter appel de la « Decision on the Prosecution’s Third Request for In-Court Protective Measures » (ICC-01/14-01/21-714-Conf) ». (ICC-01/14-01/21-718-Conf, 14 March 2024, [ICC-01/14-01/21-718-Red](#). A confidential version was filed on 11 March 2024 (ICC-01/14-01/21-718-Conf).

5. On 15 March 2024, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request (the ‘Response’).⁵ The Common Legal Representative of Victims did not respond to the Request.

II. SUBMISSIONS

6. In the Request, the Defence makes reference to the openness of the proceedings as a fundamental principle of criminal procedure, noting that the Chamber’s decisions granting protective measures makes the trial impossible for an observer to follow and has a significant impact on the Defence’s ability to cross examine witnesses in a manner which respects the right to a fair trial.⁶

7. The Defence submits that the Chamber erred in law by failing to state reasons for the way in which it took into account the requirement of respect for the principle of the publicity of the proceedings (the ‘First Issue’).⁷ Specifically the Defence notes that in the Impugned Decision the Chamber made reference to the publicity of the proceedings being a factor in deciding whether to grant protective measures, however, the Defence submits that the Chamber did not give any indication of how it took this principle into account and, to the contrary, appears to have not taken it into account.⁸

8. Furthermore, the Defence avers that the Chamber failed to take into account the principle of the publicity of the proceedings on the basis of the erroneous argument that the parties make protective measures necessary because they question witnesses extensively on their personal background. According to the Defence, it is inherent and inevitable that all witnesses must be questioned on their personal background in order to assess their credibility and understand their evidence.⁹ In this regard, the Defence claims that it is impossible to question some witnesses about what happened to them

⁵ Prosecution Response to the Defence “Application for leave to appeal the ‘Decision on the Prosecution’s Third Request for In-Court Protective Measures, ICC-01/14-01/21-714-CONF’”, 15 March 2024, ICC-01/14-01/21-723-Conf.

⁶ Request, [ICC-01/14-01/21-718-Red](#), paras 10-12.

⁷ Request, [ICC-01/14-01/21-718-Red](#), p. 7.

⁸ Request, [ICC-01/14-01/21-718-Red](#), paras 14-16, 19.

⁹ Request, [ICC-01/14-01/21-718-Red](#), paras 17-18.

without discussing their personal background or the personal context of their testimony since all issues are intrinsically linked.¹⁰

9. Taking the above into consideration, the Defence submits that the question of what weight the Chamber attached to the publicity of the proceedings was not addressed, which in turn constitutes a failure to state reasons, amounting to an error of law.¹¹

10. The Defence submits that the second issue for appeal is whether the Chamber applied the correct standard of proof for granting protective measures on the basis of assertions that were not substantiated, current and unrelated to the proceedings (the ‘Second Issue’).¹² Specifically, the Defence submits that the Impugned Decision is based on an assumption regarding the security situation which is not justified and therefore does not amount to an objective risk.¹³ Similarly, the Defence notes that the general security situation in the Central African Republic is relied upon without demonstrating a link between the security situation and the present proceedings or the specific situation of witnesses.¹⁴ Furthermore, the Defence avers that in the Impugned Decision the Chamber took the witness’s allegations about threats he suffered at face value and no information was provided concerning any verification of these threats and that the allegations at present date back several years.¹⁵

11. Last, the Defence submits that the Chamber erred in law by basing its decision on the witness’s choice to seek protective measures (the ‘Third Issue’).¹⁶ In this regard, the Defence submits that this approach renders meaningless the entire law applicable to the granting of protective measures and the principle of the publicity of hearings.¹⁷ The Defence avers that to follow the logic in the Impugned Decision allows witnesses

¹⁰ Request, [ICC-01/14-01/21-718-Red](#), para. 18.

¹¹ Request, [ICC-01/14-01/21-718-Red](#), para. 19.

¹² Request, [ICC-01/14-01/21-718-Red](#), p. 9.

¹³ Request, [ICC-01/14-01/21-718-Red](#), paras 22-23.

¹⁴ Request, [ICC-01/14-01/21-718-Red](#), para. 26.

¹⁵ Request, [ICC-01/14-01/21-718-Red](#), paras 24-25, 27

¹⁶ Request, [ICC-01/14-01/21-718-Red](#), p. 11.

