Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/14-01/21**
Date: **28 February 2022**

TRIAL CHAMBER VI

Before: **Judge Miatta Maria Samba, Presiding Judge**
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godinez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Document
With one public annex

Application for Leave to Appeal the "Decision Setting the Commencement Date of the Trial and Related Deadlines" (ICC-01/14-01/21-243)
Issued on 21 February 2022

Source: **Defence Team for Mahamat Said Abdel Kani**

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

Office of the Prosecutor
Mr Karim A. A. Khan QC, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence of Mahamat Said Abdel Kani
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims
Ms Sarah Pellet
Ms Caroline Walter

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach

Other

I. Applicable law

1. The right of the accused to have adequate time and facilities for the preparation of the defence

1. The Statute of the Court establishes a judicial mechanism structured around the rights of the defence. The Statute and the Rules of Procedure and Evidence set out the various ways in which the accused may exercise his or her rights and for those rights to be meaningfully given effect. At the core of this framework, as at the core of any framework of criminal proceedings, lies the concept of the presumption of innocence.[1]

2. The Chambers of the Court have repeatedly emphasised the importance of safeguarding the fairness of the trial. For instance, the Appeals Chamber held in *Lubanga*:

> Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the consitutent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is **outweighed** by the need to sustain the efficacy of the judicial process as the potent agent of justice.[2]

In other words, fairness of proceedings is at the heart of the international criminal trial.

3. One of the rights which the accused must be afforded is equality of arms with the Prosecutor "to have adequate time and facilities for the preparation of the defence";[3] that right is recognized not only by the Statute but also by all international human rights treaties as following from the right to a fair trial.[4] The ECtHR has also stated that:

> The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.[5]

The right to a fair trial and the ensuing right for the accused to have **adequate** time and facilities for the preparation of the defence must therefore be evaluated concretely,

[1] Article 66.
[2] ICC-01/04-01/06-772, para. 39, emphasis added.
[3] Article 67(1)(b).
[4] Article 6(3) ECHR; article 14(3) ICCPR.
[5] ECtHR, *Artico v. Italy*, no. 6694/7413, May 1980, para. 33.

so as to enable effective preparation in view of the trial. According to the Human Rights Committee, the right to have adequate time and facilities entails access "to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory."[6] It is also stated that allowing the full exercise of this right is particularly important where the accused is charged with a serious criminal offence. Therefore, the foundation of any fair trial is for the accused to have **adequate** time and facilities **for the preparation of the defence**.

2. Applicable law for applications for leave to appeal

4. It is generally well established in case law[7] that under article 82(1)(d) and rule 155(1), a Chamber must determine (1) whether there is an appealable issue; (2) whether that issue could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (3) whether an immediate resolution by the Appeals Chamber may materially advance the proceedings. Regulation 65 of the Regulations of the Court states: "1. An application for leave to appeal […] **shall specify the legal and/or factual reasons in support thereof**. […]."[8]

5. To comply with the requirements of the Statute and the Regulations of the Court, a party must therefore demonstrate that the issue(s) it raises are indeed appealable issues, i.e., that those issues could be the basis for arguments demonstrating a legal or factual error before the Appeals Bench and not a "mere disagreement" with the impugned decision.

6. Moreover, it is not for a Chamber to rule on the merits of the issues raised by a party following a decision by that Chamber. The Judges must merely determine whether the party has indeed identified an appealable issue. A decision on an application for leave to appeal is not an occasion for the judges to explain why the party might have misunderstood the decision, to clarify what they meant or to express

[6] General Comment No. 32, CCPR/C/GC/32, 23 August 2007, p. 10.
[7] ICC-01/14-01/18-206, para. 10; ICC-01/04-02/06-322, para. 9; ICC-01/04-01/06-1191, para. 9, ICC-01/04-168, para. 8.
[8] Emphasis added.

disagreement with the points raised by the party wishing to appeal. Furthermore, if it appears that the parties lack the information necessary to understand the impugned decision, it means that the reasoning for the decision is arguably lacking. For judges to assume that they did not err in handing down a decision is understandable, but that is not what they should take into account in the certification for appeal. This cautious approach is warranted by the fact that it is not for a judge to rule twice on the same points. Leave to appeal granted by judges appertains to their own decision, and they are therefore subject to a duty of objectivity and detachment when deciding whether to grant the leave to appeal. This obligation on judges to exercise caution when ruling on an application for leave to appeal is observed in the Court's case law.[9]

