

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 11 March 2025**

**TRIAL CHAMBER VI**

**Before:**

**Judge Miatta Maria Samba, Presiding Judge  
Judge María del Socorro Flores Liera  
Judge Sergio Gerardo Ugalde Godínez  
Judge Keebong Paek, Alternate Judge**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**

***THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public**

**Decision on the Prosecution's Request for an Order to Exclude Defence Counsel  
from the Defence's List of Witnesses and Evidence**

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

**The Office of the Prosecutor**

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**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**

**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) and 67 of the Rome Statute (the ‘Statute’), regulation 67(1) of the Regulations of the Court, regulations 123(1), 137, 138, and 139 of the Regulations of the Registry, and articles 1, 2, 6, 12(3), and 16 of the Code of Professional Conduct for Counsel (the ‘Code of Conduct’), issues this ‘Decision on the Prosecution’s Request for an Order to Exclude Defence Counsel from the Defence’s List of Witnesses and Evidence’.

## I. PROCEDURAL HISTORY

1. On 8 October 2024, the Chamber issued the ‘Third Directions on the Conduct of Proceedings’.<sup>1</sup> Therein, the Chamber ordered, *inter alia*, the Defence to file its final list of witnesses, final list of evidence and complete the final disclosure of items it intends to use during its case no later than 21 February 2025.<sup>2</sup>
2. On 17 January 2025, the Defence provided a preliminary list of seven witnesses, one of whom the Defence would call to testify *viva voce*, noting, *inter alia*, that it had been experiencing a number of difficulties in compiling its list of witnesses.<sup>3</sup>
3. On 21 February 2025, the Defence filed its notification of its list of witnesses and evidence,<sup>4</sup> including associate counsel, Mr Dov Jacobs (‘Mr Jacobs’), in its list of witnesses.<sup>5</sup> In its summary of Mr Jacobs’ anticipated testimony, the Defence submits that Mr Jacobs is a legal professional with over 15 years of experience in international law, international criminal law, humanitarian law, and human rights and that his

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<sup>1</sup> Third Directions on the Conduct of Proceedings, 8 October 2024, [ICC-01/14-01/21-873](#).

<sup>2</sup> Third Directions on the Conduct of Proceedings, [ICC-01/14-01/21-873](#), paras 14-15.

<sup>3</sup> Version publique expurgée de la « Notification de la Défense conformément à la « Third Directions on the Conduct of Proceedings » (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024. » ICC-01/14-01/21-908-Conf-Exp, 3 February 2025, [ICC-01/14-01/21-908-Red, paras 8-12](#). A confidential *ex parte* version and a confidential redacted version were filed on 17 January 2025 respectively (ICC-01/14-01/21-908-Conf-Exp; ICC-01/14-01/21-908-Conf-Red).

<sup>4</sup> Notification de la liste de témoins et de la liste des éléments de preuve de la Défense conformément à la « Third Directions on the Conduct of Proceedings » (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024, with three confidential annexes (ICC-01/14-01/21-921-Conf-Anx1), (ICC-01/14-01/21-921-Conf-Anx2 – ‘Defence List of Witnesses’), and (ICC-01/14-01/21-921-Conf-Anx3 - ‘Summary of Anticipated Testimony’).

<sup>5</sup> See Defence List of Witnesses, ICC-01/14-01/21-921-Conf-Anx2.

anticipated testimony would relate to a mission the Defence conducted in Bangui in May 2024, which included visits to the *Tribunal de Grande Instance de Bangui* (the ‘TGI’) and the *Office Central de Répression du Banditisme* (the ‘OCRB’).<sup>6</sup>

4. On 25 February 2025, the Chamber invited the parties and participants to submit any observations regarding counsel testifying in the current proceedings by 28 February 2025.<sup>7</sup>

5. On 28 February 2025, the Office of the Prosecutor (the ‘Prosecution’) submitted a request for the Chamber to exclude Mr Jacobs from the Defence’s list of witnesses and evidence (the ‘Request’).<sup>8</sup>

6. On 28 February 2025, the Common Legal Representative of Victims (the ‘CLR’) submitted its observations regarding the Defence’s notification of its list of witnesses (the ‘Victims’ Response’).<sup>9</sup>

7. On 28 February 2025, the Defence filed its observations relating to the anticipated testimony to be offered by Mr Jacobs and provided its response to the Request (the ‘Response’).<sup>10</sup>

## II. SUBMISSIONS

### A. Request

8. The Prosecution makes a number of submissions in support of its Request.

9. First, the Prosecution submits that article 12(3) of the Code of Conduct impedes a counsel from: (i) representing a client in proceedings in which there is substantial

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<sup>6</sup> See Summary of Anticipated Testimony, ICC-01/14-01/21-921-Conf-Anx3, p. 11.

<sup>7</sup> Email from the Chamber to the Parties and Participants, dated 25 February 2025, at 12:37.

