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

Date: 15 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

**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)**

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
Mr Mame Mandiaye Niang
Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet
Ms Caroline Walters

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court (the ‘Chamber’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), issues this 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).

I. PROCEDURAL HISTORY

1. On 14 January 2022, the Chamber convened a status conference to discuss, *inter alia*, the starting date of the trial. In this order, the Chamber instructed the parties and participants to provide submissions in relation to a number of factors that are relevant to the commencement of the trial.¹
2. On 21 January 2022, the Prosecution,² the Defence,³ the Registry,⁴ and the Office of the Public Counsel for Victims (the ‘OPCV’)⁵ submitted their observations.
3. On 28 January 2022, the Chamber held the status conference. During the status conference, the parties, participants and the Registry made oral submissions and the Chamber invited the Defence to submit further information in writing about its investigations.⁶

¹ Order Convening the First Status Conference, ICC-01/14-01/21-226.

² Prosecution’s submissions pursuant to the “Order scheduling first status conference”, ICC-01/14-01/21-230-Conf. A public redacted version was notified on 24 January 2022, ICC-01/14-01/21-230-Red.

³ Observations de la Défense de Monsieur Saïd en application de l’ « Order Scheduling the First Status Conference » (ICC-01/14-01/21-226), ICC-01/14-01/21-231-Conf-Exp. On the same date, the Defence also submitted confidential redacted and public redacted versions of its observations, ICC-01/14-01/21-231-Conf-Red and ICC-01/14-01/21-231-Red2 respectively.

⁴ Registry Submissions in view of the 28 January 2022 Status Conference, ICC-01/14-01/21-229, with two confidential ex parte annexes. A public redacted version of Annex II was notified on the same date, ICC-01/14-01/21-229-AnxII-Red.

⁵ Submissions on behalf of victims on the matters identified in the “Order Scheduling the First Status Conference” (ICC-01/14-01/21-226), ICC-01/14-01/21-228.

⁶ Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG, p. 34 line 25 to p. 35 line 1.

4. On 7 February 2022, the Defence filed additional observations in relation to its investigations.⁷

5. On 21 February 2022, the Chamber issued its Decision Setting the Commencement Date of the Trial and Related Deadlines (the ‘Impugned Decision’), *inter alia*, setting the commencement of the trial on Monday 26 September 2022.⁸

6. On 28 February 2022, the Defence submitted a request for leave to appeal the Impugned Decision (the ‘Request’).⁹

7. On 4 March 2022, the Prosecution and the OPCV submitted their responses to the Defence’s Request.¹⁰

II. SUBMISSIONS

8. In its Request, the Defence raises four grounds of appeal (the ‘Grounds of Appeal’):

- a. Insufficient reasoning in relation to the determination of the commencement date of the trial (the ‘First Ground of Appeal’);¹¹
- b. Failure to impose a deadline on the Prosecution for the disclosure of material falling under Rule 77 of the Rules, constituting both an error of law and an error of fact (the ‘Second Ground of Appeal’);¹²

⁷ 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, ICC-01/14-01/21-237-Conf-Exp.

⁸ [ICC-01/14-01/21-243](#).

⁹ [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, ICC-01/14-01/21-246.

¹⁰ [Prosecution Response to “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”](#), ICC-01/14-01/21-249 (the ‘Prosecution Response’); [Victims’ response to the Defence’s request for leave to appeal the Decision on the Commencement Date of the Trial \(ICC-01/14-01/21-246\)](#), ICC-01/14-01/21-248 (the ‘OPCV Response’).

¹¹ [Request](#), paras 21-36.

¹² [Request](#), paras 37-45.

