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

**Date: 8 April 2022**

**TRIAL CHAMBER VI**

**Before:**

**Judge Miatta Maria Samba, Presiding Judge  
Judge María del Socorro Flores Liera  
Judge Sergio Gerardo Ugalde Godínez**

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

**Public**

**Decision on Defence Request for Reconsideration or Leave to Appeal the  
'Directions on the Conduct of Proceedings' (ICC-01/14-01/21-251)**

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

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**States Representatives**

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**REGISTRY**

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**Victims and Witnesses Unit**

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**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court (the ‘Chamber’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to Articles 64(2) and 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on Defence Request for Reconsideration or Leave to Appeal the “Directions on the Conduct of Proceedings” (ICC-01/14-01/21-251)’.

## **I. PROCEDURAL HISTORY**

1. On 14 January 2022, the Chamber convened a status conference to discuss, *inter alia*, the starting date of the trial (the ‘Order Convening a Status Conference’). In this order, the Chamber instructed the parties and participants to provide submissions in relation to a number of factors relevant to the commencement of the trial.<sup>1</sup>
2. On 21 January 2022, the Office of the Prosecutor (the ‘Prosecution’),<sup>2</sup> the Defence,<sup>3</sup> the Registry,<sup>4</sup> and the Office of Public Counsel for Victims (the ‘OPCV’)<sup>5</sup> submitted their observations.
3. On 28 January 2022, the Chamber held the first status conference. During the status conference, the parties, participants and the Registry made oral submissions.<sup>6</sup>
4. On 9 March 2022, the Chamber issued its ‘Directions on the Conduct of Proceedings’ (the ‘Directions’), regulating, *inter alia*, the opening statements, witness preparation, public versions of filings and the submission of evidence.<sup>7</sup>

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<sup>1</sup> [Order Convening the First Status Conference](#), ICC-01/14-01/21-226.

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

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

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

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

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

<sup>7</sup> [ICC-01/14-01/21-251](#).

5. On 15 March 2022, the Defence submitted a request for reconsideration or, in the alternative, leave to appeal the Directions (the ‘Request’).<sup>8</sup> The Defence contends that the Chamber should have requested the parties’ submissions before issuing the Directions and failed to provide any reasoning in support thereof (the ‘First Issue’).<sup>9</sup> The Defence also argues that it should be permitted to deliver its opening statement in two parts, the first at the beginning of the trial and the second at the beginning of the presentation of the Defence case (the ‘Second Issue’).<sup>10</sup> In addition, the Defence requests the Chamber to reconsider, in whole or in part, or grant leave to appeal a number of issues relating to the witness preparation protocol adopted in the Directions (the ‘Third Issue’).<sup>11</sup> The Defence further argues that the regime for the submission of evidence adopted by the Chamber is prejudicial and should be reconsidered or certified for appeal (the ‘Fourth Issue’).<sup>12</sup> Finally, the Defence requests the Chamber to reconsider or grant leave to appeal any requirement to file a public redacted version of filings within five days (the ‘Fifth Issue’).<sup>13</sup>

6. On 21 March 2022, the Prosecution submitted a response to the Defence’s Request (the ‘Response’).<sup>14</sup> The Prosecution argues that the Defence Request should be dismissed as the Directions governed ‘matters that fall within the Chamber’s discretion to manage the proceedings, are legally correct and are overall consistent with the practice of other Chambers’.<sup>15</sup>

7. The OPCV did not file observations on the Defence Request.

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<sup>8</sup> [Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel des « Directions on the Conduct of Proceedings » \(ICC-01/14-01/21-251\) » déposées le 9 mars 2022](#), ICC-01/14-01/21-259-Conf. A public redacted version was notified on 21 March 2022, ICC-01/14-01/21-259-Red

<sup>9</sup> [Request](#), paras 8-23.

<sup>10</sup> [Request](#), paras 24-27.

<sup>11</sup> [Request](#), paras 28-48.

<sup>12</sup> [Request](#), paras 49-55.