<sup>8</sup> Prosecution Request to order the Defence to exclude Defence Counsel Dov Jacobs from its List of Witnesses and Evidence, 28 February 2025, [ICC-01/14-01/21-928](#) (‘Request’).

<sup>9</sup> Public redacted version of “Victims’ Observations regarding the Defence’s Notification of its List of Witnesses”, ICC-01/14-01/21-929-Conf, dated 28 February 2025, 5 March 2025, [ICC-01/14-01/21-929-Red](#) (‘Victims’ Response’). A confidential version was filed on 28 February 2025 (ICC-01/14-01/21-929-Conf).

<sup>10</sup> Version publique expurgée des « Observations de la Défense sur le cadre du témoignage du Conseil Associé permettant d’assurer l’égalité des armes entre Accusation et Défense et le principe du contradictoire, garantis du procès équitable et réponse à la demande de l’Accusation ICC-01/14-01/21-928. », 7 March 2025, [ICC-01/14-01/21-930-Red](#) (‘Response’). A confidential version was filed on 28 February 2025 (ICC-01/14-01/21-930-Conf).

probability that counsel may be called to appear as a witness; and (ii) appearing as a witness in proceedings in which he is representing a client as a counsel.<sup>11</sup> The Prosecution notes that, despite knowing in May 2024 that ‘he may appear as a Defence witness in this case’, Mr Jacobs continued to act as counsel for Mr Said.<sup>12</sup> Accordingly, the Prosecution argues that Mr Jacobs should be barred from appearing as a witness for the Defence in a case in which he is the accused’s co-counsel.<sup>13</sup>

10. Second, the Prosecution avers that none of the exceptions to article 12(3) of the Code of Conduct apply in the present circumstances.<sup>14</sup> In particular, the Prosecution notes that Mr Jacobs’ anticipated testimony relates to contested issues in the case in that he is expected to provide evidence on the Defence’s May 2024 mission to Bangui and on information he gathered at the OCRB and the TGI.<sup>15</sup> Furthermore, the Prosecution observes that Mr Jacobs is ‘presumed to testify on criminal procedures adopted by the judicial authorities in Bangui during the charged period’ which, per the charges against the accused and the lines of cross-examination adopted by the Defence thus far in the proceedings, are matters that have been firmly contested in this case.<sup>16</sup> As a result, the Prosecution submits that ‘Mr Jacobs’ testimony goes to the substance of the case in which he is acting as Co-Counsel for the Accused’ which would therefore breach article 12(3) of the Code of Conduct.<sup>17</sup>

11. Third, the Prosecution submits that ‘Mr Jacobs’ impediment to appear as a witness in this case cannot be cured by either withdrawing from appearing as Counsel in this case, or by obtaining a full and informed consent in writing from the Accused [...]’.<sup>18</sup> In particular, the Prosecution notes that article 16 of the Code of Conduct

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<sup>11</sup> Request, [ICC-01/14-01/21-928](#), para. 13.

<sup>12</sup> Request, [ICC-01/14-01/21-928](#), para. 14.

<sup>13</sup> Request, [ICC-01/14-01/21-928](#), para. 14.

<sup>14</sup> Request, [ICC-01/14-01/21-928](#), paras 15-17; *see* article 12(3) of the ICC Code of Professional Conduct for Counsel (‘Code of Conduct’), which provides: ‘Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless: (a) The testimony relates to an uncontested issue; or (b) The testimony relates to the nature and value of legal services rendered in the case’.

<sup>15</sup> Request, [ICC-01/14-01/21-928](#), para. 15.

<sup>16</sup> Request, [ICC-01/14-01/21-928](#), para. 16.

<sup>17</sup> Request, [ICC-01/14-01/21-928](#), para. 17.

<sup>18</sup> Request, [ICC-01/14-01/21-928](#), para. 18, referring to article 16(3) of the Code of Conduct, which provides: ‘Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either: (a) Withdraw from the representation of one or more clients

requires that Counsel must exercise all care to ensure that no conflict of interest arises, and argues that, by accepting to testify in a case in which he is also acting as the accused's counsel, Mr Jacobs has failed to exercise all care to avoid any such conflict as required by the Code of Conduct.<sup>19</sup>

12. Fourth, the Prosecution submits that allowing Mr Jacobs to appear as a witness in the current proceedings 'is likely to result in irreversible prejudice to the administration of justice'.<sup>20</sup> According to the Prosecution, by May 2024, Mr Jacobs was in a position to know that there was a substantial probability that he could appear as a witness, and that his failure to promptly inform the Chamber and the parties of said probability is 'a serious and grave violation of the statute and Code of Conduct which affects the appearance of the integrity of the proceedings'.<sup>21</sup> In this regard, the Prosecution cites a decision by Trial Chamber I in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (the '*Gbagbo & Blé Goudé Case*') wherein the Chamber revoked the appointment of a Rule 74 counsel who had previously been assigned as counsel by the Prosecution in the same case.<sup>22</sup> The Prosecution highlights, in particular, that Trial Chamber I observed that the counsel in question's previous involvement in the case and his failure to promptly inform the Court, as well as the Prosecution's belated disclosure of the same, raised concerns regarding the appearance of the integrity of proceedings.<sup>23</sup>

13. The Prosecution further submits that 'Mr Jacobs' anticipated testimony is likely to result in irreversible prejudice to the administration of justice because it is influenced by him listening to the evidence of other witnesses' in these proceedings.<sup>24</sup> Specifically, the Prosecution notes that Mr Jacobs has cross-examined a number of witnesses and has had 'full and unfettered access to the transcripts of all the witnesses who have testified in this case' and argues that rule 140(3) of the Rules permits the exclusion of

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with the prior consent of the Chamber; or (b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.'

