

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **4 March 2022**

**TRIAL CHAMBER VI**

**Before:**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF  
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public**

**Victims' response to the Defence's request for leave to appeal the Decision on the  
Commencement Date of the Trial (ICC-01/14-01/21-246)**

**Source: Office of Public Counsel for Victims**

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

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## I. INTRODUCTION

1. In accordance with regulations 24(2) and 34(b) of the Regulations of the Court, Counsel representing the collective interests of future applicants in the proceedings (the “Legal Representative”),<sup>1</sup> hereby submits her response to the Defence’s request seeking leave to appeal<sup>2</sup> the Decision setting the commencement date of the trial and related deadlines (respectively the “Defence Request” and the “Impugned Decision”).<sup>3</sup>

2. The Legal Representative submits that the Defence Request fails to meet the criteria under article 82(1)(d) of the Rome Statute and, accordingly, must be dismissed.

## II. PROCEDURAL BACKGROUND<sup>4</sup>

3. On 9 December 2021, Pre-Trial Chamber II issued the “Decision on the confirmation of charges against Mahamat Said Abdel Kani”.<sup>5</sup>

4. On 10 December 2021, the Registrar transmitted the record of the proceedings to the Presidency, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani.<sup>6</sup>

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<sup>1</sup> See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG ET](#), p. 47, lines 1-13.

<sup>2</sup> See the “*Demande d’autorisation d’interjeter appel de la ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’* (ICC-01/14-01/21-243) *rendue le 21 février 2022*”, [No. ICC-01/14-01/21-246](#), 28 February 2022 (“the Defence Request”).

<sup>3</sup> See the “Decision Setting the Commencement Date of the Trial and Related Deadlines” (Trial Chamber VI), [No. ICC-01/14-01/21-243](#), 21 February 2022 (the “Impugned Decision”).

<sup>4</sup> The procedural background included in these submissions is non-exhaustive and primarily focuses on the procedure relevant to these submissions.

<sup>5</sup> See the “Decision on the confirmation of charges against Mahamat Said Abdel Kani” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-218-Conf](#) and [No. ICC-01/14-01/21-218-Red](#), 9 December 2021.

<sup>6</sup> See the “Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021”, [No. ICC-01/14-01/21-219-Conf](#), 10 December 2021.

5. On 14 December 2021, the Presidency referred the case to the newly constituted Trial Chamber VI (the “Chamber”).<sup>7</sup> The following day, the Chamber elected its Presiding Judge and its Single Judge.<sup>8</sup>

6. On 21 December 2021, the Registrar transmitted the record of the proceedings to the Chamber.<sup>9</sup>

7. On 14 January 2022, the Chamber issued an order convening the first Status Conference, and instructing the parties, participants and the Registry to file submissions on listed items in preparation of the trial.<sup>10</sup>

8. On 21 January 2022, the Prosecution,<sup>11</sup> the Defence,<sup>12</sup> the Legal Representative of victims,<sup>13</sup> and the Registry<sup>14</sup> filed their respective submissions on the items identified by the Chamber.

9. On 28 January 2022, the first Status Conference was held,<sup>15</sup> during which the Chamber, *inter alia*, appointed the Office of Public Counsel for Victims to represent the collective interests of future applicants in the proceedings until one or more common legal representatives is appointed for the trial proceedings.<sup>16</sup>

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<sup>7</sup> See the “Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Mahamat Said Abdel Kani*” (Presidency), [No. ICC-01/14-01/21-220](#), 14 December 2021.

<sup>8</sup> See the “Decision notifying the election of the Presiding Judge and Single Judge” (Trial Chamber VI), [No. ICC-01/14-01/21-221](#), 15 December 2021.

<sup>9</sup> See the “Transmission to Trial Chamber VI of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021”, [No. ICC-01/14-01/21-223-Conf](#), 21 December 2021.

<sup>10</sup> See the “Order Scheduling the First Status Conference” (Trial Chamber VI), [No. ICC-01/14-01/21-226](#), 14 January 2022.

