

**Original: English****No.: ICC-01/14-01/21****Date: 14 August 2023****Date of Public Redacted Version: 24 August 2023****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 Redacted****Decision Appointing Experts for the Purpose of a Medical Examination pursuant  
to Rule 135 of the Rules of Procedure and Evidence**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Ms Holo Makwaia

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

Ms Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Mr Harry Tjonk

**Victims Participation and  
Reparations Section**

**Other**

[REDACTED]

[REDACTED]

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’), rule 135 of the Rules of Procedure and Evidence (the ‘Rules’), regulations 44, 92 and 103 of the Regulations of the Court and regulations 56, 156 and 189 of the Regulations of the Registry, issues this ‘Decision Appointing Experts for the Purpose of a Medical Examination pursuant to Rule 135 of the Rules of Procedure and Evidence’.

## **I. PROCEDURAL HISTORY**

1. On 18 January 2023, the Chamber concluded hearing the testimony of the Office of the Prosecutor’s (the ‘Prosecution’) sixteenth witness and adjourned the proceedings.<sup>1</sup>

2. On 7 February 2023, the Chamber convened a status conference in closed session. During the status conference, the Registry informed the Chamber, parties and participants, *inter alia*, that Mr Said was not capable of appearing at hearings for medical reasons and that he would likely be unable to participate in hearings for at least six months.<sup>2</sup> The Chamber further notified the parties and participants that Mr Said had not waived his right to be present at trial in accordance with article 67(1)(d) of the Statute, and thus the trial could not continue.<sup>3</sup>

3. On 8 March 2023, the Chamber rejected a request by the Prosecution for further information regarding the health of the accused.<sup>4</sup> Therein, the Chamber reiterated that there was ‘no possibility for the trial to proceed’ given Mr Said’s state of health and stated that it was ‘premature to enter into considerations of fitness to stand trial’.<sup>5</sup> However, the Chamber reassured the parties and participants that it would continue ‘to closely monitor the situation’ in respect of Mr Said’s health.<sup>6</sup>

4. On 12 June 2023, following a period in which the Chamber received periodic updates from the Medical Officer at the Detention Centre regarding Mr Said’s health

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<sup>1</sup> Transcript of hearing, 18 January 2023, ICC-01/14-01/21-T-046-CONF-ENG CT, p. 76.

<sup>2</sup> Transcript of hearing, 7 February 2023, ICC-01/14-01/21-T-047-SECRET-ENG, p. 5.

<sup>3</sup> Transcript of hearing, 7 February 2023, ICC-01/14-01/21-T-047-SECRET-ENG, p. 4.

<sup>4</sup> Decision on the Prosecution’s Request for Additional Information, 8 March 2023, ICC-01/14-01/21-603-SECRET (the ‘Decision on the Prosecution’s Request for Additional Information’).

<sup>5</sup> Decision on the Prosecution’s Request for Additional Information, para. 18.

<sup>6</sup> Decision on the Prosecution’s Request for Additional Information, para. 20.

(with Mr Said's consent), the Registry filed a report from the Medical Officer indicating that Mr Said had ceased to give his consent for his medical information to be disclosed to the Chamber.<sup>7</sup>

5. On 13 June 2023, the Chamber, acting pursuant to rule 135 of the Rules, ordered the Registry to submit to the Chamber, for its consideration, 'a shortlist of experts who are qualified and in a position to assess: (i) the medical condition of the accused; (ii) his prognosis; (iii) his ability to participate in the proceedings, and (iv) whether any special measures or adjustments are necessary to address any medical condition of the accused during the trial proceedings' (the 'Order for a Shortlist of Potential Experts').<sup>8</sup>

6. On 15 June 2023, the Defence requested the Chamber to reconsider the Order for a Shortlist of Potential Experts, arguing, *inter alia*, that it would be premature to appoint experts, given [REDACTED] and that any violation of medical secrecy was not justified at that stage (the 'Defence Request for Reconsideration').<sup>9</sup>

7. On 16 June 2023, the Chamber rejected the Defence's request for reconsideration of the Order for a Shortlist of Potential Experts (the 'Decision on the Defence Request for Reconsideration').<sup>10</sup>

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<sup>7</sup> Annex A to the Registry Transmission of the Medical Officer's Report, 12 June 2023, ICC-01/14-01/21-615-SECRET-Exp-Anx.

