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**TRIAL CHAMBER VI**

**Before:** Judge Miatta Maria Samba, Presiding Judge  
Judge Maria 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**

**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”**

**Source:** Office of the Prosecutor

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## I. INTRODUCTION

1. The Trial Chamber (“Chamber”) should dismiss the Defence’s request<sup>1</sup> for leave to appeal the “Decision Setting the Commencement Date of the Trial and Related Deadlines”<sup>2</sup> because none of the issues proposed for certification are appealable within the meaning of article 82(1)(d) of the Rome Statute (“Statute”). The proposed issues either misread the Impugned Decision or are premised on a mere disagreement with it and therefore do not constitute appealable issues.<sup>3</sup> They also do not fulfill the remaining article 82(1)(d) requirements.

## II. SUBMISSIONS

2. The Defence seek leave to appeal the Impugned Decision 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 commencement date of the trial (“First Issue”);<sup>4</sup>
- b. Whether the Chamber’s decision to not set a deadline for the disclosure of Rule 77 materials constitutes an error of law or fact (“Second Issue”);<sup>5</sup>
- c. Whether the Chamber adequately reasoned its decision in relation to affording three months for the Defence to analyse the Prosecution’s Trial Brief (“Third Issue”);<sup>6</sup>
- d. Whether the Chamber’s instruction to jointly instruct all experts in this case constitutes an error of law (“Fourth Issue”).<sup>7</sup>

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<sup>1</sup> ICC-01/14-01/21-246 (“Request”).

<sup>2</sup> ICC-01/14-01/21-243 (“Impugned Decision”).

<sup>3</sup> ICC-01/04-168 OA3, para. 9. *See also* ICC-02/11-01/15-1051, paras. 5-6; ICC-01/05-01/08-2487-Red, para. 19; ICC-01/05-01/13-1278, para. 9; ICC-01/05-01/13-801, para. 12.

<sup>4</sup> Request, heading 1.1, paras. 21-36.

<sup>5</sup> Request, heading 1.2, paras. 37-45.

<sup>6</sup> Request, heading 1.3, paras. 46-48.

<sup>7</sup> Request, heading 1.4, paras. 49-55.

## **A. None of the proposed issues constitute an appealable issue**

### **First Issue – alleged inadequate reasoning on the trial commencement date**

3. The First Issue misrepresents the Impugned Decision and therefore does not genuinely arise from it. Contrary to the Defence's submission,<sup>8</sup> the Chamber did explain how it came to its conclusions.<sup>9</sup> Particularly, in the Impugned Decision, the Chamber referred to relevant submissions by the parties and participants,<sup>10</sup> expressed its view on multiple issues which are pertinent in deciding the trial commencement date,<sup>11</sup> listed a number of factors, obligations and other considerations in reaching its determination,<sup>12</sup> addressed arguments advanced by the Defence including their preferred dates,<sup>13</sup> and finally concluded that it is "both feasible and desirable to commence the trial on 26 September 2022".<sup>14</sup> The Chamber's reasoning is clear, comprehensive and unambiguous.

4. Nevertheless, in the Request, the Defence insist that the Chamber's reasoning is inadequate and therefore without a legal basis<sup>15</sup> because, in their view, firstly the Chamber failed to address how it considered the arguments put forward by the Defence,<sup>16</sup> and secondly it failed to explain what factors it took into account.<sup>17</sup> As further detailed below, these two contentions are both misplaced as they are predicated on a misreading or misinterpretation of the Impugned Decision, and in any event, are a mere disagreement with the Chamber's decision.

5. First and foremost, the Chamber did address the Defence's arguments in the Impugned Decision. The Defence's arguments in the Request<sup>18</sup> are all founded on the

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<sup>8</sup> Request, paras. 21-22.

<sup>9</sup> See, e.g., Impugned Decision, paras. 18-22.

<sup>10</sup> Impugned Decision, paras. 5-8.

<sup>11</sup> See e.g., Impugned Decision, paras. 10-19.

<sup>12</sup> See e.g., Impugned Decision, paras. 20-21.

<sup>13</sup> See e.g., Impugned Decision, paras. 18-19, 20-22.

<sup>14</sup> Impugned Decision, para. 20.

<sup>15</sup> Request, paras. 34-36.

<sup>16</sup> Request, paras. 23-27.

<sup>17</sup> Request, paras. 28-33.