7. In addition, the Defence is of the opinion that a violation of the fairness of the proceedings must be assessed in such a way as to safeguard all the rights of the person charged, as recognized by the Statute. A decision that directly violates a fundamental right of the person charged can necessarily affect the fairness of the proceedings in the broad sense. Indeed, the fairness of the proceedings must be understood as the duty to respect all the rights of the person charged in all aspects of the proceedings against that person. Such an approach is consonant with the Court's case law. In *Lubanga*, the Appeals Chamber emphasised the importance of ensuring that the rights of the person charged are respected in order to safeguard the fairness of the proceedings.[10] The Appeals Chamber in *Bemba et al.* held that a Chamber had the discretion to broadly interpret the criteria of article 82(1)(d) when respect for the fundamental rights of the person charged is at stake.[11]

II. Discussion

8. In its written submissions of 21 January 2022 and at the hearing of 28 January 2022, the Defence for Mr Said explained the reasons underpinning the trial commencement date put forth by the Defence. The Defence performed a clear and

[9] ICC-02/04-01/05-20-US-EXP 19, para. 13.

[10]

[11] ICC-01/05-01/13-1533, para. 16.

simple calculation by taking the ratio of the work to be done to the means available in order to determine the adequate time for the preparation of the defence.

9. The Defence pointed out that consideration should be given in particular to the time necessary to analyse and assess – especially in the light of the trial brief – all the documents disclosed by the Prosecutor, i.e. 12,412 documents (as at 21 January 2022), which corresponded to 60,728 pages and 73 hours, 44 minutes and 21 seconds of audio and video material. The Defence indicated that it would need some 10,121 hours (at a rate of six pages an hour) to read, study, analyse and cross-check the information in the 60,728 pages already disclosed and 147 hours to watch and analyse the audio-video material, which corresponds to the work of five people, full time, for approximately 14 months.

10. Interestingly, the calculation method used by the Defence is directly in keeping with that applied by the Prosecution, in particular in *Ongwen*. To estimate the work to be performed by each member of its Office to read and analyse documents, the Prosecution had explained that it was going by an average of 50 pages a day.[12]

11. The Defence also recalled that, in the pre-trial phase, the Chamber had relied on the limited scope of the confirmation hearing to decline to allow the Defence to comprehensively analyse the evidence disclosed by the Prosecution or to conduct comprehensive investigations,[13] which should have therefore been taken into account when estimating the work to be performed and the time needed to do so.

12. Additionally, at the hearing, the Defence recalled that the Prosecution had indicated in its written submissions that in the forthcoming months it intended to disclose a further 8,300 pages of rule 77 evidence, which, by definition, is evidence material to the Defence; that it was continuing to analyse its CARII database and had already identified 40,000 case-related documents to be analysed as a priority for disclosure purposes; and that, accordingly, all the new disclosure to come should be taken into account in calculating the adequate time for the preparation of the defence.

[12] ICC-02/04-01/15-196-Conf-Exp, ICC-02/04-01/15-196-Red2, para. 17.
[13] ICC-01/14-01/21-196, para. 29.

In that respect, it should be noted that in concrete terms the Prosecution has disclosed 748 additional items, corresponding to 5,193 pages, since 21 January 2022.

13. The Defence moreover noted that it must have adequate time to conduct its investigations and the preparations for field missions, adequate time to prepare cross-examinations before the trial effectively commences and adequate time for all legal and procedural requests.

14. Furthermore, the Defence explained:

> [TRANSLATION] It is crucial for the Defence to be able to comprehensively and holistically analyse all the evidence disclosed, whether that be incriminating, exonerating or rule 77 evidence, so that it can effectively prepare its investigations and for trial in such a way as to be able to meaningfully dispute the Prosecution's allegations.[14]

15. As regards the calculation method applied by the Defence, the Defence explained at the hearing of 28 January 2022 that it had used a particularly conservative calculation method.[15] It proposed a trial commencement date corresponding to the minimum time necessary to analyse the entirety of the evidence disclosed by the Prosecution at that date in order to be in a position to participate in the trial in an informed manner and to optimize its preparation of opening statements and cross-examinations so that the conduct of the trial would be smooth and rationalized. That time was the least amount necessary, since the Defence's preparation for the trial is not circumscribed to analysing the evidence available to it to draw out the tenor, contradictions, etc., but also consists of conducting dynamic investigations and preparing field missions, and-so-on.

16. The Defence's submissions therefore showed that adequate time for the preparation of the Defence is quantifiable according to the tasks to be performed, the pages to be analysed using a simple hourly calculation per page based on the Defence's modest means. Adequate time for the preparation of the defence is the outcome of the

[14] ICC-01/14-01/21-231-Conf-Exp, para. 21.
[15] ICC-01/14-01/21-T-007-CONF-FRA, p. 34, lines 8-9.

tasks/means ratio obtained through an arithmetic exercise, which means that this time cannot be curtailed.