<sup>13</sup> [Request](#), para. 53.

<sup>14</sup> [Prosecution response to the Defence’s “Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel des “Directions on the Conduct of Proceedings” \(ICC-01/14-01/21-251\) déposées le 9 mars 2022”](#), ICC-01/14-01/21-264.

<sup>15</sup> [Response](#), para. 1.

## II. APPLICABLE LAW

8. Regarding the standard applicable to requests for reconsideration, the Chamber follows the jurisprudence of previous Chambers in considering that,

it has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Nevertheless, reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.<sup>16</sup>

9. Regarding the requests for leave to appeal, the Chamber recalls previous Chambers' jurisprudence regarding the application of Article 82(1)(d) the Statute.<sup>17</sup> Thus, in considering the Request, the Chamber must have regard to whether: (i) the matter is an 'appealable issue'; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>18</sup>

10. The three criteria under Article 82(1)(d) of the Statute are cumulative.<sup>19</sup> Therefore, failure to fulfil one or more of the criteria will result in dismissal of the

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<sup>16</sup> Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on Defence request for reconsideration, or leave to appeal the 'Fourth decision on matters related to the conduct of proceedings'](#), 2 March 2021, ICC-01/12-01/18-1330, para. 4; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), 15 June 2016, ICC-02/04-01/15-468, para. 4; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal](#), 18 March 2015, ICC-01/04-02/06-519, para. 12.

<sup>17</sup> [Decision on Defence Request for Leave to Appeal the 'Decision Setting the Commencement Date of the Trial and Related Deadlines' \(ICC-01/14-01/21-243\)](#), 15 March 2022, ICC-01/14-01/21-258, paras 11-15; *See also* Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the Demande d'autorisation d'interjeter appel de la 'Decision on the request for suspension of the time limit to respond to the Prosecutor's Trial Brief submitted by the Defence for Mr Gbagbo' \(ICC-02-11-01/15-1141\)](#), 13 April 2018, ICC-02/11-01/15-1150, para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Defence request for leave to appeal the decision appointing experts on reparations](#), 29 June 2017, ICC-01/05-01/08-3536 (the 'Bemba Gombo Decision'), paras 4-7; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68\(2\)\(b\)](#), 5 September 2018, ICC-02/04-01/15-1331 (the 'Ongwen Decision'), para. 8.

<sup>18</sup> [Bemba Gombo Decision](#), para. 4; [Ongwen Decision](#), para. 8.

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

Request.<sup>20</sup> In particular, the Chamber notes that Article 82(1)(d) ‘cannot be used to litigate abstract or hypothetical issues’.<sup>21</sup>

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

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

### III. ANALYSIS

12. At the outset, the Chamber underlines that the Directions set out general rules that are conducive to the fair and efficient organisation of proceedings. A number of the arguments raised by the Defence involve hypothetical problems and the Chamber considers that such issues are best dealt with as and when they arise rather than in the context of an abstract request for reconsideration or leave to appeal. The Chamber urges the parties to raise any concrete and specific issue with the implementation of the Directions, which may jeopardise the fairness of proceedings or the protection of victims and witnesses, in a timely manner so that it may be resolved during the course of the trial.

13. The Chamber is aware that some procedural rulings touch upon important aspects of the presentation of the parties’ case and that the parties may strongly disagree with a particular approach adopted. The Chamber stresses however, that it is erroneous to view every issue as providing suitable subject-matter for appeal or reconsideration. In the interests of avoiding frivolous litigation and maintaining focus on the key issues in dispute in this matter, the Chamber encourages the parties to consider carefully whether procedural rulings issued by the Chamber during the course of the trial merit being challenged and reiterates its call to raise any concrete issue that may jeopardise the

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

<sup>21</sup> [Bemba Gombo Decision](#), para. 6.

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

fairness of proceedings or the protection of victims and witnesses, in a timely manner so that it may be resolved during the course of the trial.

14. The Chamber will now discuss the five specific issues contested by the Defence in the Request. As the arguments grounding the First Issue, Third Issue and Fourth Issue are related, the Chamber will address these together.