<sup>18</sup> Request, paras. 23-27.

assumption that their complete and full analysis of all disclosed evidence is a precondition for their preparation of trial and investigation. Here, the Chamber clearly considered the Defence's position,<sup>19</sup> but took a different view by stating 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."<sup>20</sup> It further addressed the Defence's concern on the adequacy of the witness examination preparation time by reminding the Defence that there will be sufficient additional time to prepare during the trial as this trial will likely take place in alternation with other ongoing cases.<sup>21</sup> Concerning their argument that the investigation can only commence after the receipt of the bulk of the evidence and Trial Brief, the Chamber further went on to say that the Defence should start investigation "without delay and not [] wait until the Prosecution has fully disclosed every last item of evidence" because "the Defence already possess the core of the evidence" and therefore "should therefore already be in a position to start preparing its main investigative steps".<sup>22</sup> Therefore, the Defence's arguments were effectively addressed by the Chamber in the Impugned Decision.

6. In any event, the Defence's first contention amounts to a basic disagreement with the Chamber's decision disguised as an issue of lack of reasoning. The Defence received ample time and opportunities to fully address their position prior to the rendering of the Impugned Decision. Particularly, the Chamber invited the Defence's submissions on, among other issues, "[c]ommencement date of the trial" on 14 January 2022.<sup>23</sup> The Defence advanced their arguments on three occasions, first in writing on 21 January 2022,<sup>24</sup> subsequently orally on 28 January 2022<sup>25</sup> and then

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<sup>19</sup> See e.g., Impugned Decision, paras. 5-8, 20 and fn. 28.

<sup>20</sup> Impugned Decision, para. 22.

<sup>21</sup> Impugned Decision, para. 21.

<sup>22</sup> Impugned Decision, paras. 18-19.

<sup>23</sup> ICC-01/14-01/21-226, para. 1(A).

<sup>24</sup> ICC-01/14-01/21-231-Red2.

<sup>25</sup> Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET.

through an additional written submission on 7 February 2022.<sup>26</sup> The Chamber considered all arguments made by the participants<sup>27</sup> and decided that it is “both feasible and desirable to commence the trial on 26 September 2022”.<sup>28</sup> The Defence’s first contention is an attempt to relitigate the same matter and should be dismissed as it is not an appealable “issue” arising from the Impugned Decision.

7. The Defence’s second contention—that the Chamber failed to explain what factors it took into account in setting the trial commencement date<sup>29</sup>—is equally inapposite. The Chamber clearly described all factors which it took into account in reaching its conclusion. Contrary to the Defence’s assertion that the Chamber did not explain how it considered the factors on the victim and witness protection and the victims’ right to justice,<sup>30</sup> the Chamber addressed both factors in the Impugned Decision. Specifically, it noted the Prosecution’s observation that “it does not anticipate any difficulty in putting the necessary protective measures in place by the beginning of July 2022”<sup>31</sup> and clarified the scope of the victims’ right to justice by referring to relevant cases in a footnote.<sup>32</sup> The same is true of the Defence’s remaining claim regarding the Chamber’s consideration of “certain logistical and other constraints”.<sup>33</sup> The Impugned Decision referred to the parties’ and participants’ written submissions and their submissions at the status conference—including those of the Defence<sup>34</sup>—where the matter of logistical constraints was discussed,<sup>35</sup> and further specifically noted the constraint that the trial will likely take place in alternation with other ongoing cases.<sup>36</sup> There is no ambiguity in the Chamber’s ruling.

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<sup>26</sup> ICC-01/14-01/21-237-Conf-Exp. As this is an *ex-parte* filing, the Prosecution is not privy to its content.

<sup>27</sup> Impugned Decision, paras. 5-8, 20-22.

<sup>28</sup> Impugned Decision, para. 20.

<sup>29</sup> Request, paras. 28-33.

<sup>30</sup> Request, paras. 29-31.

<sup>31</sup> Impugned Decision, para. 13.

<sup>32</sup> Impugned Decision, para. 21, fn. 29, citing ICC-01/04-01/07-474, paras. 37-44 and ECHR, Case of *Mutimura v. France*, no.46621/99, 8 June 2004, as examples.

<sup>33</sup> Request, para. 32.

<sup>34</sup> Impugned Decision, paras. 5-8.

<sup>35</sup> See e.g., Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET, page. 8, lns. 8-11.

<sup>36</sup> Impugned Decision, para. 21.

