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Date: **21 March 2022**

TRIAL CHAMBER VI

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Confidential

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*"

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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Other

Introduction

1. Trial Chamber VI (“Chamber”) should dismiss the Defence request for reconsideration, or alternatively, leave to appeal¹ the “Directions on the Conduct of Proceedings”² (“Decision”). The Chamber’s directions — including those that the Defence impugns, namely, concerning opening statements,³ witness preparation⁴ and the submission of documentary evidence⁵ — are 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.
2. The Defence neither shows that any circumstances justify reconsideration of the Decision, nor that any of the four proposed issues it raises are appealable issues within the meaning of article 82(1)(d) of the Statute. The Defence’s arguments either misread the Decision, relate to matters that have already been decided by the Appeals Chamber, or consist of mere disagreements with the Chamber’s findings and conclusions. The Defence Request should be dismissed on these bases alone.
3. In any event, should the Chamber decide not to dismiss the Defence Request on these bases, it should dismiss them because the proposed issues also fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute. The Defence Request does not elucidate how any of the four proposed issues affects the fair and expeditious conduct of the proceedings, or that they merit an immediate resolution by the Appeals Chamber.

Confidentiality

4. This filing is classified as confidential, pursuant to regulation 23*bis* (2) of the Regulations of the Court (“Regulations”), because it responds to the Defence Request which was filed confidentially and because it refers to other documents which are

¹ “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 (“Defence Request”).

² [ICC-01/14-01/21-251](#), 9 March 2022 (“Decision”).

³ Decision paras. 4-9.

⁴ Decision, para. 44 (and Annex A).

⁵ Decision, paras. 15-24.

currently subject to the same classification. The Prosecution will file a public redacted version of this document in due course.

Submissions

A. The Defence Request does not show that reconsideration is merited, nor does it raise any appealable issues arising from the Decision

5. A chamber's reconsideration of its previous decision is an exceptional remedy which may only be granted in very limited circumstances. They include the existence of a clear error of reasoning on the part of a Chamber and a necessity to prevent injustice.⁶ New facts and arguments arising since the impugned decision was rendered may be relevant to this assessment.⁷ The Court has consistently required that "an appealable issue must be 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.'"⁸ No appealable issue arises if a party misreads or misrepresents the decision or record.⁹

6. None of the Defence's proposed four issues satisfy these requirements.

(i) *First Proposed Issue* — concerning alleged absence of an opportunity for the Parties to make submissions on the conduct of proceedings and absence of a reasoned opinion

7. The first proposed issue misreads the record, not only because the Chamber afforded the Parties an opportunity to be heard, but also provided a reasoned opinion.¹⁰ In any event, the issue is predicated on a wrong legal premise that there is an open-ended right for the Parties to be heard on any matter. As such, the first proposed issue neither demonstrates any legal error by the Chamber justifying reconsideration of the Decision, nor identifies an appealable issue under article 82(1)(d).

⁶ [ICC-02/04-01/15-1547](#), para. 7; [ICC-02/04-01/15-468](#), para. 4; [ICC-01/04-02/06-519](#), para. 12.

⁷ [ICC-02/04-01/15-1259](#), para. 12; [ICC-02/04-01/15-1210-Red](#), para. 6.

⁸ [ICC-01/04-168 OA3](#), para. 9. See also [ICC-01/05-01/08-532](#), para. 17; [ICC-01/04-01/06-1557](#), para. 30.

⁹ See e.g., [ICC-01/04-01/10-487](#), paras. 32-33; [ICC-01/05-01/13-1489](#), paras. 9, 10; [ICC-01/05-01/08-75](#), para. 32.

¹⁰ *Contra* Defence Request, paras. 8-21.