<sup>8</sup> Order pursuant to rule 135 of the Rules of Procedure and Evidence, 13 June 2023, ICC-01/14-01/21-616-SECRET.

<sup>9</sup> See Éléments d'informations portant sur la teneur du « Medical Officer's Report » du 12 juin 2023 (ICC-615-SECRET-Exp) et demande de reconsidération de la décision de la Chambre du 13 juin 2023 ordonnant une expertise conformément à la Règle 135 du Règlement de Procédure et de preuve, 14 June 2023, ICC-01/14-01/21-617-SECRET-Exp. A SECRET redacted version was filed on 15 June 2023 (ICC-01/14-01/21-617-SECRET-Red).

<sup>10</sup> Decision on the Defence Request for Reconsideration of 'Order pursuant to rule 135 of the Rules of Procedure Evidence', 16 June 2023, ICC-01/14-01/21-618-SECRET-Exp. A SECRET redacted version was filed simultaneously (ICC-01/14-01/21-618-SECRET-Red) (the 'Decision on Defence Request for Reconsideration').

8. On 21 July 2023, after having been granted an extension of time,<sup>11</sup> the Registry filed two lists of potential experts (the ‘Registry’s Shortlists’).<sup>12</sup>

9. On 28 July 2023, the Prosecution,<sup>13</sup> Defence<sup>14</sup> and CLRV<sup>15</sup> filed their observations on the Registry’s Shortlists.

## II. SUBMISSIONS

10. The Registry’s Shortlists contain two lists: (i) a list of four experts in ‘[REDACTED]’ who are already admitted to the Court’s List of Experts;<sup>16</sup> and, (ii) a list of four medical specialists who are not yet admitted to the Court’s List of Experts.<sup>17</sup>

11. In respect of the four medical specialists not yet admitted to the Court’s List of Experts, the Registry notes that all have ‘confirmed their availability and interest to provide their expertise to the Chamber’.<sup>18</sup> Furthermore, the Registry submits that ‘a preliminary assessment indicates that these medical professionals are all qualified and meet the substantive criteria for their inclusion to the List of Experts’, but that the process of inclusion itself ‘will take several weeks.’<sup>19</sup>

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<sup>11</sup> Email from the Chamber dated 23 June 2023 at 15:22. *See* Registry’s Request pursuant to regulation 35 of the Regulations of the Court for an Extension of Time Limit to Transmit the Registry’s shortlist of Medical Experts, 22 June 2023, ICC-01/14-01/21-619-SECRET-Exp. A SECRET redacted version was filed on 23 June 2023 (ICC-01/14-01/21-619-SECRET-Red) (the ‘Registry’s Request for an Extension of Time’).

<sup>12</sup> Registry’s Submission following Trial Chamber VI’s “Order pursuant to rule 135 of the Rules of Procedure and Evidence” (ICC-01/14-01/21-616-SECRET), 21 July 2023, ICC-01/14-01/21-621-SECRET (the ‘Registry’s Shortlists’), with two SECRET Annexes (ICC-01/14-01/21-621-SECRET-Anx1; ICC-01/14-01/21-621-SECRET-Anx2).

<sup>13</sup> Prosecution’s Submissions on Registry’s Shortlist of Medical Experts, ICC-01/14-01/21-621-SECRET-RED, 28 July 2023, ICC-01/14-01/21-624-SECRET (the ‘Prosecution’s Observations’), with one SECRET annex (ICC-01/14-01/21-624-SECRET-AnxA).

