Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/14-01/21**
Date: **22 July 2022**

THE APPEALS CHAMBER

Before: **Judge Gocha Lordkipanidze, Presiding Judge**
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Pierre Perrin de Brichambaut
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF
THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public Document

Public Redacted Version of "Defence Appeal Brief against the 'First review of the detention of Mr Mahamat Said Abdel Kani' (ICC-01/14-01/21-382) by Trial Chamber VI Deciding to Continue Mr Said's Detention" (ICC-01/14-01/21-409-Conf)

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
Ms Helen Brady

Counsel for the Defence
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of the Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

Office of Public Counsel for Victims
Ms Sarah Pellet

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

Classification:

1. This brief is filed as confidential pursuant to regulation 23 *bis*(2), as it refers to filings and information that are confidential.

I. Procedural history

2. On 25 January 2022, the Defence filed its "*demande de mise en liberté provisoire de Mahamat Said Abdel Kani*".[1]

3. 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.

4. On 9 March 2022, the Defence filed a notice of appeal "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".[2]

5. On 21 March 2022, the Defence filed a brief "[of] [a]ppeal […] 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 Communications".[3]

6. On 19 May 2022, the Appeals Chamber confirmed the decision of the Trial Chamber.[4]

7. On 17 May 2022, the Trial Chamber, recalling its duty to assess Mr Said's detention periodically, ordered the Prosecution and the OPCV to file observations on the matter by 30 May 2022 and invited the Defence to respond to those observations by 10 June 2022.[5]

[1] ICC-01/14-01/21-233-Conf.
[2] ICC-01/14-01/21-252-tENG.
[3] ICC-01/14-01/21-265-Conf-tENG.
[4] ICC-01/14-01/21-318.
[5] Email from TC VI on 17 May 2022 at 13.09.

8. On 30 May 2022, the Prosecution[6] and the OPCV[7] filed their observations on Mr Said's detention.

9. On 10 June 2022, the Defence filed its response.[8]

10. On 17 June 2022, pursuant to instructions communicated by the Trial Chamber,[9] the Registry filed the "Brief Report on the Security Situation in the Central African Republic".[10]

11. By emails of 21 and 22 June 2022 respectively, the OPCV and the Office of the Prosecutor stated that they would not submit observations on the Registry's report.[11]

12. On 24 June 2022, the Defence for Mr Said filed the "*Observations de la Défense portant sur le rapport 'on the Security Situation in the Central African Republic' (ICC-01/14-01/21-365-Conf) déposé par le Greffe le 17 juin 2022*".[12]

13. On 29 June 2022, Trial Chamber VI issued the "First review of the detention of Mr Mahamat Said Abdel Kani", in which it decided to continue Mr Said's detention.[13]

14. On 5 July 2022, the Defence filed a notice of appeal "against the 'First review of the detention of Mr Mahamat Said Abdel Kani' (ICC-01/14-01/21-382) by Trial Chamber VI Deciding to Continue Mr Said's Detention".[14]

15. On 7 July 2022, the Appeals Chamber issued an order in which it stated that the proceedings would be conducted in writing. It ordered the Defence to file its appeal brief by 14 July 2022 and specified that the Prosecution and the OPCV could file their briefs in response by 21 July 2022.[15]

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[6] ICC-01/14-01/21-335.
[7] ICC-01/14-01/21-336.
[8] ICC-01/14-01/21-353-Conf-Red.
[9] ICC-01/14-01/21-365-Conf, para. 1.
[10] ICC-01/14-01/21-365-Conf-AnxA.
[11] Email from OPCV to TC VI on 21 June 2022 at 09.04, email from OTP to TC VI on 22 June 2022 at 20.27.
[12] ICC-01/14-01/21-366-Conf-Exp.
[13] ICC-01/14-01/21-382.
[14] ICC-01/14-01/21-388.
[15] ICC-01/14-01/21-393.

II. Applicable law: in principle, liberty is the rule and detention the exception

1. The international standards

16. In accordance with article 21(3) of the Rome Statute, the interpretation and application of the entire Statute must be consonant with internationally recognized human rights, not least the standards pertaining to pre-trial detention.[16] Those rules provide the general framework for this request and must be taken into account for the proper interpretation of the provisions of the Statute.

17. In international law, deprivation of liberty is governed by a strict regime, given the seriousness of this measure. The slightest deviation equates to arbitrary detention, in contravention of international law. This point is all the more critical in the case of pre-trial detention since a person is presumed innocent.