8. The Defence ignores that in reaching the Decision, the Chamber not only had regard to the practices of other trial chambers of this Court, but also took account of the submissions made by the Parties in *preparation of* and *during* the status conference of 28 January 2022.¹¹ In particular, the Chamber considered the submissions made by the Parties from 21 January 2022 in preparation of the 28 January Status Conference. Indeed, during the 28 January 2022 Status Conference, the Presiding Judge underlined that the Chamber had considered submissions of the Parties from 21 January 2022, and asked the Parties not to repeat them during the status conference, but to only provide information that had not yet been conveyed or covered in the written filings.¹²

9. The Defence incorrectly suggests that the scope of the 28 January 2022 status conference was necessarily limited to questions concerning the date of the commencement of trial.¹³ To the contrary, not only did the Chamber's Order scheduling this status conference identify a non-exhaustive list of items on which the Parties and participants were to make submissions,¹⁴ but also the matters on which the Parties actually made written submissions or were discussed during the status conference transcended the limited subject of trial date and covered other issues. These included witness preparation;¹⁵ opening statements (e.g., whether the Parties and

¹¹ [ICC-01/14-01/21-251](#), para. 2.

¹² ICC-01/14-01/21-T-007-Conf-Eng, p.3, lns.3-10.

¹³ Defence Request, paras. 8-9.

¹⁴ See also [ICC-01/14-01/21-226](#) (Order Scheduling the First Status Conference), identifying diverse items beyond the commencement date of trial on which the Parties were asked to make submissions. These included: estimated number of witnesses to testify; use of expert witnesses; testimony by video-link; estimated volume of documentary and other non-testimonial evidence; use of rule 68; agreed facts; trial briefs; opening statements. The order also permitted the Parties and participants to "express their wish to add further items on the list (...)." (para. 3). Moreover, "should the parties and participants be of the view that any matter ought to be resolved before the status conference, they should bring it to the Chamber's attention promptly." (para. 4).

¹⁵ See e.g., [ICC-01/14-01/21-228](#), paras. 44; 45 ("[T]he Legal Representative highlights the need to protect the safety and well-being of witnesses in the present case, including participating victims. As Trial Chamber V noted in the *Ruto & Sang* and the *Kenyatta* cases, much of a witness' apprehension about testifying may result from "[...] anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination". In the particular circumstances of the present case, it is likely that a significant number of witnesses will be highly vulnerable. Witness familiarisation is thus essential to reduce the psychological burden of testifying in an environment completely different from the one in which witnesses live and that they are used to. The protocol adopted in the *Ongwen* case "[...] reflects the jurisprudence on familiarisation and its related procedures and also takes into account the practices and experiences concerning witnesses appearing before the Court. The protocol aims to outline the procedures that serve the best interests of witnesses and provide for sustainable working solutions for all entities involved". In this regard, the *Chambers Practice Manual* also recommends that the Trial Chamber adopt a "familiarisation protocol governing the period of time shortly before a witness commences his/her testimony". The Legal Representative suggests that the Chamber also adopt a similar Witness Familiarisation Protocol in these proceedings."

participants were to present them all at once;¹⁶ their duration, and whether to hold the opening statements in the Central African Republic);¹⁷ protocols;¹⁸ use of rule 68 and video-link;¹⁹ agreed facts and trial briefs.²⁰ Therefore, the Defence misrepresents that the Chamber did not afford the Parties and participants the opportunity to be heard before reaching the Decision.

10. It was within the Chamber's discretion to assess whether the material and information provided by the Parties in preparation for and during the status conference, together with the practices of other chambers of this Court, were 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. The Defence merely disagrees with the Chamber's exercise of discretion and assessment.²¹ That the Parties had indicated their intention to submit, at a later stage, written submissions on the conduct of proceedings did not fetter the Chamber's discretion to make the requisite assessment of the sufficiency of information necessary for it to issue the directions.

11. In any event the first issue is predicated on a wrong legal premise that there is an open-ended right for the Parties to be heard or to make detailed submissions on every issue before a Chamber makes any ruling.²² To the contrary—and in particular concerning the mandate to control proceedings—Chambers enjoy wide discretion.²³ In the end, the Defence merely disagrees with the Chamber's exercise of its discretion

¹⁶ See e.g., Defence's submissions indicating that it was open to either present the opening statement at the beginning of the Defence case or present only part at the beginning of the Prosecution case and another part at the opening of its case. ICC-01/14-01/21-231-Conf-Red, para. 73.

¹⁷ See e.g., ICC-01/14-01/21-T-007-Conf-Eng, p.40: lns. 6-20 – p.41: lns. 1-13; [ICC-01/14-01/21-230-Red](#), para. 46; [ICC-01/14-01/21-228](#), paras. 34-35; 46-47.

