



**Original: English**

**No. ICC-01/14-01/21 OA3**

**Date: 19 May 2022**

**THE APPEALS CHAMBER**

**Before:** Judge Gocha Lordkipanidze, Presiding  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc 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**

**Judgment**

**on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”**

**Judgment 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, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**The Office of Public Counsel for Victims**

Ms Sarah Pellet  
Mr Tars Van Litsenborgh

**REGISTRY**

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**Registrar**

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” of 3 March 2022 (ICC-01/14-01/21-247-Red),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The “Decision on the Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” of 3 March 2022 (ICC-01/14-01/21-247-Red) is confirmed.

## REASONS

### I. KEY FINDINGS

1. In determining whether the conditions of article 60 (2) of the Statute have been met, a chamber must find that detention “appears necessary”. Such a determination shall be made concerning the *possibility*, and not the inevitability, that one of the events listed in article 58(1)(b) of the Statute will occur. It is the responsibility of the relevant chamber, on the basis of the available evidence, to weigh such evidence and, on that basis, to make a prediction as to the likelihood of future events.

2. The importance of securing a person’s attendance at trial, as set out in article 58(1)(b)(i) of the Statute, constitutes a lawful reason for pre-trial detention. A chamber may find that, given the gravity of the charges, an accused may have greater incentive to abscond. Considering the gravity of the charges in a specific case, among other case-specific factors, does not violate the principle that the right to liberty must be respected. At the same time, detention pending trial remains a temporary measure subject to periodic review.

3. To ensure the fairness of the proceedings, a chamber must remain diligent as it balances, on a case-by-case basis, the rights of the detained person to be informed against the possible need to withhold information. Where a chamber relies on *ex parte* material, the detained person must be able to understand, to the extent possible, the basis for the decision from the reasons discerned from the materials *in toto* available to him or her.

## II. INTRODUCTION

4. This appeal concerns the decision of Trial Chamber VI (hereinafter: “Trial Chamber”) on the first request for interim release of Mr Mahamat Said Abdel Kani (hereinafter: “Mr Said”) under article 60(2) of the Statute. In its decision, the Trial Chamber recalled the serious nature of the charges and determined that there was a risk that Mr Said could use his access to a network of supporters to either abscond from justice or interfere with the proceedings. This, coupled with the fact that there was a general state of insecurity in certain regions of the Central African Republic, led the Trial Chamber to conclude that Mr Said should remain in detention while awaiting trial. The Defence has raised five grounds of appeal, challenging the use of evidence and the effect of the Trial Chamber’s decision on the right of the accused to liberty and the presumption of innocence.

## III. PROCEDURAL HISTORY

### A. Proceedings before the Pre-Trial and Trial Chamber

5. On 7 January 2019, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued the warrant of arrest for Mr Mahamat Said Abdel Kani (hereinafter: “Mr Said”).<sup>1</sup>

6. On 20 January 2021, Mr Said was arrested by the UN peacekeeping mission in the Central African Republic. He was transferred to the Court on 24 January 2021.<sup>2</sup>

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<sup>1</sup> Pre-Trial Chamber II, [Warrant of Arrest for Mahamat Said Abdel Kani](#), 7 January 2019, ICC-01/14-01/21-2-US-Exp. A public redacted version was filed on 17 February 2021, ICC-01/14-01/21-2-Red2.

<sup>2</sup> Trial Chamber VI, [Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions](#), 3 March 2022, ICC-01/14-01/21-247-Red, paras 2-4. A confidential version was filed on the same day.

7. On 9 December 2021, the Pre-Trial Chamber confirmed seven counts of war crimes and crimes against humanity charged against Mr Said.<sup>3</sup>
8. On 14 December 2021, the Presidency transferred the case to Trial Chamber VI (hereinafter: “Trial Chamber”).<sup>4</sup>
9. On 28 January 2022, following the Defence’s written request for the interim release of Mr Said,<sup>5</sup> the Trial Chamber held a hearing on detention pursuant to rule 118(3) of the Rules of Procedure and Evidence (hereinafter: “Rules”).
10. On 3 March 2022, the Trial Chamber issued its decision on Mr Said’s request for interim release (hereinafter: “Impugned Decision”).<sup>6</sup>

## **B. Proceedings before the Appeals Chamber**

11. On 9 March 2022, the Defence filed a notice of appeal against the Impugned Decision pursuant to article 82(1)(b) of the Statute.<sup>7</sup>
12. On 21 March 2022, pursuant to the order of the Appeals Chamber, the Defence filed its appeal brief (hereinafter: “Appeal Brief”), raising five grounds of appeal against the Impugned Decision.<sup>8</sup> On 31 March 2022, the Prosecution and the Victims

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<sup>3</sup> Pre-Trial Chamber II, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), 9 December 2021, ICC-01/14-01/21-218-Red, pp. 60-61. A confidential version was filed on the same day.