<sup>14</sup> Observations de la Défense sur les « Registry’s Submission following Trial Chamber VI’s « Order pursuant to rule 135 of the Rules of Procedure and Evidence » » en date du 20 juillet 2023., 28 July 2023, ICC-01/14-01/21-626-SECRET-Exp. A SECRET redacted version was filed on 3 August 2023 (ICC-01/14-01/21-626-SECRET-Red) (the ‘Defence’s Observations’).

<sup>15</sup> Common Legal Representative of Victims’ observations on the “Registry’s Submission following Trial Chamber VI’s ‘Order pursuant to rule 135 of the Rules of Procedure and Evidence’ (ICC-01/14-01/21-616-SECRET)” (ICC-01/14-01/21-621-SECRET), 28 July 2023, ICC-01/14-01/21-625-SECRET (the ‘CLR’s Observations’).

<sup>16</sup> ICC-01/14-01/21-621-SECRET-Anx1. *See also* Registry’s Shortlists, para. 8.

<sup>17</sup> ICC-01/14-01/21-621-SECRET-Anx2.

<sup>18</sup> Registry’s Shortlists, para. 10.

<sup>19</sup> Registry’s Shortlists, para. 11.

12. In the Prosecution's Observations, the Prosecution submits that '[t]he guiding criteria for selecting expertise should be forensic experience in the issue of fitness to stand trial, and not only experience in treating the specific illnesses',<sup>20</sup> and questions of fitness to stand trial 'concern whether the accused is able to exercise effectively his fair trial rights in the proceedings'.<sup>21</sup>

13. Specifically, the Prosecution avers that the Chamber should appoint 'a panel of two or three experts with complementary expertise, varying background and working experience to assess Mr SAID's fitness to stand trial',<sup>22</sup> and supports the selection of experts from amongst the following: [REDACTED].<sup>23</sup>

14. In respect of any directions to be given to any prospective experts, the Prosecution submits that the experts should be instructed that 'the purpose of the examination is to assess: (i) the accused's medical condition ; (ii) his prognosis; (iii) his ability to participate in the proceedings, and (iv) whether any special measures or adjustments are necessary to address any medical condition during the trial.'<sup>24</sup>

15. In addition, the Prosecution requests, *inter alia*, that: (i) the Chamber order the submission 'of a joint Terms of Reference by the Prosecution and the Defence',<sup>25</sup> (ii) the appointed experts be given 'unrestricted access – in unredacted form – to the Accused's medical file, as well as prior medical reports, detention reports, joint Registry and Defence reports and Defence submissions on the case record',<sup>26</sup> (iii) [REDACTED];<sup>27</sup> (iv) the Registry facilitate necessary translation and interpretation,<sup>28</sup> (v) all parties and participants refrain from any contact with the experts,<sup>29</sup> and (vi) the experts file a joint report, to the extent possible.<sup>30</sup>

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<sup>20</sup> Prosecution's Observations, para. 9.

<sup>21</sup> Prosecution's Observations, para. 10.

<sup>22</sup> Prosecution's Observations, para. 12.

<sup>23</sup> Prosecution's Observations, para. 13. *See also* Prosecution's Observations, paras 14-18.

<sup>24</sup> Prosecution's Observations, para. 25. *See also* Prosecution's Observations, paras 20-24.

<sup>25</sup> Prosecution's Observations, para. 26.

<sup>26</sup> Prosecution's Observations, para. 27. *See also* Prosecution's Observations, paras 28-29.

<sup>27</sup> Prosecution's Observations, para. 30.

<sup>28</sup> Prosecution's Observations, para. 31.

<sup>29</sup> Prosecution's Observations, para. 32.

<sup>30</sup> Prosecution's Observations, para. 33.