18. The right to liberty is a fundamental right which a person possesses by virtue of being human and is guaranteed by international human rights law.[17] Detention, on the other hand, is an exception to this principle. As such, and in order for the right to liberty to be effective, detention is circumscribed by strictly defined and exhaustively enumerated legal criteria. In the words of the International Covenant on Civil and Political Rights: "It shall not be the general rule that persons awaiting trial shall be detained in custody".[18] These words have been echoed on many an occasion by various human rights courts and bodies,[19] which consider detention "an exceptional departure from the right to liberty and one that is only permissible in exhaustively

[16] Article 21 of the Rome Statute; ICC-01/04-01/07-OA-4, para. 15.
[17] Universal Declaration of Human Rights, 10 December 1948, article 3; International Covenant on Civil and Political Rights, article 9; African Charter on Human and Peoples' Rights, article 6; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5; American Convention on Human Rights, article 7; "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", adopted by the United Nations General Assembly, resolution A/RES/43/173, 9 December 1988, Principle 2.
[18] International Covenant on Civil and Political Rights, article 9(3).
[19] ECtHR, *Al-Jeda v. The United Kingdom*, Application no. 27021/08, 7 July 2011, para. 99; Inter-American Commission on Human Rights, *Lysias Fleury and his family against the Republic of Haiti*, Case 12.549, 5 August 2009, para. 42.

enumerated and strictly defined cases".[20]

19. That principle has often been reaffirmed by the judges of the Court, who thus in no uncertain terms are agreed that, "when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule".[21]

2. The presumption of innocence

20. The presumption of innocence is central to the concept of a fair trial.[22] Article 66 of the Statute adopts the principle and provides that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. As liberty is the corollary to this presumption, respect of this fundamental right must inform the bench's assessment of the need to continue Mr Said's detention.

3. Article 60(3)

21. Starting from the premise that the drafters of the Statute were seeking the best means of ensuring compliance with the principle that liberty is the rule and detention the exception – in keeping with modern, human rights-compliant proceedings – it is then readily apparent that article 60(3) is not a tool for keeping an accused in detention at all costs but in contrast constitutes a restrictive framework within which the bench must operate if it believes detention to be warranted, and that each condition in that provision constitutes a safeguard for the accused aimed at ensuring that detention which is arbitrary or based on vague criteria is not ordered. Thus viewed, the very existence of the provision constitutes an essential safeguard for the accused because it requires the bench to determine, at regular intervals, whether there is an existing need for continued detention.

[20] ECtHR, *Ilijkov v. Bulgaria*, Application no. 33977/96, 26 July 2001, para. 85.
[21] ICC-01/05-01/08-403, para. 36; ICC-01/04-01/07-426, p. 6; ICC-01/05-01/08-475, para. 36.
[22] ECHR, art. 6(2); International Covenant on Civil and Political Rights, art. 14(2); African Charter on Human and Peoples' Rights, art. 7(b); American Convention on Human Rights, art. 8(2).

22. That being so, the starting point for any discussion of detention is the fact that the presumption of innocence makes liberty the rule and detention the exception − a principle reaffirmed by all international human rights courts[23] and recognized by the International Criminal Court: "[W]hen dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule".[24]

23. The corollary of this principle that makes liberty the rule is that the burden of proof must always lie with the Prosecution, to whom it falls to justify the detention sought by showing that it is still applicable, as the judges of the Court have emphasized on a number of occasions.[25]

24. That duty to make a showing stands to reason since it invariably rests with the Prosecutor to prove the need for detention. Merely because he satisfied the bench in the past does not relieve him of having to satisfy the bench again. The fundamental principle that **liberty is the rule and detention the exception** is thus safeguarded; this is why it makes sense that the burden of proof falls on the Prosecution. The Prosecutor cannot merely state, but must show, that the circumstances have not changed.

25. In the context of article 60(3), the principles just described bar the conditions that give effect to the provision from being used to frustrate application of the principle that liberty is the rule and to reverse the burden of proof. Taking as an example the condition that there be a "change in circumstances", that condition does nothing to alter the fact that the Chamber must simply ascertain, on the basis of evidence submitted by the Prosecutor, an existing need for any detention, *viz.*, that the conditions for detention are still, at the present time, met.

26. Specifically, the phrase "[TRANSLATION] the conditions for detention are still met" presupposes that those conditions exist *now*, at the time of the fresh decision on

[23] ICC-02/11-01/15-83, paras. 6-13.
[24] ICC-01/05-01/08-403, para. 36. ICC-01/04-01/07-426, p. 6; ICC-01/05-01/08-475, para. 36.
[25] ICC-01/05-01/08-1019, para. 51.

interim release. That the circumstances must exist now therefore necessarily means that the Prosecutor must, on each review, update his line of argument in the form of a further showing, that is to say, a set of reasons that is structured around and based on fresh evidence capable of informing a discussion of the existing need for detention.

