

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No.: ICC-01/14-01/21
Date: 17 January 2024**

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 the Defence's Request for Leave to Appeal the 'Decision on Mr Said's Fitness to Stand Trial' and Further Directions on Sitting Schedule

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

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Legal Representatives of Victims

Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

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**The Office of Public Counsel
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States Representatives

Amicus Curiae

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Mr Harry Tjonk
Ms Michele Churchley

**Victims Participation and
Reparations Section**

Other

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 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Defence’s Request for Leave to Appeal the “Decision on Mr Said’s Fitness to Stand Trial” and Further Directions on Sitting Schedule’.

I. PROCEDURAL HISTORY

1. On 13 June 2023, the Chamber ordered a medical examination of Mr Said pursuant to rule 135 of the Rules of Procedure and Evidence (the ‘Rules’) and appointed two independent medical experts (the ‘Panel’) to conduct the examination (the ‘Decision Appointing Experts’).¹
2. On 30 November 2023, the Panel submitted its report (the Panel’s Report’).²
3. On 15 December 2023, the Chamber issued the ‘Decision on Mr Said’s Fitness to Stand Trial’ (the ‘Impugned Decision’).³ Therein, the Chamber, *inter alia*: (i) found Mr Said fit to stand trial;⁴ (ii) ordered evidentiary hearings to resume on 29 January 2024;⁵ and (iii) ordered the Medical Officer to report to the Chamber by 12 January 2024 regarding Mr Said’s ongoing treatment plan so that it could be ‘factored into the future scheduling of hearings, if required’.⁶
4. On 11 January 2024, the Defence filed a request for leave to appeal the Impugned Decision, identifying three issues for appeal (the ‘Request’).⁷

¹ Decision Appointing Experts for the Purpose of a Medical Examination pursuant to Rule 135 of the Rules of Procedure and Evidence, 24 August 2023, ICC-01/14-01/21-630-Red. A SECRET *ex parte* and SECRET Redacted version were filed on 14 August 2023 (ICC-01/14-01/21-630-SECRET-Exp) (ICC01/14-01/21-630-SECRET-Red).

² Annex II to the Registry Transmission of the Panel of Experts’ Report, 30 November 2023, ICC-01/14-01/21-654-SECRET-Exp-AnxII.

³ Decision on Mr Said’s Fitness to Stand Trial, 15 December 2023, [ICC-01/14-01/21-667-Red](#) (the ‘Impugned Decision’).

⁴ See [Impugned Decision](#), para. 44.

⁵ [Impugned Decision](#), para. 48.

⁶ [Impugned Decision](#), paras 45, 48.

⁷ Demande d’autorisation d’interjeter appel de la « Decision on Mr Said’s Fitness to Stand Trial », ICC-01/14-01/21-667-Conf. 11 January 2024, ICC-01/14-01/21-668-Conf.

5. On 12 January 2024, pursuant to the Chamber’s order in the Impugned Decision, the Registry filed a report containing the Medical Officer’s recommendations regarding the sitting schedule in light of Mr Said’s treatment and recovery plan (the ‘Registry’s Report’).⁸ In addition, the Registry also transmitted a medical report from the Medical Officer to the Chamber.⁹
6. On 12 January 2024, the Chamber, via email, requested submissions from the parties and participants on the Registry’s Report, noting that ‘it intends to adopt the Medical Officer’s recommendations and adjust the sitting schedule accordingly’.¹⁰ The Office of the Prosecutor (the ‘Prosecution’) and Common Legal Representative of Victims (the ‘CLR V’) indicated, via email, that they would not make submissions on the Registry’s Report.¹¹
7. On 15 January 2024, the Prosecution responded to the Request (the ‘Response’).¹² The CLR V indicated that she would not respond to the Request.¹³
8. On 15 January 2024, the Defence filed its observations on the Registry’s Report (the ‘Defence’s Observations’).¹⁴

II. SUBMISSIONS

A. The Request

9. In the Request, the Defence submits that the assessment of an individual’s ability to exercise all of his or her rights during a trial is central to determining his or her fitness to stand trial and if there is the slightest medical obstacle preventing such an exercise he or she cannot be considered fit to stand trial.¹⁵ In this regard, the Defence avers that

⁸ Registry Report on the Adjustments to the Sitting Schedule, 12 January 2024, ICC-01/14-01/21-669-Conf (the ‘Registry’s Report’).

⁹ Email from the Registry to the Chamber, dated 12 January 2024, at 10:10.

¹⁰ Email from the Chamber to the parties and participants, dated 12 January 2024, at 17:31.