<sup>4</sup> Presidency, [Decision constituting Trial Chamber VI and referring to it the case of \*The Prosecutor v. Mahamat Said Abdel Kani\*](#), 14 December 2021, ICC-01/14-01/21-220.

<sup>5</sup> [Demande de mise en liberté provisoire de Mahamat Said Abdel Kani](#), 25 January 2022, ICC-01/14-01/21-233-Conf. A public redacted version was filed on 27 January 2022, ICC-01/14-01/21-233-Red.

<sup>6</sup> Trial Chamber VI, [Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions](#), 3 March 2022, ICC-01/14-01/21-247-Red. A confidential version was filed on the same day.

<sup>7</sup> [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](#), 9 March 2022, ICC-01/14-01/21-252-tENG (English translation notified on 22 March 2022).

<sup>8</sup> [Defence Appeal Brief 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](#), ICC-01/14-01/21-265-Conf-tENG. A public redacted version was notified on 23 March 2022, ICC-01/14-01/21-265-Red. An English translation was notified on 2 May 2022, ICC-01/14-01/21-265-Red-tENG.

filed responses opposing the appeal (hereinafter: “Prosecution’s Response” and “Victims’ Observations”, respectively).<sup>9</sup>

#### IV. STANDARD OF REVIEW

13. With respect to errors of law, the Appeals Chamber has held that it

will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.<sup>10</sup>

14. Regarding an alleged error of fact, the Appeals Chamber has held in the context of an appeal against a decision concerning interim release that

its review is corrective and not *de novo*. It has explained that “[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”. As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings.<sup>11</sup>

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<sup>9</sup> [Prosecution Response to the \*Mémoire de la défense relatif à l’appel interjeté à l’encontre de la ‘Decision on the Defence Application for Interim Release of Mahamat Saïd Abdel Kani and Contact Restrictions’ \(ICC-01/14-01/21-247-Conf\) de la Chambre de première instance VI décidant du maintien en détention de Monsieur Saïd et du Maintien des mesures de restrictions à ses communications \(ICC-01/14-01/21-265-Conf\)\*](#), ICC-01/14-01/21-268-Conf. A public redacted version was notified on April 6, 2022, ICC-01/14-01/21-268-Red; [Victims’ response to the “\*Mémoire de la défense relatif à l’appel interjeté à l’encontre de la ‘Decision on the Defence Application for Interim Release of Mahamat Saïd Abdel Kani and Contact Restrictions’ \(ICC-01/14-01/21-247-Conf\) de la Chambre de première instance VI décidant du maintien en détention de Monsieur Saïd et du Maintien des mesures de restrictions à ses communications’ \(ICC-01/14-01/21-265-Conf\)\*”, 31 March 2022, ICC-01/14-01/21-267.](#)

<sup>10</sup> Appeals Chamber, [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10) (hereinafter: “*Gbagbo / Blé Goudé OA10 Judgment*”), para. 15 and references cited therein.

<sup>11</sup> [Gbagbo / Blé Goudé OA10 Judgment](#), para. 16 (footnotes omitted). The Appeals Chamber recalls what it stated in recent judgments in appeals under article 81 of the Statute, on the applicable standard of review for errors of fact. In particular, it noted that “[i]n assessing the reasonableness of factual findings, the Appeals Chamber will consider [among other things] whether the trial chamber [...] was mindful of the pertinent principles of law [...]”. See Appeals Chamber, [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; Appeals Chamber, [The Prosecutor v. Bosco Ntaganda, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor](#)

15. The above standard of review will guide the analysis of the Appeals Chamber.

## V. RELEVANT PARTS OF THE IMPUGNED DECISION

16. In the Impugned Decision, the Trial Chamber noted that the charges had been confirmed and that, as a corollary, article 58(1)(a) of the Statute was fulfilled.<sup>12</sup>