27. It is worth underscoring the importance of this requirement to update which is imposed on the Prosecution since it makes basic sense. This is because to show a "change in circumstances" does not mean to show retroactively that the earlier analysis was incorrect or incomplete, but rather that it now no longer holds true.

28. The "change in circumstances" must be understood in terms of how the Prosecutor will go about framing the discussion, given that it falls to him to show the need for detention. If, in May 2022, the Prosecutor cannot prove that events warranting continued detention occurred just before May 2022 that clearly constitutes a "change in circumstances". The fact that what was previously true now no longer holds true must inevitably lead to reassessment of the detention. The Prosecutor, and the OPCV for that matter, cannot substitute a mere reference to what may have happened *in the past* for a genuine showing in order to justify detention *in the present.*

29. To allow the Prosecutor to rely solely on the past would be tantamount to reversing the burden of proof. It would suffice for the Prosecutor to show just once during the course of a trial – a trial that could last years – that circumstances warranted detention at a particular point in time in order for him never to have to do so again, relying on past circumstances corresponding to a particular context and a specific point in the past, and for the burden of proof to lie with the Defence, to whom it would then fall to prove that the past circumstances no longer exist, proof of which, by definition is impossible, to provide.

30. Unless the Prosecution presents fresh up-to-date evidence, only one option is open to the Bench: release, since the article 58(1) conditions are not met. It should be recalled, as the Appeals Chamber has pointed out, that

> the decision on continued detention or release […] is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released.[26]

4. The duty to give reasons

31. The duty to give reasons for judicial decisions is central to any modern, democratic judicial system. It informs the parties of the basis for a decision and puts them in a position to identify the underpinnings – legal and factual – of a decision and, hence, to assess whether it is founded in law and in fact, for example in prospect of a possible appeal. Reasoning is a bulwark against arbitrariness or the impression of arbitrariness – the inevitable outcome of decisions given without explanation.

32. The provision of reasoning for judicial decisions also serves a wider social purpose, as it allows the community as a whole to acquaint itself with the basis for a decision, thus fostering acceptance of the institution and its legitimacy. Thus viewed, reasoning is more than the underpinning of a particular decision: it also contributes to reaffirming and strengthening the intangible principles which form the fabric of any society.

33. The duty to provide reasons, as Judge Ušacka recalled,

> is at the heart of a judicial decision and an important aspect of the right to a fair trial […] reasoning is a requirement of a fair trial that contributes to the acceptance of the decision by the parties and to preserving the rights of the defence. It requires that courts indicate with sufficient clarity the grounds upon which they base their decisions. While they are not obliged to give a detailed answer to every argument raised, the courts must base their reasoning on objective arguments and it must be clear from the decision that the essential issues of the case have been addressed. Further, and importantly, reasoning is the basis for raising an appeal and allows the appellate body to review a decision.[27]

34. The duty to provide reasons, *viz*. to set out grounds, has been affirmed by all the international human rights bodies. The European Court of Human Rights has, on a number of occasions, underlined that the duty cast on courts to supply reasons for their decisions is among the guarantees pertaining to the right to a fair hearing

[26] ICC-01/04-01/06-824, para. 134.
[27] ICC-02/11-01/11-278-Red, dissenting opinion, paras. 8-9.

enshrined in article 6 of the ECHR.[28] In *Hadjianastassiou v. Greece*,[29] the ECtHR made plain that courts must "indicate with sufficient clarity the grounds on which they based their decision."

35. The Defence would in particular point out that, when the denial of interim release to a person charged is at stake, the ECtHR requires considerable detail and specificity from the reasoning on the risks that might arise were the accused to be accorded interim release. On the alleged risk that the release of an accused would pose to witnesses, for example, the ECtHR has stated that "it did not suffice merely to refer to an abstract risk unsupported by any evidence".[30] In the same vein, on the risk of obstruction to investigations that interim release might pose, the ECtHR has said: "The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*; it has to be supported by factual evidence."[31] Judge Ušacka encapsulates this stream of authority thus:

> In sum, the ECtHR has repeatedly found domestic courts' reasons on detention matters neither relevant nor sufficient whenever a domestic court merely repeated abstract and stereotypical grounds, instead of indicating reasons why they considered those abstract statements to be well-founded in the case before them.[32]

36. This line of authority is of clear relevance where the issue *sub judice* is one of continuing a person's detention and one of imposing restrictive measures on a detained person's communications with the outside world. The existence of the same risks (for instance, the risk to ongoing Prosecution investigations) serves as ground for both denial of interim release and restrictions on an accused person's communications. Accordingly, to ensure that the fundamental rights of a detained person are respected, there is no reason not to apply the same standard of determination of the existence of these risks.