### **A. First, Third and Fourth Issues**

#### *1. Submissions*

15. According to the Defence, the First Issue is that Chamber did not respect the requirement contained in Article 64(3)(a) of the Statute to confer with the parties prior to adopting the Directions. The Defence argues that Article 64(8)(b) of the Statute does not provide an appropriate legal basis for the issuance of directions on the conduct of proceedings at this stage.<sup>23</sup> The Defence requests the Chamber to reconsider the Directions in light of the submissions contained in the Request.<sup>24</sup> In the alternative, the Defence requests leave to appeal the following issues: (i) whether the Chamber erred in law in issuing the Directions without having consulted the parties in violation of Article 64(3)(a) of the Statute and the adversarial principle, thereby prejudicing the Defence who could not inform the Chamber of elements specific to the present case allowing the fairness of proceedings to be preserved; and (ii) whether the lack of reasoning in the Directions constituted a nullifying error of law.<sup>25</sup>

16. The Prosecution submits that the Chamber afforded the parties an opportunity to be heard and took these submissions as well as the practices of other trial chambers of the Court into account in deciding on the Directions.<sup>26</sup> The Prosecution contends that, in any event, there is no ‘open-ended right for the Parties to be heard or to make detailed submissions on every issue before a Chamber makes any ruling’.<sup>27</sup> In their submission, Chambers enjoy wide discretion, in particular, in exercising their mandate to control

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<sup>23</sup> [Request](#), para. 16.

<sup>24</sup> [Request](#), para. 22.

<sup>25</sup> [Request](#), para. 23.

<sup>26</sup> [Response](#), paras 7-10.

<sup>27</sup> [Response](#), paras 7, 11.

proceedings,<sup>28</sup> and it was within the Chamber's discretion to assess whether the material before it was 'sufficient for it to issue directions on the conduct of the proceedings, or whether it required additional written submissions from the Parties to do so'.<sup>29</sup>

17. The Third Issue raised by the Defence is that the witness preparation protocol adopted by the Chamber opens the possibility that the calling party may influence the witnesses and deviates from the practice followed in the majority of past cases before the Court.<sup>30</sup> The Defence requests the Chamber to reconsider the Directions and adopt the witness familiarisation protocol used in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the 'Yekatom and Ngaïssona case').<sup>31</sup> In the alternative, the Defence requests leave to appeal the following issues: whether the Chamber erred in law by: (i) adopting a witness preparation protocol without first hearing the parties; (ii) adopting a witness preparation protocol without a legal basis; (iii) adopting a witness preparation protocol which does not guarantee the Defence sufficient time to prepare; and (iv) failing to provide reasoning for the Directions.

18. In a second alternative, the Defence requests the Chamber to reconsider the following specific aspects of the witness preparation protocol: (i) the 24 hour interval between witness preparation and the testimony of the witness, which, in the view of the Defence, is too short; (ii) the provision for the calling party to review the statements together with the witness and question the witness on inconsistencies, which the Defence submits should be deleted; (iii) the provision allowing the witness to be shown potential exhibits, regardless of whether or not the witness has previously seen them, which the Defence submits should be deleted; and (iv) automatic access to the video recordings of the preparation sessions, which the Defence submits should be granted.<sup>32</sup> In a final alternative, the Defence requests the Chamber to grant leave to appeal the following issue: whether the Chamber erred in law in adopting a witness preparation

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<sup>28</sup> [Response](#), para. 11.

<sup>29</sup> [Response](#), paras 10-11.

<sup>30</sup> [Request](#), paras 30-31.

<sup>31</sup> [Request](#), para. 41.