<sup>11</sup> See the “Prosecution’s submissions pursuant to the ‘Order scheduling first status conference’”, [No. ICC-01/14-01/21-230-Conf](#) and [No. ICC-01/14-01/21-230-Red](#), 21 January 2022.

<sup>12</sup> See the “Version confidentielle expurgée des ‘Observations de la Défense de Monsieur Saïd en application de l’ ‘Order Scheduling the First Status Conference’ (ICC-01/14-01/21-226)’”, [No. ICC-01/14-01/21-231-Conf-Red](#) and [No. ICC-01/14-01/21-231-Red2](#), 21 January 2022.

<sup>13</sup> See the “Submissions on behalf of victims on the matters identified in the ‘Order Scheduling the First Status Conference’ (ICC-01/14-01/21-226)”, [No. ICC-01/14-01/21-228](#), 21 January 2022.

<sup>14</sup> See the “Registry Submissions in view of the 28 January 2022 Status Conference”, [No. ICC-01/14-01/21-229](#), 21 January 2022.

<sup>15</sup> See the transcript of the hearing held on 28 January 2022, *supra* note 1.

<sup>16</sup> *Idem*, p. 47, lines 1-13.

10. On 21 February 2022, the Chamber issued the Impugned Decision,<sup>17</sup> and notably decided to set the date of the commencement of the trial to 26 September 2022.<sup>18</sup>

11. On 28 February 2022, the Defence filed a request for leave to appeal said decision in relation to the following four issues:

i) *“le manque de motivation permettant de comprendre le fondement de la détermination de la date du début du procès”* (the “First Issue”);<sup>19</sup>

ii) *“l’absence de date limite imposée à l’Accusation avant le début du procès pour la divulgation des éléments relevant de Règle 77 constitue une erreur de droit et de fait”* (the “Second Issue”);<sup>20</sup>

iii) *“l’absence de motivation portant sur le délai de trois mois accordé à la Défense pour analyser le mémoire de l’Accusation”* (the “Third Issue”);<sup>21</sup> and

iv) *“l’instruction générale donnée aux Parties d’instruire en commun tous les experts de l’affaire constitue une erreur de droit”* (the “Fourth Issue”).<sup>22</sup>

### III. RESPONSE TO THE REQUEST

#### A. The criteria contained in article 82(1)(d) of the Rome Statute

12. The Legal Representative notes that Article 82(1)(d) of the Rome Statute limits the possibility to request leave to appeal to “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

13. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.<sup>23</sup>

<sup>17</sup> See the Impugned Decision, *supra* note 3.

<sup>18</sup> *Idem*, paras. 31-33.

<sup>19</sup> See the Defence Request, *supra* note 2, paras. 21-36.

<sup>20</sup> *Idem*, paras. 37-45.

<sup>21</sup> *Idem*, paras. 46-48.

<sup>22</sup> *Idem*, paras. 49-55.

<sup>23</sup> See, *inter alia*, the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8 and 14; and the “Decision on Prosecutor’s Application for leave to appeal in

14. In this regard, the Appeals Chamber determined that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.<sup>24</sup> The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,<sup>25</sup> and defined the term ‘issue’ as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>26</sup> Accordingly, the Legal Representative underlines that the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal.<sup>27</sup>

15. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.<sup>28</sup>

16. Consequently, it must first be determined whether the purported “issue” identified in the Defence Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, “while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the

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part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21.

<sup>24</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *idem*, para. 8.

<sup>25</sup> *Idem*, para. 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> See the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-817](#), 18 July 2013, para. 12; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

<sup>28</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 23, para. 10.

*Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.*<sup>29</sup>

17. Moreover, pursuant to the constant jurisprudence of the Court, *“the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”*,<sup>30</sup> and *“[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”*.<sup>31</sup>

18. Furthermore, a Chamber presented with an application for leave to appeal must not examine or consider *“arguments on the merits or the substance of the appeal”*, since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.<sup>32</sup>

19. According to the established jurisprudence, in analysing whether an appealable issue would ‘significantly affect’ the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of ‘fairness’ must be understood as referring to situations *“when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.<sup>33</sup> In turn, ‘expeditiousness’ must be read as *“closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.<sup>34</sup>

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<sup>29</sup> See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 21 October 2015, para. 70.