37. The Appeals Chamber of the ICTY has held that the right to a reasoned decision

[28] ECtHR, *Higgins and others v. France*, 19 February 1998 (134/1996/753/952).
[29] ECtHR, *Hadjianastassiou v. Greece*, para. 33.
[30] ECtHR, *Grishin v. Russia*, para. 148.
[31] ECtHR, *Piruzyan v. Armenia*, para. 96.
[32] ICC-02/11-01/11-278-Red, dissenting opinion, para. 12.

is part of the right to a fair trial and that only reasoned decisions can rightly be canvassed, [33] not least because "at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[34] The International Criminal Court has consistently held, in keeping with human rights and ad hoc tribunal authority, that the Chambers are duty-bound to provide reasons for judicial decisions.[35]

III. Discussion

Introduction

38. Since liberty is the rule and detention the exception, in accordance with all the international human rights standards it falls to the Prosecution to make a showing, on the basis of substantiated facts, of the need for continued detention. If a Chamber finds that the Prosecution has not adduced evidence in support of its request, it must order the release of the accused. This principle holds true including in a review of the detention under article 60(3) of the Statute, which is intended to safeguard the rights of the defence, rather than to rubber-stamp the first decision on continued detention (see applicable law above). If detention cannot be justified under that provision, the Chamber is duty-bound to order interim release. That decision on whether to continue detention is not a matter of discretion on the part of the bench, as the Appeals Chamber clarified in *Lubanga*,[36] but simply one of the application of the criteria laid down in the Statute. The Chamber must therefore assess the concrete evidence placed before it by the Prosecution and may not go beyond the evidence presented to it in support of a request for continued detention. Otherwise stated, the Chamber must base continued detention on that concrete evidence or, if the Prosecution fails to

[33] *Nikolić*, 8 March 2006, IT-02-60/1-A, para. 96; *Kunarac*, 12 June 2002, IT-96-23 and 23/1-A, para. 41.
[34] *Milutinović*, IT-05-87-AR65.1, para. 11.
[35] ICC-01/04-01/06-773, para. 20.
[36] ICC-01/04-01/06-824, para. 134; ICC-01/04-01/06-824.

present tangible evidence in support of its request, make a finding of the lack thereof and order release. It should be noted that in the impugned decision the Chamber ensured that it made a finding that the Prosecution had not discharged its duty to show the need for continued detention, but did not act on that finding, that is to say, it did not order Mr Said's release.

39. In the impugned decision, the Chamber also refused to rule on whether certain factual findings in the first decision on continued detention of 3 March 2022 still held true, in particular the alleged links between Mr Said and the FPRC. This constitutes an error of law which invalidates the impugned decision.

40. That refusal by the Chamber to determine, on the date of its decision, the validity of factual findings which might justify detention entails that Mr Said's detention is in fact now founded solely on theoretical assumptions or generic premises about the security situation in the Central African Republic and the theoretical motives that any accused might have to prejudice the integrity of the proceedings, with no effort made to establish the slightest link with the Accused, which violates his fundamental rights and constitutes an error of law which invalidates the impugned decision.

41. Such an approach gives rise to a reversal of the burden of proof to the detriment of the Accused because, ostensibly, it rests with him to prove that the theoretical assumption on which the Chamber relies could not materialize. For that matter, it is, by definition, impossible to present such proof: the theoretical and generic assumption is not rebuttable since it is not based on any tangible evidence that can be rebutted.

42. In a regime where the Appeals Chamber is both the court of second and last instance to rule on matters pertaining to fundamental freedoms − unlike in all modern and democratic legal systems where an accused may access an even higher tier of justice (such as a supreme court or a court of cassation) and/or in courts specialized in fundamental rights (such as the ECtHR) − the responsibility cast on the appellate bench is all the greater since that bench is the guarantor of exemplary justice that observes the highest international standards of fundamental rights, foremost among which is, as it is here, the fundamental right to liberty and respect for the presumption

of innocence.

43. The Defence therefore respectfully moves the Appeals Chamber to set aside the impugned decision and to remand it to the Chamber for a fresh decision which scrupulously respects Mr Said's fundamental rights.

1. Grounds of appeal

1.1. First ground of appeal: the errors or law and fact arising from the Chamber's refusal to consider or respond to the Defence submissions

44. In the impugned decision the Chamber states that

> as regards the Defence's specific arguments that it has not been established that (i) Mr Said can still count on supporters in the CAR, (ii) that there is no link between him and the FPRC, and (iii) that he has demonstrated a willingness to appear, the Chamber considers that the Defence is relitigating issues that were already decided by the Chamber in the Initial Detention Decision and confirmed on appeal. The Chamber will therefore not consider these arguments further.[37]

By so ruling, the Chamber committed a number of errors that invalidate the impugned decision.