<sup>32</sup> [Request](#), paras 44-47.



protocol that does not safeguard the right of the Defence to adequate time and facilities for the preparation of the Defence thereby undermining the fairness of proceedings.<sup>33</sup>

19. The Prosecution argues that Chambers have discretion to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings and submits that the fact that other Chambers have not allowed witness preparation does not show a clear error in the Directions.<sup>34</sup> In the view of the Prosecution, ‘the Defence not only merely expresses disagreement with the Chamber’s decision to allow for witness preparation, but also misreads or misunderstand it in many respects — especially concerning potential abuses that the Defence purports witness preparation may promote’.<sup>35</sup>

20. The Fourth Issue contested is the regime for the submission of evidence adopted by the Chamber. The Defence requests reconsideration of the matter, arguing that it is prejudicial because: (i) it confuses the admission of evidence with the weight ultimately accorded to it; (ii) means that the Chamber could take a decision based on evidence that does not satisfy the admissibility criteria; (iii) overloads the record with evidence to which the Defence must respond even if it is inadmissible; (iv) places the burden on the opposing party to prove that evidence is inadmissible; and (v) sets an unrealistic three-day deadline for objections to evidence submitted.<sup>36</sup> In the alternative, the Defence requests leave to appeal the following issues: whether the Chamber erred in law in adopting a regime for the submission of evidence that (i) allows the Chamber to decide on its admissibility at the end of the trial or not at all; (ii) reverses the burden of proof regarding admissibility of evidence to the detriment of the Defence; and (iii) violates the rights of the defence to the time and facilities necessary for preparation by requiring objections to the admission of evidence to be presented three days after the evidence is submitted.<sup>37</sup>

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<sup>33</sup> [Request](#), para. 48.

<sup>34</sup> [Response](#), para. 19.

<sup>35</sup> [Response](#), para. 21. See also paras 22-23

<sup>36</sup> [Request](#), paras 49-51.

<sup>37</sup> [Request](#), para. 52.

21. The Prosecution argues that the Fourth Issue has already been determined by the Appeals Chamber and that the Defence arguments are misconceived.<sup>38</sup>

## 2. *Analysis*

22. The Chamber considers that the Court's legal framework provides it with broad discretionary powers to regulate proceedings in such a way as to ensure that they are fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. While the Chamber will rely on the submissions and cooperation of the parties and participants in many aspects of trial management, it must be underlined that the legal framework does not contain any obligation to consult the parties in relation to each and every procedural matter that may arise.

23. Article 64(8)(b) of the Statute and Rule 140 of the Rules clearly envisage that directions on the conduct of proceedings may be given without receiving submissions from the parties. The Defence suggests that directions under Article 64(8)(b) of the Statute may only be given *during the trial* and that, at the present stage in proceedings, directions must be given under Article 64(3)(a) of the Statute which requires the Chamber to confer with the parties.<sup>39</sup> However, the Chamber finds no reason in law or practice to view the legal framework as creating a distinction such that parties would have to be consulted when the case is assigned for trial, but not thereafter. Rather the legal framework (in particular, Articles 64(3), (6) and (8)(b) and Rules 132, 134 and 140 of the Rules) makes it clear that the Chamber is obliged to confer with the parties upon the assignment of the case for trial and may, as necessary, at any stage before or during the trial issue directions on the conduct of the proceedings.

24. In the present case, the Chamber sought submissions on a non-exhaustive list of issues relevant to trial preparation in the Order Convening a Status Conference. Thereafter, the Chamber adopted general directions on the conduct of proceedings taking into account the information received from the parties and the practice of other Chambers of the Court. The Chamber considered itself to have been sufficiently informed so as to issue directions on the conduct of proceedings without receiving the

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<sup>38</sup> [Response](#), paras 26-30.

<sup>39</sup> [Request](#), para. 16.

views of the parties on each specific matter and the present Request has not dissuaded it from that view.

25. Regarding the past practice of the Court, the Chamber notes the Defence's submission that, in previous cases, the parties were given an opportunity to debate the directions on the conduct of proceedings. While this is true of the early cases before the Court, it is less and less the case as practices become more consolidated. At this stage in the life of the Court, the options in relation to key procedural matters have been considerably narrowed and clarified by the experience of past cases. Indeed, the Chamber considers that the value of this lies in allowing unnecessary litigation to be dispensed with and in facilitating the adoption of consistent practices to the extent possible. In issuing the Directions, the Chamber carefully considered this litigation, the arguments put forward and the differences, and (increasingly) similarities in the various procedural steps that were taken in those cases. The arguments raised in the present Request are not novel and do not persuade the Chamber that reconsideration of its Directions is warranted.