<sup>30</sup> See the “Decision on Ruto Defence's Application for Leave to Appeal the ‘Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-983](#), 24 September 2013, para. 20; and the “Decision on the Prosecutor's application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), [No. ICC-01/04-01/07-2375-tENG](#), 8 September 2010, para. 4.

<sup>31</sup> See the “Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 7; and the “Decision on the Prosecutor's application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *idem*, para. 4.

<sup>32</sup> See the “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”, *supra* note 23, para. 22.

<sup>33</sup> See, *inter alia*, the “Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

<sup>34</sup> *Idem*, para. 18.

20. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.<sup>35</sup>

## **B. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Defence Request**

### **1. The purported ‘issues’ and sub-issues do not arise from the Impugned Decision**

21. The Legal Representative submits that the Defence fails to identify an ‘issue’ that arises from the Impugned Decision, as required by article 82(1)(d) of the Rome Statute. Many of the arguments contained in the Defence Request were already litigated and presented to the Pre-Trial Chamber in requests aiming at postponing the confirmation of charges hearing, and were dismissed by the latter.<sup>36</sup> In fact, it is apparent from the wording of the request that the Defence merely disagrees with the Chamber’s decision, again: the Defence had the opportunity to submit its proposals in details to the Trial Chamber at three occasions at least<sup>37</sup> and together with the submissions of the Prosecution and the Legal Representative of victims, the Defence’s

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<sup>35</sup> See the Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *supra* note 23, para. 13.

<sup>36</sup> See the oral decision issued by the Presiding Judge of Pre-Trial Chamber II at the beginning of the hearing held on 12 October 2022, [No. ICC-01/14-01/21-T-004-Red2-ENG CT WT](#), p. 6, line 15 to p. 7, line 16; the “Demande d’autorisation d’interjeter appel de la ‘Decision on the Defence’s request for postponement of the confirmation hearing’ (ICC-01/14-01/21-196)”, [No. ICC-01/14-01/21-201](#), 11 October 2021; the “Decision on the Defence’s request for postponement of the confirmation hearing” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-196](#), 4 October 2021; and the “Version publique expurgée de la ‘Demande déposée en vertu de la Règle 121(7) du Règlement de procédure et de preuve afin d’assurer le respect du droit fondamental de la Défense à disposer du temps et des facilités nécessaires à la préparation de l’audience de confirmation des charges pour pouvoir y contester les charges et les éléments de preuve présentés par l’Accusation’ (ICC-01/14-01/21-175-Conf-Exp) déposée le 23 septembre 2021”, [No. ICC-01/14-01/21-175-Red2](#), 26 September 2021.

<sup>37</sup> See the “Éléments d’information sur les enquêtes en cours de la Défense dans les suites de la conférence de mise en état du 28 janvier 2022”, No. ICC-01/14-01/21-237-Conf-Exp, 7 February 2022; the transcript of the hearing held on 28 January 2022, *supra* note 1; and the “Version confidentielle expurgée des ‘Observations de la Défense de Monsieur Saïd en application de l’ ‘Order Scheduling the First Status Conference’ (ICC-01/14-01/21-226)’”, *supra* note 12.



observations were duly taken into account by the Chamber in reaching its decision.<sup>38</sup> In conformity with its duty, the Chamber balanced all the arguments and interests at stake in its ruling. Consequently, the contentions raised by the Defence simply reflect mere disagreements with the conclusions of the Chamber and therefore do not meet the requisite threshold for leave to appeal to be granted.