- c. Insufficient reasoning in relation to the three month period allotted to the Defence to analyse the Prosecution Trial Brief (the ‘Third Ground of Appeal’);¹³ and
- d. Error of law by imposing an obligation on the participants to jointly instruct all experts in the case (the ‘Fourth Ground of Appeal’).¹⁴

9. According to the Defence, the right to have adequate time to prepare is directly linked to the fairness of the proceedings. Thus, any alleged violation thereof should give rise to an automatic right to appeal. The Defence further claims that all four Grounds of Appeal involve matters of principle, which need to be resolved by the Appeals Chamber before the start of the trial. In particular, the Defence argues that the Appeals Chamber must pronounce itself on the content of the Defence’s right to have adequate time to prepare for trial. According to the Defence, if it became clear at a later stage in the proceedings that the Defence did not have enough time to prepare, this could undermine the entire trial and irreparably harm the rights of the accused.¹⁵

10. Both the Prosecution and the OPCV argue that none of the Grounds of Appeal constitute appealable issues, either because they misinterpret the Impugned Decision or constitute a mere disagreement with it.¹⁶

III. APPLICABLE LAW

11. The Chamber recalls previous Chambers’ jurisprudence regarding the application of Article 82(1)(d) the Statute.¹⁷ Thus, in considering the Request, the Chamber must have regard to whether: (i) the matter is an ‘appealable issue’; (ii) the issue would

¹³ [Request](#), paras 46-48.

¹⁴ [Request](#), paras 49-55.

¹⁵ [Request](#), paras 56-60.

¹⁶ [Prosecution Response](#); [OPCV Response](#).

¹⁷ See e.g. 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 (the ‘Bemba Gombo Decision’), 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 (the ‘Ongwen Decision’), paras 8.

significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁸

12. The three criteria under Article 82(1)(d) of the Statute are cumulative.¹⁹ Therefore, failure to fulfil one or more of the criteria will result in dismissal of the Request.²⁰ In particular, the Chamber notes that Article 82(1)(d) ‘cannot be used to litigate abstract or hypothetical issues’.²¹

13. In relation to the first criterion, the Appeals Chamber has held that

[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.²²

14. Satisfying the aforementioned first criterion does not imply an automatic right of appeal under Article 82(1)(d) of the Statute.²³ It must also concern an issue ‘for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.’²⁴ In this regard, the Appeals Chamber noted that ‘[t]his opinion constitutes the definitive element for the genesis of a right to appeal’. The Appeals Chamber held that ‘[i]n essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue’.²⁵

15. Since the power to state an issue emanating from a decision vests with the chamber that made the decision, the Chamber is not bound by the formulation of the

¹⁸ [Bemba Gombo Decision](#) para. 4; [Ongwen Decision](#) para. 8.

¹⁹ [Bemba Gombo Decision](#), para. 5; [Ongwen Decision](#), para. 8.

²⁰ [Bemba Gombo Decision](#), para. 5; [Ongwen Decision](#), para. 8.

²¹ [Bemba Gombo Decision](#), para. 6.

²² Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168 (OA3) (the ‘Situation in the DRC Appeals Decision’), para. 9.

²³ [Situation in the DRC Appeals Decision](#), para. 14; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Prosecution’s Application for Leave to Appeal the Decision on Disclosure of Information related to Prosecution Intermediaries](#), 8 October 2013, ICC-01/09-01/11-1018, para. 7.

²⁴ Article 82(1)(d) of the Statute.

²⁵ [Situation in the DRC Appeals Decision](#), para. 20.

issue(s) by the party seeking certification.²⁶ The Chamber may therefore elect to certify an issue arising from the Impugned Decision in its own wording, if it considers that this issue is more deserving of immediate appellate attention.

IV. ANALYSIS

16. The Chamber will now discuss the four specific Grounds of Appeal raised by the Defence. The First and Third Grounds of Appeal will be dealt with together on the basis that both claim that there was a lack of reasoning on the part of the Chamber in the Impugned Decision.

A. First and Third Grounds of Appeal

17. In the First and Third Grounds of Appeal, the Defence claims that the Impugned Decision is insufficiently motivated in relation to the setting of the commencement date of the trial and the decision to allot the Defence a period of three months to prepare after the submission of the Prosecution's Trial Brief. In support of this claim, the Defence argues that the Chamber: (i) has not explained in detail how certain factors played a role in its determination; and (ii) has not responded to certain arguments raised by the Defence, in particular the Defence's calculation of how much time it would need to analyse all evidence disclosed by the Prosecution. The Defence also argues that a comparison between the scope and volume of the *Gicheru* and *Said* cases demonstrates objectively that the Defence should have been given more than three months to prepare after receipt of the Prosecution's Trial Brief.

