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

Date: **23 September 2021**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Tomoko Akane

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public**

**Prosecution Response to Defence Request for Leave to Appeal the Order Setting the  
Schedule for the Confirmation of Charges Hearing**

**Source:** Office of the Prosecutor

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

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**Victims Participation  
and Reparations Section**

**Other**

## I. INTRODUCTION

1. The Defence's request for leave to appeal ("Request")<sup>1</sup> Pre-Trial Chamber II's order setting the schedule for the confirmation of charges hearing ("Order")<sup>2</sup> should be dismissed. The Defence's arguments boil down to a mere disagreement with the Chamber's decision to allocate the Defence fewer hours of oral presentation time than it had requested. The issues raised for certification do not constitute "appealable issues" and also do not meet the other requirements under article 82(1)(d) of the Rome Statute.

## II. SUBMISSIONS

2. The Defence seeks leave to appeal the Order in relation to four issues, which the Prosecution understands in summary as follows:

- a. Whether the Chamber adequately reasoned its decision in relation to the amount of time and pages allocated to the Defence to discuss the merits of the charges during the confirmation phase of the proceedings ("Issue 1");<sup>3</sup>
- b. Whether the Chamber respected the principle of equality of arms when it allocated the Defence 3.5 hours to present its arguments on the merits of the charges at the confirmation hearing and the opportunity to file a 30-page submission in advance of the hearing ("Issue 2");<sup>4</sup>
- c. Whether the Chamber's organisation of the confirmation of charges hearing is consistent with the Defence's right to have the last word ("Issue 3");<sup>5</sup>

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<sup>1</sup> ICC-01/14-01/21-173 ("Request").

<sup>2</sup> ICC-01/14-01/21-172 ("Order").

<sup>3</sup> Request, heading 1, paras. 27-32.

<sup>4</sup> Request, heading 2, paras. 33-36.

<sup>5</sup> Request, heading 3, paras. 37-53.

- d. Whether the Chamber has the power to limit the scope of the objections or observations a Party may make pursuant to rule 122(3) of the Rules of Procedure and Evidence (“Issue 4”).<sup>6</sup>

3. All issues the Defence raises either misrepresent the Order and/or simply disagree with it, failing to demonstrate the existence of an appealable issue genuinely arising from it. The Defence also fails to establish the other requirements for article 82(1)(d) interlocutory appeal, that is, that any of the proposed issues (1) would significantly affect both the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) that immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>7</sup>

#### *Issue 1 – sufficiency of reasoning*

4. Issue 1 misrepresents the Order and therefore does not genuinely arise from it.<sup>8</sup> Contrary to the Defence’s submission that the Chamber failed to provide any reasoning allowing the Parties to understand the basis upon which it reached its decision,<sup>9</sup> the Chamber did explain how it came to its conclusions, including by extensively addressing the Defence’s submissions and arguments.<sup>10</sup>

5. In particular, the Chamber considered the Defence’s submissions about the challenges it faced, but reasoned that it had taken measures from early in the course of the proceedings to ensure sufficient and meaningful preparation for the Defence.<sup>11</sup> The Chamber also reminded the Defence that the scope of the confirmation of charges phase is limited, amounting to a “light review,”<sup>12</sup> and invited the Defence to consider focusing on the matters which are most relevant to Mr Said’s individual criminal responsibility.<sup>13</sup> The Chamber further made a suggestion about how the

<sup>6</sup> Request, heading 4, paras. 54-60.

<sup>7</sup> ICC-02/05-01/20-372, para. 9; ICC-01/14-01/18-206, para. 10.

<sup>8</sup> See ICC-02/05-01/20-372, para. 11 (citing Appeals Chamber jurisprudence).

<sup>9</sup> Request, para. 28.

<sup>10</sup> See Order, paras. 9-11, 15-20, 22-23, 29-30. *Contra* Request, para. 30.

<sup>11</sup> Order, para. 18.

<sup>12</sup> Order, para. 20.

<sup>13</sup> Order, para. 20.

Defence could streamline its oral presentation, by presenting a table of evidence to avoid having to refer to the full ERN numbers of each item of evidence.<sup>14</sup> The Chamber also specifically addressed the request to file a written submission after the confirmation hearing<sup>15</sup> and offered an alternate solution whereby the Defence is allowed to file a written submission in advance of the hearing.<sup>16</sup>

6. The Defence's arguments boil down to a basic disagreement with the Chamber's decision disguised as an issue of lack of reasoning. However, contrary to its submission, the Defence had all the information to understand the Chamber's reasoning<sup>17</sup> but chose to ignore it by misrepresenting the Order. Issue 1 therefore does not genuinely arise from it. Even if it did, the Defence has not established that Issue 1 would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that appellate resolution may materially advance the proceedings.

### *Issue 2 – alleged breach of the principle of equality of arms*

7. Issue 2 misrepresents the Order and therefore does not genuinely arise from it. Contrary to the Defence's submission that "*il n'y a aucune explication dans la décision attaquée sur comment l'égalité des armes entre les Parties serait assurée*",<sup>18</sup> the Chamber properly reasoned its decision—<sup>19</sup> which it reached in light of the principle of equality of arms that the Chamber expressly recalled at the outset of its analysis.<sup>20</sup>

8. In any event, Issue 2 fails to constitute an appealable issue as it expresses nothing but the Defence's disagreement with the Chamber's determination. In deciding how to conduct courtroom proceedings, Chambers have a wide margin of discretion. Inevitably, Chambers must balance a variety of factors, including efficient

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<sup>14</sup> Order, para. 23.