1.1.1. First limb of the ground of appeal: error of law arising from failure to consider the Defence submissions

45. The fact that the Chamber made particular factual findings in an earlier decision cannot bar the Defence from arguing that those factual findings are now no longer valid in a review of the detention of the person charged. Those factual findings are the logical starting point for discussion of whether a change in circumstances has occurred, and the Defence will naturally take them as its basis.

46. For example, the Defence pointed out in its response of 10 June 2022 (1) that it still did not have the Registry's *ex parte* report on which the Chamber had nevertheless relied heavily in issuing its first decision on 3 March 2022, and (2) that the Registry did not appear to have supplied any new information relating to the contents of that

[37] ICC-01/14-01/21-382, para. 28.

report or regarding whether it was standing by the report's conclusions. It stands to reason, the Defence submitted, that the report could no longer be factored into the review because it had not been updated. It also submitted that the Chamber could now no longer endorse past factual findings founded on a now obsolete report, because the basis for those findings no longer exists. It was legitimate for the Defence to raise this issue which is central to the discussion in the event of a review.

47. In the same vein, the fact that, on one occasion, the Chamber found Mr Said's assurances that he would appear at his trial to be insufficient, in its view, to offset the risks referred to in article 58(1)(b) cannot bar the Defence from continuing to rely on that fact, since the accused's willingness to appear is recognized in the jurisprudence as a criterion for determining whether detention should be continued and it is important that he should be able to renew his undertakings.

48. The aim is not one of "relitigating" but merely one of implementing the normal process established by article 60(3).

1.1.2. Second limb of the ground of appeal: the Chamber refused to perform its task under article 60(3) of the Statute, which constitutes an error of law invalidating the impugned decision

49. The Chamber's refusal to "consider these arguments further" constitutes an error of law because the Chamber is refusing to perform its task of ascertaining whether those factual findings now still hold true, which is nevertheless the essence of the exercise established in article 60(3). To concur with the Chamber would mean that the Defence would have no right to question at a later date the basis for a factual finding and that the Chamber would not be in any way obliged, on each review of detention, to ascertain whether the past factual findings underpinning detention are still well founded. To concur with the Trial Chamber would entail that the Chamber would only need to determine once that a circumstance existed for that circumstance to be regarded as holding true forever, which would run counter to the entire rationale of the periodic review established by article 60(3).

50. For example, the Chamber was duty-bound to rule on whether the alleged links between Mr Said and the FPRC exist now: absent that ruling, the decision to continue detention quite simply has no basis in fact.

51. As a further example, the fact that the Chamber ruled in the past on the weight to be given to the Accused's assurances that he would appear is no justification for the Chamber's failure to address how it has factored in the assurances given by the Accused, when determining anew whether continued detention is necessary. The personal circumstances of the person charged and that person's relationship with the Court and with the case by definition change over time and the passage of time shows as a matter of course that Mr Said is cooperating with the Court. By refusing to revisit that issue over time, the bench is telling the person charged that the Court will never revisit its first assessment, in contradiction with the very rationale of article 60(3).

1.1.3. Third limb of the ground of appeal: the error of fact consisting in finding in practice that the factual circumstances were unchanged

52. By failing to rule on the substance of the Defence's submissions, the Chamber is taking the view in practice, albeit without expressly so stating, that the factual findings in the decision of 3 March 2022 still hold true, even though there is no evidence to that effect. This constitutes an error of fact which invalidates the impugned decision. The Defence notes in that respect that it was all the more incumbent on the Chamber to revisit those factual findings since the Appeals Chamber had found, in relation in particular to the claim that there is a link between Mr Said and the FPRC, that "the Trial Chamber could have referred to more than two items of evidence in support of this determination".[38]

53. That exercise was all the more necessary since, in its filing of 30 May 2022, the Prosecution provided no concrete evidence to support the claim that any link whatsoever exists now between Mr Said and the FPRC or between the FPRC and the

[38] ICC-01/14/01/21-318, para. 35.

proceedings before the ICC.

54. In its most recent filing, the Prosecution stated:

> the Prosecution submits that according to recent media coverage, the FPRC and its off-shoot rebel groups and partner groups continue to engage in armed hostilities. Their behaviour shows that Mr SAID's support network is still armed and continues to destabilise the CAR, including by killing CAR soldiers.[39]

This calls for a number of comments:

55. First, by using the expression "support network" the Prosecution misrepresents the Chamber's decision of 3 March 2022. At no time did the Prosecution show that any "support network" existed and at no time did the Chamber determine that any "support network" existed. The Chamber merely concluded hypothetically that it was possible that certain individuals could still support Mr Said – a far cry from a "support network".