<sup>19</sup> Request, [ICC-01/14-01/21-928](#), para. 20.

<sup>20</sup> Request, [ICC-01/14-01/21-928](#), para. 21.

<sup>21</sup> Request, [ICC-01/14-01/21-928](#), para. 21.

<sup>22</sup> Request, [ICC-01/14-01/21-928](#), para. 22, referring to Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of Hearing, 6 March 2017, [ICC-02/11-01/15-T-129-Red2-ENG](#) ('Hearing Transcript of 6 March 2017 *Gbagbo & Blé Goudé*'), pp. 13-15.

<sup>23</sup> Request, [ICC-01/14-01/21-928](#), para. 22, referring to Hearing Transcript of 6 March 2017 *Gbagbo & Blé Goudé*, [ICC-02/11-01/15-T-129-Red2-ENG](#), pp. 13-15.

<sup>24</sup> Request, [ICC-01/14-01/21-928](#), para. 24.

witnesses who have not testified from the courtroom during evidence of other witnesses in the same proceedings so as to protect against the possibility that a witness may be influenced by the evidence of others.<sup>25</sup> The Prosecution argues that if Mr Jacobs is allowed to testify, it will be faced with the ‘legal impediment of not being able to cross-examine him fully as many issues will be protected under the Counsel-client’s privilege’, thereby resulting in irreversible prejudice to the administration of justice.<sup>26</sup>

14. Fifth, the Prosecution submits that Mr Jacobs’ testimony is not sufficiently unique so as to warrant his appearance as a witness, noting that the Defence could have instructed individuals not covered under article 12(3) of the Code of Conduct to gather evidence at the TGI and the OCRB in order to preserve the integrity and independence of their investigation and the evidence they collected.<sup>27</sup> The Prosecution notes that Mr Jacobs is not an expert witness and argues that the ‘Defence has not demonstrated extreme and rare circumstances that would make it necessary for Mr Jacobs to testify in these proceedings’.<sup>28</sup>

15. Last, the Prosecution argues that the prohibition on counsel appearing as a witness in the same proceedings is a sacrosanct principle that is embedded in the codes of conduct of counsel in various jurisdictions.<sup>29</sup>

## **B. Victims’ Response**

16. The CLRV opposes having Mr Jacobs appear as a witness in the current proceedings.<sup>30</sup>

17. First, the CLRV submits that article 12(3) of the Code of Conduct prohibits counsel from appearing as a witness before the Court in proceedings in which they represent a client, unless such testimony relates to an uncontested issue or the nature and value of legal services rendered in the case.<sup>31</sup> The CLRV notes that the Code of

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<sup>25</sup> Request, [ICC-01/14-01/21-928](#), paras 24-25, referring to Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo* Decision on “Prosecution’s Request for the Preservation of Evidence”, 21 November 2007, ICC-01/04-01/06-1040-Conf, para. 17.

<sup>26</sup> Request, [ICC-01/14-01/21-928](#), para. 26.

<sup>27</sup> Request, [ICC-01/14-01/21-928](#), para. 28.

<sup>28</sup> Request, [ICC-01/14-01/21-928](#), para. 29.

<sup>29</sup> Request, [ICC-01/14-01/21-928](#), paras 30-31.

<sup>30</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 10.

<sup>31</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 11.

Conduct is part of the Court’s applicable law under article 21(1)(a) of the Statute and may serve as an appropriate guide to fairness at trial, particularly in light of its purposes of ensuring that a person is suitable to act as counsel and of preventing conflicts of interest.<sup>32</sup>

18. The CLRV observes that the Defence ‘intends to call Defence Counsel to testify about a field mission conducted in May 2024 in Bangui, and, in particular, about the methodology followed and the information gathered during said mission’, and argues that Mr Jacobs’ anticipated testimony does not relate to any of the exceptions outlined in article 12(3) of the Code of Conduct.<sup>33</sup> The CLRV highlights that the codes of conduct of other international criminal tribunals contain ‘nearly identical provisions’ as that of article 12(3) of the Code of Conduct.<sup>34</sup> In this regard, the CLRV notes that, in the case of the *Prosecutor v. Gotovina et al.* before the International Criminal Tribunal for the former Yugoslavia, the analogous provision led to the withdrawal of Mladen Markač’s counsel due to the likelihood of that counsel being called as a witness.<sup>35</sup>

19. Second, the CLRV argues that allowing ‘both counsel and witness in the same proceedings raises significant questions of objectivity and credibility, greatly limiting the probative value of counsel’s testimony’.<sup>36</sup>

20. Last, the CLRV submits that Mr Jacobs is not a professional investigator, nor is his role in the proceedings compatible with that of an investigator, noting in particular that the investigators of the Court are bound by their own specific code of conduct (the ‘Code of Conduct for Investigators’).<sup>37</sup> Specifically, the CLRV claims that the Code of

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<sup>32</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 12, referring to Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, 10 November 2011, [ICC-01/09-02/11-365](#), paras 48, 51 (‘Muthaura OA3 Appeals Judgment’).