16. In the Defence's Observations, the Defence reiterates previous submissions regarding medical secrecy and emphasises that Mr Said has not consented to the disclosure of any medical information, and that he does not wish the Prosecution and CLRV to have information about his current state of health without his consent.<sup>31</sup> The Defence further notes that questions regarding [REDACTED].<sup>32</sup>

17. In respect of the prospective experts proposed by the Registry, at the outset the Defence notes that [REDACTED].<sup>33</sup> In respect of the remaining prospective experts, the Defence notes that it is difficult to comment on the qualifications of the experts in the abstract and it can only decide on the precise parameters of what expertise is necessary [REDACTED].<sup>34</sup> That notwithstanding, the Defence supports the inclusion of French-speaking practitioners on the shortlist,<sup>35</sup> however, notes that none of the experts appear to have any expertise in [REDACTED].<sup>36</sup> The Defence also expresses the importance of having a panel of experts who are able to [REDACTED] and fully understand Mr Said's state of health so as to be best positioned to evaluate what [REDACTED].<sup>37</sup> As a result, the Defence observes that [REDACTED].<sup>38</sup>

18. Last, the Defence indicates that, in its view, [REDACTED] appears to be the most relevant of all the practitioners already admitted to the Court's List of Experts.<sup>39</sup> In respect of the practitioners not yet admitted to the Court's List of Experts, the Defence notes that [REDACTED] is a [REDACTED].<sup>40</sup> Furthermore, the Defence avers that the panel of experts should include at least one practitioner specialised in [REDACTED], as well as a [REDACTED] specialised in [REDACTED].<sup>41</sup>

19. In the CLRV's observations, the CLRV notes, *inter alia*, that the Registry has identified four experts on the Court's List of Experts and four not currently admitted,

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<sup>31</sup> Defence's Observations, paras 36-38.

<sup>32</sup> Defence's Observations, paras 39-43.

<sup>33</sup> Defence's Observations, para. 44.

<sup>34</sup> Defence's Observations, para. 45.

<sup>35</sup> Defence's Observations, para. 46.

<sup>36</sup> Defence's Observations, para. 47.

<sup>37</sup> Defence's Observations, para. 47.

<sup>38</sup> Defence's Observations, para. 47.

<sup>39</sup> Defence's Observations, para. 49.

<sup>40</sup> Defence's Observations, para. 51.

<sup>41</sup> Defence's Observations, para. 52.

all who have ‘confirmed their availability and interest to provide their expertise to the Chamber’.<sup>42</sup> Furthermore, the CLRV observes that the areas of expertise of the experts outside the List of Experts ‘[REDACTED]’.<sup>43</sup>

20. Last, the CLRV notes the process of inclusion of the experts not currently admitted to the List of Experts will ‘take “several weeks”, and posits that such a timeline further compromises the expeditiousness of the proceedings.’<sup>44</sup> Accordingly, the CLRV submits that ‘the Chamber should be minded to instruct the experts outside of the List of Experts before their formal inclusion to the List, especially considering the Registry’s preliminary assessment which indicates that they “are all qualified and meet the substantive criteria for their inclusion”’.<sup>45</sup>

### III. ANALYSIS

#### A. Reasons for ordering the medical examination (Rule 135(2) of the Rules)

21. At the outset, although already set out in the Order for a Shortlist of Potential Experts, and reiterated in Decision on Defence Request for Reconsideration, the Chamber finds it pertinent for the clarity of the record to set out its reasons for ordering a medical examination of the accused pursuant to rule 135 of the Rules. In this regard, the Chamber observes that, pursuant to rule 135(1) of the Rules, it may order a medical examination of the accused for any reason.

22. As noted above, at the February 2023 status conference, the Registry informed the Chamber, parties and participants that Mr Said would be unable to attend hearings due to his medical condition and the proceedings were adjourned.<sup>46</sup> The Chamber recalls that it stated at the February 2023 status conference that ‘although Mr Said is currently unable to take part in trial proceedings, the broader question of his fitness to

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<sup>42</sup> CLRV’s Observations, para. 10.

<sup>43</sup> CLRV’s Observations, para. 11.

<sup>44</sup> CLRV’s Observations, para. 12.

<sup>45</sup> CLRV’s Observations, para. 12.