56. Second, the Prosecution was clearly missing the point when it gave a commentary on the political and security situation in the Central African Republic. Admittedly, that country is experiencing long-standing and complex political instability involving numerous actors: the government, Wagner mercenaries working for the government, and armed opposition groups which are themselves multifarious and fragmented. It is also true that this instability involves armed fighting between the various actors. However, that is not the point. Those confrontations have nothing to do with the proceedings at the Court or anything to do with Mr Said and are therefore completely irrelevant to a discussion of the legal conditions under article 58(1) of the Statute.

57. Third, the Prosecution did nothing more than refer to two media reports (and therefore sources with negligible probative value) which contributed nothing to the discussion.

58. The report entitled "*Centrafrique: Au moins huits soldats tués dans une attaque*

[39] ICC-01/14-01/21-335, para. 6.

armée"[40] recounts firing from heavy weapons apparently heard in the mining town of Nzacko in the prefecture of Mbomou in the south-east of the Central African Republic. The town is nearly 500 km from the capital, Bangui. The only reference to the FPRC is that the armed group reportedly involved in the alleged attack was led by a former member of the FPRC, about whom we know nothing else. The report does not mention Mr Said or show that he enjoys any support whatsoever or even benefits from links with the leader of the armed group. The report does not mention the Court or show any intention on the part of anyone to interfere with proceedings at the Court.

59. The second report, of 29 May 2022 and entitled "UPC rebels kill Central African Republic Soldiers in Ouadda",[41] describes an alleged attack by the UPC on members of the FACA in the town of Bokolobo, some 250 km from Bangui. The only reference to the FPRC is that, "[according to] [l]ocal sources", the UPC attack was supported by the FPRC, with no further details. Once again, the report does not mention Mr Said or show that he enjoyed any support. The report does not mention the Court or show any intention on the part of anyone to interfere with the proceedings at the Court.

60. The Prosecution is therefore using whatever it can find: a report need only to relate to the "FPRC" for the Prosecution to submit it to the Chamber, without making the slightest effort to show any link whatsoever with Mr Said, the Court, the proceedings or article 58(1) conditions, thereby substituting political comment for genuine legal showing. The overall political and security situation in the CAR does not suffice to keep Mr Said in detention.

61. The Defence recalls in that regard that, in its decision of 3 March 2022, the Trial Chamber had already rejected the Prosecution's approach since it had considered that media reports concerning incidents hundreds of kilometres from Bangui and completely unrelated to Mr Said or the Court were irrelevant.[42]

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[40] https://www.aa.com.tr/fr/afrique/centrafrique-au-moins-huit-soldats-tues-dans-une-attaque-armee/2595690.

[41] https://humanglemedia.com/upc-rebels-kill-central-african-republic-soldiers-in-ouadda.

[42] ICC-01/14/01/21-247-Conf, para. 31.

62. It should therefore have been found that there was no basis in the Prosecution's filing of 30 May 2022 for the submission from the Prosecution and the OPCV that Mr Said might have enjoyed or be enjoying any support whatsoever in the CAR in order to abscond, bearing in mind that Mr Said has been in custody since January 2021, thousands of kilometres from Bangui and with no contact with anyone except his close family. That objective state of affairs shows that, now, Mr Said has no link with the FPRC or with any other group in the CAR. It was for the Prosecution to show otherwise, since it bears the burden of proof − a burden not discharged in this instance.

1.1.4. Fourth limb of the ground of appeal: the failure to provide reasons constitutes an error of law which invalidates the impugned decision

63. The Defence considers that the consequence of the Chamber's refusal to consider the Defence submissions, its refusal to perform its task under article 68(3) and its view in practice that certain findings still held true is that it based Mr Said's detention on assumptions that are unfounded and unsubstantiated by evidence, and hence, on theoretical assumptions, is not only a reversal of the burden of proof to the detriment of the Defence but also a lack of reasoning in the impugned decision.

64. As recalled previously, it is the settled view of the ECtHR that "it did not suffice merely to refer to an abstract risk unsupported by any evidence"[43] to justify the continued detention of a person presumed innocent. Yet, that is precisely what has happened here, since, as the Chamber itself has routinely observed (see above), the Chamber makes assumptions about risk that are "unsupported by any evidence". To so proceed precludes any reasoning: reference to risks that are not substantiated by evidence to justify continued detention dispenses with any need to show the existence of risk and therefore relieves the Chamber of providing reasoning for its conclusions.