<sup>33</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 13.

<sup>34</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 14.

<sup>35</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 14, referring to International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *The Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović’s Interlocutory Appeal against Trial Chamber’s Decisions on Conflict of Interest and Finding of Misconduct”, 4 May 2007, paras 17-18.

<sup>36</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 15.

<sup>37</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 16, referring to the ICC Code of Conduct for Investigators, [ICC/AI/2008/005](#).



Conduct for Investigators ‘does not contain a prohibition for investigators to appear as witnesses’ and contains professional obligations that are ‘highly conducive to credible and reliable testimony, particularly regarding the methodology of their investigations’.<sup>38</sup> The CLRV argues that Mr Jacobs is not bound by said code, but instead must adhere to the Code of Conduct which requires him to ‘put his client’s interests above any other interests’.<sup>39</sup>

### C. Response

21. In the Response, the Defence requests that the Chamber reject the Request.<sup>40</sup> In so doing, the Defence makes a number of submissions.

22. First, the Defence submits that it modelled its decision to call Mr Jacobs on the Prosecution’s consistent practice of calling members of its office to testify.<sup>41</sup> The Defence points to a number of instances across different cases before this Court in which the Prosecution called its own investigators, coordinators, experts, or personnel to testify, and notes that in the current proceedings the Prosecution called three such members of its team to testify about their investigative work, methodology, and findings.<sup>42</sup>

23. The Defence notes that such Prosecution witnesses have extensive experience in testifying and in executing their employer’s (the Prosecution) assignments during fact-finding missions and submits that, at no time, were said witnesses asked to cease working due to their expectation of being called to testify in court.<sup>43</sup> The Defence submits that the same should apply for counsel before the Court who, in order to be on equal footing with the Prosecution, must be able to operate under the same conditions, that is to be able to present investigative findings through a witness.<sup>44</sup>

24. In this respect, the Defence submits that the Prosecution called one of its own analysts, P-3108, to testify in the current proceedings, who, the Defence notes, was

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<sup>38</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 17.

<sup>39</sup> Victims’ Response, [ICC-01/14-01/21-929-Red](#), para. 17.

<sup>40</sup> Response, [ICC-01/14-01/21-930-Red](#), p. 14.

<sup>41</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 11.

<sup>42</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 12-15.

<sup>43</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 17.

<sup>44</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 18.

regularly present in court assisting the Prosecution's trial lawyers during their examinations-in-chief and therefore was directly involved in the presentation and examination of evidence in this case.<sup>45</sup> The Defence also avers that P-3108 had involvement in the preparation of Prosecution witnesses prior to their in-court testimony, including P-0834, P-2573, P-0312, P-1263, P-2239, and P-0342, and was present during the taking of prior recorded testimony of witnesses P-1737 and P-1524.<sup>46</sup> The Defence argues that, despite P-3108 being aware that she would testify in the current proceedings, she was not transferred to another case or situation but continued to work for the Prosecution, including preparing witnesses who would later testify in this case.<sup>47</sup> Because of this, the Defence submits that it is incomprehensible that Mr Jacobs, who operates under the supervision of the lead counsel, should have ceased working on this case in light of the Prosecution's longstanding practice of having its own team members testify.<sup>48</sup>

25. Second, the Defence advances that the members of the Prosecution team who have testified have done so as salaried employees in the presence of their hierarchical superiors and colleagues without any issues.<sup>49</sup> The Defence notes that it naturally flows that such work involves a discussion between the members of the team for the purpose of determining if and how to use the results of investigative findings during trial, including questions relating to chain of custody.<sup>50</sup>

26. Third, the Defence argues that Mr Jacobs, as associate counsel, is appointed by the lead counsel, and therefore is not specifically instructed or retained by Mr Said.<sup>51</sup> In this regard, the Defence submits that Mr Jacobs does not execute Mr Said's instructions but rather responds to the lead counsel, further noting that Mr Said has not signed a representation agreement with Mr Jacobs<sup>52</sup> and that Mr Jacobs is appointed solely at the request of the lead counsel.<sup>53</sup> Accordingly, the Defence claims that Mr

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<sup>45</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 19.

<sup>46</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 19.

<sup>47</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 20.

<sup>48</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 21-22.

<sup>49</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 23, 26.