8. Additionally, the Defence's allegation that the Chamber used the factor of "expeditiousness" of the proceedings against the Accused<sup>37</sup> is based on a mischaracterization of the Impugned Decision. The plain reading of the decision shows that the Chamber took into account all relevant factors, including the Accused's right to an expeditious trial and to adequate time and facilities to prepare his defence,<sup>38</sup> and considered them holistically.<sup>39</sup> The Chamber's analysis of the relevant factors was appropriate and reasonable in light of its duty to ensure the overall fairness and expeditiousness of the proceedings while taking into account the various competing interests at stake.<sup>40</sup>

9. Finally, the Defence's argument regarding the lack of legal basis of the Chamber's decision on the trial date is inapposite.<sup>41</sup> As set out above, the allegation that the Chamber provided inadequate reasoning is based on a mischaracterisation of the Impugned Decision. Moreover, it is based on a misunderstanding of the applicable law. As the Appeals Chamber has held, "the obligation to provide reasons 'will not necessarily require reciting each and every factor that was before the [relevant chamber] to be individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion'".<sup>42</sup>

10. The First Issue is therefore "merely a question over which there is disagreement or conflicting opinion"<sup>43</sup> in that the Defence disagree with the Chamber's finding, and is not an appealable issue within the meaning of article 82(1)(d) of the Statute.

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<sup>37</sup> Request, para. 28.

<sup>38</sup> Impugned Decision, para. 21.

<sup>39</sup> Impugned Decision, paras. 20-21.

<sup>40</sup> ICC-01/05-01/13-1269, para. 20; ICC-01/05-01/13-1254, para. 15.

<sup>41</sup> *Contra* Request, paras. 34-36.

<sup>42</sup> ICC-02/05-01/20-177, para. 42; *see also* ICC-01/04-01/06-774, para. 30; ICC-01/04-01/06-773, para. 20.

<sup>43</sup> ICC-01/04-168, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

**Second Issue – alleged error of law or fact in relation to the timeline for the disclosure of Rule 77 materials**

11. The Second Issue misrepresents the Impugned Decision and therefore does not genuinely arise from it. The Chamber's decision not to set a deadline for the disclosure of all Rule 77 materials does not constitute an appealable issue.

12. The Defence's principal concern appears to be that they fear there might be a last minute disclosure of Rule 77 materials which would, in the Defence's view, not afford sufficient time to prepare their defence.<sup>44</sup> They further aver that there is no tangible reason to trust the Prosecution's view that "[t]hese items are not expected to have any direct connection to the charges against Mr SAID", and that the disclosure of Rule 77 materials may eventually lead to further disclosure depending on their defence strategy.<sup>45</sup> However, as underscored by the Prosecution during the recent status conference, at the pre-confirmation stage, the Prosecution disclosed evidence on a rolling basis and adhered to all deadlines and instructions the Pre-Trial Chamber set.<sup>46</sup> Moreover, there is nothing in the record of this case at this stage suggesting that the disclosure of Rule 77 materials would lead to further disclosure at all, let alone substantial further disclosure. The concerns expressed by the Defence are merely speculative or hypothetical, and therefore do not constitute an appealable issue.<sup>47</sup>

13. In any event, the Second Issue fails to constitute an appealable issue as it merely expresses the Defence's discontent with the Chamber's determination. The jurisprudence of the Court is clear that the Prosecution's disclosure obligation of Rule 77 materials is an on-going obligation,<sup>48</sup> and there is no legal requirement for the Prosecution to disclose all Rule 77 materials prior to the trial or for a Trial Chamber to

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<sup>44</sup> Request, paras. 39-40.

<sup>45</sup> Request, para. 45.

<sup>46</sup> Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET, page 23, ln. 22 – page 24, ln. 25.

<sup>47</sup> See, e.g., ICC-01/05-01/08-75, para. 11.

<sup>48</sup> See e.g., ICC-02/05-03/09-535-Red, para. 36; ICC-01/05-01/08-750-Conf, para. 34. See also Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 21.



set a deadline by which the Prosecution must disclose Rule 77 materials, as the Defence assert in the Request.<sup>49</sup> In deciding whether and when to set such a deadline, chambers have a wide margin of discretion, balancing a variety of factors and taking into account the arguments put forward by the parties. This is what the Chamber did in the present case. The Chamber invited the Defence's submissions on the matter of "[t]iming and volume of disclosure of outstanding evidence pursuant to Article 67(2) of the Statute and Rule 76 and 77 of the Rules" in its order of 14 January 2022,<sup>50</sup> to which the Defence responded both in writing on 21 January 2022<sup>51</sup> and orally on 28 January 2022.<sup>52</sup> Again, the Defence had ample time and opportunities to fully express their position on the matter. The Chamber factored in all arguments advanced by the parties<sup>53</sup> and held that "the starting date of the trial cannot be beholden to the completion of the disclosure of every item of Rule 77 material" and that "the disclosure process of items falling under Article 67(2) or Rule 77 continues throughout the proceedings and cannot be constrained by artificial deadlines."<sup>54</sup> The Defence's mere disagreement with the Chamber's conclusion does not give rise to an appealable issue.

