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

Date: **9 March 2022**

APPEALS CHAMBER

Before:

**Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public Document

Notice of Appeal by the Defence against the “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” (ICC-01/14-01/21-247-Conf) of Trial Chamber VI Deciding to Continue Mr Said’s Detention and Maintain the Restrictions on His Communication

Source: Defence Team for Mahamat Said Abdel Kani

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

Office of the Prosecutor

Mr Karim A. A. Khan
Mr Eric MacDonald

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**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

I. Procedural history

1. On 25 January 2022, the Defence filed a request for the interim release of Mahamat Said Abdel Kani.¹
2. On 28 January 2022, a hearing was held on Mr Said's detention, at which the Prosecution stated that it wished to request the continuation of Mr Said's detention and of the restrictions on Mr Said's communication with the outside world.²
3. That day, at the hearing, the Chamber informed the parties that they could make initial statements orally and subsequently expand on them in written submissions.³ It specified that the Prosecution had until 4 February 2022 to file its written submissions and the Defence and the Legal Representatives of Victims until 11 February 2022.⁴
4. On 4 February 2022, the Prosecution filed additional submissions related to the detention of and contact restrictions on Mahamat Said Abdel Kani.⁵
5. On 11 February 2022, the Defence filed its response to the oral request for the continuation of Mr Said's detention and of restrictions on Mr Said's communication made at the hearing of 28 January 2022 (ICC-01/14-01/21-T-007-CONF-FRA ET) and in the additional submissions related to the detention of and contact restrictions on Mahamat Said Abdel Kani (ICC 01/14-01/21-236-Conf) filed on 4 February 2022.⁶

¹ ICC-01/14-01/21-233-Conf. The public redacted version of the request for interim release was filed on 27 January 2022 (ICC-01/14-01/21-233-Red).

² ICC-01/14-01/21-T-007-CONF-FRA, p. 67.

³ ICC-01/14-01/21-T-007-CONF-FRA, p. 67, lines 1-11.

⁴ ICC-01/14-01/21-T-007-CONF-FRA, p. 84, lines 26-28.

⁵ ICC-01/14-01/21-236-Conf. The public redacted version was filed the same day (ICC-01/14-01/21-236-Red).

⁶ ICC-01/14-01/21-239-Conf-Exp. The public redacted version was filed the same day (ICC-01/14-01/21-239-Red2).

6. On 3 March 2022, the Trial Chamber issued its “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” (the impugned decision) in which it decided to continue Mr Said’s detention and to maintain the restrictions, albeit relaxing them.

II. The impugned decision

7. The Defence hereby appeals Decision ICC-01/14-01/21-247-Conf, handed down by Trial Chamber VI on 3 March 2022, entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”,⁷ deciding to continue Mr Said’s detention and to maintain the restrictions on his communication.

III. Legal basis

8. The Defence files its appeal under article 82(1)(b) of the Statute, which provides that either party may appeal a decision granting or denying release of the person being investigated or prosecuted.

9. Rule 154(1) of the Rules of Procedure and Evidence provides that, in the case specified in article 82(1)(b), an appeal may be filed not later than five days from the date upon which the party filing the appeal is notified of the decision; in the instant case, the deadline for filing this notice of appeal is 9 March 2022.

10. Regulation 64(5) of the Regulations of the Court specifies that any appeal filed under rule 154 must state:

- (a) the name and number of the case or situation;
- (b) the title and date of the decision being appealed;

⁷ ICC-01/14-01/21-247-Conf. The public redacted version was filed the same day (ICC-01/14-01/21-247-Red).

- (c) whether the appeal is directed against the whole decision or part thereof;
- (d) the specific provision of the Statute pursuant to which the appeal is filed;
- (e) the grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision;
- (f) the relief sought.

11. Regulation 64(6) of the Regulations of the Court provides:

For appeals filed under article 82, paragraph 1 (b) and rule 154, the Appeals Chamber shall, within two days of the filing of the notice of appeal, issue directions for the conduct of the proceedings, which may, at its full discretion, include:

- (a) Scheduling a hearing to be held no later than 10 days from the notification of the notice of appeal. Depending on the circumstances, the Appeals Chamber may decide to adjourn the hearing following all or some of the participants' submissions and resume the hearing on a later date. The holding of a hearing is without prejudice to the Appeals Chamber also requiring the submission of written arguments or summaries thereof in advance of and/or following the hearing. The date of the hearing may be fixed after the 10 day deadline if necessary; or
- (b) Proceeding by way of written submissions only and setting a timetable therefor.

IV. Grounds of appeal

1. The grounds of appeal against the decision to continue Mr Said's detention

12. First ground of appeal: the impugned decision bases the continued detention on hypothetical conclusions unsupported by concrete and objective evidence. For example: (1) at paragraph 27 of the impugned decision, the Chamber acknowledges that the Prosecution has failed to advance any evidence to support the claim that Mr Said has held any role in an organization since his transfer to the Court yet still takes the view that "there is also no indication that Mr Said has broken ranks with the FPRC or has fallen out with its current leadership, former colleagues or subordinates"; (2) at paragraph 28 of the impugned decision, the Chamber states: "The Chamber is aware of the Registry's report of 24 January 2022, which suggests

that no evidence has been found indicating that the FPRC has, so far, done anything to interfere with the current proceedings” but nonetheless goes on to say:

However, this does not show that it would not do so if given the opportunity. Moreover, the Chamber is not only concerned about the possibility that the FPRC as an organisation might offer assistance to Mr Said, but equally that individual members may do so in their private capacity;

(3) at paragraphs 32-35 of the impugned decision, the Chamber, even while noting that it has no material evidence that Mr Said has any connection with the alleged incidents concerning the witnesses – incidents which, in the Chamber’s own words, “are based on uncorroborated hearsay evidence and raise a lot of questions”⁸ – or that Mr Said has the slightest intention of interfering with the proceedings, nevertheless concludes that Mr Said “*may* have a strong motive to influence the Prosecution’s witnesses before the start of the trial.”⁹

13. It appears from the impugned decision, therefore, that the Chamber relied on the identification of theoretical and abstract risks to continue Mr Said’s detention despite the lack of concrete evidence to lend support to the existence of the alleged risks.