<sup>50</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 25, 27.

<sup>51</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 28.

<sup>52</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 30.

<sup>53</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 31.

Jacobs fulfils the same role as that of the members of the Prosecution's investigative team<sup>54</sup> and will, as a result, be in the same position of having to testify about issues such as the quality of his work and the manner in which evidence was collected during the fact-finding missions.<sup>55</sup>

27. Fourth, the Defence submits that the Defence's resource limitations necessitate the involvement of counsel in investigations and that failure to permit the Defence to utilise the same means at the disposal of the Prosecution (i.e., introducing, *inter alia*, testimony on investigative findings and methodology through available witnesses), would undermine the equality of arms.<sup>56</sup>

28. Fifth, responding to the Prosecution's argument that rule 140(3) of the Rules applies to the instant case, the Defence argues that, although the aforementioned rule provides that witnesses who have yet to testify shall not be present during the testimony of another witness, it explicitly excludes experts and investigators from said category of witnesses.<sup>57</sup> The Defence reiterates that defence counsel before this Court also occupy the role of investigator and suggests that it would be difficult to understand how and in which way Mr Jacobs' testimony would be influenced (as the Prosecution alleges) if Mr Jacobs testifies in a targeted manner regarding investigative acts he conducted under the supervision of the lead counsel.<sup>58</sup> The Defence argues that the inability of presenting evidence through counsel represents a near impossibility of introducing its investigative findings through a witness while the same barrier does not apply to the Prosecution.<sup>59</sup>

29. Sixth, the Defence argues that, contrary to the Prosecution's submission that the Defence could have instructed individuals not covered under article 12(3) of the Code of Conduct to gather evidence at the TGI and the OCRB, the Defence is under no obligation to instruct external personnel, given that the investigations are the

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<sup>54</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 30.

<sup>55</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 33.

<sup>56</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 34, 37.

<sup>57</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 39.

<sup>58</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 39.

<sup>59</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 38.

responsibility of the lead counsel and because the Prosecution itself proceeded in the same manner by relying on its own senior investigators.<sup>60</sup>

30. Seventh, the Defence submits that it would follow the same witness preparation protocol followed by the Prosecution in the context of its examinations-in-chief of its own team members, most notably by restricting any contact with the witness twenty-four hours prior to and through the end of the witness' testimony.<sup>61</sup> In this regard, the Defence asserts that Mr Jacobs, like the Prosecution witnesses, would not have contact with the lead counsel and the entire Defence team from twenty-four hours before his testimony as well as throughout the duration of his testimony, noting that it confirmed with the Victims and Witnesses Unit that the previously existing procedure would remain the same.<sup>62</sup>

31. Eighth, the Defence submits that Mr Jacobs will testify on matters identical to those covered by the relevant Prosecution witnesses and that the nature of Mr Jacobs' testimony falls within the requirements laid out in article 12(3) of the Code of Conduct.<sup>63</sup> The Defence reiterates that, if the Prosecution was permitted to call its own team members as witnesses to testify regarding fact-finding missions and evidence gathering they conducted at the TGI and the OCRB, then the Defence must also be allowed to call witnesses to discuss the methodology followed and investigative steps taken.<sup>64</sup> The Defence highlights that it never disputed the Prosecution's fact-finding missions to the TGI and the OCRB, but instead questioned the Prosecution's witnesses in court on said missions, and argue that the Defence should therefore have the right to submit its own findings regarding the measurements of certain areas, the location of offices where evidence was collected, and other matters.<sup>65</sup>

32. Furthermore, the Defence clarifies that Mr Jacobs' testimony will relate specifically to legal services rendered in the instant case in the context of investigations conducted and notes that the associate counsel is appointed via the Court's Legal Aid

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<sup>60</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 41.

<sup>61</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 43.

<sup>62</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 43.

<sup>63</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 44.

<sup>64</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 44.

<sup>65</sup> Response, [ICC-01/14-01/21-930-Red](#), paras 45-46.

Policy and is specifically remunerated for the purpose of conducting such investigations.<sup>66</sup> The Defence submits that, because Mr Jacobs' testimony will be limited to the explanation of the investigation (through his testimony) and an analysis of findings resulting therefrom, it falls within the exception outlined in the Code of Conduct and serves to guide the Chamber in its search for the truth.<sup>67</sup> Furthermore, the Defence submits that, because Mr Jacobs' testimony will relate to legal services rendered, there is no risk of disclosing information that would be protected by privilege.<sup>68</sup> The Defence avers that, just as the Prosecution's witnesses are able to testify about their missions without revealing confidential information pertaining to investigation efforts, it too can exercise the same duty of care.<sup>69</sup>

33. Last, the Defence submits that there is no real risk of a conflict of interest arising in the instant case.<sup>70</sup> In this regard, the Defence argues that the Prosecution incorrectly interprets the decision by Trial Chamber I in the *Gbagbo & Blé Goudé Case*, submitting that the situation at bar is different because there is only one client involved (as opposed to two in the *Gbagbo & Blé Goudé Case* per the Defence) and because Mr Jacobs does not have a representation agreement in place with Mr Said.<sup>71</sup>

### **III. APPLICABLE LAW**

34. The Chamber finds, *inter alia*, that the following provisions from the Code of Conduct are relevant for the present analysis:

#### **Article 6: Independence of counsel**

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:
  - (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or

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<sup>66</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 48.