¹⁷ Request, [ICC-01/14-01/21-718-Red](#), para. 31.

to decide, for their personal convenience, that they do not want to be heard publicly and therefore limit the accused's right to a public trial.¹⁸

12. The Defence submits that the issues identified for leave to appeal significantly affect the fair and expeditious conduct of the proceedings and outcome of the trial, and an immediate resolution by the Appeals Chamber may materially advance proceedings. In support of this contention, the Defence avers that it must be able to conduct its investigative work in an informed manner and it is easier to interview persons if the identities of witnesses are not secret.¹⁹ In addition, the Defence submits that if it cannot cross examine in a proper manner the Judgment could be rendered without the Defence having had a full opportunity to challenge the Prosecution's case.²⁰ Furthermore, the Defence submits that if the Appeals Chamber is not seized now then the witness could come and testify without protective measures being objectively justified, thereby creating a situation where the witness knows that their testimony is not available to the public.²¹

13. In the Response, the Prosecution submits that the Request should be rejected 'because it fails to identify any appealable issue'²² and instead 'repeats arguments that have already been considered and rejected by the Chamber.'²³

14. In respect of the First Issue, the Prosecution avers that it 'does not arise from the [Impugned Decision] since the Chamber provided sufficient reasons underpinning [the Impugned Decision].'²⁴ Specifically, the Prosecution notes that 'the Chamber correctly recognised that in determining whether or not to apply protective measures to P-2504, two competing interests needed to be balanced against each other'²⁵ and 'then expressly set out its reasons for concluding that the balance fell in favour of granting protective measures'.²⁶

¹⁸ Request, [ICC-01/14-01/21-718-Red](#), para. 31.

¹⁹ Request, [ICC-01/14-01/21-718-Red](#), para. 34.

²⁰ Request, [ICC-01/14-01/21-718-Red](#), para. 35.

²¹ Request, [ICC-01/14-01/21-718-Red](#), para. 36.

²² Response, ICC-01/14-01/21-723-Conf, para. 1.

²³ Response, ICC-01/14-01/21-723-Conf, para. 2.

²⁴ Response, ICC-01/14-01/21-723-Conf, para. 7.

²⁵ Response, ICC-01/14-01/21-723-Conf, para. 8.

²⁶ Response, ICC-01/14-01/21-723-Conf, para. 9.

15. The Prosecution further submits that the Defence's reading of the Impugned Decision is 'inaccurate',²⁷ noting, *inter alia*, that the Defence's submission that 'protective measures impact the Defence's ability to test the evidence or credibility of P-2504 through cross-examination is untenable' as such measures 'shield a witness's identity from members of the public at large not from the Defence.'²⁸ In addition, the Prosecution notes that the Defence does not explain why it is 'unable to ask the majority of its questions in public session' and it is 'up to the Defence to organise and structure its questioning of the Witness in a manner that limits the need for private sessions.'²⁹

16. In respect of the Second Issue, the Prosecution submits that it is 'not an appealable issue' as it is 'the result of the Defence's misunderstanding of the applicable law.'³⁰ In this regard, the Prosecution avers that the Chamber has 'broad discretion in determining what information to rely on' in order to be satisfied that there is an objectively justifiable risk.³¹ In respect of P-2504, the Prosecution submits that [a]ll factors considered by the Chamber were proper and relevant since they all impacted the objective risk to P-2504.'³²

17. In respect of the Third Issue, the Prosecution argues that it is 'predicated on a misunderstanding of the [Impugned Decision]'.³³ Specifically, the Prosecution submits that the Chamber 'did not apply a "subjective test" as alleged',³⁴ noting that the Chamber's determination was based on 'objective factors, establishing an objectively justifiable risk to P-2504' as 'expressed in paragraph 24 of the [Impugned Decision]'.³⁵

18. Last, the Prosecution submits that, in addition to its submissions that the aforementioned issues do not constitute appealable issues, 'the Defence fails to establish that any of the issues it identified significantly affects the fair and expeditious conduct of the proceedings and requires an immediate resolution by the Appeals

²⁷ Response, ICC-01/14-01/21-723-Conf, para. 11.

²⁸ Response, ICC-01/14-01/21-723-Conf, para. 12.

²⁹ Response, ICC-01/14-01/21-723-Conf, para. 13.

³⁰ Response, ICC-01/14-01/21-723-Conf, para. 15.

³¹ Response, ICC-01/14-01/21-723-Conf, para. 16.

³² Response, ICC-01/14-01/21-723-Conf, para. 18.

³³ Response, ICC-01/14-01/21-723-Conf, para. 21.

³⁴ Response, ICC-01/14-01/21-723-Conf, para. 23.

³⁵ Response, ICC-01/14-01/21-723-Conf, para. 24.