22. **Regarding the *First Issue* and the *Third Issue*,**<sup>39</sup> the Defence argues that the Impugned Decision lacks motivation. The simple fact that the Chamber did not agree with the Defence's proposal for a commencement date of the trial and that the Defence finds itself unsatisfied with the result does not mean that the Chamber committed an error.<sup>40</sup>

23. The Legal Representative highlights that there is no obligation for the Chambers of the Court to provide a full explanation for each and every aspect of their decisions, particularly where the issues addressed are procedural in nature. This is consistent with the jurisprudence of the European Court for Human Rights, which has constantly stated that "*Article 6 § 1 [ensuring fair trial guarantees] obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument*"<sup>41</sup> and that "*the extent to which [the] duty to give reasons applies may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case*".<sup>42</sup>

24. Moreover, the lack of reasoning alleged by the Defence does not arise from the Impugned Decision, in as much as the Chamber did provide its reasoning in support of its decision, assessing methodically in turn the following elements: the anticipated

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<sup>38</sup> See the transcript of the hearing held on 28 January 2022, *supra* note 1; the "Prosecution's submissions pursuant to the 'Order scheduling first status conference'", *supra* note 11; and the "Submissions on behalf of victims on the matters identified in the 'Order Scheduling the First Status Conference' (ICC-01/14-01/21-226)", *supra* note 13.

<sup>39</sup> See the Defence Request, *supra* note 2, paras. 21-36, and 46-48.

<sup>40</sup> See the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 3 January 2014, para. 33.

<sup>41</sup> See ECHR, *Perez v. France*, Application No. 47287/99, [Judgment](#), 2 February 2004, para. 81; *Garcia Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, [Judgment](#), para. 26 ; *Van de Hurk v. The Netherlands*, Application No. 16034/90, [Judgment](#), 19 April 1994, para. 61.

<sup>42</sup> See ECHR, *Ruiz Torija v. Spain*, Application No. 18390/91, [Judgment](#), 9 December 1994, para. 29; *Hiro Balani v. Spain*, Application No. 18064/91, [Judgment](#), 9 December 1994, para. 27.

evidence to be presented by the Prosecution and its impact on the preparation for trial;<sup>43</sup> the disclosure of outstanding material in the Prosecution's possession and related issues, and their possible impact on the starting date of the trial and Mr Saïd's case;<sup>44</sup> possible disclosure by the Defence including in relation to its intention under rules 79 and 80 of the Rules of Procedure and Evidence;<sup>45</sup> the ongoing process regarding agreed facts;<sup>46</sup> and the Defence investigation prior the commencement of the trial.<sup>47</sup> Having "*considered all the [...] information*" provided by the parties, the Chamber concluded that it was both "*feasible and desirable to commence the trial on 26 September 2022*".<sup>48</sup>

25. Furthermore, the Chamber also indicated the various obligations it took into consideration according to the legal framework of the Court in order to reach its decision, namely: the fairness and expeditiousness of the trial in accordance with Article 64(2) of the Statute; the protection of victims and witnesses pursuant to Article 68(1) of the Statute; the victims' right to justice; and its duty to ensure that the Accused has adequate time and facilities for the preparation of his defence.<sup>49</sup>

26. Turning to the Defence's arguments, they mainly academically recount the Defence's rights in very general terms,<sup>50</sup> and in light of the above, they simply reflect its disagreements with the conclusion reached by the Chamber.

27. In relation to some specific arguments put forward by the Defence, namely the estimated amount of work required for trial preparation and the methodology used by the Defence to proceed with its estimate,<sup>51</sup> or the speculative and unsupported allegation that once a witness has come to testify at trial, there will be no opportunity

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<sup>43</sup> See the Impugned Decision, *supra* note 3, paras. 10, and 22.

<sup>44</sup> *Idem*, paras. 11-13.

<sup>45</sup> *Idem*, para. 14.

<sup>46</sup> *Idem*, paras. 15-17.

<sup>47</sup> *Idem*, paras. 18-19.

<sup>48</sup> *Idem*, para. 20.

<sup>49</sup> *Idem*, paras. 21-23.

<sup>50</sup> See the Defence Request, *supra* note 2, *inter alia*, paras. 1-3, and 20.