<sup>46</sup> See Transcript of hearing, 7 February 2023, ICC-01/14-01/21-T-047-SECRET-ENG.



stand trial is not at issue at this point'.<sup>47</sup> This conclusion was re-affirmed by the Chamber in its Decision on the Prosecution's Request for Additional Information.<sup>48</sup>

23. Until June 2023, the Chamber was kept regularly up to date by the Medical Officer regarding Mr Said's medical condition.<sup>49</sup> The information the Chamber received in this respect clearly indicated that Mr Said was in no condition to attend hearings and that there was no possibility for the trial to proceed. In this regard, the Chamber was of the view that appointing medical experts pursuant to rule 135 of the Rules had no potential to assist in furthering the proceedings at that time. However, on 12 June 2023, the Registry filed a report from the Medical Officer indicating that Mr Said had ceased to give his consent for his medical information to be disclosed to the Chamber.<sup>50</sup>

24. As noted previously,<sup>51</sup> given current circumstances, the Chamber no longer has the necessary information for it to make a fully informed assessment regarding the adjournment of the proceedings and is cognisant that the proceedings have been adjourned for a significant period of time. As a result, mindful of its obligations to ensure the fairness and expeditiousness of the proceedings, the Chamber finds that it requires an objective, independent assessment of Mr Said's health by independent experts who can report directly to the Chamber.<sup>52</sup> Accordingly, for these reasons the Chamber orders an assessment of the accused pursuant to rule 135 of the Rules.

## **B. Appointment of medical experts**

25. The Chamber notes that all experts on the lists prepared by the Registry have confirmed their availability to provide expertise to the Chamber.<sup>53</sup> In determining which experts to appoint the Chamber has had due regard to the qualifications and

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<sup>47</sup> Transcript of hearing, 7 February 2023, ICC-01/14-01/21-T-047-SECRET-ENG, p. 5.

<sup>48</sup> Decision on the Prosecution's Request for Additional Information, para. 18.

<sup>49</sup> Order for a Shortlist of Potential Experts, para. 6. *See also* Decision on Defence Request for Reconsideration, para. 10.

<sup>50</sup> Annex A to the Registry Transmission of the Medical Officer's Report, 12 June 2023, ICC-01/14-01/21-615-SECRET-Exp-Anx.

<sup>51</sup> *See* Order for a Shortlist of Potential Experts, para. 6. *See also* Decision on Defence Request for Reconsideration, paras 10-11.

<sup>52</sup> *See* Order for a Shortlist of Potential Experts, para. 6. *See also* Decision on Defence Request for Reconsideration, paras 10-11.

<sup>53</sup> Registry's Shortlists, paras 9-10.

competence of all experts relevant to the particular medical condition of Mr Said, and makes the following observations.

26. First, the Chamber observes that both the Prosecution and the Defence support the appointment of a panel of experts, as opposed to a single expert.<sup>54</sup>

27. Second, the Chamber notes that the Prosecution supports the selection of experts from amongst the following: [REDACTED].<sup>55</sup>

28. Third, the Chamber observes that the Defence finds [REDACTED] the most relevant of all the French speaking practitioners proposed.<sup>56</sup> However, the Chamber notes that his field of expertise appears to be quite broad, relating to [REDACTED],<sup>57</sup> which the Chamber finds is less suitable for the present purposes.

29. That notwithstanding, the Chamber agrees with the submissions to the effect that there is a need to have experts with demonstrated experience in providing medical reports to judicial bodies<sup>58</sup> and that it would facilitate the examination of Mr Said if one of the experts is French speaking.<sup>59</sup> In this regard, the Chamber notes that [REDACTED] is French speaking, has experience of conducting medical examinations in a judicial context and has been appointed as an expert to the [REDACTED].<sup>60</sup>

30. Last, the Chamber notes that the Medical Officer has recommended '[REDACTED]'.<sup>61</sup> The Chamber takes note of the Defence's submissions that there is no expert specialised in [REDACTED];<sup>62</sup> however, it observes that [REDACTED] is [REDACTED].<sup>63</sup> Furthermore, the Chamber notes that [REDACTED] is experienced in [REDACTED].<sup>64</sup>

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<sup>54</sup> See Prosecution's Observations, para. 12; Defence's Observations, para. 47.