14. The consequence of such an approach is that the burden of proof is reversed, since the onus would then fall on the Defence to prove – which is, by definition, impossible – that no risks exist. This reversal of the burden of proof constitutes an error of law which invalidates the impugned decision.

15. Such an approach also gives rise to a presumption of continued detention for any person detained for the purposes of proceedings before the Court, since it will always be possible to make baseless arguments in favour of detention by claiming that there might be someone who might want to interfere with the proceedings or even that the accused, still absent any concrete evidence, might want to. This

⁸ ICC-01/14-01/21-247-Conf, para. 32.

⁹ ICC-01/14-01/21-247-Conf, para. 35, emphasis added.

presumption of continued detention, which violates the principle that “liberty is the rule and detention the exception”, also constitutes an error of law which invalidates the impugned decision.

16. Second ground appeal: at paragraph 26 of the impugned decision, the Chamber relies on the seriousness of the charges against Mr Said to continue his detention.

17. First, by failing to define the concept of “seriousness”, as the Defence had invited it to do in its request for release,¹⁰ the Chamber committed an error of law which invalidates the impugned decision. Given that all the crimes within the Court’s jurisdiction are, by definition, “serious”, failure to define the concept of seriousness as it pertains specifically to interim release makes way for a presumption of continued detention for any person accused of crimes within the Court’s jurisdiction and would render article 60(2) of the Statute nugatory, since no accused could ever be granted interim release.

18. Second, by omitting to explain how the charges laid against Mr Said are serious, the Chamber committed an error of fact which invalidates the impugned decision. In this instance, it was all the more important to explain why the acts imputed to Mr Said meet the standard of gravity in the context of a request for interim release, since the Defence had demonstrated in its request for release that the limited charges laid against Mr Said did not meet the gravity threshold: there are no participating victims and no allegations of sexual violence or of homicides, etc.

19. Third ground of appeal: by giving consideration to alleged incidents involving Prosecution witnesses to warrant Mr Said’s detention but without demonstrating the least connection with Mr Said,¹¹ the Chamber committed an error of law which invalidates the impugned decision. As the Appeals Chambers recalled in *Bemba*,

¹⁰ ICC-01/14-01/21-233-Conf, paras. 46-49.

¹¹ ICC-01/14-01/21-247-Conf, para. 32.

“there must be a link between the detained person and the risk of witness interference.”¹²

20. Fourth ground of appeal: in deciding to continue the detention, the Chamber relied on a Registry report which was never transmitted to the Defence.¹³ Such an approach constitutes an error of law which invalidates the decision: the Defence was not placed in a position enabling it to discuss or challenge the content of that report, which violates the adversarial principle. It was all the more important for the Defence to have this report, since not one piece of evidence in the case record was able to serve as a basis for continuing Mr Said’s detention (see above).

21. Fifth ground of appeal: in deciding to continue the detention, the Chamber relied on the fact that “the disclosure process has reached an advanced stage and that Mr Said is now in possession of a lot of confidential information, including the identities of a large number of witnesses.”¹⁴ Such an approach constitutes an error of law which invalidates the impugned decision, since it creates an unsurmountable predicament for the Accused of having to choose between two of his fundamental rights: the right to be informed of the charges and the right to enjoy his freedom.

2. The grounds of appeal against the decision to maintain the restrictions on Mr Said’s communication

22. Insofar as the Chamber, in deciding to maintain the restrictions on Mr Said’s communications, relied on the same conclusions as for continuing the detention,¹⁵ the Defence advances the exact same five grounds of appeal with regard to the decision to maintain the restrictions on Mr Said’s communication.

¹² ICC-01/05-01/08-1937-Red2, para. 67.

¹³ ICC-01/14-01/21-247-Conf, para. 33.

¹⁴ ICC-01/14-01/21-247-Conf, para. 35.

¹⁵ ICC-01/14-01/21-247-Conf, para. 42.

23. Consequently, these alleged errors invalidate the decision rejecting the Defence's request for the lifting of the restrictions on Mr Said's communication.

V. Relief sought

24. The Defence respectfully prays the Appeals Chamber to:

- (1) Set aside, in its entirety, Trial Chamber VI's decision rejecting the request for the interim release of Mr Said, for lack of legal basis and on account of the factual and legal errors committed;
- (2) Set aside, in its entirety, Trial Chamber VI's decision rejecting the request for the lifting of the restrictions on Mr Said's communication, for lack of legal basis and on account of the factual and legal errors committed;
- (3) Accordingly, order Trial Chamber VI to rule anew on whether (1) the conditions at article 58(1)(b) of the Rome Statute and (2) the conditions of regulation 101(2) of the Regulations of the Court are met, with reference to the applicable legal rules.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 9 March 2022,

At The Hague, Netherlands