26. For example, regarding the comparative risks and benefits of witness familiarisation versus witness preparation, the Chamber considered the decisions of previous Chambers that weighed up the advantages and disadvantages of the two approaches. The arguments raised in the Request – for example regarding the legal basis for witness preparation, the automatic disclosure of video recordings of witness preparation sessions, questioning regarding inconsistencies in their prior statements, and whether the witness may be shown materials that they have not previously seen – are not new and have been adequately addressed in past cases. This jurisprudence is accessible and the parties have demonstrated familiarity with and understanding of it in their filings. The Chamber agrees with the analysis of other Chambers that have adopted witness preparation protocols and determined that the present case should proceed on this basis.<sup>40</sup> In these circumstances, the Chamber does not consider it conducive to the efficiency of proceedings to re-litigate these matters in the present case.

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<sup>40</sup> Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, [Decision on witness preparation](#), 2 January 2013, ICC-01/09-02/11-588 (filed on 3 January 2013), paras 30-52;

27. The Chamber is not persuaded by the Defence's arguments that the present case has specific features that make it distinguishable from these previous cases or that it should proceed on the same procedural footing as the *Yekatom* and *Ngaïssona* case simply because they arise from the same situation and there may be some overlap in evidence.<sup>41</sup> Each Chamber has a duty to ensure respect for fair trial principles and the protection of victims and witnesses, but they may take different approaches in achieving these aims. While the Chamber considered the possibility of the witness familiarisation approach in issuing the Directions, it took the view that the advantages of witness preparation outweighed the disadvantages. The arguments in the Request do not persuade the Chamber that this decision was unjust, based on an error of reasoning, or would affect the fair and expeditious conduct of the proceedings or the outcome of the trial. If any concrete issues were to arise in the implementation of the witness preparation protocol, the Chamber will take the necessary decisions at that time.

28. In setting out the regime for the submission of evidence, the Chamber also had regard to past jurisprudence, particularly from the Appeals Chamber, which has confirmed the legality of the regime adopted.<sup>42</sup> The Chamber did not consider it conducive to the efficiency of proceedings to re-litigate this matter in the present case, but, given the specific arguments made by the Defence, it deems it necessary to provide a number of clarifications. First, the regime adopted does not confuse the admissibility of evidence with the weight ultimately to be accorded to that evidence; rather it indicates that the Chamber will consider the admissibility of each item of evidence submitted *at the same time* as it evaluates the evidence as a whole. Second, the Chamber will not rely on evidence that does not meet the basic criteria of admissibility for the

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Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on witness preparation and familiarisation](#), 17 March 2020, ICC-01/12-01/18-666, paras 10-13, 15-28; 43-53.

<sup>41</sup> [Request](#), paras 32, 35-37.

<sup>42</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), paras 36-37; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5) (a confidential version was filed on the same date), paras 572-601.

purposes of its decision under Article 74 of the Statute. Finally, should the three-day time limit for raising issues relating to the relevance or admissibility of items submitted prove to be impossible to meet in any specific situation, the parties may request an extension of time in accordance with Regulation 35 of the Regulations of the Court.

29. Regarding the requirement to give reasons, the Appeals Chamber has held that ‘[t]here is no prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision’.<sup>43</sup> In the present context, the duty to give reasons must be viewed also in the light of the past jurisprudence mentioned above. Earlier decisions giving directions on the conduct of proceedings rightly contained extensive reasoning to explain the basis for setting out the regimes elaborated in those cases. However, the Chamber considers that it is unnecessary and inefficient to rehash this reasoning in adopting the same procedures in this case. The Chamber also notes that the Defence was able to articulate its arguments against the contested aspects of the Directions based on the reasoning provided and its familiarity with past jurisprudence.