### **Third Issue – alleged inadequate reasoning on the period afforded to the Defence to analyse the Trial Brief**

14. The Third Issue misrepresents the Impugned Decision and therefore does not genuinely arise from it. The Defence's contention that the Impugned Decision failed to explain the basis for granting a three-month period to the Defence to analyse the Prosecution's Trial Brief is predicated on a misreading or misinterpretation of the Impugned Decision, and in any event, is a mere disagreement with it. It thus does not identify an appealable issue.

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<sup>49</sup> Request, paras. 37-41.

<sup>50</sup> ICC-01/14-01/21-226, para. 1.E(2).

<sup>51</sup> ICC-01/14-01/21-231-Red2.

<sup>52</sup> Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET.

<sup>53</sup> Impugned Decision, paras. 5-8, 20-22.

<sup>54</sup> Impugned Decision, para. 22.

15. The Trial Chamber considered all the information provided by the parties and their “preferences” as to the trial commencement date and related deadlines<sup>55</sup> and decided that “the Defence must have at least three months to prepare after receiving the Trial Brief.”<sup>56</sup> The Impugned Decision was not, as the Defence suggests, deprived of sufficient reasoning and therefore of legal basis.<sup>57</sup> To the contrary, the Trial Chamber considered a number of “main parameters”<sup>58</sup> when deciding that the Trial Brief is to “be filed no later than 13 June 2022”<sup>59</sup> – including: “the Defence already possess[ing] the core evidence which the Prosecution intends to rely upon at trial”;<sup>60</sup> the Prosecution having disclosed “‘the core evidence and most of the essential material’ necessary for the Defence’s preparation;”<sup>61</sup> in this context, the Defence “already [being] in a position to start preparing its main investigative steps;”<sup>62</sup> and the rights of the Accused to a fair and expeditious trial and to adequate time and facilities to prepare his defence.<sup>63</sup>

16. A Trial Brief has become common practice at the Court and while not provided for in the Court’s statutory framework, many chambers have previously required the Prosecution to file such a brief three months prior to the commencement of the trial.<sup>64</sup> In line with this practice, the Chamber considered it “feasible and desirable to commence the trial on 26 September 2022”<sup>65</sup> and found it necessary to order the intermediate procedural step of the Trial Brief to “be filed no later than 13 June 2022”.<sup>66</sup> This timeline was well within the scope of the Chamber’s discretion, and the Chamber

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<sup>55</sup> Impugned Decision, paras. 5-9, 11, 19-22.

<sup>56</sup> Impugned Decision, para. 23.

<sup>57</sup> Request, para. 46.

<sup>58</sup> Impugned Decision, para. 9.

<sup>59</sup> Impugned Decision, para. 20.

<sup>60</sup> Impugned Decision, para. 19.

<sup>61</sup> Impugned Decision, para. 11.

<sup>62</sup> Impugned Decision, para. 19.

<sup>63</sup> Impugned Decision, paras. 21-22.

<sup>64</sup> ICC-01/09-01/11-440, paras. 15 and 20, (*Ruto and Sang Decision*); ICC-01/04-02/06-450, para. 89 (*Ntaganda Decision*); ICC-02/04-01/15-449, paras. 8 and page 7 (*Ongwen Decision*); ICC-01/12-01/18-548, paras. 16 and 24 (*Al Hassan Decision*); ICC-01/14-01/18-589, paras. 14 and 24 (*Yekatom and Ngaissona Decision*); ICC-01/09-01/20-185, paras. 15 and 16, (*Gicheru Decision*); ICC-02/05-01/20-T-013-FRA, page 73, lines 5-6 and page 74, lines 6-7 (*Abd-Al-Rahman oral Decision*). See also Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 75.

<sup>65</sup> Impugned Decision, para. 20.

<sup>66</sup> Impugned Decision, para. 23.

reasonably took the decision after hearing the Parties' views both orally and in writing.<sup>67</sup>

17. The Chamber stated that "as long as the Accused has received all 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."<sup>68</sup> Thus, contrary to the Defence's allegation therefore, the Chamber expressly took into account the Accused's rights to be informed, to prepare his defence and to be tried without undue delay pursuant to article 67(1)(a), (b) and (c) of the Statute in determining the Trial Brief deadline. The Defence simply disagrees with the Chamber's decision.