65. In its appeal brief of 21 March 2022, the Defence emphasized the importance of requiring detailed reasoning where the Chamber performs the initial examination *de*

[43] ECtHR, *Grishin v. Russia*, para. 148.

novo of the existence of risks enumerated at article 58(1)(b), pursuant to article 60(2) since in the absence of reasoning the parties would be unable to show a "change in circumstances" in the context of article 60(3).[44]

66. The difficulty persists. If the Chamber refuses to rule on whether factual findings that underpinned the first decision on detention hold true, now, the question arises as to how the Prosecutor – on whom the burden of proof will still lie – will be able to show in the future that circumstances have not changed and how the Defence will then be able to go on to show the contrary if the impugned decision rests on theoretical assumptions and, as a result, the parties are not cognizant of which factual "circumstances" actually informed the decision to continue detention. If the Chamber's conclusions on the risk of obstruction to the investigation or the risk of flight do not rest on any concrete evidence but only on abstract premises and theoretical assumptions, it may prove difficult for the Defence to show a change in circumstances. The Chamber's approach puts the Defence in a situation where it must prove the impossible: that factual circumstances never specified by the Chamber have changed. A decision on detention devoid of reasoning therefore bars the Defence from fully challenging the decision on appeal and, above all, denies it the factual grounds on which it can challenge it in the future.

1.2. <u>Second ground of appeal: the Chamber failed to act on the finding that the Prosecution did not discharge its obligations to show the need for continued detention, which constitutes an error of law</u>

67. In the impugned decision the Chamber notes:

> The Defence is correct in saying that it is insufficient for the Prosecution to simply make a blanket claim that nothing has changed. Even though this may well be factually true, and the Chamber will make an independent assessment in this regard below, the mere affirmation by the Prosecution is not enough to establish it. The Chamber therefore finds that the Prosecution should have made a greater effort to provide substantiated submissions on the matter.[45]

[44] ICC-01/14-01/21-265-Conf-tENG.
[45] ICC-01/14-01/21-382, para. 30.

68. The Chamber states that it undertook an "independent assessment in this regard", specifying that "[t]he Chamber notes that the review of its prior ruling on detention is not entirely dependent upon the parties' submissions and that it has an independent responsibility to assess whether or not the circumstances justifying detention remain in place".[46] By so holding, the Chamber assumes the role of the Prosecution, which bears the burden of showing the need for continued detention.

69. Since it finds in the impugned decision that the Prosecution has not provided the necessary evidence to establish the need for continued detention, the Chamber should have found that the Prosecution failed to discharge its burden of proof, and accordingly have ordered Mr Said's release. By failing to act on its own findings the Chamber committed an error of law which invalidates the impugned decision.

1.3. Third ground of appeal: the consideration given to a Registry report affected by methodological shortcomings constitutes an error of law and an error of fact

70. In the impugned decision the Chamber relies primarily on the report on the situation in the Central African Republic filed by the Registry on 17 June 2022. The Chamber thereby committed several errors.

71. First, the Chamber states: "Moreover, the Chamber observes that, even though the Defence bears no probative burden in this regard, it does not claim that any of the information provided in the Registry Report is false or inaccurate."[47]

72. Therein lies an error of law since by questioning the methodology that the Registry used to write the report the Defence is quite clearly taking the view that the factual findings made by the Registry are not substantiated and are therefore not valid grounds for Mr Said's continued detention. To expect the Defence to show positively that an assertion is false is not only to ask it to prove the impossible but also amounts

[46] ICC-01/14-01/21-382, para. 31.
[47] ICC-01/14-01/21-382, para. 32.

to reversing the burden of proof, which constitutes an error of law that invalidates the impugned decision.

73. The fact that the Chamber states that "the Defence bears no probative burden in this regard" does not alter the fact that, by expecting the Defence to make submissions showing positively that the Registry's report is false or inaccurate in order to determine what weight to give to it, the Chamber has in practice created an expectation that the Defence bears the burden of proving that what the Registry asserts – but has not substantiated using tangible evidence – is false or inaccurate, and therefore, in practice, reverses the burden of proof.

74. Second, the Defence notes that the Chamber relies on conclusions by the Registry for which there were not even any sources, as the Defence previously underscored in its response of 24 June 2022 to the Registry's report.[48] For example, the Chamber states: "Moreover, according to the Registry Report, there have been reports of high profile detainees being released without trial and even abducted from detention facilities in Bangui."[49]

75. Paragraph 15 of the Registry report to which the Chamber referred was written entirely as a series of assertions without a single footnote:

> [REDACTED]

76. [REDACTED] "[REDACTED]" [REDACTED]. The Registry concludes, also in paragraph 15: "[REDACTED]", but does not elaborate in the slightest on what those "[REDACTED]" or those "[REDACTED]" might be.