<sup>67</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 49.

<sup>68</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 50.

<sup>69</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 50.

<sup>70</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 51.

<sup>71</sup> Response, [ICC-01/14-01/21-930-Red](#), para. 52.

(b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

**Article 12: Impediments to representation**

3. Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless:

(a) The testimony relates to an uncontested issue; or

(b) The testimony relates to the nature and value of legal services rendered in the case.

4. This article is without prejudice to article 16 of this Code.

**Article 16: Conflict of interest**

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, [...]'.<sup>72</sup>

**IV. ANALYSIS**

35. For the reasons outlined below, the Chamber grants the Request.

**A. The Nature of Mr Jacob's Role as Associate Counsel to Mr Said in the Current Proceedings**

36. The Chamber notes the Defence's argument that Mr Jacobs operates solely at the instruction of the lead counsel and fulfils the same roles and responsibilities as the Prosecution team members (for example, P-3108) who have testified thus far in these proceedings. For the following reasons, the Chamber rejects the Defence's position.

37. Contrary to the Defence's assertion, Mr Jacobs is not a mere member of the Defence team. In this regard, the Chamber observes that the notification of his appointment in April 2021 clearly states that Mr Jacobs 'has been appointed as Associate Counsel *for* Mr Mahamat Said Abdel Kani to *represent him* in proceedings before the Court'.<sup>72</sup> The Chamber further notes that Mr Jacobs was appointed as

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<sup>72</sup> Notification of the Appointment of Mr Dov Jacobs as Associate Counsel for Mr Mahamat Said Abdel Kani, 9 April 2021, [ICC-01/14-01/21-52](#), para. 1 (Emphasis added).

associate counsel for Mr Said pursuant to rule 67(1) of the Regulations of the Court<sup>73</sup> and regulation 123(1) of the Regulations of the Registry.<sup>74</sup> On his appointment in April 2021, Mr Jacobs gave a solemn undertaking, pursuant to article 5 of the Code of Conduct, to perform his duties as *associate counsel* independently and to be bound by the rules of professional secrecy and by the Code of Conduct.<sup>75</sup> The Chamber further notes that Mr Jacobs styles himself as Mr Said’s ‘co-counsel’ outside the court.<sup>76</sup>

38. Furthermore, since his appointment, Mr Jacobs has carried out a number of activities in furtherance of his mandate as associate counsel, including, *inter alia*: (i) leading the cross-examination of a significant number of Prosecution witnesses in this case; (ii) making regular submissions before the Chamber on a number of procedural and substantive issues throughout the course of this trial; and (iii) standing in for lead counsel on a number of occasions during her absence from the courtroom. In this regard, the Chamber finds that the Defence’s submissions regarding the professional relationship and working methods that may exist between Mr Jacobs and lead counsel have no bearing on Mr Jacobs’ status as associate counsel in these proceedings.

39. Accordingly, the Chamber considers that Mr Jacobs clearly occupies the role of associate counsel and is therefore indisputably bound by the Code of Conduct.

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<sup>73</sup> Regulation 67(1) of the Regulations of the Court provides: ‘Criteria to be met by counsel 1. Subject to regulation 78, sub-regulation 2, the necessary relevant experience for counsel as described in rule 22 shall be at least ten years for lead counsel and at least eight years for associate counsel.’

<sup>74</sup> Regulation 123(1) of the Regulations of the Registry provides: ‘The Registrar shall acknowledge the issuance of power of attorney or the appointment of counsel in writing, stating that he or she has been included in the list. The acknowledgment shall be notified to the person who has chosen the counsel, to the counsel, to the Chamber and to the competent authority exercising regulatory and disciplinary powers over counsel in the national order.’

<sup>75</sup> See Solemn undertakings executed pursuant to Article 5 and 22(3) of the Code of Professional Conduct for Counsel, 9 April 2021, [ICC-01/14-01/21-52-AnxII](#), p. 2. (Emphasis added).

<sup>76</sup> See Strategic International Legal Consulting, ‘Internship position – Said Defence team ICC’ (6 March 2025), <https://www.strategic-ilc.com/post/internship-position-said-defense-team-icc> (announcing that, ‘The Defense team of Mahamat Said at the International Criminal Court, lead by co-founders of SILC, Jennifer Naouri as Lead Counsel and Dov Jacobs as *co-Counsel*, is looking for an intern’ – Emphasis added); see also 9 Bedford Row, ‘Dr. Dov Jacobs’, <https://www.9brchambers.co.uk/our-people/dr-dov-jacobs/> (where Mr Jacobs is described as ‘co-Counsel for Mahamat Said’).