Chamber.’³⁶ In particular, the Prosecution argues that the Request: (i) ‘fails to credibly demonstrate that Mr Said will suffer any prejudice by the imposition of protective measure to P-2504’;³⁷ (ii) ‘does not show how the protective measures impact its ability to effectively cross-examine the Witness’;³⁸ and (iii) ‘the outcome of the trial cannot be affected by protective measures being applied, since P-2504’s identity is not being shielded from the Defence, Parties or the Court and because the Chamber will consider P-2504’s testimony in full.’³⁹

III. APPLICABLE LAW

19. The Chamber recalls its previous decisions,⁴⁰ as well as prior jurisprudence of the Court, regarding the application of article 82(1)(d) of the Statute.⁴¹ The Chamber adopts its findings as set out in its previous decisions on requests for leave to appeal for the purposes of the present decision.

³⁶ Response, ICC-01/14-01/21-723-Conf, paras 25-26.

³⁷ Response, ICC-01/14-01/21-723-Conf, para. 26.

³⁸ Response, ICC-01/14-01/21-723-Conf, para. 26.

³⁹ Response, ICC-01/14-01/21-723-Conf, para. 26.

⁴⁰ See Decision on the Defence’s Request for Leave to Appeal the ‘Decision on Mr Said’s Fitness to Stand Trial’ and Further Directions on Sitting Schedule, 17 January 2024, [ICC-01/14-01/21-672](#), para. 22; Decision on the Defence’s Request for Leave to Appeal the “Decision on the Prosecution Second Request for In-Court Protective Measures”, 7 June 2023, [ICC-01/14-01/21-614-Red](#), paras 23-28; 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), 21 December 2022, [ICC-01/14-01/21-575-Red](#), paras 20-23; 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

⁴¹ 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; 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.

IV. ANALYSIS

20. For the reasons that follow the Chamber finds that the Request must be rejected in its entirety.

21. At the outset, the Chamber observes that the Defence's submissions and issues identified for leave to appeal have, to a large extent, been previously raised in the Defence Request for Leave to Appeal the Second Protective Measures Decision,⁴² which the Chamber addressed and rejected in the Decision on Leave to Appeal the Second Protective Measures Decision.⁴³ In this regard, the Chamber notes that the Defence repeats, at times verbatim, submissions from the Defence Request for Leave to Appeal the Second Protective Measures Decision.⁴⁴

22. The Chamber finds that the issues identified in the Request do not satisfy the cumulative requirements of article 82(1)(d) of the Statute. As in the Defence Request for Leave to Appeal the Second Protective Measures Decision,⁴⁵ the Defence advances two arguments in support of the contention that an immediate resolution of the issues would concretely affect the fair and expeditious conduct of proceedings or the outcome of the trial, namely: (i) granting anonymity to witnesses makes it more difficult for the Defence to conduct its investigations⁴⁶ and; (ii) if the Defence is unable to cross examine witnesses under appropriate conditions then any judgment rendered will be without the Defence having a full opportunity to challenge the Prosecution's case.⁴⁷ The Chamber continues to be unconvinced by the Defence's arguments in this regard

⁴² See Defence Request for Leave to Appeal the Second Protective Measures Decision, [ICC-01/14-01/21-607-Red](#), paras 13-39.

⁴³ See Decision on Leave to Appeal the Second Protective Measures Decision, , [ICC-01/14-01/21-614-Red](#), paras 29-34.

⁴⁴ See, for example, Defence Request for Leave to Appeal the Second Protective Measures Decision, [ICC-01/14-01/21-607-Red](#), paras 13-14 and Request, [ICC-01/14-01/21-718-Red](#), paras 14-15; Defence Request for Leave to Appeal the Second Protective Measures Decision, [ICC-01/14-01/21-607-Red](#), paras 16-27 and Request, [ICC-01/14-01/21-718-Red](#), paras 30-28.

⁴⁵ See Defence Request for Leave to Appeal the Second Protective Measures Decision, [ICC-01/14-01/21-607-Red](#), paras 40-45.

⁴⁶ Request, [ICC-01/14-01/21-718-Red](#), para. 34.

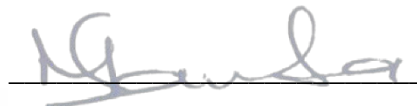
⁴⁷ Request, [ICC-01/14-01/21-718-Red](#), para. 35.

and refers to its previous findings in the Decision on Leave to Appeal the Second Protective Measures Decision.⁴⁸

23. Accordingly, the Chamber finds 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 issues 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 proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

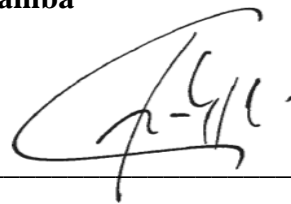


Judge Miatta Maria Samba

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 19 March 2024

At The Hague, The Netherlands

⁴⁸ Decision on Leave to Appeal the Second Protective Measures Decision, [ICC-01/14-01/21-614-Red](#), paras 30-34.