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

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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 joint instruction of an expert on the *arbatachar* method

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
Mr Mame Mandiaye Niang

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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**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*, with regard to articles 64(2), 64(6)(d) and 69(3) of the Rome Statute (the ‘Statute’) and regulations 35 and 44 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the joint instruction of an expert on the *arbatachar* method’.

I. PROCEDURAL HISTORY

1. On 14 January 2022, the Chamber issued an order convening the first status conference and instructing the parties, participants and the Registry to make submissions on a number of issues.¹

2. On 21 January 2022, the Prosecution filed its submissions.² In these submissions, the Prosecution stated that it was considering calling two expert witnesses (including one expert on ‘Torture method of the *arbatachar*’) and that it would ‘endeavour, in consultation with the Defence, to jointly instruct the said experts in the interests of justice and judicial economy.’³

3. On 21 February 2022, the Chamber issued its ‘Decision Setting the Commencement of the Trial and Related Deadlines’, in which it instructed the parties to ‘jointly instruct all experts in this case’ (the ‘Order on Joint Instruction’)⁴ and also ordered the Prosecution to file its final list of witnesses by 13 June 2022 (the ‘Disclosure Deadline’).⁵

¹ Order Convening the First Status Conference, 14 January 2022, ICC-01/14-01/21-226.

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

³ Prosecution’s Submissions, para. 13.

⁴ [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), 21 February 2022, ICC-01/14-01/21-243, para. 35.

⁵ On 28 February 2022, the Defence requested authorisation to appeal the Chamber’s Order on Joint Instruction, which the Chamber rejected on 15 March 2022. [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.

4. On 9 March 2022, the Chamber issued its ‘Directions on the Conduct of Proceedings’, in which the Chamber reiterated its instruction that all experts to be called in the present case be jointly instructed by the parties.⁶

5. On 30 May 2022, the Prosecution invited the Defence to a meeting to discuss the possibility of jointly instructing two experts selected by the Prosecution, without identifying who these experts were.⁷ The Defence responded the same day that it would not be available until after 6 June 2022, to which the Prosecution responded that it would prepare ‘the necessary elements’ to allow the Defence to make a decision. The Prosecution further suggested that it might be necessary for the Prosecution and the Defence to jointly ask for an extension of time.⁸

6. On the same day, the Prosecution sent a letter of instruction to P-3111,⁹ who completed his report on 5 June 2022.¹⁰

7. On 7 June 2022, the Prosecution informed the Defence that it had identified P-3111 as an expert witness, who had already prepared an ‘initial report’ at the request of the Prosecution ‘related to the method of tying someone in a way also referred to as “arbatachar”’.¹¹ The Prosecution then invited the Defence to inform the Prosecution by 10 June 2022 whether the Defence would join the instruction of P-3111.¹²

8. On 8 June 2022, the Defence refused to join the instruction of P-3111.¹³

⁶ Directions on the Conduct of Proceedings, 9 March 2022, ICC-01/14-01/21-251, para. 40.

⁷ Annex A to the Information de la Défense afin de porter au dossier de l’affaire les éléments utiles non communiqués par l’Accusation concernant le déroulé de l’instruction de P-3111 par le Bureau du Procureur et la position de la Défense à cet égard, 14 June 2022, ICC-01/14-01/21-362-Conf-AnxA (hereinafter ‘Annex A’).

⁸ Annex A.

⁹ CAR-OTP-2135-3352.

¹⁰ CAR-OTP-2135-3369.

¹¹ Annex B to the Information de la Défense afin de porter au dossier de l’affaire les éléments utiles non communiqués par l’Accusation concernant le déroulé de l’instruction de P-3111 par le Bureau du Procureur et la position de la Défense à cet égard, 14 June 2022, ICC-01/14-01/21-362-Conf-AnxB (hereinafter ‘Annex B’), p. 5.

¹² Annex B, p. 5.

¹³ Annex B, p. 5.