17. In view of these quantifiable elements, the Defence thought it reasonable to set the commencement of the trial for the month of February 2023.[16] This date was arrived at as the result of a well-supported demonstration based on the tasks to be carried out by the Defence before commencement of the trial in order to guarantee respect for the rights of Mr Said and calculated using clear and transparent methods. In other words, the date did not reflect a "preference"[17] of the Defence as to the start of the trial; it was determined through an objective calculation of the time necessary to fulfil its mission within the shortest time possible. Accordingly, in the Defence's view, the Chamber – when it deviated from the date advanced by the Defence – should have explained how the Defence's calculations were inaccurate.

18. It appears, however, that the Chamber disregarded the figures provided by the Defence when – without giving the reasons – it set the trial commencement date to the trial for 26 September 2022, as a result of which the Defence does not have adequate time for effective and efficient preparation. The Defence is therefore at a disadvantage from the outset, since the Prosecutor, for its part, will have had several years to build its case – given that the situation in CARII has been before the Court since 2014, i.e. for eight years, and the warrant of arrest for Mr Said was issued in 2018, i.e. four years ago – which adversely affects the fairness of the trial.

19. On review, at no point in the impugned decision does the Chamber explain why and how it decided on 26 September 2022 as the trial commencement date. It therefore did not provide the reasoning for its decision, violating the spirit of the Statute, the Court's case law[18] and the provisions of international human rights instruments.

20. Moreover, it also appears on review that the impugned decision adversely affects the fairness of the proceedings in that it does not set a time limit for the

[16] ICC-01/14-01/21-231-Conf-Exp, para. 34.
[17] ICC-01/14-01/21-243, para. 20.
[18] Example: ICC-01/04-01/07-475, para. 101.

Prosecution to complete, to the extent possible, its rule 77 disclosures; does not afford the Defence sufficient time between receipt of the trial brief and the commencement of the trial to be able to effectively prepare for trial; and undermines the independence of the parties in building their cases by imposing a blanket requirement that all the experts be instructed jointly.

1. Appealable issues

1.1. First appealable issue: no reasons are provided to make it possible to understand the basis on which the trial commencement date was determined

21. The impugned decision states:

> The Chamber has considered all the above information and has noted the parties' preferences in terms of when they would like the trial to commence. In light of the information received from the parties and bearing in mind certain logistical and other constraints, the Chamber considers it both feasible and desirable to commence the trial on 26 September 2022. In making this determination, the Chamber has taken into account its obligations to ensure: (i) that the trial is fair and expeditious in accordance with Article 64(2) of the Statute; (ii) the protection of victims and witnesses pursuant to Article 68(1) of the Statute; and (iii) the victims' right to justice. The Chamber also considered its duty to ensure that the Accused has adequate time and facilities for the preparation of his defence. The Chamber notes, in this regard, that the trial will likely take place in alternation with other ongoing cases, which would leave sufficient time between evidentiary blocks for the Defence to further prepare, should they need to.[19]

22. This descriptive paragraph does not enable the parties and the participants to understand how and what concrete elements the Chamber relied on to consider that 26 September 2022 could be adhered to by the parties and could guarantee that the Accused's right to have adequate time and facilities for the defence would be respected and therefore that a fair trial could be held.

1.1.1. Lack of reasoning as to how the Defence arguments might have been given consideration by the Chamber in determining the trial date

23. First, the Chamber does not explain how, in determining the trial date, it gave consideration to the fact that the Pre-Trial Chamber had not allowed the Defence, in the pre-trial phase, to comprehensively analyse all the evidence disclosed to the

[19] ICC-01/14-01/21-243, paras. 20-21.

Defence by the Prosecution or to conduct comprehensive investigations. As a result, the Defence finds itself in the position of having to analyse, before the start of the trial, the entirety of the Prosecution's evidence (against a new standard of proof: "beyond reasonable doubt"), the majority of which it was not apprised of in the pre-trial phase.