77. That being so, it should have been found that those intimations about the political situation in the CAR, which are not based on anything tangible and objective, offer nothing relevant to the bench and the parties. Suppositions cannot be relied on in legal proceedings, especially when there is not the slightest shred of evidence and there is a danger of endorsing what may be outlandish political theories and helping to

[48] ICC-01/14-01/21-373-Conf.
[49] ICC-01/14-01/21-382, para. 33.

disseminate baseless rumours.

78. In those circumstances, the Chamber's reliance on an unsubstantiated assertion of that nature constitutes an error of fact which invalidates the impugned decision.

1.4. Fourth ground of appeal: to order Mr Said's continued detention on the basis of the overall security situation in the CAR without identifying specific risks linked to Mr Said constitutes an error of law

79. The Chamber predicates Mr Said's continued detention on the general security situation in the Central African Republic but never takes the trouble to establish the slightest link with Mr Said, since it relies on theoretical "motives" that a person might have for wanting to prejudice the proceedings but at no point establishes that those are Mr Said's "motives".

80. It should be recalled that in the appeal judgment of 19 May 2022 in the case *sub judice* the only factor that led the Appeals Chamber to determine that, in its view, the Chamber had not created a presumption of continued detention was the fact that the Trial Chamber relied on the existence of alleged links between Mr Said and the FPRC:

> [T]he Appeals Chamber recalls that the Trial Chamber determined that there was a "significant risk" on the basis of the evidence before it, indicating, *inter alia*, that Mr Said may still enjoy the support of his network in the FPRC. Thus, the Appeals Chamber is not convinced that there was a presumption of continued detention, absent any concrete evidence, as argued by the Defence[50]

and that the Appeals Chamber stated in relation to that determination that "the Trial Chamber could have referred to more than two items of evidence in support of this determination".[51]

81. The continued reliance on theoretical risks and the refusal to revisit the only relevant factual findings (see above) now mean that it is even more apparent from the impugned decision 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

[50] ICC-01/14-01/21-318, para. 36.
[51] ICC-01/14/01/21-318, para. 35.

lend support to the existence of the alleged risks.

82. This approach is contrary to the principle that it must be shown specifically that the Accused is the source of the alleged risks to the investigations. That obligation comes from the very terms of article 58(1)(b) (ii), which lays down that the Chamber must be satisfied that "[t]he arrest of the person appears necessary] [t]o ensure […] that the person does not obstruct or endanger the investigation or the court proceedings". The exercise is, therefore, one of determining that there is a risk linked to the person charged and not a general and generic risk to the witnesses. As the Appeals Chamber of the Court acknowledged in the most unequivocal of terms:

> The Appeals Chamber would like to highlight that article 58(1)(b)(ii) of the Statute stipulates that detention must be necessary "to ensure that *the person* does not obstruct or endanger the investigation or the court proceedings" (emphasis added). This indicates that there must be a link between the detained person and the risk of witness interference.[52]

83. Such an approach also gives rise to a presumption of continued detention for any person who stands charged in proceedings before the Court, since it will always be possible to justify by claiming − absent evidence − that there might be someone who might want to interfere with the proceedings or even that the Accused himself – again, absent any concrete evidence − might want to. This 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.

84. The consequence of such an approach is in reality 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. The reversal of the burden of proof constitutes an error of law which invalidates the impugned decision.

2. The material impact of the errors of law and fact raised on the impugned decision

85. It is plain to see that the errors of law and fact identified by the Defence in this appeal brief have materially affected the impugned decision. This is because, absent

[52] ICC-01/05-01/08-1937-Red2, para. 67

these errors, the Chamber would have had no factual or legal footing to support the existence of the risks set out in article 58(1)(b) and therefore to warrant continuing Mr Said's detention.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

- **Hold** that the impugned decision is affected by the errors of law and fact as set out in this appeal brief;
- **Hold** that these errors have materially affected the impugned decision;

Accordingly:

- **Reverse** in its entirety the "First review of the detention of Mr Mahamat Said Abdel Kani" in which Trial Chamber VI decided to continue Mr Said's detention, for lack of legal basis and the errors of fact and law committed (ICC-01/14-01/21-382);

And,

- **Remand** the matter to Trial Chamber VI and **order** it to rule anew, with reference to the applicable legal rules, on whether the conditions at article 58(1)(b) of the Rome Statute are met.

[signed]

Jennifer Naouri
Lead Counsel for Mahamat Said Abdel Kani
Dated this 22 July 2022
At The Hague, Netherlands