<sup>51</sup> *Idem*, paras. 21-36.

to recall him or her,<sup>52</sup> the Legal Representative contends that said arguments relate to the merits of the proposed appeal and are therefore irrelevant to the determination of the Request.<sup>53</sup>

28. In addition, the Defence contends that the calendar set by the Chamber *forces* them to have completed its investigations before the 12 August 2022.<sup>54</sup> This perception is incorrect, and the Legal Representative respectfully underlines that, in principle, Defence investigations must be conceived as an ongoing process taking place throughout the duration of the trial.<sup>55</sup>

29. Moreover, the Legal Representative questions the interpretation made by the Defence of the rights *belonging* to the accused, stating that the latter is the only one who can determine when and how to use them.<sup>56</sup> She posits in response that the *when* and *how* are parameters not only set by the legal framework of the Court in relation to each concerned rights but also by the Chamber – rather than the accused person – in light of the circumstances of each case, noting the Chamber’s duty to ensure that the implementation of these rights upholds the guarantees to a fair trial.

30. Finally, the Legal Representative submits that postponing the commencement date of the trial will inevitably have adverse consequences for the victims participating

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<sup>52</sup> *Idem*, para. 26. See in this regard the “Decision on Defence Request for Disclosure and Remedy for Late Disclosure” (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1351](#), 28 September 2018, paras. 46 and 47.

<sup>53</sup> See, *inter alia*, the “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”, *supra* note 23, para. 22; the “Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings” (Trial Chamber VI), [No. ICC-01/04-02/06-1677](#), 12 December 2016, paras. 12-13; and the “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’” (Trial Chamber I), [No. ICC-01/04-01/06-1417](#), 14 August 2012, para. 10.

<sup>54</sup> See the Defence Request, *supra* note 2, para. 27.

<sup>55</sup> See, *inter alia*, the “Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No Case-to-Answer Motion” (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1074](#), 16 November 2017, paras. 15-19; and the “Redaction of: Decision on the Prosecution’s Requests to Add New Witnesses to its List of Witnesses” (Trial Chamber V(a)), [No. ICC-01/09-01/11-899-Red](#), 3 September 2013, para. 19.

<sup>56</sup> See the Defence Request, *supra* note 2, para. 28.

in the proceedings. Contrary to what the Defence alleges,<sup>57</sup> there are victims participating at trial, or, at this stage, who have at least applied to participate at trial, pending a decision of the Chamber on their request. Indeed, the Legal Representative refers to the 50 forms announced by the Registry in the course of the first status conference held on 28 January 2022.<sup>58</sup> She further indicates that she has already transmitted two victims application forms to the Registry on 11 and 24 February 2022, and is in the process of completing another 20 forms for the purpose of transmission to the Victims Participation and Reparations Sections by the end of March 2022.

31. Postponing the starting date of the trial would further delay the realisation of their right to truth, to have those responsible for those crimes held accountable and to receive just reparations for the harm suffered.<sup>59</sup> Victims have already suffered from extremely long periods of judicial inactivity, waiting as to this date for more than 8 years in the hope that justice would one day be done.

32. Despite the Defence's views on "*victims' right to justice*",<sup>60</sup> the Legal Representative further underlines that the 'fair trial' guarantees shall not be considered from the Defence standpoint only. Indeed, these rights cover, in addition to the right of the Defence, the right for the victims to expeditious proceedings, the right to truth and to adequate reparations for the harms suffered. In the same vein, the requirements of fair proceedings shall apply to all the parties and participants before the Court, and not only to the accused,<sup>61</sup> and shall furthermore prevail over the specific interests of

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<sup>57</sup> See the Defence Request, *supra* note 2, paras. 30-31.

<sup>58</sup> See the transcript of the hearing held on 28 January 2022, *supra* note 1, p. 44, lines 4-11.

<sup>59</sup> See, *inter alia*, the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007" (Appeals Chamber), [No. ICC-01/04-503 OA4 OA5 OA6](#), 30 June 2008, para. 97; the "Decision on the Set of Procedural Rights Attached to the Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 13 May 2008, para. 32; and the "Decision on victims' participation" (Trial Chamber I), [No. ICC-01/04-01/06-1119](#), 18 January 2008, para. 98.

<sup>60</sup> See the Defence Request, *supra* note 2, para. 30.

