

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **28 June 2024**

TRIAL CHAMBER VI

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

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

PUBLIC

Public redacted version of “Prosecution’s Response to Defence Request for Reconsideration of “Second Order Pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-01/14-01/21-761””, 28 May 2024, ICC-01/14-01/21-774-Conf

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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I. INTRODUCTION

1. The Defence request ("Defence Request")¹ for reconsideration of Trial Chamber VI's ("Chamber's") "Second Order Pursuant to Rule 135 of the Rules of Procedure and Evidence" ("Second Order")² should be denied.
2. The standard for reconsideration of a decision is high: "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice"³. The Defence Request fails to meet this standard.
3. Instead, the Defence Request is premised on an unfounded apprehension that an updated medical examination of Mahamat Said Abdel Kani ("Mr SAID") by an independent medical expert may conflict with recommendations from the Medical Officer of the International criminal Court's Detention Centre ("MO"). The Defence also presumes that a further examination will automatically lead to increased hours of the sitting schedule. This is unjustified.
4. The Second Order does no more than delineate steps that will allow the Chamber to obtain relevant information before making decisions. The Chamber's reasoning for ordering an updated medical examination of Mr SAID is well-founded, clear and unimpeachable.
5. The Defence Request further fails to establish that reconsideration is needed to prevent an injustice. On the contrary, the Defence Request argues that [REDACTED]⁴ [REDACTED] that "it is necessary to take stock of what is acceptable in order to respect all the rights of Mr SAID".⁵ The Second Order has

¹ ICC-01/14-01/21-763-Conf.

² ICC-01/14-01/21-761.

³ ICC-01/04-02/06-1282, para.12.

⁴ ICC-01/14-01/21-763-Conf, para. 41.

⁵ ICC-01/14-01/21-763-Conf, paras. 40-41, 45.

the effect of granting this request. The Defence's preference for the Chamber to be informed by their chosen medical practitioners, rather than an independent medical expert appointed by the Registry, does not change this.

II. CONFIDENTIALITY

6. Pursuant to regulation 23bis(2) of the Regulations of the Court, this submission is classified as confidential since it responds to a filing with the same classification and because it makes references to Mr SAID's health.

III. SUBMISSIONS

A. The Chamber has discretion to order an updated medical examination of Mr SAID

7. The assessment of medical evidence in relation to Parties and Participants who are engaged in litigation is not an unfamiliar issue for Chambers to be confronted with.
8. Articles 64(2) and 68 of the Rome Statute ("Statute") require Chambers to ensure that a trial is fair, expeditious and also protects the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The Chamber therefore has a broad discretion to conduct further enquiries if it deems that medical evidence before it is insufficient to allow it to discharge these obligations.
9. This is explicitly provided for in rule 135 of the Rules of Procedure and Evidence ("Rules") which provides the Chamber with the power to "order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113" "*for any... reason*" (emphasis added).

B. The Chamber's Second Order is correctly reasoned

10. On 10 May 2024, the Chamber received a recommendation from the MO concerning the sitting schedule and Mr SAID's ability to attend his trial. However, it was not provided with any reasoning in support of the recommendation. It was also not provided with any medical evidence because "Mr SAID had not consented ...to provide this medical report to the Chamber."⁶
11. The Defence Request does not dispute that the Chamber was not in possession of this relevant medical information. Instead, it claims that this arose because of a misunderstanding and because Defence counsel were on mission. Mr SAID's legal team consists of multiple lawyers. The Defence team was notified of the MO's recommendation and Mr SAID's lack of consent on both 10 May⁷ and 15 May 2024.⁸ Despite these factors, the Defence Request fails to offer any reasonable explanation as to why at the time of filing its Request, the Chamber has still not been provided with the relevant medical evidence.⁹
12. The Prosecution submits that the Second Order and the Chamber's reasoning that it "cannot be expected to blindly accept the [MO's] recommendations"¹⁰ is, in the circumstances, unimpeachable. The Defence Request cannot reasonably contend that the Chamber must take the MO's recommendations which affect both Mr SAID's fair trial rights as well as victims and witnesses at face value.
13. The Prosecution further submits that the reasoning of the Chamber's Second Order was fair and necessary in order to: safeguard Mr SAID's welfare; ensure that he can properly participate; and be tried without undue delay. Further, an updated medical examination of Mr SAID will assist the Chamber in the conduct and control of the proceedings, whilst balancing the interests of victims and witnesses

⁶ ICC-01/14-01/21-759, para. 10.