18. Moreover, given the link between the rights of the Accused to be informed in detail of the nature, cause and content of the charges and to have adequate time for the preparation of the defence provided in article 67(1)(a) and (b) of the Statute,<sup>69</sup> the Chamber's decision to order a Trial Brief—an auxiliary document containing further details about the charges<sup>70</sup>—only *further* ensures the fair and expeditious conduct of the proceedings in full respect of the parties' rights".<sup>71</sup>

19. In sum, the Third Issue is not an appealable issue under article 82(1)(d).

#### **Fourth Issue – alleged error of law on the Chamber's instruction to jointly instruct all experts in this case**

20. The Fourth Issue does not genuinely arise from the Impugned Decision. It is predicated on the Defence's mischaracterisation of the Impugned Decision and the applicable law, and constitutes a mere disagreement with that Decision. Moreover, the Defence's arguments are hypothetical or speculative at this stage.

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<sup>67</sup> ICC-01/14-01/21-230-Red; ICC-01/14-01/21-231-Red2; Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET. *See also* ICC-01/14-01/21-237-Conf-Exp. As this is an *ex-parte* filing, the Prosecution is not privy to its content.

<sup>68</sup> Impugned Decision, para. 22.

<sup>69</sup> ICC-02/04-01/15-1562, para. 69.

<sup>70</sup> ICC-01/04-01/06-3121-Red, para. 124. ICC-02/11-01/15-58, para. 26 ('*Gbagbo and Ble Goude Decision*').

<sup>71</sup> Impugned Decision, para. 9.

21. First, the Defence misconstrues the applicable law and the Impugned Decision. Regulation 44 provides the Chamber with broad discretion as to the instruction of experts, including allowing it to direct the parties to jointly instruct experts, or to instruct experts itself, *proprio motu*, and to determine the modalities of instructing the expert. There is accordingly no presumption that the system for appointing experts must be based on the parties' choices alone, contrary to the Defence's assumption.<sup>72</sup> Previous Chambers have exercised this discretion in different ways.<sup>73</sup> The Defence's arguments that this violates parties' autonomy, distorts the dynamics of the criminal trial, and infringes upon the parties' strategies are thus misplaced.<sup>74</sup>

22. Second, the Defence mischaracterises the Impugned Decision in alleging that it was not based on the circumstances of this case.<sup>75</sup> The Chamber directed the Parties pursuant to Regulation 44(2) of the Regulations to jointly instruct any experts to be called in the case.<sup>76</sup> The Chamber's exercise of discretion was reasonable and appropriate in the circumstances of this case,<sup>77</sup> particularly given that: (i) the question of the joint instruction of experts was expressly placed on the agenda for the Status Conference;<sup>78</sup> (ii) the Prosecution stated in its submissions that it would endeavour to consult with the Defence to jointly instruct experts;<sup>79</sup> (iii) the Chamber noted this submission with approval;<sup>80</sup> and (iv) the Defence made no comment on this issue in its written or oral submissions.<sup>81</sup>

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<sup>72</sup> Request, para. 55.

<sup>73</sup> See ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211, paras. 33 and 39; ICC-01/09-02/11-88, para. 25, *see also* paras. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

<sup>74</sup> Request, paras. 50-51.

<sup>75</sup> *Contra* Request, para. 55.

<sup>76</sup> Impugned Decision, para. 35, p. 13.

<sup>77</sup> Impugned Decision, para. 35.

<sup>78</sup> ICC-01/14-01/21-226, para. 1(B)(2).

<sup>79</sup> ICC-01/14-01/21-230-Red, paras. 12-13.

<sup>80</sup> Impugned Decision, para. 35.

<sup>81</sup> ICC-01/14-01/21-231-Red2, para. 11; Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET.