¹¹ Email from the Prosecution to the Chamber, dated 12 January 2024, at 20:15; Email from the CLR V to the Chamber, dated 15 January 2024 at 10:37.

¹² Prosecution Response to the Defence “Application for leave to appeal the ‘Decision on Mr Said’s Fitness to Stand Trial, ICC-01/14-01/21-667-Conf’”, 15 January 2024, ICC-01/14-01/21-670-Conf (the ‘Response’).

¹³ Email from the CLR V to the Chamber, dated 15 January 2024 at 10:37.

¹⁴ Observations de la Défense sur le « Registry Report on the Adjustments to the Sitting Schedule » déposé le 12 janvier 2024 (ICC-01/14-01/21-669-Conf), 15 January 2024, ICC-01/14-01/21-671-Conf (the ‘Defence’s Observations’).

¹⁵ Request, para. 21.

it is clear from the evidence before the Chamber that Mr Said is not fit to resume the trial full time, however, the Chamber failed to take this evidence into account relying exclusively on the insufficiently reasoned report by the Panel of Experts.¹⁶ As a result, the Defence submits that the Impugned Decision is vitiated by a number of errors and identifies three issues on which it requests leave to appeal.¹⁷

1. First Issue

10. The Defence submits that the Chamber erred in law by reversing the burden of proof concerning the determination of the competence of the Panel and the quality of the methodology followed in the Panel's Report (the 'First Issue'). Specifically, the Defence submits that the Panel did not explain its methodology and there was nothing in the Panel's Report to indicate that it was fully aware of the practical implications of participating in a hearing before the Court.¹⁸ In addition, the Defence notes that there was nothing in the experts' CVs to suggest that it had any expertise in determining fitness to stand trial in the context of international criminal proceedings.¹⁹ As a result, from this point on the Defence argues that it could not reasonably have been required to demonstrate further inadequacies of the report and the knowledge of the Panel, and it was for the Chamber to explain why it considered that the Panel was competent and had the information available.²⁰ In this regard, the Defence submits that the Chamber's finding in the Impugned Decision that the Defence made a 'misplaced assumption' about the competence of the Panel effectively reversed the burden of proof and constituted an error of law which invalidates the Impugned Decision.²¹

2. Second Issue

11. The Defence submits that the Chamber erred in fact by automatically relying on the Panel's conclusions without carrying out its own analysis of the situation on the basis of all available information (the 'Second Issue'). In this regard, the Defence notes that there were numerous elements in Mr Said's medical file, including a report from

¹⁶ Request, paras 22-24.

¹⁷ Request, para. 24.

¹⁸ Request, para. 25.

¹⁹ Request, para. 26.

²⁰ Request, para. 27.

²¹ Request, para. 29.

the Medical Officer, which contradicted the assertion that Mr Said would be able to resume trial full time.²² The Defence submits that the Impugned Decision refers exclusively to the Panel's Report and there is no indication that it took into consideration any other information, such as the report of the Medical Officer and the submissions of the Defence.²³

3. Third Issue

12. The Defence submits that the Chamber erred in law by automatically relying on the Panel's findings without giving reasons for its decision (the 'Third Issue'). In this respect, the Defence submits that the Impugned Decision does not explain how the Chamber considered that: (i) Mr Said was fully capable of exercising his right to instruct counsel; and (ii) Mr Said was able to participate effectively in hearings according to the regular schedule.²⁴ The Defence posits that the Chamber relied exclusively on the Panel's Report which does not address the aforementioned issues and thus there was no basis for the Chamber to draw any conclusions in this respect.²⁵ As a result, the Defence submits that the Chamber should have explained in further detail how it reached the conclusion that Mr Said is fit to stand trial.²⁶

13. The Defence submits that the above issues affect the fair conduct of the proceedings and resuming trial full time when Mr Said is not fit will have a deleterious impact on Mr Said's health.²⁷ Furthermore, the Defence avers that immediate intervention by the Appeals Chamber will avoid creating a situation where the trial resumes on the basis of an unfounded decision.²⁸ In this respect, the Defence submits that if it turns out that the trial should not have resumed on a full time basis then it will be too late to rectify as Mr Said's health would already have been impacted.²⁹ Similarly,

²² Request, para. 33.

²³ Request, para. 37.

²⁴ Request, para. 38.

²⁵ Request, paras 39-41.

²⁶ Request, para. 42.

²⁷ Request, paras 45-46

²⁸ Request, para. 48.

