



Original: English

**No. ICC-01/14-01/21
Date: 29 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
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

Decision on the Defence's request for leave to appeal the 'Order setting the schedule for the confirmation of charges hearing'

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, Prosecutor
Mr James Stewart
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

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Language Services Section

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Chamber’ and the ‘Court’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani* (‘Mr Said’), issues this ‘Decision on the Defence’s request for leave to appeal the “Order setting the schedule for the confirmation of charges hearing”’.

I. PROCEDURAL HISTORY

1. The Chamber recalls the relevant procedural history of the case as detailed in previous decisions and orders.¹
2. On 14 September 2021, the Chamber issued the Order on Hearing Schedule, in which it, *inter alia*, allocated three and a half hours to the Defence to present its arguments on the merits of the case during the confirmation hearing that will be held on 12 until 14 October 2021, and allowed it to file written submissions on the merits of the case by no later than 16:00 on Monday, 4 October 2021, should it wish to do so.²
3. On 20 September 2021, the Defence file the ‘Demande d’autorisation d’interjeter appel de l’« Order setting the schedule for the confirmation of charges hearing » (ICC-01/14-01/21-172)’ (the ‘Defence’s Request’).³
4. On 24 September 2021, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution Response to Defence Request for Leave to Appeal the Order Setting the Schedule for the Confirmation of Charges Hearing’ (the ‘Prosecution’s Response’).⁴

II. SUBMISSIONS

A. The Defence’s Request

5. In the view of the Defence, the Order on Hearing Schedule raises four appealable issues. Concerning the first issue, the Defence submits that the Chamber failed to provide reasons and the legal basis for the number of hours allocated to the Defence to present arguments on the merits during the confirmation hearing (the ‘First Issue’). Regarding the second issue, the Defence argues that, by allocating three and a half hours

¹ See e.g. Order setting the schedule for the confirmation of charges hearing, 14 September 2021, ICC-01/14-01/21-172 (the ‘[Order on Hearing Schedule](#)’), paras 1-5.

² [Order on Hearing Schedule](#), ICC-01/14-01/21-172, para. 30, p. 12.

³ [ICC-01/14-01/21-173](#).

⁴ Dated 23 September 2021 and registered on 24 September 2021, [ICC-01/14-01/21-177](#).

to the Defence and 30 pages for its written submissions, the Chamber failed to respect the equality of arms principle (the ‘Second Issue’).

6. With respect to the third issue, the Defence avers that the Chamber disregarded the Defence’s right to have the last word by allowing the Prosecution and the Office of Public Counsel for Victims to respond to its written submissions to be filed in advance of the confirmation hearing (the ‘Third Issue’). Concerning the fourth issue, the Defence submits that by limiting observations under rule 122(3) of the Rules of Procedure and Evidence (the ‘Rules’) to ‘issues or objections that were not previously brought to the Chamber’s attention’, the Chamber adopted an overly restrictive interpretation of this provision without providing reasons (the ‘Fourth Issue’).

7. Furthermore, the Defence submits that all four issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber is warranted. For the First and Second Issues, the Defence submits that the allocation of hours granted by the Chamber affects its right to challenge the Prosecution’s evidence and the charges and thus violates its right to a fair trial. It also avers that since future proceedings may be affected by this alleged unfairness, the intervention of the Appeals Chamber is warranted. The Defence further argues that the Third and Fourth Issues concern the exercise of its rights to have the last word and to make observations under rule 122(3) of the Rules and that an immediate resolution by the Appeals Chamber is therefore warranted.

B. The Prosecution’ Response

8. The Prosecution submits that the Defence’s Request should be dismissed. Regarding the First Issue, the Prosecution avers that the Chamber explained the basis for its conclusions and extensively addressed the Defence’s submissions. With respect to the Second Issue, the Prosecution argues that the Defence misrepresents the Chamber’s findings and its submissions amount to a mere disagreement with the Chamber’s determination. According to the Prosecution, the Defence fails to appreciate that it ‘was granted more than double the amount of time’ allocated to the Prosecution to present its arguments on the merits at the hearing in addition of being granted the ‘opportunity to file a 30-page written submissions document in advance of the hearing’. The Prosecution adds that the Order on Hearing Schedule specifically reserves an

additional session in case further time is required; hence additional time could possibility be afforded to a Party if the need should arise.

9. Regarding the Third Issue, the Prosecution avers that, contrary to the Defence's submissions, the Order on Hearing Schedule specifically provides for the Defence to have the last word and that the optional written submissions to be filed by the Defence before the hearing do not affect this order in the schedule, nor does it deprive the Defence of this right. As for the Fourth Issue, the Prosecution submits that the Defence misrepresents the Order on Hearing Schedule and that this issue does not arise from it. According to the Prosecution, requiring the parties to refrain from repeating or reformulating previous submissions 'does not in any way *restrict* the scope of the observations and objections that the Defence is entitled to advance under rule 122(3)' of the Rules nor does it deprive the Defence of the ability to exercise any rights. The Prosecution argues that preventing such unnecessary repetitions is in 'the interest of a fair and expeditious conduct of the proceedings'.