¹⁸ See e.g., [ICC-01/14-01/21-230-Red](#), para. 48 (While the Prosecution indicated a willingness to provide any further submissions regarding witness preparation, it also indicated that it was "operating under the assumption that the protocols adopted by the Pre-Trial Chamber relevant to standard redactions and confidentiality obligations continue to apply. This will ensure continuity of established practice and streamline the proceedings"); [ICC-01/14-01/21-228](#), paras. 41-46.

¹⁹ See e.g., [ICC-01/14-01/21-230-Red](#), paras. 14-18; [ICC-01/14-01/21-228](#), para. 28; ICC-01/14-01/21-231-Conf-Red, paras. 27, 44-46.

²⁰ [ICC-01/14-01/21-230-Red](#), paras. 19, 44; [ICC-01/14-01/21-228](#), paras. 29-33; ICC-01/14-01/21-231-Conf-Red, para. 47.

²¹ [ICC-01/04-168 OA3](#), para. 9; [ICC-02/05-02/09-267](#), paras. 4, 11-12, 23-25; [ICC-01/05-01/13-801](#), paras. 9-11.

²² [ICC-01/04-01/07-2297 OA10](#), para. 57 (Dissenting Opinion).

²³ See e.g., [ICC-01/09-02/11-588](#), para. 31.

in considering not only existing practices of other chambers, but also the Parties' submissions regardless of whether they were entirely exhaustive on the matter or not.

12. Finally, contrary to the Defence's submissions, the Chamber provided a reasoned opinion—including the reasons or the materials it based on²⁴—to reach the Decision.²⁵

13. Based on the above, the first proposed issue neither elucidates a legal error justifying reconsideration of the Decision, nor identifies an appealable issue under article 82(1)(d) necessitating immediate appellate intervention.

(ii) *The Second Proposed Issue* — concerning opening statements

14. The Defence neither identifies any provision of the Court's governing law nor of its jurisprudence mandating Chambers to permit Parties and participants to make opening statements as of right.²⁶ Nor, should a Chamber choose to permit the Parties and participants to make opening statements, does the Defence identify any statutory provision embodying a legal bar preventing a Chamber from requiring the Parties and participants, including the Defence to make their opening statements all at one time. The domestic case-law the Defence cites does not support the existence of such legal bar,²⁷ nor in any event is such jurisprudence binding on the Court.

15. Ultimately, whether a Chamber will permit the Parties to make opening statements, and if so, in what manner, are matters that fall within a Chamber's discretion. Indeed, this Decision is not the first one at the Court to order the Parties and participants to present their opening statements all at once.²⁸ No unfairness has been found in those other cases to flow from such an approach.

16. In this case, the Defence, in its submissions before the Chamber, indicated that it was open to either present the opening statement at the beginning of the Defence case or present only part of its speeches at the beginning of the Prosecution case, reserving the possibility to present other elements at the opening of its case.²⁹ The Chamber

²⁴ See e.g., [ICC-01/04-01/06-774 OA6](#), para. 31.

²⁵ See Decision, e.g., para. 1; *contra* Defence Request, paras. 18-21.

²⁶ Defence Request, paras. 24-27.

²⁷ Defence Request, para. 24 (citing a decision of the United States Supreme Court).

²⁸ See e.g., [ICC-02/04-01/15-497 \(Ongwen\)](#), para. 7; [ICC-01/05-01/13-1231 \(Bemba et al\)](#), para. 4.

²⁹ ICC-01/14-01/21-231-Conf-Red, para. 73.

permitted the Defence to make its opening statements either at the beginning of the Prosecution case or at the beginning of the Defence case. The Defence Request therefore merely disagrees with the Chamber's exercise of discretion to choose one of the options the Defence had in fact presented to the Chamber (i.e., to make the opening statements prior to the Defence case). In any event, the Decision's simply expresses disagreement with the underlying motivation for requiring the Parties and participants to present their opening statement at once — namely to streamline the presentation of opening statements.³⁰ Other chambers at the Court have provided similar reasons in ordering Parties and participants to present their opening statements all at once.³¹

17. Therefore, the second proposed issue neither elucidates any clear legal error by the Chamber justifying reconsideration of the Decision, nor identifies an appealable issue under article 82(1)(d).