<sup>61</sup> See the "Decision on the admission of material from the 'bar table'" (Trial Chamber I), [No. ICC-01/04-01/06-1981](#), 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139. See also the "DECISION ON

the parties.<sup>62</sup> The Court is a unique international jurisdiction which has been established not only to investigate the most serious crimes of concern to the international community but also and particularly to render justice to victims.<sup>63</sup> As far as victims' participation constitutes an integral part of the concept of fair and impartial proceedings before the Court, relevant Chambers have a duty to take into consideration the interests of the victims throughout the proceedings, and in particular when deciding on any requests for postponement of proceedings.

33. Accordingly, the Legal Representative submits that a balancing exercise between competing interests is required when considering the Defence Request. Such a consideration simply entails that, in the circumstances of the present case, a lengthy postponement of the trial cannot be granted because of the resulting prejudice to the victims' right to have the truth established and justice rendered with no delay.

34. **Regarding the *Second Issue***, the Legal Representative posits that the Defence is incorrect in its reading of the Chamber's Decision. Indeed, and contrary to the Defence's allegations,<sup>64</sup> the Chamber has set a deadline for the disclosure of all evidence and material on which the Prosecution intends to rely at trial and this date is the 13 June 2022.<sup>65</sup> The Legal Representative understands from the Impugned Decision that this includes Rule 77 material. The arguments raised by the Defence based on the

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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" (Pre-Trial Chamber I), [No. ICC-01/04-135-tEN](#), 31 March 2006, para. 38.

<sup>62</sup> See SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, "Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts", Case [No. SCSL-04-16-PT-047](#), 31 March 2004, para. 26.

<sup>63</sup> It was determined that the need to "*ensure the effective implementation of victims' rights [...] constitute a cornerstone of the Rome Statute system*". See ASP, Victims and affected communities, reparations and Trust Fund for Victims, Resolution [No. ICC-ASP/12/Res.5](#), 27 November 2013, Preamble, para. 2. It was also emphasised that "[a] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims". See the "Report of the Court on the strategy in relation to victims", Assembly of States Parties, Eighth session, [No. ICC-ASP/8/45](#), 10 November 2009, para. 3.

<sup>64</sup> *Idem*, paras. 37-45.

<sup>65</sup> See the Impugned Decision, *supra* note 3, paras. 25-28.

Chamber's simple acknowledgement of the fact that it may happen that the parties, including the Prosecution, and notably in relation to rule 77 material,<sup>66</sup> introduce further *requests* for the submission of additional evidence after this date, and only with the leave of the Chamber as underlined by the latter in the Impugned Decision,<sup>67</sup> simply reflects the reality of the conduct of a trial and are based on sheer speculations at this stage.

35. As a result, the Legal Representative submits that the arguments developed under the Second Issue by the Defence correspond to an incorrect reading of the Impugned Decision and therefore do not constitute an issue arising out of said Decision.

36. **Regarding the *Fourth Issue***, the Legal Representative respectfully submits that whether the participants will be able to reach any agreement or resolve unsettled issues related to the joint instruction of expert witnesses, is not known. This purported issue is therefore based on mere speculation to a large extent. The Defence Request also fails to state the reason why a postponement of the trial is necessary for such an agreement to be reached. The Legal Representative submits in this regard that the two processes may be adequately carried out concurrently. Finally, the arguments developed in relation to the joint instructions of experts not only are debatable but also and importantly pertain to the substance and merits of an eventual appeal and therefore shall neither be discussed in detail in the present proceedings nor be assessed for the purpose of the Chamber's determination of the Defence Request.<sup>68</sup> These arguments simply demonstrate mere disagreements of the Defence with the Chamber's decision and therefore fail to constitute an appealable issue.

37. The Legal Representative recalls the Dissenting Opinion of Judge Eboe-Osuij regarding mere disagreements:

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<sup>66</sup> In addition, the Legal Representative notes that the wide stand the Defence is taking in relation to Rule 77 not only touches upon the merits of the request and should therefore not be assessed by the Chamber, but also indicates a view on the relevance of potential Rule 77 material that is broadly speculative. In this regard, see the "Decision on Defence Request for Disclosure and Remedy for Late Disclosure", *supra* note 52, paras. 18-28, and 33.