<sup>55</sup> Prosecution's Observations, para. 13. See also Prosecution's Observations, paras 14-18.

<sup>56</sup> See Defence's Observations, para. 49.

<sup>57</sup> See ICC-01/14-01/21-621-SECRET-Anx1, pp 10-12.

<sup>58</sup> See Prosecution's Observations, paras 9-10.

<sup>59</sup> See Defence's Observations, para. 46.

<sup>60</sup> See ICC-01/14-01/21-621-SECRET-Anx1, pp 5-6, 8.

<sup>61</sup> Registry's Request for an Extension of Time, para. 9.

<sup>62</sup> See Defence's Observations, paras 47, 52.

<sup>63</sup> See [REDACTED].

<sup>64</sup> See [REDACTED].

31. Accordingly, based on the foregoing, in combination with the information available to it at this point and having regard to the parties' submissions, the Chamber decides to appoint [REDACTED] and [REDACTED] to examine Mr Said (hereinafter 'the Panel').

32. If the Panel is of the view that one or more experts from other areas of medical expertise are needed in order to make a fully informed assessment of Mr Said's condition, they shall inform the Chamber as soon as possible.

33. Last, the Chamber notes that [REDACTED] is not currently admitted to the Court's List of Experts. As per rule 135(3) of the Rules and regulation 44 of the Regulations of the Court, the Chamber finds that this does not preclude his appointment, nor his ability to take up his appointment. This notwithstanding, the Chamber instructs the Registry to ensure his inclusion on the Court's List of Experts as soon as possible.

### **C. Directions on the medical examination**

#### *1. General Directions*

34. The concept of 'fitness to stand trial' must be interpreted in the light of the need to ensure that the accused receives a fair trial in the sense that, when the accused is unable to meaningfully exercise his or her procedural rights because of his or her state of health, the trial cannot be fair.<sup>65</sup> In such circumstances the proceedings must therefore be adjourned until such obstacles cease to exist.<sup>66</sup>

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<sup>65</sup> Trial Chamber X, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, 24 March 2021, [ICC-01/12-01/18-1006-Red](#), (the 'Al Hassan Rule 135 Decision') para. 33; Trial Chamber X, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial, 2 September 2020, [ICC-01/12-01/18-952-Red](#) (the 'Al Hassan Decision on Defence notice of unfitness'), para. 33; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016, [ICC-02/04-01/15-637-Red](#) (the 'Ongwen Decision Ordering a Medical Examination'), para. 7; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, [ICC-02/11-02/11-286-Red](#), (the 'First Gbagbo Fitness Decision') para. 43; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015, [ICC-02/11-01/15-349](#) (the 'Second Gbagbo Fitness Decision'), para. 33.

<sup>66</sup> [Al Hassan Rule 135 Decision](#), para. 33; [Al Hassan Decision on Defence notice of unfitness](#), para. 33; [First Gbagbo Fitness Decision](#), para. 43.

35. As held by other chambers of this Court, there are a number of relevant capacities which are necessary for the meaningful exercise of the accused's procedural rights.<sup>67</sup> These include, *inter alia*, the capacities to engage with and participate in trial proceedings and instruct counsel.<sup>68</sup>

36. It is not required, however, that the aforementioned capacities 'be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity. The threshold is met when an accused has these capacities, viewed overall and in a reasonable manner'.<sup>69</sup>

37. In connection with the foregoing, the question of whether an accused is fit to stand trial does not depend, in and of itself, on whether he or she has particular medical conditions, but whether he or she is able to effectively exercise his or her fair trial rights in the proceedings.<sup>70</sup>