24. Second, the Chamber does not explain how it took into consideration the Defence's calculations, which were nevertheless based on objective criteria. As the Defence has demonstrated in its submissions, the adequate time for effective and efficient preparation afforded to the defence before the start of the Proseutor's case must not be decided upon arbitrarily but must be based on quantifiable, objective criteria. The time adequate for the defence is calculated by taking the tasks to be carried out, precisely measured, in relation to the means available to the defence. This being a calculation, the outcome of that calculation is itself irrefutable. While the baselines for calculation or the calculation method may be refuted and challenged, the outcome of the calculation, however, cannot. If the baselines for calculation can be agreed upon, then the calculation only needs to be carried out: for the reading and analysis of a document, the amount of work that can be performed by one person per hour or per day, etc., is what needs to be calculated. From that calculation, it must then be concluded that this amount of time cannot be curtailed. In order to be duly reasoned, the decision being impugned should enable the parties to understand whether the Defence's calculation method (which is consistent with the Prosecution's practice, see above) was taken into consideration by the Chamber and how; or, if the Chamber departed from the Defence's calculation method, why, and which calculation method was applied instead.

25. The issue raised does not stem from a mere disagreement between the Defence and the Chamber on the choice of a trial commencement date but is a matter of what is encompassed by the concept of adequate time for the preparation of the defence and of the calculation methods to be applied. The issue is therefore whether it appears from the decision that the Chamber accurately analysed the needs of the Defence by relying on figures and any other arguments that the parties put before it.

26. Third, the Chamber does not explain how it took into consideration the Defence argument that it is crucial for it to be able to analyse all the disclosed evidence fully and holistically so that it can effectively prepare its investigations and for trial in order to meaningfully dispute the Prosecution's allegations, and that it is only in these circumstances that it will be able to conduct effective cross-examinations during the trial.[20] Instead, the Chamber, rather than explaining how it might have taken into account this argument, avoids the question by responding that the Defence might, potentially, be able to continue to prepare over the course of the trial, depending on the logistical arrangements of the hearings. However, the Defence specifically explained that it had to familiarize itself with the entirety of the evidence in order to conduct cross-examinations; otherwise it might overlook crucial information during the initial cross-examinations. It should be noted that once a witness has been called, that person will not return and the Defence will not be able to put to him or her questions that arise from new information discovered during the analysis of the evidence and its investigations and that those witnesses will not return.

27. It was all the more important for the Chamber to explain how it took the Defence argument into account since the calendar of proceedings established by the Chamber curtails even further the time available to the Defence *before the start of the trial*. The Chamber invited the Defence to file a brief by 12 August 2022. If the Defence were to choose to file such a brief, it would have to have finished fully analysing the Prosecution's evidence and completed its investigations *before* 12 August 2022 to be in a position to indicate in such a brief, if appropriate – without unveiling its strategy or violating the presumption of innocence – whether it challenges the Prosecution's approach to the presentation of its case, whether there are aspects it does not challenge, etc. Such an exercise necessarily entails having familiarized itself with the Prosecutor's case in its entirety in order to be able to potentially file an informed trial brief. Preparing for the trial during evidentiary blocks would not remedy the situation

[20] ICC-01/14-01/21-231-Conf-Exp, para. 21; ICC-01/14-01/21-T-007-CONF-FRA, p. 38, lines 8-16.

created by the calendar: the Defence has only until 12 August 2022 to analyse all the Prosecution evidence and not until 26 September 2022.

1.1.2. The lack of reasoning enabling the parties to understand what is encompassed by the factors which the Chamber states it considered in determining the trial date

28. First, as regards the "expeditiousness" of the proceedings: the Chamber does not explain what this concept encompasses in its view and therefore how it was taken into account in determining the trial date. It should be reiterated that having adequate time for the preparation of the defence is an inalienable right of the accused. To afford the accused **adequate** time and facilities **for the effective preparation of the defence** is the foundation of a fair trial. Nothing must diminish or curb that right. In no way must that right, or any right of the accused whatsoever, be weighed against other considerations, especially those of a logistical or administrative nature. The question arises as to the concept of "expeditiousness" on which the Chamber relies. In the impugned decision, the Chamber in fact appears to advert to the accused's right to be tried without undue delay. That right vests in the accused and not the Court. Were it to vest in the Court, the exercise of the accused's rights, and first and foremost, the right to adequate time and facilities for the preparation of the defence, would be denied, or at least weighed against other considerations, which, in effect, amounts to the same thing. The right to be tried without undue delay was conceived to pre-empt a trial from being used to incarcerate an accused person for years on end with no possibility of mounting a defence. It was not designed to limit the accused's right to prepare a defence. Yet, the Chamber is using the concept of "expeditiousness" **against** the accused to curtail the time available for preparation, which reduces his or her room for manoeuvre and capacity to defend him or herself. In other words, a right which vests in the accused, designed to pre-empt arbitrariness, is now being used in a way that limits full exercise of the accused's right to time to be able to defend him or herself. By definition, the only person who can determine when and how to exercise his or her rights is the holder of those rights. The accused person alone can determine how much time is needed to prepare effectively a defence.