30. In view of the foregoing, the Chamber is not persuaded that the Defence has established a clear error of reasoning in the Directions or that the issues formulated by the Defence would cause an injustice. The Chamber also considers that these matters raise mere disagreements with its rulings and do not identify subjects that require a decision from the Appeals Chambers for their resolution. The First Issue, the Third

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<sup>43</sup> *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the Defence Request to provide written reasoning for two oral decisions](#), 18 December 2020, ICC-02/05-01/20-236 (OA5), para. 14. *See also* Appeals Chamber, *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'](#), 8 October 2020, ICC-02/05-01/20-177 (OA2), para. 42, *quoting* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"](#), 14 December 2006, ICC-01/04-01/06-774 (OA6), para. 30, *citing* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"](#), 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20.

Issue and the Fourth Issue therefore fail to meet the criteria for reconsideration set out in paragraph 8 above and leave to appeal as described in paragraphs 9 to 10 above.

### **B. Second Issue**

31. The Defence argues that it is essential to the preservation of the rights of the accused that the Chamber allows for the opening statement to be divided so the Defence may make opening statements at the start of trial (in order to present its view on the Prosecution's case) and also at the start of the defence case (in order to outline the Defence evidence).<sup>44</sup> In the alternative, the Defence requests leave to appeal the following issues: (i) whether the Chamber erred in law by limiting the Defence's ability to divide its opening statement in two parts; and (ii) whether the Chamber erred in fact by finding that this limitation would have any 'streamlining' effect on the proceedings.<sup>45</sup>

32. In the Directions, the Chamber determined how it would prefer the opening statements to be presented taking into account, *inter alia*, the Defence submissions.<sup>46</sup> This is a matter that falls within the Chamber's discretion and is not an issue that could affect the fair and expeditious conduct of the proceedings or the outcome of the trial. No error of reasoning has been identified in the Request and no injustice arises such that would make this a matter for reconsideration. The Second Issue therefore fails to meet the criteria for reconsideration set out in paragraph 8 above and leave to appeal as described in paragraphs 9 to 10 above.

### **C. Fifth Issue**

33. Finally, the Defence requests the Chamber to reconsider any requirement to file a public redacted version of filings within five days.<sup>47</sup> In the alternative, the Defence requests leave to appeal the following issue: whether the Chamber erred in law by requiring the parties to file a public redacted version of every filing although reasons

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<sup>44</sup> [Request](#), paras 24-26.

<sup>45</sup> [Request](#), para. 27.

<sup>46</sup> [Defence Submissions](#), para. 73.

<sup>47</sup> [Request](#), para. 53.

of security and strategy may clearly justify the confidentiality of the document's very existence.<sup>48</sup>

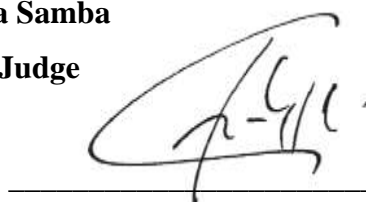
34. The Chamber notes that this aspect of the Request is based on a misunderstanding of the Directions. Parties are required to file public and confidential redacted versions of any confidential or *ex parte* filings only to the extent that this is possible.<sup>49</sup> Should this not be possible, the factual and legal basis for the chosen classification shall be set out in accordance with Regulation 23bis of the Regulations. As it is based on a misunderstanding, the Fifth Issue fails to meet the criteria for reconsideration set out in paragraph 8 above and leave to appeal as described in paragraphs 9 to 10 above.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.




**Judge Miatta Maria Samba**  
**Presiding Judge**



**Judge María del Socorro Flores Liera**

**Judge Sergio Gerardo Ugalde Godínez**

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

Dated 8<sup>th</sup> April 2022

At The Hague, The Netherlands

<sup>48</sup> [Request](#), para. 53.

<sup>49</sup> [Directions](#), para. 54.