(iii) The Third Proposed Issue — challenging witness preparation

18. The Defence's third proposed issue concerning the permission of witness preparation³² is misconceived, misreads the Decision, and as such reveals no error or an appealable issue meriting immediate appellate intervention under article 82(1)(d).

19. Merely that a number of Chambers at the Court have not permitted witness preparation is not sufficient to show a clear error in the Decision. The Defence ignores that a number of other chambers at the Court have actually permitted witness preparation.³³ This is because Chambers have significant flexibility and discretion under rule 64(3) to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.³⁴ Indeed, article 64's formulation "makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation (...). Article 64 is formulated

³⁰ Decision, para. 7.

³¹ [ICC-02/04-01/15-497](#) (Ongwen), para. 7.

³² Defence Request, paras. 28-48.

³³ See e.g., [ICC-01/09-02/11-588](#) (Muthaura & Kenyatta); [ICC-01/09-01/11-524](#) (Ruto & Sang); [ICC-01/04-02/06-652](#) (Ntaganda).

³⁴ [ICC-01/09-02/11-588](#), para. 31.

so as to give judges a significant degree of discretion concerning the procedure they adopt in this respect, as long as the rights of the accused are respected and due regards is given to the protection of witness and victims.”³⁵

20. Given this level of flexibility and discretion, the Defence’s claims that it is discriminatory to allow witness preparation in this case yet it was not permitted in the *Yekatom* and *Ngaissona* case that arises from the same situation in Central Africa,³⁶ is legally misconceived — and fails to show a clear error of law justifying reconsideration of the Decision. In any event, it simply disagrees with the Chamber’s assessment and ignores that merely that two cases arise from the same situation does not mean that the respective accused are entirely similarly situated.

21. Furthermore, 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, such as distortion of the truth,³⁷ promotion of rehearsal of evidence or training of witnesses or erosion of spontaneity.³⁸

22. Yet, not only has the Court’s case-law that the Defence fails to cite consistently held that witness preparation does not promote these dangers,³⁹ but crucially, the Protocol attached to the Decision⁴⁰ expressly identifies the purpose of witness preparation and prohibits certain conduct that may promote such risks. Witness preparation — which consists of a meeting between a witness and the party calling the witness that takes place shortly before the witness’s testimony for the purpose of discussing matters relating to the witness’s testimony — is “to help ensure the witness gives relevant, accurate and structured testimony,”⁴¹ and also “help ensure the well-being of the witness.”⁴² Far from distorting the evidence or undermining spontaneity,

³⁵ [ICC-01/09-02/11-588](#), para. 31.

³⁶ Defence Request, paras. 35-38.

³⁷ Defence Request, para. 30.

³⁸ Defence Request, paras. 31, 36.

³⁹ See e.g., [ICC-01/09-02/11-588](#) (*Muthaura & Kenyatta*); [ICC-01/09-01/11-524](#) (*Ruto & Sang*); [ICC-01/04-02/06-652](#) (*Ntaganda*).

⁴⁰ [ICC-01/14-01/21-251-AnxA](#).

⁴¹ [ICC-01/14-01/21-251-AnxA](#), para. 1(a)(i).

⁴² [ICC-01/14-01/21-251-AnxA](#), para. 1(a)(ii).

the Protocol expressly prohibits “any attempt to influence a witness to testify to factual events that the witness did not observe or perceive (...)”.⁴³ Coaching, training or practising of testimony is also not allowed.⁴⁴

23. In the same regard, during preparation sessions, lawyers are not only required *inter alia*, to reiterate the witness’ obligation to tell the truth,⁴⁵ but they also undertake “not to influence the substance of the witness’s answers, either directly or indirectly (including (...) by informing the witness of the type of evidence that would assist the calling party’s case, by suggesting whether or not the witness’s answers are right or leading the witness in any inappropriate way).”⁴⁶ Moreover, lawyers undertake not “to train the witness or practice the questions and answers expected during the witness’s in-court testimony so that the witness memorises those questions and answers.”⁴⁷

24. Ultimately, the Defence’s requests that certain aspects of the Protocol should be deleted or modified—such as the scope of re-examination⁴⁸—are legally misconceived, or simply express disagreement, for instance with time-lines for conducting witness preparation or access to the video record.⁴⁹

25. Based on the above, the third proposed issue neither elucidates any clear legal error justifying reconsideration of the Decision, nor identifies an appealable issue under article 82(1)(d) that merit immediate appellate intervention.