29. Second, as regards victim and witness protection, the Chamber does not explain how this matter is germane to determining the trial commencement date, nor, concretely, how it was taken into account in setting 26 September 2022 as the trial commencement date in the case at bar.

30. Third, as regards the "victims' right to justice", the Chamber also does not explain how this principle had a bearing on its determination of the trial date, i.e. 26 September 2022. There is nothing in the impugned decision to explain what factors concerning the victims might have been taken into account. The abstract concept of a "victims' right" to justice – a concept that is neither provided for nor recognized by the Statute – cannot impede the accused's full exercise of his or her rights explicitly afforded under article 67 of the Statute, namely in this instance the right to have adequate time and facilities for the preparation of the defence.

31. Lastly, it should be recalled that, to date, there are no participating victims in the present proceedings who could claim a "right to justice" or who invoked arguments to which the Bench might have given consideration.

32. Fourth, the Chamber does not explain which "certain logistical and other constraints" it took into account to consider that 26 September was a "feasible" date. Explaining what those constraints were would have been critical to allowing the parties to simply understand the Chamber's reasoning and the regard it had had to those "constraints" on its determination of the trial date.

33. Fifth, the Chamber does not explain how the fact that the Defence could potentially prepare for the trial *over the course* of the trial makes it possible to discount the fact that the Defence was deprived of adequate time and facilities to prepare *before* the trial. It was all the more important that the Chamber explain its reasoning since, by stating that the Defence would be able to prepare during the trial, the Chamber is thus admitting that the Defence will not have had the time to prepare before the trial. The Defence therefore will not have been able to analyse the entirety of the evidence before the initial cross-examinations (see above). An explanation of the Chamber's reasoning was all the more imperative since the periods between the evidentiary

blocks allow the parties to prepare forthcoming examinations on the basis of their knowledge of the case (gained from a holistic analysis), the outcome of their investigation, witness interviews, etc. It is also to be borne in mind that, while the Prosecution has various trial lawyers and examiners, the Defence on the other hand, with meagre resources at its disposal, will have only a limited number of people able to cross-examine the witnesses. The periods between the evidentiary blocks therefore permit the Defence to focus on the preparation of cross-examinations *stricto sensu* and not of the trial in general.

1.1.3. The lack of reasoning deprives the decision of legal basis.

34. The duty to provide a reasoned decision is the bedrock of justice.[21] Justice cannot rest on arbitrariness or an impression of arbitrariness. A duty is therefore cast on the courts to explain the grounds in fact and in law for each of its decisions, not only to the parties concerned but also to the community they represent. Thus viewed, reasoning is more than the underpinning of a particular decision: it also contributes to reaffirming and strengthening the intangible principles which form the fabric of any society. By failing to explain why it did not rely on the objective criteria set out by the Defence and, on the contrary, decided to curtail the Defence's preparation time, the Chamber appeared to be giving precedence to considerations of expediency over those of principle.

35. The European Court of Human Rights has, on a number of occasions, underlined that the duty cast on courts to supply reasons for their decisions is among the guarantees pertaining to the right to a fair hearing enshrined in article 6 of the ECHR[22] (*Hadjianastassiou v. Greece*:[23] courts must "indicate with sufficient clarity the grounds on which they based their decision"). In the same vein, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is part of the right to a fair

[21] ICC-02/11-01/11-278-Conf, dissenting opinion.
[22] *Higgins and others v. France*, 19 February 1998 (134/1996/753/952).
[23] https://hudoc.echr.coe.int/fre?i=001-57779.

trial and that only reasoned decisions can rightly be canvassed,[24] not least because "at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision."[25]

36. To simply state that consideration was given to what the Defence said[26] or to general and theoretical considerations cannot constitute sufficient grounds.

1.2. Second appealable issue: the lack of a deadline imposed on the Prosecution before the commencement of the trial to disclose rule 77 evidence constitutes an error of law and fact

37. The Defence is of the view that failure to impose a deadline on the Prosecution to disclose all rule 77 material (evidence material to the preparation of the defence) or article 67(2) (exonerating evidence)[27] constitutes, first and foremost, an error of law which invalidates the impugned decision.