18. As a preliminary matter, the Chamber recalls that the Appeals Chamber has consistently held that 'the extent of the reasoning [that is required] will depend on the circumstances of the case' and that 'the obligation to provide reasons "will not necessarily require reciting each and every factor that was before the [relevant chamber]

²⁶ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#), 19 December 2008, ICC-01/04-556 (OA4 OA5 OA6), para. 38; [Situation in the DRC Appeals Decision](#), para. 20; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [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'](#), 24 September 2013, ICC-01/09-01/11-983, para. 20.

to be individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion.”²⁷ Therefore, the fact that the Defence would have preferred the Chamber to explicitly address specific points does not mean that the Impugned Decision was insufficiently reasoned.

19. The Chamber further notes that the Defence’s central reproach – i.e., that the Chamber ignored what it calls ‘objective calculations’ of how much time the Defence will need to analyse all of the Prosecution’s evidence – is incorrect. In fact, the Chamber responded to this argument at paragraph 22 of the Impugned Decision by holding that ‘as long as the Accused has received all the relevant and significant materials in the Prosecution’s possession, there will not be prejudice to the rights of the Accused by proceeding to trial before the Prosecution has reviewed every last item of evidence in its database.’²⁸ The Chamber also noted at paragraph 11 of the Impugned Decision that the Prosecution had already disclosed what it considers ‘the core evidence and most of the essential material’ necessary for the Defence’s preparation.²⁹ In other words, the Chamber rejected the premise of the Defence’s calculations concerning the analysis of all the Prosecution’s evidence.

20. Similarly, the Defence’s argument that there exists no objective justification for the defence in *Gicheru* and *Said* to have been allocated the same amount of time between the notification of the Prosecution’s Trial Brief and the start of the trial is based on the same assumption that the Defence is only in a position to start preparing after it has received full disclosure and the Prosecution’s Trial Brief. The Chamber rejected this view in the Impugned Decision.³⁰ The Defence seems to disagree with this aspect

²⁷ See Appeals Chamber, *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’](#), 8 October 2020, ICC-02/05-01/20-177 (OA2), para. 42, quoting Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”](#), 14 December 2006, ICC-01/04-01/06-774 (OA6), para. 30, citing Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”](#), 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20.

²⁸ Impugned Decision, para. 22.

²⁹ Impugned Decision, para. 11.

³⁰ Impugned Decision, para. 22.

of the Impugned Decision but it did not raise it as a ground of appeal. The Chamber further points out that it granted the Defence a period of three months and 13 days (105 days) to further prepare after receiving the Prosecution's Trial Brief,³¹ which clearly belies the Defence's claim that the Chamber 'mechanically' applied the 'standard' three months period without having regard to the specific circumstances of this case.

21. The remainder of the Defence's arguments on these Grounds of Appeal are essentially disagreements with the Chamber's reasoning. Since the Defence did not formulate them as specific legal or factual errors, the Chamber is under no obligation to consider them for granting leave to appeal.

22. In conclusion, the First and Third Grounds of Appeal do not constitute appealable issues.

B. Second Ground of Appeal

23. In relation to the Second Ground of Appeal, the Defence alleges that the Chamber erred both in law and in fact by not imposing a deadline for the Prosecution to disclose all Rule 77 material.

1. Alleged error of law

24. As regards the alleged error of law, the Defence claims that the Impugned Decision violates the 'procedural logic' of the Statute. It is also argued that the setting of deadlines is essential to oblige the Prosecution to be diligent in complying with its disclosure obligations.³² The Defence argues that the Prosecution might disclose essential items at the last moment before the start of the trial, which would force the Defence to ask for additional time to analyse them.³³ The Defence further claims that the Court's practice has always been to impose deadlines for disclosure of Rule 77 material, which is not negated by the fact that, in many cases, there has been belated disclosure past the imposed deadline.

25. First, the Chamber notes that the Request fails to formulate a clear legal error. Broad and vague allegations about the procedural framework of the Court do not

³¹ Impugned Decision, para. 23.

³² [Request](#), paras 38-39.