(iv) The Fourth Proposed Issue — challenging the system of submission of evidence

26. The Defence’s fourth proposed issue challenging the Chamber’s choice of evidentiary regime to apply in this case — including that the submission regime adopted confuses two stages (admissibility of an item, and weight to be accorded to it) ; and that a Chamber must always first assess admissibility before marking any item

⁴³ [ICC-01/14-01/21-251-AnxA](#), para. 3.

⁴⁴ [ICC-01/14-01/21-251-AnxA](#), para. 3.

⁴⁵ [ICC-01/14-01/21-251-AnxA](#), para. 16.

⁴⁶ [ICC-01/14-01/21-251-AnxA](#), para. 28.

⁴⁷ [ICC-01/14-01/21-251-AnxA](#), para. 29.

⁴⁸ Defence Request, para. 45 (referring to Decision, para. 29).

⁴⁹ Defence Request, paras. 44, 46-47.

as submitted — are misconceived.⁵⁰ As such, they neither show any error meriting reconsideration of the Decision, nor identify any appealable issue under article 82(1)(d).

27. Critically, the fourth proposed issue concerns matters that have already been settled by the Appeals Chamber. As such, the Defence cannot identify any error of law in the Decision — or indeed any appealable issue meriting appellate intervention.⁵¹

28. As the Appeals Chamber has repeatedly stated, two evidentiary regimes apply at the Court — namely, the so-called *admission regime* and the *submission regime*, and Trial Chambers enjoy discretion in choosing which system to adopt in a case. Here, the Chamber adopted the *submission regime*. As underscored by the Appeals Chamber, when a chamber adopts a *submission regime*, it is not required to assess, not even on a *prima facie* basis, the admissibility, relevance, probative value or alleged prejudicial effect of each item at the time of its submission via the Prosecution's bar table motion.⁵² Rather, it is entitled to defer such assessment to the deliberation stage as part of its holistic assessment of all evidence. As established by the Appeals Chamber,

Upon the submission of an item of evidence by a party, a trial chamber has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) *recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused. Under the latter approach, no separate ruling on the admissibility of all evidence is required.*⁵³

29. The Defence's arguments that seem to allege fair trial concerns, are also misconceived. These include the claim that the submissions regime may jeopardise a speedy trial, since it will be necessary to assume that, potentially the Chamber will

⁵⁰ Defence Request, paras. 49-52.

⁵¹ [ICC-01/05-01/08-2487-Red](#), para. 28.

⁵² *Contra* Defence Request, para. 50.

⁵³ [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), para. 8 (Emphasis added). See also [ICC-01/05-01/08-1386 OA5 OA6](#), para. 37.

rely on any evidence even if it does not show any indices of reliability.⁵⁴ These claims have already been found by the Appeals Chamber to be without merit.⁵⁵

30. Similarly, the Defence's further claim that the submission regime adopted in this case reverses the burden of proof — namely, that the party submitting evidence need not show that it is admissible, unless the other party objects — is also misconceived, and in any event, misrepresents the Decision.⁵⁶ Merely that the Chamber need not rule on the admissibility of any items at the point of its submission, does not exempt the party formally requesting submission of any item of evidence⁵⁷ to make submissions on the relevance and probative value of the evidence that will guide the Chamber when assessing the item at the time of deciding the accused's guilt or innocence. Indeed, there is nothing in the Decision that exempts the submitting party from making such submissions. The Defence's challenge to the three days allotted to the other party to challenge the admissibility of evidence following the submitting party's formal request,⁵⁸ is a mere disagreement with the Chamber's assessment of the sufficiency of such time. In any event, the Defence's claim is couched in sweeping terms — namely that the time is not realistic during the trial phase; that the Defence has limited resources — all of which cannot show a clear error of law, or an appealable issue for which immediate appellate intervention is warranted.

31. For the foregoing reasons, the fourth proposed issue identifies neither a clear error of law justifying reconsideration of the Decision, nor any appealable issue arising from the Decision that merits appellate intervention under article 82(1)(d).

⁵⁴ Defence Request, para. 50.

⁵⁵ [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), para. 607.

⁵⁶ Defence Request, para. 51.