38. To allow the Prosecutor to continue, throughout the course of the proceedings, to disclose rule 77 or article 67(2) evidence when he becomes aware that it is in his possession or it is collected after the trial has begun is one thing; by definition, such evidence is material to the preparation of the defence. Not to impose a deadline before the commencement of the trial on the Prosecutor in which to discharge his disclosure obligations is quite another. According to the logic of the proceedings, the defence should have all the relevant evidence in its possession – whether that be incriminating or exonerating evidence or evidence material to the preparation of the defence – with sufficient time *before* the commencement of the trial to enable the defence to take into account all relevant evidence for its preparation (see annex). In that sense, there is no reason to differentiate between the incriminatory evidence and the other evidence that the Prosecution must duly disclose to the defence. It must all be analysed,

[24] *Nikolić*, 8 March 2006, IT-02-60/1-A, para. 96; *Kunarac*, 12 June 2002, IT-96-23 and 23/1-A, para. 41.
[25] *Milutinović*, IT-05-87-AR65.1, para. 11.
[26] ICC-01/14-01/21-243, para. 20.
[27] ICC-01/14-01/21-243, para. 22.

cross-checked and taken into account in the preparation of the defence, ahead of the commencement of the trial.

39. The deadline plays a fundamental role: it forces the Prosecution to be diligent in discharging its disclosure obligations. Currently, without any deadlines imposed by the Chamber, the Prosecution could disclose evidence material to the preparation of the defence at the last minute before the commencement of the trial – or even thereafter – thereby leaving the Defence no choice but to request additional time to analyse that evidence, consequently affecting the expeditiousness of the proceedings for reasons beyond the Accused's control, and therefore in full violation of his rights. In other words, seeking to advance faster now, to the detriment of the Accused's right to have adequate time for the preparation of his defence, is to risk protracting the proceedings later, still to the detriment of the rights of the Defence. In both scenarios it is the Accused who would pay the price and would be prevented from fully exercising his rights.

40. It is thus vital that the Chamber afford the Defence the means to have adequate time and facilities for the preparation of Mr Said's defence, as guaranteed by the Court's consistent practice, not least by imposing a time limit on the Prosecution to disclose all rule 77 evidence before the trial.

41. The Defence notes that the Chamber relies on "experience in other ICC trials". First, a lack of reasoning should be noted here since the Chamber does not advert to any footnote or specific examples. While there have obviously been cases before the Court in which the Prosecution has made tardy rule 77 disclosure, for example, that does not mean that such experience is an indication of a common practice at the Court. The opposite is true: instances of rule 77 disclosure occurring after the trial has begun – and in fact after a time limit set on the Prosecution – are by definition rare: once a time limit has been set, the Prosecution must justify those delays. In that respect, the practice of the Court has accordingly always been to impose a time limit on the Prosecution to disclose all exonerating evidence and rule 77 evidence with ample time

before the commencement of the trial (see annex) to ensure respect for the rights of the defence.

42. Moreover, the Defence considers that failure to impose a time limit on the Prosecution also constitutes an error of fact which invalidates the impugned decision. Indeed, this departure from the Chamber's case law is even more peculiar in *Said* since the Prosecution has plainly stated that it is in the process of analysing a large amount of material contained in the database existing in relation to CARII that might fall under rule 77.[28] This database is colossal, comprising 136,000 items, of which 40,000 have been identified by the Prosecution as needing to be analysed as a priority with a view to a rule 77 disclosure. It also stated on 21 January 2022 that 8,300 pages will be disclosed in that context. As the Prosecution is currently analysing this database, it is wholly conceivable that it will discover other exonerating (or even incriminating) or rule 77 evidence therein that it will need to disclose.

43. Accordingly, in the case *sub judice*, it seems all the more crucial to set a time limit for the Prosecution so that it optimizes and streamlines its work in order to discharge its obligations with respect to exonerating and rule 77 disclosure and avoids inundating the Defence right *before* or *during* the trial, not least since the risk of having to delay the proceedings (see above) is that much greater given the volume of the evidence in the case at bar. Bearing in mind

44. In the same vein, the Defence has already stated in its written and oral submissions that, in the instant case, the Prosecution had disclosed the bulk of the rule 77 or exonerating evidence it possessed at the last moment before the confirmation hearing.[29] In such a situation, it was of the utmost importance to explain why the Chamber did not take into account that practice of the Prosecution, even though the Defence had drawn attention to it, and how the impugned decision, which departs from the Court's consistentcase law, does not violate the rights of the Defence.

[28] ICC-01/14-01/21-230-Conf, paras. 31-32.
[29] ICC-01/14-01/21-231-Conf-Exp, para. 54.