<sup>67</sup> See the Impugned Decision, *supra* note 3, paras. 22, and 26.

<sup>68</sup> See the references incorporated *supra*, note 53.

*“In considering what would amount to sufficient reason to grant leave, it needs to be kept in mind that in almost every decision that a Chamber makes, it is generally possible for the losing party to disagree with the Chamber. The earliest formal opportunity for the party to register that disagreement is presented by the procedure of request for leave to appeal the decision. In making that request, it all but tasks the imagination of counsel very minimally to hitch the disagreement with the Chamber’s decision onto the argument that to wait for the opportunity of final appeal on the merits to litigate the disagreement entails the possibility of a risk that the Appeals Chamber may overrule the Trial Chamber on the relevant point of the decision and possibly nullify every step traceable to the point; thus resulting in ultimate delay, if the steps in question may be required to be repeated. But, this is an argument that is always present in every decision except the very plainest that any Chamber may make. It can thus not be a desirable basis to grant leave to launch an interlocutory appeal. It would render pointless the constraining requirements laid down in article 82(1)(d) of the Statute, for grant of leave for interlocutory appeals”.<sup>69</sup>*

38. Consequently, noting as underlined *supra* that the criteria of article 82(1)(d) of the Statute are cumulative in nature, since the four purported issues raised by the Defence appear to constitute mere disagreements or differences of opinions with the Chamber, or an incorrect reading of the Impugned Decision, therefore not constituting appealable issues under article 82(1)(d) of the Statute, it is unnecessary to assess the other criteria under this article. Nonetheless, should the Chamber be mindful to address them, the Legal Representative is providing *infra* her analysis of the other criteria of article 82(1)(d) of the Statute.

**2. The purported ‘issues’ do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings**

39. If, by extraordinary, the Chamber were to find that one or several of the four purported ‘issues’ or sub-issues identified by the Defence arise(s) from the Impugned Decision, the Legal Representative submits that none of these purported issues have

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<sup>69</sup> See the “Dissenting Opinion of Judge Eboe-Osuji” annexed to the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-817-Anx.](#) 18 July 2013, para. 2; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

40. In analysing whether an appealable issue would “*significantly affect*” the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.<sup>70</sup> In turn, ‘expeditiousness’ must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.<sup>71</sup> The Appeals Chamber stated that in order to determine whether an issue would significantly affect the ‘outcome of the trial’ under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.<sup>72</sup>

41. The Legal Representative further recalls the Dissenting Opinion of Judge Eboe-Osuji regarding mere disagreements and their impact on the fairness or expeditiousness of the proceedings, or the outcome of the trial:

*“Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that ‘would significantly’ affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue ‘would’ affect the fair conduct of the case or its outcome, without considering how ‘significantly’ so. Nor is the question whether the issue ‘may’ – not would – affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue would significantly affect the outcome of the trial or the fair and*

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<sup>70</sup> See *inter alia* the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, *supra* note 33, para. 14.

<sup>71</sup> *Idem*, para. 18.

<sup>72</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 23, para. 13.



*expeditious conduct of the proceedings. Both words—'would significantly'—must be given their juristic values".<sup>73</sup>*

42. The Legal Representative submits that, as demonstrated *supra*, none of the four purported 'issues' identified by the Defence in its Request affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and to the contrary, by virtue of being mere disagreements or incorrect and speculative readings of the Impugned Decision, would prejudice the very essence of these principles by entertaining fictions which would significantly delay the proceedings. She therefore submits that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings, in as much as such a resolution would lead undue delay of the proceedings.<sup>74</sup>

**FOR THESE REASONS**, the Legal Representative respectfully requests the Chamber to dismiss the Defence Request in its entirety.

Respectfully submitted,



Sarah Pellet

Dated this 4<sup>th</sup> day of March 2022

At The Hague, The Netherlands

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<sup>73</sup> See the "Dissenting Opinion of Judge Eboe-Osuji", *supra* note 69, para. 3; and the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

<sup>74</sup> See the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-530](#), 8 October 2013, para. 42.