23. Third, the Defence's arguments are based on hypothetical or speculative concerns regarding expert reports.<sup>82</sup> The Chamber did not direct the Parties as to the modalities of instructing the experts, nor did it make any findings on the admissibility of any expert reports, nor did it state that the Defence is obliged to accept the conclusions in any expert reports. While the Defence argue that jointly instructing experts will require them to reveal their defence strategy before the conclusion of the Prosecution case,<sup>83</sup> this is an issue that the Defence can raise before the Chamber if and when they find they are actually required to give advance disclosure of their case. In the *Lubanga* and *Ruto and Sang* cases, the Trial Chambers found this was an acceptable compromise.<sup>84</sup> Moreover, if the parties are unable to agree on experts/modalities for instructing the experts, they can bring the matter to the Chamber's attention for its guidance and/or resolution. Unless and until that occurs, any concerns about the Defence being forced to reveal their strategy, or there being any impact on the Defence's strategy, is speculative. The Defence cannot merely speculate in the abstract that a decision causes prejudice to the rights of an accused in order to invoke arguments regarding the fairness of the proceedings.<sup>85</sup>

24. Accordingly, the fourth issue does not arise from the Decision.

#### **B. The proposed issues do not meet the other article 82(1)(d) requirements**

25. As explained above, none of the four proposed issues qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfil one of the criteria is fatal to an application for leave to appeal, the Request should fail on this basis alone.

26. Even assuming, *arguendo*, that the four proposed issues are deemed appealable, they should not be certified for appeal because the Defence do not show that they

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<sup>82</sup> Request, paras. 51-54.

<sup>83</sup> Request, para. 53.

<sup>84</sup> ICC-01/04-01/06-1069, paras. 16-17, 19-20 and 27; ICC-01/09-01/11-440, para. 12.

<sup>85</sup> ICC-01/04-168, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211, paras. 33 and 39; ICC-01/09-02/11-88, para. 25, *see also* paras. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and that their immediate resolution by the Appeals Chamber may materially advance the proceedings.

27. Indeed, as it is clear from the text of article 82(1)(d) of the Statute and case law of the Court, to grant leave to appeal, a Chamber must be satisfied that “the issue on which appeal is sought would *significantly* affect the proceedings both in terms of fairness and in terms of expeditiousness (...)”.<sup>86</sup> The Defence’s unsubstantiated claims of unfairness or prejudice to the expeditious conduct of the proceedings cannot meet this standard. In fact, as the Prosecution clarified during the recent status conference and the Chamber rightly pointed out in the Impugned Decision, the Defence have been in the possession of the core evidence and most of the essential material necessary for the Defence’s preparation since August 2013 at the latest, more than six months before the date of this filing.<sup>87</sup> The Chamber further urged the Defence in the Impugned Decision to not delay its investigation as it “already possesses the core of the evidence” and “[t]he Defence should therefore already be in a position to start preparing its main investigative steps”.<sup>88</sup> The fact that the Defence (1) allegedly still could not complete their full review of disclosed documents notwithstanding the Prosecution’s disclosure practice on a rolling basis, always well within the set deadlines, and (2) have not commenced in earnest their investigation despite possessing necessary materials to do so for over six months, should not be used as a basis for arguing that the fair and expeditious conduct of the proceedings is affected.

28. This requirement is also not met for the Fourth Issue, as the joint instruction of experts would generally expedite the proceedings.<sup>89</sup> In any event, the Fourth Issue raises concerns that are hypothetical at this stage, and the Defence is not prevented

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<sup>86</sup> ICC-02/04-01/15-64, para. 23.

<sup>87</sup> Impugned Decision, para. 11. *See also* Transcript of hearing, 28 January 2022, ICC-01/14-01/21-T-007-CONF-ENG ET, page 23, ln. 22 – page 24, ln. 25.

<sup>88</sup> Impugned Decision, para. 19.

<sup>89</sup> *See e.g.* ICC-01/04-01/06-1069, paras. 14-15; ICC-01/09-01/11-440; ICC-01/04-01/07-1515-Corr, para. 68; ICC-01/09-01/11-440, para. 12.

from bringing matters to the Chamber's attention for its guidance and/or resolution if an actual problem concerning the joint instruction of experts arose. The Defence cannot otherwise merely speculate in the abstract that a decision causes prejudice to the rights of the Accused in order to invoke arguments regarding the fairness of the proceedings.<sup>90</sup>

29. The Defence also fail to establish that resolution of any of the four Issues would materially advance the proceedings. Instead, the proceedings would be delayed since the Defence is requesting additional time to suit their preferences without explaining how this could advance the overall proceedings.

### III. CONCLUSION

30. Based on the above, the Chamber should deny the Defence's Request in its entirety.




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

Dated this 4<sup>th</sup> day of March 2022  
At The Hague, The Netherlands

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<sup>90</sup> ICC-01/04-168, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211, paras. 33 and 39; ICC-01/09-02/11-88, para. 25; *see also* paras. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.