<sup>15</sup> Order, para. 29.

<sup>16</sup> Order, para. 30.

<sup>17</sup> *Contra*, Request, para. 30.

<sup>18</sup> Request, paras. 33-34.

<sup>19</sup> See above response to Issue 1.

<sup>20</sup> Order, para. 15.

use of courtroom time and the expeditious conduct of the proceedings, and decide on an appropriate way forward. The Defence had the opportunity to present its proposal for how the confirmation hearing would be conducted, and the Chamber took that into account.<sup>21</sup> The Defence's mere disagreement with the Chamber's conclusion, disguised as an issue of lack of reasoning, does not constitute an appealable issue.

9. Furthermore, the Defence has not established that Issue 2 would affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence was granted more than double the amount of time granted to the Prosecution to present its arguments at the hearing as well as the opportunity to file a 30-page written submission in advance of the hearing.<sup>22</sup> Further, the Order does not rule out the possibility that additional time could be afforded to a Party if the need arises. In fact, the Chamber seemingly anticipates that possibility as it specifically reserved a whole session in case any further time was required.<sup>23</sup> In this context, the Defence's assertion that "*la Défence aura vu sa capacité à tester la preuve du Procureur [] limitée par la Chambre préliminaire*"<sup>24</sup> and that consequently the Chamber's schedule *would* affect the fair and expeditious conduct of the proceedings and the outcome of the trial is wholly speculative and premature.

10. The Defence also fails to establish that interlocutory appellate review would materially advance the proceedings. Instead, the proceedings would be delayed waiting for a decision from the Appeals Chamber even though the potential harm envisioned by the Defence—not having enough time to present its arguments—may never actually arise.

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<sup>21</sup> Order, para. 22 ("...having considered the observations of the parties and participants as well as the scope of the present case...").

<sup>22</sup> Order, paras. 22, 30.

<sup>23</sup> Order, p. 10.

<sup>24</sup> Request, para. 35.

### *Issue 3 – alleged failure to grant the Defence “the last word”*

11. Issue 3 misrepresents the Order and therefore does not genuinely arise from it.<sup>25</sup> The Order in no way restricts the Defence from having the “last word” within the meaning of rule 122(8) of the Rules. Indeed, the Chamber specifically acknowledged that the Defence should have the last word,<sup>26</sup> and its envisioned schedule calls for the Defence to speak last.<sup>27</sup> Contrary to the Defence’s misrepresentation of the Order,<sup>28</sup> the Chamber’s decision to allow the Defence to file additional written submissions before the hearing<sup>29</sup> in no way (neither *de jure* nor *de facto*)<sup>30</sup> affects the schedule nor deprives the Defence to its right to have the last word. As such, the proposed issue does not arise from the Order and is not appealable.

12. Further, the Defence has not established that Issue 3 would affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that immediate resolution would materially advance the proceedings.

### *Issue 4 – purported limitation on rule 122(3) submissions*

13. Issue 4 misrepresents the Order and therefore does not arise from it. Contrary to the Defence’s submission,<sup>31</sup> the Chamber did not *restrict* the scope of the observations that the Defence is allow to make at the opening of the hearing under rule 122(3). Rather it simply invited *all* Parties to raise issues or objections that were *not* previously brought to the Chamber’s attention.<sup>32</sup> Requiring all Parties to “refrain from repeating or reformulating previous submissions”<sup>33</sup> does not in any way *restrict* the scope of the observations and objections that the Defence is entitled to advance

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<sup>25</sup> See Request, paras. 39, 44-49.

<sup>26</sup> Order, para. 15.

<sup>27</sup> Order, para. 10.

<sup>28</sup> Request, paras. 37-51.

<sup>29</sup> Order, para. 30.

<sup>30</sup> See *contra* Request, paras. 55-60.

<sup>31</sup> Request, paras. 55-58.

<sup>32</sup> Order, para. 25.

<sup>33</sup> Order, para. 25.

under rule 122(3), nor does it deprive the Defence of its “*plein exercice de ce droit*”,<sup>34</sup> but merely prevents unnecessary repetitions in the interest of a fair and expeditious conduct of the proceeding.

14. In any event, even if the Issue 4 did arise from the Order, the question whether the Pre-Trial Chamber will bar the Defence from raising observations or objections related to the conduct of the proceedings is merely speculative and does not constitute an appealable issue.<sup>35</sup> Further, it would not affect the fairness of the proceedings or the outcome of the trial.

### III. CONCLUSION

15. For the foregoing reasons, the Pre-Trial Chamber should reject the Request.



**Karim A. A. Khan QC, Prosecutor**

Dated this 23<sup>rd</sup> day of September 2021  
At The Hague, The Netherlands

<sup>34</sup> Request, para. 59.

<sup>35</sup> See, e.g., *Prosecutor v. Bemba*, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 11 (finding that “the appealable issue, as defined by the Appeals Chamber, has to be an issue that emanates from the rule of the decision concerned and does not merely represent an abstract question or a hypothetical concern”).