38. The Chamber further notes that, even where a medical examination is ordered pursuant to rule 135 of the Rules, the appointed experts are not required themselves to make a determination of an accused's fitness to stand trial.<sup>71</sup> Rather, such a determination remains within the exclusive responsibility of the Chamber, in view of its obligations under article 64(2) of the Statute.<sup>72</sup> Additionally, the role of the parties and appointed medical experts in connection to the determination of whether an accused is fit to stand trial is better seen as assisting the Chamber in the discharge of its obligations in this regard.<sup>73</sup>

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<sup>67</sup> [Al Hassan Rule 135 Decision](#), para. 33; [Al Hassan Decision on Defence notice of unfitness](#), para. 34; [Ongwen Decision Ordering a Medical Examination](#), para. 8; [First Gbagbo Fitness Decision](#), para. 50; [Second Gbagbo Fitness Decision](#), para. 35.

<sup>68</sup> [Al Hassan Decision on Defence notice of unfitness](#), para. 34; [Ongwen Decision Ordering a Medical Examination](#), para. 8; [First Gbagbo Fitness Decision](#), para. 50; [Second Gbagbo Fitness Decision](#), para. 35.

<sup>69</sup> [Al Hassan Rule 135 Decision](#), para. 35; [Al Hassan Decision on Defence notice of unfitness](#), para. 34; [Second Gbagbo Fitness Decision](#), para. 36.

<sup>70</sup> [Al Hassan Decision on Defence notice of unfitness](#), para. 36; [Ongwen Decision Ordering a Medical Examination](#), para. 13.

<sup>71</sup> [Al Hassan Rule 135 Decision](#), para. 36; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order to conduct a medical examination of Mr Gbagbo under Rule 135 of the Rules, 30 September 2015, [ICC-02/11-01/15-253](#), (the 'Gbagbo Rule 135 Order'), para. 14.

<sup>72</sup> [Al Hassan Rule 135 Decision](#), para. 36; [Gbagbo Rule 135 Order](#), para. 14.

<sup>73</sup> [Al Hassan Rule 135 Decision](#), para. 36; [Ongwen Decision Ordering a Medical Examination](#), para. 11; [First Gbagbo Fitness Decision](#), para. 56.

39. In light of the aforementioned considerations, and in line with the directions given in its Order on a Shortlist of Potential Experts, the Chamber instructs the Panel to assess: (i) the medical condition of the accused; (ii) his prognosis; (iii) his ability to participate in the proceedings; and, (iv) whether any special measures or adjustments are necessary to address any medical condition of the accused during the trial proceedings.

40. In respect of this latter point, the Chamber is cognisant of the need to ensure that Mr Said's future participation in the trial proceedings does not negatively affect his recovery, whilst also ensuring that hearings resume as soon as practicable. To that end, if Mr Said's participation can only be resumed gradually, the Chamber wishes to receive concrete proposals about the appropriate schedule and modalities pursuant to which any such resumption could occur. This will allow the Chamber to adopt specific measures/adjustments in order to address such conditions during the trial proceedings, including, but not limited to, practical arrangements regarding Mr Said's attendance and participation at trial.

## *2. Contact with the Panel*

41. In order to maintain the impartiality of the Panel, the parties and participants shall refrain from any contact with the Panel, unless approved by the Chamber.

## *3. Access to material and assistance by the Registry*

42. The Registry is directed to provide all necessary assistance to the Panel in order for it to undertake the medical examination of Mr Said.

43. The Chamber is of the view that the Panel should be provided with Mr Said's medical record, all the reports by the Medical Officer to date, his detention record, as well as all relevant filings<sup>74</sup> on the case record. The Defence is ordered to seek Mr Said's written consent for disclosure of his medical record, detention record and reports

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<sup>74</sup> Specifically: ICC-01/14-01/21-T-047-SECRET-ENG; ICC-01/14-01/21-600-SECRET-Exp; ICC-01/14-01/21-602-SECRET-Exp; ICC-01/14-01/21-603-SECRET; ICC-01/14-01/21-615-SECRET-Exp-Anx; ICC-01/14-01/21-616-SECRET; ICC-01/14-01/21-617-SECRET-Exp; ICC-01/14-01/21-618-SECRET-Exp; ICC-01/14-01/21-626-SECRET-Exp. To the extent that French/English translations of any of the aforementioned documents are required, the Registry is ordered to ensure such translations are made available.

by the Medical Officer as soon as possible, and no later than 21 August 2023. If Mr Said's consent is given, the Registry shall transmit all the aforementioned documents to the Panel.