III. DETERMINATION BY THE CHAMBER

10. The Chamber notes article 82(1)(d) of the Rome Statute (the 'Statute'), rule 155 of the Rules and regulation 65 of the Regulations of the Court.

11. The Chamber recalls that the requirements under article 82(1)(d) of the Statute are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.⁵

12. Regarding the First and Second Issues, the Chamber notes at the outset that when allocating hours to parties during the confirmation hearing, it exercised its discretion with respect to the conduct of the hearing, pursuant to rule 122(1) of the Rules. In doing so, the Chamber duly considered the challenges faced by the Defence, the observations

⁵ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Decision on the Defence alternative request for reclassification of a document or reconsideration of a decision and subsidiary request for leave to appeal a decision](#), 3 May 2021, ICC-02/05-01/20-372, para. 10; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'](#), 24 May 2019, ICC-01/14-01/18-206, para. 11; Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision on a Request for Leave to Appeal](#), 11 February 2011, ICC-01/09-43, para. 12; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on the OPCD's request for leave to appeal the 3 July 2008 decision on applications for participation](#), 4 September 2008, ICC-01/04-535, para. 16.

of the parties and the scope of the case. By arguing that the Chamber disregarded these factors and failed to provide reasons, the Defence misrepresents the Order on Hearing Schedule. Therefore, the Chamber considers that these issues amount to a mere disagreement with the manner in which the Chamber exercised its discretion in allocating hours and as such do not constitute appealable issues within the meaning of article 82(1)(d) of the Statute.

13. Turning to the Third Issue, the Chamber notes that in the Order on Hearing Schedule it ‘allow[ed] the Defence, *should it wish to do so*, to file written submissions on the merits’ in advance of the hearing.⁶ It follows from this finding that the Defence is not required to file any such submissions. In fact, this constitutes an entitlement which adds to the rights of the Defence. It is therefore unclear how the Order on Hearing Schedule would have an impact on Mr Said’s rights in the manner described in the Defence’s Request, since it is entirely up to the Defence to decide whether it wishes to avail itself of this opportunity. Should the Defence not wish to do so, it may simply choose not to make written submissions in advance of the hearing. The Third Issue therefore does not arise from the Order on Hearing Schedule.

14. Furthermore, to the extent the Defence alleges a violation of its right to have the last word, the Chamber recalls that this right, as set out in rule 122(8) of the Rules, requires that ‘the Prosecutor and the person, in that order,’ must be permitted to make final observations. The Defence appears to ignore that the Order on Hearing Schedule expressly sets the order of final observations in the manner required by rule 122(8), namely with the Defence making such observations last. The Chamber therefore is not satisfied that the Third Issue is an appealable issue arising from the Order on Hearing Schedule.

15. With respect to the Fourth Issue, the Chamber notes that the Defence does not explain how its inability to repeat observations or objections that have been previously considered by the Chamber has any impact on the fairness and expeditiousness of the proceedings. It is unclear how the Chamber’s instruction not to repeat such observations or objections, which the Chamber has already disposed of and which are therefore unlikely to be considered again, would affect the Defence’s rights. Therefore, the

⁶ Emphasis added.

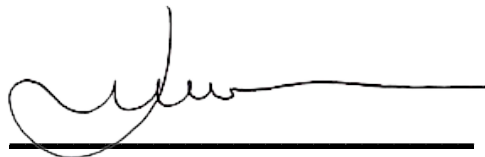
Chamber does not find that the Fourth Issue ‘would significantly affect the fair and expeditious conduct of the proceedings’, as required by article 82(1)(d) of the Statute.

16. Having found that each of the four issues identified by the Defence does not meet at least one of the requirements of article 82(1)(d) of the Statute, the Chamber does not need to consider whether an immediate resolution by the Appeals Chamber of these issues would materially advance the proceedings. Nonetheless, the Chamber notes that, in any event, an appellate resolution of the issues raised would not materially advance the proceedings; rather it would delay them.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence’s Request.

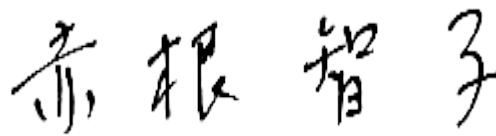
Done in both English and French, the English version being authoritative.



**Judge Rosario Salvatore Aitala,
Presiding Judge**



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Wednesday, 29 September 2021

At The Hague, The Netherlands