45. In the circumstances of the instant case, it was all the more crucial to impose a time limit on the Prosecution given that the volume of the evidence disclosed or to be disclosed is tremendous and since the Prosecution has yet to disclose everything, its investigations are ongoing and its analysis of the database creates a situation conducive to further disclosures as part of the Prosecution's disclosure obligations. On that point, the Defence notes that the impugned decision states that:

> as long as the Accused has received all the relevant and significant materials in the Prosecution's possession, there will be no prejudice to the rights of the Accused by proceeding to trial before the Prosecution has reviewed every last item of evidence in its database.

However, as long as the Prosecution is investigating and analysing its database, no one – including the Prosecution and the Chamber – knows whether the Defence has the relevant material. The Prosecution's assertion that "[t]hese items are not expected to have any direct connection to the charges against Mr SAID",[30] to reassure the Chamber, begs the question and is not based on any tangible information, and cannot be relied on by the Chamber to determine whether the Defence at present has all the evidence material to the preparation of the defence or whether it would be prejudiced because of a tardy disclosure of new evidence; and above all since, as the Defence has stated (see above), the prejudice for the Defence will be a significant delay in the proceedings as it will constantly have to request additional time to familiarize itself with the new evidence disclosed and incorporate it into its defence. Moreover, in analysing the evidence disclosed by the Prosecution, the Defence might realise that it needs to obtain certain additional rule 77 evidence in response to its defence strategy.

1.3. Third appealable issue: the lack of reasoning for the three-month time limit granted to the Defence to analyse the Prosecution's brief

46. The Chamber states in the impugned decision that "the Defence must have at least three months to prepare after receiving the Trial Brief."[31] The Bench gives no explanation as to how it arrived at this three-month period apparently necessary for

[30] ICC-01/14-01/21-230-Conf, para. 32.
[31] ICC-01/14-01/21-243, para. 23.

the Defence to prepare for the trial after the Prosecution has filed the trial brief, thereby depriving the decision of its reasoning and thus of legal basis.

47. As the Defence pointed out in its submissions of 21 January 2022, in view of the volume of the record in the instant case (whether that be incriminating, exonerating or rule 77 evidence), the number of witnesses that the Prosecution intends to call and the importance of the trial brief for comprehending the Prosecution's case, the Defence had requested at least six months between the filing of the Prosecution's trial brief and the commencement of the trial.[32] However, nowhere in the order does the Chamber explain or give the reasoning for the three-month period provided for between the filing date of the trial brief and the commencement date of the trial.

48. The Chamber appears in fact to have adopted, without stating so explicitly, a standard length of three months applied in other cases before the Court, mechanically and without tailoring it to the case *sub judice*. However, a time limit must be calculated using objective factors, such as the volume of work, the means available to the Defence team, etc., lest it in effect be arbitrary. For example, there is no objective reason for the defence to receive the same amount of time in *Said* and in *Gicheru*, which is a case of contempt (and therefore does not concern the crimes falling within the Court's jurisdiction) and has a limited scope, especially in terms of evidence and the number of witnesses. If the Defence in *Gicheru* had three months between the filing of the trial brief and the trial commencement date, it is objectively warranted for the Defence in *Said* – a case that is considerably larger – to receive more time.

1.4. Fourth appealable issue: the general instruction given to the parties to jointly instruct all the experts in the case constitutes an error of law

49. In the impugned decision, the Chamber states:

> The Prosecution indicated its intention to call two expert witnesses and that it endeavours to jointly instruct these experts with the Defence. The Chamber approves of this approach and hereby instructs the participants to jointly instruct all experts in this case pursuant to Regulation 44(2) of the Regulations.[33]

[32] ICC-01/14-01/21-231-Conf-Exp, para. 68.
[33] ICC-01/14-01/21-243, para. 35.

50. The Defence considers that ordering the parties to jointly instruct all the experts in the case, generally, is consonant neither with regulation 44(2), which does not provide for such a scenario, nor with the nature of the judicial process.

51. First, ordering the parties to jointly instruct all the experts in the case completely distorts the dynamics of the criminal trial. The decision of one party – whether that be the Prosecution or the defence – to make use of an expert is part of a specific strategy, of a choice to focus on a certain aspect of the case rather than another, etc. In other words, calling upon an expert and instructing the expert on certain aspects of the case related to his or her expertise is a strategic decision that must belong solely to Counsel, be that for the Prosecution or for the defence. Choosing to appoint an expert is part and parcel of the strategy settled upon by a party; requiring that party to involve the other party in that strategy, by imposing a joint instruction each and every time, infringes its autonomy to determine the content of its own case.