²⁹ Request, para. 48.

if the question of the legality of the decision is not decided immediately it would lead to an irreparable violation of Mr Said's rights.³⁰

B. Response

14. In the Response, the Prosecution submits that the Request should be rejected as 'it fails to identify any appealable issue and is founded on an erroneous understanding of the [Impugned Decision].'³¹

15. Specifically, the Prosecution avers that 'all three proposed grounds of appeal relate to a mistaken understanding that Mr Said's trial will resume on a "full time basis" without there being any adjustments in place to the sitting schedule.'³²

16. In respect of the First Issue, the Prosecution contends that 'the Defence repeats arguments concerning the Panel's expertise, qualifications and methodology which the Chamber considered and expressly rejected' and therefore the First Issue 'merely expresses disagreement with the Chamber's finding'.³³

17. In respect of the Second Issue, the Prosecution submits that it is 'premised on the mistaken understanding that the Chamber ordered Mr Said's trial to resume "full time."³⁴ and the Chamber 'reserved its judgment until it considered the Registry's Report.'³⁵

18. In respect of the Third Issue, the Prosecution avers that the Chamber 'did not passively accept the Panel's determination' and rather it 'explained the extent and basis upon which it relied on the Panel of Experts' Report.'³⁶

19. Last, the Prosecution submits that in 'reserving judgment on the issue of adjustments to be adopted [...], the [Impugned Decision] effectively granted the relief

³⁰ Request, para. 48.

³¹ Response, para. 1.

³² Response, para. 5.

³³ Response, para. 6.

³⁴ Response, para. 7.

³⁵ Response, para. 8.

³⁶ Response, paras 9-10.

sought in the [Request]’ as it ‘left open the possibility of adjusting the sitting schedule and adopting measures to support Mr Said.’³⁷

C. Registry’s Report

20. In the Registry’s Report, the Medical Officer recommends the following modalities for an ‘initial period of two weeks’: (i) ‘[m]aximum four days a week in Court, preferably Monday, Tuesday, Thursday and Friday with the Wednesday as a day of rest and restoration; (ii) ‘[o]nly half days in Court, preferably in the morning’; (iii) ‘[m]aximum two Court sessions of maximum 90 minutes with 30-minute break in which Mr. Said is able to lie down’; and (iv) ‘[e]valuation after two weeks of Court and if necessary, adjustments to the advised modalities’.³⁸

D. Defence’s Observations

21. In the Defence’s Observations, the Defence indicates that while Mr Said is grateful that his state of health and rehabilitation can be taken into account in the hearing schedule, he still has concerns about the intensity of the resumption of trial but will do his best.³⁹ In addition, the Defence notes that Mr Said is reassured that the proposed accommodations are for an initial two week period as this will allow him to give his feedback based on his experience during this time.⁴⁰

³⁷ Response, para. 11.

³⁸ Registry’s Report, para. 9.

³⁹ Defence’s Observations, paras 22-23.

⁴⁰ Defence’s Observations, para. 25.

III. APPLICABLE LAW

22. The Chamber recalls its previous decisions,⁴¹ as well as prior jurisprudence of the Court, regarding the application of article 82(1)(d) of the Statute.⁴² The Chamber adopts its findings as set out in its previous decisions on requests for leave to appeal for the purposes of the present decision.

IV. ANALYSIS

A. Analysis of the Request

23. For the reasons that follow the Chamber finds that the Request must be rejected in its entirety.

24. The Chamber observes that the Request is largely premised on a misrepresentation of the Impugned Decision. Specifically, the Chamber notes that in the Request the Defence repeatedly submits that the Chamber decided to resume the trial full time, largely grounding the issues it identifies for leave to appeal on this erroneous assertion.⁴³

25. Contrary to the Defence's assertions, the Chamber did not decide to resume the trial on a full time basis. In this regard, the Chamber recalls that it ordered the Medical

⁴¹ See Decision on the Defence's Request for Leave to Appeal the "Decision on the Prosecution Second Request for In-Court Protective Measures", 7 June 2023, [ICC-01/14-01/21-614-Red](#), paras 23-28; Decision on the Defence's Request for Reconsideration of or Leave to Appeal the Decision on the Prosecution's Fifth Request under Rule 68(2)(b), 21 December 2022, [ICC-01/14-01/21-575-Red](#), paras 20-23; Decision on the Defence's Request for Leave to Appeal the 'Decision on the Prosecution's First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules' (ICC-01/14-01/21-507-Conf), 28 November 2022, [ICC-01/14-01/21-562](#), paras 16-18; Decision on Defence Request for Leave to Appeal (ICC-01/14-01/21-440) and Reasons for Decision Rejecting Leave to Appeal (ICC-01/14-01/21-425), 6 September 2022, [ICC-01/14-01/21-473](#), paras 11-13; Decision on Defence Request for Reconsideration or Leave to Appeal the 'Directions on the Conduct of Proceedings' (ICC-01/14-01/21-251), 8 April 2022, [ICC-01/14-01/21-275](#), paras 9-11; 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

⁴² See 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](#), 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](#), para. 8.