³³ [Request](#), para. 39.

constitute appealable issues. Second, the Defence's argument that the failure to impose a specific deadline has harmed the accused's right to have adequate time to prepare is purely speculative as it is not known how many more items the Prosecution will still disclose or how significant they will be to the case. Finally, as the Defence acknowledges, the imposition of a deadline would not necessarily prevent the Prosecution from disclosing additional material under Rule 77 of the Rules after the deadline has passed. Therefore, the Defence's claim that the Prosecution would be more diligent if a deadline were imposed is purely speculative.

2. *Alleged error of fact*

26. The Defence argues that the Chamber committed an error of fact by not considering the volume of evidence in the CAR II database (136,000 items) and the fact that the Prosecution still needs to analyse 40,000 items. The Defence further claims that the Chamber failed to consider the fact that during the pre-trial phase the Prosecution disclosed the majority of the Rule 77 material on the eve of the confirmation hearing. The Defence claims that, had the Chamber considered this information, it would have understood that it was crucial to impose a deadline to avoid a situation in which the Prosecution might 'drown' the Defence with vast amounts of last-minute disclosure. The Defence also argues that the Chamber could not rely upon the Prosecution's assertion that it did not expect to find additional evidence with a direct connection to the charges against Mr Said. According to the Defence, as long as the Prosecution has not finalised its investigations and its analysis of the entire CAR database, it is not possible to determine whether the Defence has received all relevant material.

27. First, the Chamber notes that the Defence did not identify any point of fact which the Chamber has missed or misunderstood. The Chamber refers to paragraphs 11 and 12 of the Impugned Decision and observes that the volume of the CAR II database as well as the fact that the Prosecution still needs to analyse 40,000 items were indeed considered. Second, as the Defence seems to acknowledge, whether or not the Prosecution may still disclose a large volume of evidence and, if so, when this will occur, is entirely hypothetical. Since the Defence does not allege that the Chamber abused its discretion by not imposing a deadline for Rule 77 disclosure, it is merely stating a disagreement with the Chamber's decision. This is not an appealable issue.

28. The Second Ground of Appeal, therefore, does not constitute an appealable issue.

C. Fourth Ground of Appeal

29. According to the Defence, Regulation 44(2) of the Regulations of the Court does not allow the Chamber to impose a blanket obligation for the parties to jointly instruct all experts. Instead, the Chamber only has the power to impose joint instruction on a case by case basis. The Defence claims that, by instructing the parties to jointly instruct all experts, the Impugned Decision violates the parties' right to autonomously determine their strategy. The Defence also argues that this approach would force them to reveal certain elements of their defence strategy. The Defence further argues that the non-calling party must always retain the right to: (i) challenge the expert's expertise, (ii) fully cross-examine the expert, and (iii) appoint another expert of its choice.

30. The Chamber understands that the Defence is arguing that chambers do not have the power to impose a blanket order for the joint instruction of all experts in the case. This may qualify as an appealable issue. At this point in the proceedings, it is entirely hypothetical whether or not the Defence may wish to appoint and instruct an expert unilaterally. However, as acknowledged by the Defence,³⁴ the Chamber has the power to impose joint instructions on a case-by-case basis, this case not being any exception. In other words, even if the Appeals Chamber were to rule in favour of the Defence, the impact of such a ruling on the fair and expeditious conduct of the proceedings is entirely speculative. Furthermore, the Defence has failed to explain how immediate appellate intervention would materially advance the proceedings.

31. The Fourth Ground of Appeal therefore fails to meet the second and third criteria of Article 82(1)(d) of the Statute for interlocutory appeal as outlined in paragraph 11 above.

³⁴ Request, para. 55.

FOR THESE REASONS, THE CHAMBER HEREBY

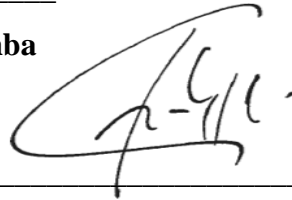
REJECTS the Request.



Judge Socorro Flores Liera



**Judge Miatta Maria Samba
Presiding Judge**



Judge Sergio Ugalde Godínez

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

Dated 15 March 2022

At The Hague, The Netherlands