**B. The Code of Conduct Impedes Mr Jacobs from Testifying as a Witness in these Proceedings**

40. For the reasons outlined below, the Chamber considers that the Code of Conduct impedes Mr Jacobs from appearing as a witness in the present case.

41. At the outset, the Chamber reiterates that Mr Jacobs undertook to be bound by the Code of Conduct while executing his mandate as associate counsel in the proceedings before this Chamber. In particular, the Chamber observes that the Appeals Chamber has held that, even if a counsel is not acting as the lead counsel in proceedings before this Court, he or she is nonetheless practising before the Court as counsel within the meaning of article 1 of the Code of Conduct and is therefore bound by its provisions.<sup>77</sup>

42. The Chamber notes that article 12(3) of the Code of Conduct provides that counsel shall not act in proceedings in which there is a substantial probability that he or she will be called to appear as a witness. Notably, the Chamber observes that there is not only a substantial probability that Mr Jacobs will be called to appear as a witness in the current proceedings, but a verifiable and concrete eventuality as the Defence has included him in its list of *viva voce* witnesses and that he, if permitted, would indeed testify before the Chamber in the course of the proceedings. The Chamber also notes that, being part of the Defence mission in May 2024, Mr Jacobs was aware of the possibility that he could testify. Despite this possibility, Mr Jacobs continued to participate in the proceedings and cross-examine Prosecution witnesses on the very topics he now seeks to testify, only informing the Chamber of the fact that he intended to testify when the Defence submitted its List of Witnesses on 21 February 2025.

43. The Chamber will now consider the exceptions to the bar on counsel testifying as a witness outlined in article 12(3) of the Code of Conduct. For the following reasons, the Chamber is of the view that none of the exceptions apply in the present case.

44. First, with regard to the exception outlined in article 12(3)(a) of the Code of Conduct, the Chamber agrees with the Prosecution's submission that Mr Jacobs'

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<sup>77</sup> See *Muthaura* OA3 Appeals Judgment, [ICC-01/09-02/11-365](#), para. 48.



anticipated testimony would go to matters that are contested in this case. The Chamber notes that the Defence proposes that Mr Jacobs testify about missions the Defence team conducted at the TGI and the OCRB, including analysis of the criminal procedure executed by judicial authorities in Bangui at the time of the charges, descriptions of record-keeping practices and other procedures, and assessments of and findings relating to the layout and structure of the OCRB.<sup>78</sup> In light of the witness testimony presented thus far in these proceedings, the Chamber considers that Mr Jacobs' anticipated testimony would indeed touch upon issues that are contested in this case, which impedes him from appearing as a witness.

45. Second, the Chamber notes the exception outlined in article 12(3)(b) of the Code of Conduct, which allows counsel to appear as a witness where counsel's testimony relates to the nature and value of legal services rendered in a case. The Chamber considers that there is no issue, at this stage, relating to the nature and value of legal services rendered to Mr Said. Moreover, Mr Jacobs' anticipated testimony does not relate to such issues. Accordingly, the Chamber finds the exception inapplicable in the present case.

46. In light of the circumstances of the present situation, the Chamber also considers it necessary to recall that article 6 of the Code of Conduct provides that counsel must act independently and refrain from doing anything which may lead to any reasonable inference that his or her independence has been compromised. The Chamber finds that this provision is largely at odds with the prospect of a counsel testifying on behalf of his or her client, as is proposed in this case, insofar as the duty of counsel to safeguard the client's interests may directly conflict with their obligations as a witness under the applicable legal framework.

47. The Chamber further recalls article 16(1) of the Code of Conduct, which provides that counsel shall put the client's interests before counsel's own interests. In this respect, if defence counsel were to testify in the manner proposed, they would run the risk of not being able to put the interests of their client above their own. As counsel is

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<sup>78</sup> See Summary of Anticipated Testimony, ICC-01/14-01/21-921-Conf-Anx3, p.11; CAR-D33-0015-0711; CAR-D33-0015-0716.

aware, the Chamber must evaluate the credibility of all witnesses who appear before it, and in such circumstances the personal interests of counsel in bolstering their credibility could lead to tension in the discharge of their duty to the Court and to their client. The Chamber is of the view that, in light of their seriousness, the aforementioned issues cannot be cured by obtaining a waiver from one's client.

48. Furthermore, the Chamber finds that the fact that counsel for the defence also play a large role in investigations does not relieve them from their obligations under the Code of Conduct. The role of counsel is to advocate at all times in service of the client and to put the client's interests first.<sup>79</sup> It follows that, in light of their role in the proceedings, counsel cannot give evidence about any findings that may have been made during the investigation that are relevant to any aspect of the merits of the case. Such information can be introduced through other persons who are not bound by the ethical obligations contained in the Code of Conduct. Accordingly, the Defence's submissions regarding the role of Prosecution investigators and analysts giving evidence in the present case are inapposite.