9. On 10 June 2022, the Prosecution filed its List of Witnesses, which included P-3111 as an expert witness.¹⁴

10. On 14 June 2022, the Defence informed the Chamber of the above course of events and argued that the Prosecution's conduct had made it impossible for the Defence to comply with the Chamber's Order on Joint Instruction.¹⁵ The Defence therefore requested the Chamber's permission to cross-examine P-3111 on his qualifications, methodology and conclusions.¹⁶

11. On 1 July 2022, the Chamber ordered that P-3111 be removed from the Prosecution's Witness List and that all related items be removed from the Prosecution's List of Evidence (the 'Decision on P-3111').¹⁷

12. On 8 July 2022, the Prosecution filed a request pursuant to regulation 35(2) of the Regulation to extend the time limit to seek an agreement with the Defence on a joint expert on the *arbatachar* method of restraint or, in the alternative, to reconsider the Decision on P-3111 and to allow P-3111 to testify (the 'Prosecution Request').¹⁸

13. On 12 July 2022, the Defence filed a request for clarification of the Decision on P-3111 as well as a request for reconsideration or, in the alternative, leave to appeal (the 'Defence Request').¹⁹

¹⁴ Prosecution's List of Witnesses, Proposed Order of Appearance, and Summaries of Anticipated Testimony, 10 June 2022, ICC-01/14-01/21-354-Conf-AnxA.

¹⁵ Information de la Défense afin de porter au dossier de l'affaire les éléments utiles non communiqués par l'Accusation concernant le déroulé de l'instruction de P-3111 par le Bureau du Procureur et la position de la Défense à cet égard, 14 June 2022, ICC-01/14-01/21-362-Conf, (the 'Defence's Submissions'), para. 60.

¹⁶ Defence's Submissions, para. 65. The Prosecution did not respond to the Defence's submissions.

¹⁷ [Decision on Prosecution Expert Witness P-3111](#), ICC-01/14-01/21-385.

¹⁸ [Prosecution's Request Under Regulation 35 for an Extension of Time to Seek an Agreement with the Defence on a Joint Expert on the Arbatachar Method of Restraint or, alternatively, Request for Reconsideration of the Chamber's Decision to Remove P-3111](#), ICC-01/14-01/21-399.

¹⁹ [Demande de clarification de la « Decision on Prosecution Expert Witness P-3111 » \(ICC-01/14-01/21-385\) et demande de reconsidération de ladite décision ou, subsidiairement, demande d'autorisation d'interjeter appel de cette décision](#), ICC-01/14-01/21-404. The Prosecution and the Common Legal Representative of the Victims did not respond to the Defence Request.

14. On 15 July 2022, the Defence responded to the Prosecution Request, asking that it be rejected (the ‘Defence Response’).²⁰ The Common Legal Representative of Victims did not make submissions.

II. ANALYSIS

15. In the Prosecution Request, the Prosecution asks for additional time to seek agreement with the Defence on the joint appointment and instruction of an expert on the *arbatachar* method of restraint. The Prosecution argues that good cause for an extension of time limit has been established because it made a good faith error in interpreting the Chamber’s Order on Joint Instruction.²¹ The Prosecution further claims that the delay in engaging with the Defence with a view to instructing a joint expert was impacted by its workload and asserts that it did not anticipate that there was any risk that it would be barred from presenting P-3111’s evidence.²²

16. The Prosecution further argues that it is important to hear an expert who can explain the physiological effects of the *arbatachar* technique, as this can supplement the testimony of witnesses who allegedly experienced it.²³ For this reason, the Prosecution seeks an extension of time to further engage with the Defence with a view to agreeing on the joint instruction of P-3111 or, possibly, another expert.²⁴

17. The Defence responds that the Order on Joint Instruction was clearly understood by the Prosecution and points to a number of submissions by the Prosecution in support of this claim.²⁵ The Defence further argues that the current situation was brought about by strategic choices on the part of the Prosecution and rejects the Prosecution’s argument that the delay was in part caused by the its workload.²⁶ In particular, the Defence argues that the fact that the Prosecution started the consultation process so

²⁰ [Réponse de la Défense à la “Prosecution’s Request Under Regulation 35 for an Extension of Time to Seek an Agreement with the Defence on a Joint Expert on the Arbatachar Method of Restraint or, alternatively, Request for Reconsideration of the Chamber’s Decision to Remove P-3111”](#), ICC-01/14-01/21-412.