44. In the absence of written consent by the time-limit indicated above, the Chamber will conclude that Mr Said has refused consent, and take this into consideration in deciding whether to nevertheless order the transmission of the aforementioned documents for the purposes of the Panel's examination.

45. The Chamber enjoins the Panel to only utilise the information it receives for the purpose of formulating its report and orders it not to divulge any information without prior approval of the Chamber.

4. [REDACTED]

46. [REDACTED].

5. *Submission of report and subsequent procedure*

47. The Chamber instructs the Panel to submit a joint report, to the extent possible and as considered appropriate. The joint, or individual, reports should contain clear recommendations and should be submitted within 15 days after the Panel has finalised its examination of Mr Said. Furthermore, the Chamber is mindful of Mr Said's right to medical privacy and therefore in formulating its report(s), the Chamber reiterates that the Panel should exercise the highest level of caution so as not to divulge any information from the medical record in its report(s) unless doing so is essential and the circumstances so require.

48. The joint, or individual, report(s) should be submitted to the Registry, which shall file it on the record as SECRET *ex parte*, Defence and Registry only.

49. Thereafter, the Defence may propose any redactions to the Registry, together with justifications, within three days of notification of the Panel's report(s). The Registry shall then file a SECRET redacted version of the report(s) on the record as soon as practicable thereafter. In addition, the Registry shall file, as an additional SECRET *ex parte* Defence and Registry only annex, the Defence's justifications for any redactions.

While the Chamber is mindful of Mr Said's right to medical privacy, redactions may not be applied to facts, conclusions or recommendations which relate to Mr Said's fitness to stand trial. The Prosecution and CLRV may submit requests to the Chamber to review the redactions applied by the Defence within two days of receiving the redacted version of the report if they are of the view that they make it impossible for them to make meaningful submissions. If such request(s) are made, the Chamber will then rule on the redactions to be applied to the report(s).

50. The parties and participants may then make submissions of up to 20 pages on the report(s) presented, the submissions of other parties or participants, and any other matter they wish for the Chamber to consider within 5 days after receiving the redacted versions of the Panel's report(s), either filed by the Registry or as decided by the Chamber, as applicable.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**ORDERS** that a medical examination of Mr Said be conducted in accordance with the present decision;

**APPOINTS** a panel consisting of [REDACTED] and [REDACTED] to undertake the aforementioned medical examination;

**ORDERS** the Defence to seek Mr Said's written consent, in accordance with paragraph 43 above, no later than 21 August 2023;

**INSTRUCTS** the Registry to make the necessary arrangements and provide all necessary assistance to facilitate the conduct of the examination, in accordance with paragraphs 33, 42-43 above;

**INSTRUCTS** [REDACTED];

**INSTRUCTS** the Panel to submit a report, jointly to the extent possible and as considered appropriate, in accordance with paragraphs 47-48 above;

**INSTRUCTS** the Registry to file on the record the original and redacted versions of the Panel's report(s) in accordance with paragraphs 48-49 above; and

**ORDERS** the parties and participants to refrain from contact with the Panel, and proceed in accordance with paragraphs 49-50 above.

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

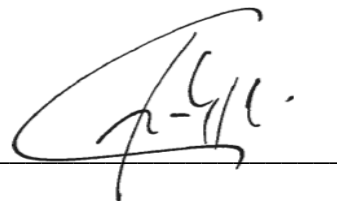


**Judge María del Socorro Flores Liera**



**Judge Miatta Maria Samba**

**Presiding Judge**



**Judge Sergio Gerardo Ugalde Godínez**



Dated 14 August 2023

At The Hague, The Netherlands