⁵⁷ Decision, para. 22(i).

⁵⁸ Defence Request, para. 44.

B. The Defence Request does not meet the remaining criteria for leave to appeal under article 82(1)(d) of the Statute

32. Should the Trial Chamber find that any of the four issues proposed by the Defence to constitute appealable issues arising from the Decision, the Defence Request should, in any event, be denied as these issues fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute. The proposed issues do not significantly affect both the fair and expeditious conduct of proceedings, nor do they require an immediate resolution by the Appeals Chamber to materially advance the proceedings.⁵⁹

33. Here, the Defence Request simply makes an omnibus, cursory, conclusory and unsubstantiated claim that the cumulative criteria are met.⁶⁰ This approach is insufficient to establish that each of the four proposed issues *individually* meets all the cumulative requirements under article 82(1)(d) of the Statute.⁶¹

34. In any event, none of the four proposed issues cumulatively affect the fair and expeditious conduct of the proceedings.

35. For instance, even *arguendo* that the Chamber could have benefited from additional Parties' submissions in reaching the directions – and the Prosecutions submits that such additional submissions were unnecessary – many of the directions the Chamber made are well-established in the Court's practices across different cases, including cases already concluded either at the trial or appellate stages. As noted above, the Appeals Chamber has already ruled that adoption of a *submissions regime* falls within a Chamber's discretion and presents no fair trial concerns. Additionally, a number of trial chambers in different cases that have already been decided and to which the Defence makes no reference, adopt similar approaches to opening statement and witness preparation as the Decision.

⁵⁹ See e.g. [ICC-01/09-01/11-912](#), para. 16 (underscoring that or leave to appeal to be granted, “a) the decision must involve an ‘issue’ that would significantly affect (i) *both* the ‘fair’ and ‘expeditious’ conduct of the proceedings; or (ii) the outcome of the trial; and b) in the view of the [Pre-Trial] Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings” (emphases in the original).

⁶⁰ Defence Request, paras. 55-56.

⁶¹ See e.g. [ICC-01/05-01/08-3382](#), para. 12 (emphasis added).

36. Even those procedural matters on which there is no consistent Court practice (such as witness preparation, or opening statements), lack of unanimity does not reflect that there is an error of law or that any injustice is occasioned. It only shows that different chambers, properly exercising discretion in engaging circumstances in their respective cases, may achieve justice regardless of the different 'route' or 'direction' they may individually pursue. This is in keeping with rule 64(3), which grants the Chamber flexibility to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.⁶² Indeed, article 64's formulation "makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedure they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witness and victims."⁶³ Here, the Trial Chamber had before it submissions from the Parties and participants to issue the Decision.

37. The Defence cannot also show that the outcome of the trial will be prejudiced, or that immediate appellate intervention is required. Unlike some domestic jurisdictions which conduct trials via lay juries, trials at the Court are conducted by professional judges. To this extent, whether the Parties do not make opening statements, or make their respective statements all at one time, the ICC's professional judges are well placed to appreciate the Parties' cases, and to determine which party's version or account to believe, before reaching conclusions on guilt or innocence.

38. The same applies to whether or not a chamber permits witness preparation. Regardless of any circumstances, the ICC's professional judges are capable of assessing the credibility of witnesses appearing before them. As submitted above, all the discrete potential abuses that the Defence purports witness preparation may engender and which allegedly may prejudice fairness, such as distortion of the truth,

⁶² [ICC-01/09-02/11-588](#), para. 31.

⁶³ [ICC-01/09-02/11-588](#), para. 31.

promotion of rehearsal of evidence or training of witnesses or erosion of spontaneity, are either misconceive, or are specifically addressed by the Protocol. Additionally, some of the proposed issues, in particular concerning the *submissions regime* have already been determined by the Appeals Chamber. The Appeals Chamber's intervention is thus unwarranted.

39. Ultimately, the Defence Request cannot show that any of the four proposed issues significantly affects both the fair and expeditious conduct of proceedings or the outcome of the trial, nor that any of them requires an immediate resolution by the Appeals Chamber to materially advance the proceedings.

Conclusion

40. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Defence Request.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a small dot.

Karim A. A. Khan QC, Prosecutor

Dated this 21st day of March 2022

At The Hague, The Netherlands.