49. In short, the Chamber finds that the Code of Conduct prevents Mr Jacobs from testifying in the present instance.

### **C. Regarding the Equality of Arms and the Impediment to Mr Jacobs' Testimony**

50. The Chamber notes the Defence's submission that impeding the testimony of Mr Jacobs would undermine the equality of arms between the Prosecution and the Defence. In particular, the Chamber recalls the Defence's submissions that its resource limitations require that counsel be involved in investigations and that impeding the Defence from employing the same methods and means as the Prosecution would result in an unequal playing field between the parties. Additionally, the Defence argues that it was under no obligation to hire external personnel given that the Prosecution itself did not do so, having instead relied on its own investigators to carry out work similar to that of Defence counsel.

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<sup>79</sup> See article 16(1) of the Code of Conduct.

51. The Chamber recognises that equality of arms is an indivisible element of a fair trial which is designed to, among other things, afford the same opportunities to the Prosecution and the Defence in confronting one another's case.<sup>80</sup> However, the Chamber notes, as have other Chambers, that the principle does not require the creation of a situation of absolute parity.<sup>81</sup> Rather, what the principle demands is that each party has a reasonable opportunity to adequately prepare for and present its case, without being placed at a substantial disadvantage *vis-à-vis* the opposing party.<sup>82</sup>

52. In the instant case, there is no indication that the Defence did not have adequate investigative opportunities or resources available to it in order to carry out investigative missions at the TGI and the OCRB. In this respect, the Chamber notes the Court's Legal Aid Policy allocates resources to cover costs associated with the investigation or analysis activities of defence teams, including 'fees of the professional investigators or resource persons assigned to the team to conduct investigative work in the field [...]'.<sup>83</sup> The budget for investigation and analysis for defence teams is determined based on the complexity level of the case.<sup>84</sup> According to regulation 139 of the Regulations of the Registry, when legal assistance is paid by the Court and includes the fee of a professional investigator, defence counsel must select an investigator from the Court's list of professional investigators. Regulation 137 of the Regulations of the Registry sets the standards for inclusion in the list of professional investigators, including established competence in international or criminal law and procedure and at least ten years of relevant experience in investigative work in criminal proceedings. Regulation 139(2)

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<sup>80</sup> See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georgios Pikis to the Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, [ICC-01/04-01/06-424](#), pp. 8-10; see also *inter alia* European Court of Human Rights, *Case of Rowe and Davis v. The United Kingdom*, Judgment, Application no. 28901/95, 16 February 2000, paras 59-61; European Court of Human Rights, *Case of Laukkanen and Manninen v Finland*, Judgment, Application no. 50230/99, 3 February 2004, para. 34.

<sup>81</sup> Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on Defence requests and procedural challenges, 21 May 2021, [ICC-02/05-01/20-402](#), para. 45.

<sup>82</sup> Pre-Trial Chamber I, *Prosecutor v. Thomas Dyilo Lubanga*, Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, 6 November 2006, [ICC-01/04-01/06-672-tEN](#), p. 7; Pre-Trial Chamber II, *Situation in Uganda*, 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 2005, [ICC-02/04-01/05-20](#), para. 30.

<sup>83</sup> Legal Aid Policy of the International Criminal Court, [ICC-ASP/22/9](#), para. 83, adopted effective 1 January 2024 by Assembly of States Parties Resolution ICC-ASP/22/20 (the 'Legal Aid Policy').

<sup>84</sup> Legal Aid Policy, [ICC-ASP/22/9](#), para. 84.

of the Regulations of the Registry sets out the requirements to be met by resource persons engaged by the defence team for the purposes of investigations, including that they are not related to the person entitled to legal assistance, to the counsel or any person assisting him or her.

53. Counsel must assume responsibility for the manner in which the investigation and presentation of evidence is managed. If the Defence expected to present evidence collected on its investigative missions through witness testimony, it would have been prudent for it to have engaged a professional investigator or resource person, all the more so knowing that article 12(3) of the Code of Conduct would in all likelihood impede testimony by counsel.

54. Taking the foregoing together, the Chamber finds that there is no violation of the principle of equality of arms in the present instant.

#### **D. Conclusion**

55. Based on the foregoing, the Chamber finds that Mr Jacobs is precluded from giving the anticipated evidence in the present case. To the extent that the reports associated with his testimony contain testimonial evidence on the part of the authors of the report (lead counsel and associate counsel), they can also not be introduced into evidence for the same reasons stated above. This is without prejudice to the Defence making a request for a limited amount of additional time to propose alternative means to authenticate relevant items/information collected at the TGI and/or the OCRB currently contained in the reports prepared by counsel.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**GRANTS** the Request; and

**STRIKES** Mr Jacobs from the Defence's List of Witnesses.



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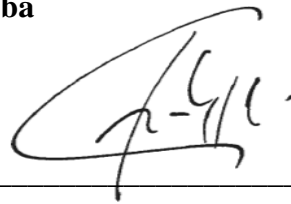
**Judge Miatta Maria Samba**

**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 11 March 2025

At The Hague, The Netherlands