52. On that matter, the fact that the Prosecutor may be contemplating calling on specific experts and may be choosing – as part of the strategy he has formulated – to ask the defence whether it wishes to give joint instructions, cannot have the effect that the defence is obliged to agree to that request or is compelled to proceed in the same manner.

53. Moreover, there will be a risk, for a party opting to instruct an expert of the other party, that it will have to reveal to that other party elements of its strategy and angles on its intended approach to the case. Therefore, such a choice should belong to Counsel alone – the sole person in a position to to determine whether the defence of the interests of the accused will be imperilled by giving joint instructions to a Prosecution witness.

54. Lastly, the Defence is of the opinion that any agreement between the parties to jointly instruct such or such expert, on a case-by-case basis, cannot be construed as that party's acceptance of the other party's expert or of the expert's findings. Specifically, the party not calling the expert (1) must always be able to challenge the witness's expert evidence; (2) must always be able to fully and completely cross-examine the

expert at the trial; and (3) must always be able to seek a second expert opinion from an expert of its choice.

55. Hence, while regulation 44(2) provides that the Chamber "may direct the joint instruction of **an** expert"[34] – i.e. taking into account the specific situation of a single expert, on a case-by-case basis – it does not provide for changing the method for the appointment of experts, the choice of whom belongs to the parties. It is necessary to assess, on a case-by-case basis and for each type of expert investigation (forensic police, military, psychologist, etc.), whether, depending on the area of activity and the situation of the parties, it is advisable and necessary to jointly instruct an expert, albeit without the fair trial being affected.

2. The resolution of the issues raised may materially affect the fair and expeditious conduct of the proceedings or the outcome of the trial

56. The choice of trial date insofar as it affects defence preparation time and hence the exercise of a fundamental right of the accused has a profound bearing on the fairness of the trial. Were the person charged not to have the time to prepare adequately his or her defence, he or she would, from the outset, be hamstrung vis-à-vis the Prosecution and so the fairness of the trial would be violated. Of note is that the Prosecutor has been investigating the present situation for eight years and the present case for four years. To maintain a balance between the Prosecution and the defence, it is paramount, therefore, that the defence have sufficient preparation time to mount a proper and effective defence, so that a fair trial may be held.

57. The courts have consistently taken the view that sufficient time for preparation of the defence forms the cornerstone of a fair trial. International criminal courts and tribunals have consistently drawn a connection between the time accorded to the defence and procedural fairness and so have consistently granted leave to appeal on that issue. For example, in *Karadzic*, the Defence was, on a number of occasions, granted leave to appeal as regards the trial start date by the Trial Chamber, which held

[34] Emphasis added.

that "the issue of trial readiness pertains directly to the fairness of the proceedings. […] the consequences for the outcome of the trial of proceeding on the basis of the flawed decision could be extremely serious."[35] Of further note in this regard is that it was the policy of the ICTY Prosecutor not to object to defence applications for leave to appeal since matters of preparation time have a profound bearing on a fair trial.

3. The immediate resolution of the issues raised is necessary to materially advance the proceedings

58. It is evident that the determination of the trial date will have a lasting effect on the remainder of the proceedings by directly affecting the accused's ability to prepare his or her defence. That being so, it clearly appears that an immediate resolution of the issue by the Appeals Chamber is essential. Were it confirmed at a late stage of the proceedings that the Accused's right to prepare had not been respected, that could call into question *a posteriori* the entire proceedings and would irreparably affect the accused's rights.

59. The Defence also notes that the resolution of a matter of principle can be considered a material advancement of the proceedings.[36] At stake here is a matter of principle concerning the very concept of "adequate time and facilities for the preparation of the defence" before the start of the trial, which must be settled by the Appeals Chamber.

60. Lastly, the immediate resolution of the issues raised,by the Appeals Chamber through its authoritative response, would rid the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.[37] On those issues, the ICTY has recognized the importance of the Appeal Chamber's immediate intervention.[38] The Prosecutor had not objected to the Defence's request on that point either.

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[35] *Karadzic*, "Decision on Application For Certification To Appeal Decision On Commencement Of Trial", 18 September 2009, para. 5.
[36] "Decision on Joseph Nzirorera's Application for Certification to Appeal", 9 October 2007.
[37] ICC-02/04-177.
[38] See footnote 35, para. 6.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER VI TO:

- **Grant** the Defence leave to appeal the "Decision Setting the Commencement Date of the Trial and Related Deadlines" (ICC-01/14-01/21-243).

[signed]

Jennifer Naouri
Lead Counsel for Mahamat Said Abdel Kani

Dated this 28 February 2022,

At The Hague, Netherlands