²¹ Prosecution Request, paras 4-10.

²² Prosecution Request, paras 11-14.

²³ Prosecution Request, para. 15.

²⁴ Prosecution Request, paras 17-18.

²⁵ Defence Response, paras 5-17.

²⁶ Defence Response, paras 18-27.

close to the Disclosure Deadline allowed it to anticipate the need to either: (a) seize the Chamber to discuss the possibility of instructing an expert unilaterally; or (b) request a variation of time limit.²⁷ The Defence point out, in this regard, that the Prosecution foreshadowed the need for a joint request for variation of time limit in its *inter partes* communications with the Defence.²⁸ The Defence therefore concludes that the Prosecution has not shown good cause and that it would be unjust to give the Prosecution a second chance, after it has deliberately flouted the Chamber's clear instructions.²⁹

18. The Defence did not express a view on whether it would be useful to hear an expert on the *arbatachar* method.

19. Having considered these arguments, the Chamber cannot but conclude that the Prosecution Request does not fulfil the criteria of regulation 35(2) of the Regulations. It is quite clear from the record that there was nothing to prevent the Prosecution from requesting a variation of the time limit before it expired, as evidenced by the fact that the Prosecution actually considered making such a request but ultimately decided, for reasons that are not explained, not to do so.

20. Nevertheless, the Chamber agrees with the Prosecution that it would be helpful for a better understanding of certain aspects of this case to hear evidence on the physiological effects of the *arbatachar* method. The Chamber will therefore give one last opportunity to the parties to agree on a suitable expert and to provide him or her with the necessary instructions. If the parties cannot agree on a single set of instructions, they may each put separate questions to the expert.

21. The parties have until 22 August 2022 to come to an agreement on jointly instructing an expert on the physiological effects of the *arbatachar* method. If no agreement can be reached, the Prosecution may seize the Chamber no later than on 24 August 2022 with a request to appoint such an expert. The Defence will have until 29 August 2022 to respond. The Chamber will then decide whether or not to instruct an

²⁷ Defence Response, paras 28-33.

²⁸ Defence Response, para. 34.

²⁹ Defence Response, paras 38-40.

expert *proprio motu* in accordance with regulation 44(4) of the Regulations, who may be one of the experts proposed by the parties. In such case, the Chamber will decide whether and how the parties may question the expert after having reviewed the report and heard the parties on this matter.

22. In light of the above, the Chamber considers the Prosecution's request for reconsideration moot.

23. In response to the Defence Request, the Chamber wishes to clarify that, if the parties have jointly instructed an expert, there will normally be no reason to conduct additional *voir dire*. The parties are expected to have explored the expert's qualifications before agreeing to jointly instruct him or her and the Chamber does not intend to intervene on this matter. Nevertheless, the fact that the parties have consented to the selection of a particular expert does not mean that they have to acquiesce with the findings of the expert's report or the methodology applied. Accordingly, if one of the parties has substantial questions arising from the report to put to the expert, they will have an opportunity to do so, either orally or in writing. However, barring exceptional circumstances, the Chamber will not allow the parties to appoint their own experts on the same topic.

24. The Chamber will not engage with a number of purely hypothetical questions raised in the Defence Request. If any of the scenarios envisaged by the Defence were to manifest in the future, it is always open to it to seize the Chamber with a concrete request.

25. In light of the above, the Chamber considers the Defence's request for reconsideration or, in the alternative, leave to appeal, moot.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution Request;

REJECTS the Defence Request; and

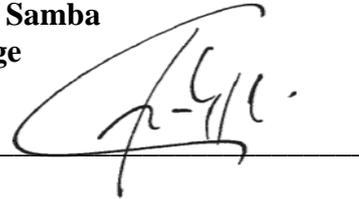
INSTRUCTS the parties to consult on the joint instruction of an expert on the *arbatachar* method in accordance with paragraph 21 of this decision.



**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 1 August 2022

At The Hague, The Netherlands