⁷ ICC-01/14-01/21-759.

⁸ ICC-01/14-01/21-763-Conf.

⁹ ICC-01/14-01/21-763-Conf, para. 59.

¹⁰ ICC-01/14-01/21-761, para. 7.

who have suffered trauma and who may be anxious about the prospect of providing testimony to the Court in an expeditious manner.

14. The Prosecution submits that the Defence's request for reconsideration is also misplaced. It is premised on an unfounded apprehension that an updated medical examination of Mr SAID by an independent medical expert will conflict with recommendations from the MO. It further assumes that this step will automatically lead to an increase of hours of the sitting schedule.¹¹
15. There is no objective basis for such a presumption. The Second Order demonstrates the Chamber's intent to verify and rigorously scrutinise medical evidence in order to "determine under which conditions Mr SAID can participate in proceedings without jeopardising his health."¹² In so doing, the Second Order does no more than take appropriate steps for the Chamber to be fully informed before making any determination.
16. The Prosecution submits that the Defence Request is similar to the error made by the Defence when it incorrectly presumed that the Chamber would not adjust the sitting schedule after finding Mr SAID fit to stand trial.¹³

C. The Chamber's Second Order does not cause any injustice

17. The Defence Request does not contest that it is an appropriate time for the Chamber to update itself on Mr SAID's current state of health. On the contrary, it expressly asserts that "it is necessary to take stock of what is acceptable in order to respect all the rights of Mr SAID".¹⁴ Therefore, the actions taken by the Chamber

¹¹ ICC-01/14-01/21-763-Conf, para. 45.

¹² ICC-01/14-01/21-761, para. 7.

¹³ ICC-01/14-01/21-668-Conf, para. 24.

¹⁴ ICC-01/14-01/21-763-Conf, paras. 40-41, 45.

to fully inform itself of Mr SAID's current state of health promotes, rather than undermines, the interests of justice and aligns the Defence's request.

18. The Prosecution submits that the real complaint underpinning the Defence Request is the intent to restrict the scope of medical information available to the Chamber to that provided by the MO and/or his treating physicians along with representations from Mr SAID's counsel. It is for this reason that the Defence Request contends that once the Chamber is provided with medical evidence that formed the basis of the MO's recommendation, the Second Order will become "moot".¹⁵
19. However, such limits or restrictions are untenable. First, the substance of the medical evidence relied on by the MO is unknown. The Defence Request itself suggests that the Defence counsel have not yet seen it.¹⁶ The Defence's assertion that the medical report is sufficient to inform the Chamber is therefore speculative. Second, even if the medical evidence/report should now be provided, the Chamber is still entitled to seek a second opinion and/or request further information. Third, the Defence Request fails to explain why a fully informed independent medical expert is unable to evaluate and report on Mr SAID's current state of health. Indeed, were this line of reasoning permitted, Chambers would be prohibited from instructing independent medical experts as expressly provided for under rule 135.
20. The Prosecution submits that in any event, the Chamber implemented measures ensuring that any appointed expert would be in a position to assess and report on Mr. SAID's current state of health. These include instructing that the examination take place "as soon as practicable"¹⁷; that the expert be fully briefed "on the

¹⁵ ICC-01/14-01/21-763-Conf, para. 59.

¹⁶ ICC-01/14-01/21-763-Conf, paras. 11, 51, 55.

¹⁷ ICC-01/14-01/21-761, para. 10.

ordinary course of proceedings”¹⁸; and that Mr SAID provides his consent so that the expert has access to all relevant information.¹⁹

21. In the circumstances, there can be no suggestion that reconsideration as an exceptional measure, is needed to prevent an injustice.

IV. RELIEF REQUESTED

22. For the reasons set out above, the Defence Request should be denied.



Karim A. A. Khan KC, Prosecutor

Dated this 28th day of June 2024

At The Hague, The Netherlands

¹⁸ ICC-01/14-01/21-761, para. 9.

¹⁹ ICC-01/14-01/21-761, para. 13.