⁴³ See Request, paras 22-24, 32, 46, 48.

Officer and the Registry to finalise Mr Said's ongoing treatment plan and 'report to the Chamber, as soon as possible and no later than 12 January 2024, should adjustments to the sitting schedule be required'.⁴⁴ Similarly, the Chamber further recalls when it set the date of 29 January 2024 as the date for the resumption of evidentiary hearings it stated that it 'also expects the Registry and the relevant medical services to finalise Mr Said's ongoing treatment plan so that this can be factored into the future scheduling of hearings, if required.'⁴⁵

26. Based on the foregoing, the Chamber finds that the Impugned Decision did not decide to resume the trial on a full time basis, and explicitly allowed for the possibility that there may be adjustments to the sitting schedule to take into account any ongoing medical treatment that Mr Said requires. Indeed, the Chamber notes that, as instructed, the Registry has filed recommendations from the Medical Officer recommending reduced sitting hours,⁴⁶ which the Chamber intends to adopt.⁴⁷ In this regard, the Chamber accepts the Prosecution's submission that the Request is effectively moot as hearings will not resume on a full time basis.

27. Accordingly, the Chamber finds that the issues identified by the Defence for leave to appeal are based on a misrepresentation of the Impugned Decision, and therefore do not constitute appealable issues.

B. Directions in respect of the Sitting Schedule

28. Turning to the sitting schedule, the Chamber has taken note of the Medical Officer's recommendations, the corresponding medical report, and the Defence's Observations. At this stage, the Chamber finds the adaptations proposed by the Medical Officer are necessary.

29. However, mindful of its obligations pursuant to article 64(2) of the Statute to ensure expeditiousness of the proceedings, and noting the fact that the proceedings have been adjourned for a significant period of time, the Chamber expects the Defence, Mr Said and the Medical Officer to work together in good faith, with a view to working

⁴⁴ [Impugned Decision](#), para. 45.

⁴⁵ [Impugned Decision](#), para. 48.

⁴⁶ Registry's Report, para. 9.

⁴⁷ See paragraph 28 *et seq* below.

towards resuming a regular sitting schedule. In this regard, whilst the Chamber takes note of the Medical Officer's submission that the situation will be reviewed in two weeks' time, the Chamber trusts the Medical Officer to only propose recommendations which are strictly necessary for Mr Said's recovery and to ensure his presence at trial.

30. Based on the foregoing, the Chamber hereby modifies the sitting schedule for an initial two week period commencing 29 January 2024 as follows:

- (i) Monday (9:30-11:00; 11:30-13:00);
- (ii) Tuesday (9:30-11:00; 11:30-13:00);
- (iii) Wednesday (*No hearings*);
- (iv) Thursday (9:30-11:00; 11:30-13:00);
- (v) Friday (9:30-11:00; 11:30-13:00).

31. The Prosecution is ordered to circulate an updated schedule of witnesses in line with the modified sitting schedule no later than 19 January 2024.

32. Last, the Chamber notes that the parties and the Registry have not yet filed public redacted versions of their filings and orders the parties and Registry to file public redacted versions of the following as soon as practicable: ICC-01/14-01/21-668-Conf; ICC-01/14-01/21-669-Conf; ICC-01/14-01/21-670-Conf; and ICC-01/14-01/21-671-Conf.

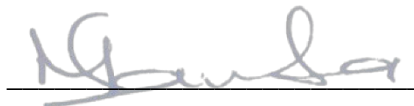
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

MODIFIES the sitting schedule in line with paragraph 30 above;

ORDERS the Prosecution to circulate a revised schedule of witnesses in line with paragraph 31 above no later than 19 January 2024.

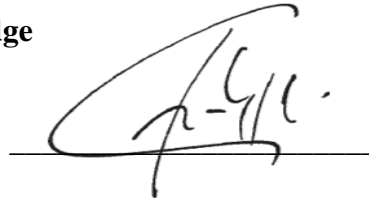
ORDERS the parties and the Registry to file public redacted versions in line with paragraph 32 above.



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 17 January 2024

At The Hague, The Netherlands