17. In relation to the need to continue Mr Said's detention in order to ensure his appearance at trial (article 58(1)(b)(i) of the Statute), the Trial Chamber considered that the risk of incurring a lengthy sentence may motivate the accused to abscond if given the opportunity.<sup>13</sup> The Chamber acknowledged that the Prosecution had not advanced any evidence showing that Mr Said continued his membership in the FPRC, but found that there was also no indication that he had departed from the organisation or no longer enjoyed their support.<sup>14</sup>

18. The Trial Chamber also acknowledged the Report of the Registry (24 January 2022) suggesting that no evidence had been found indicating that the FPRC has done anything to assist Mr Said or otherwise interfere with the proceedings.<sup>15</sup> Nevertheless, the Chamber found that this fact does not lead to the conclusion that the FPRC would not do so in the future if given the opportunity.<sup>16</sup>

19. Finally, the Trial Chamber noted the "current situation of insecurity and instability in CAR". It considered that the fact that Mr Said bears no responsibility for this situation "does not diminish the fact that Mr Said might take advantage of this situation to extract himself from the reach of the CAR authorities if he so wished".<sup>17</sup>

20. Accordingly, the Trial Chamber concluded that there was still a significant risk that Mr Said might be able to abscond if he were to be allowed to return to the CAR with or without conditions.

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[against the decision of Trial Chamber VI of 8 July 2019 entitled "Judgment"](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 39.

<sup>12</sup> [Impugned Decision](#), para. 25.

<sup>13</sup> [Impugned Decision](#), para. 26.

<sup>14</sup> [Impugned Decision](#), para. 27.

<sup>15</sup> [Impugned Decision](#), para. 28.

<sup>16</sup> [Impugned Decision](#), para. 28.

<sup>17</sup> [Impugned Decision](#), para. 29.

21. Regarding article 58(1)(b)(ii) of the Statute, the Trial Chamber noted the allegations that a number of potential Prosecution witnesses faced threats in the CAR.<sup>18</sup> The Chamber acknowledged that these allegations were not linked to Mr Said and they were based upon uncorroborated hearsay, but considered that “if there are apparently individuals in the CAR who are able to make attempts to intimidate witnesses in this case with impunity, this clearly shows how fragile the security situation is for ICC witnesses residing inside the CAR”.<sup>19</sup>

22. The Trial Chamber further considered that it could not ignore the dire security situation in the CAR simply because Mr Said did not create it. Moreover, the Trial Chamber found that it was “incorrect to suggest that a person can only be detained on the basis of article 58(1)(b)(ii) of the Statute when there are already concrete indications that the detained person has in the past made attempts to influence witnesses or has specific plans to do so in the future”.<sup>20</sup> In this regard, the Chamber noted that it must take into consideration “how easy it would be for the detained person, once released, to interfere with witnesses or otherwise obstruct justice”.<sup>21</sup> As part of its assessment, the Chamber noted information provided by the Registry on an *ex parte* basis.<sup>22</sup>

23. The Trial Chamber concluded that, “based upon all the information available to it”, there would be little to prevent Mr Said from harming or intimidating witnesses in this case if he were to be released.<sup>23</sup> Therefore, it determined that the risk of potential witness interference remained high.

24. Based upon the foregoing, the Trial Chamber concluded that the conditions of article 58(1)(b)(i) and (ii) of the Statute continued to be met.<sup>24</sup>

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<sup>18</sup> [Impugned Decision](#), para. 32.

<sup>19</sup> [Impugned Decision](#), para. 32.

<sup>20</sup> [Impugned Decision](#), para. 33.

<sup>21</sup> [Impugned Decision](#), para. 33.

<sup>22</sup> [Impugned Decision](#), para. 33.

<sup>23</sup> [Impugned Decision](#), para. 34.

<sup>24</sup> [Impugned Decision](#), para. 39.



## VI. ADMISSIBILITY OF THE DEFENCE'S CHALLENGE TO THE RESTRICTIONS ON COMMUNICATION DURING MR SAID'S DETENTION

25. In the Impugned Decision, the Trial Chamber, in addition to deciding the Defence's application regarding interim release, also ruled on the Defence's application to lift the restrictions on communication during Mr Said's detention. In the Appeal Brief, the Defence argues that, in deciding to maintain those restrictions on communication, the Trial Chamber relied upon the same reasons as those given for maintaining Mr Said's detention. Thus, the Defence argues that the errors alleged in the Appeal Brief regarding the reasons for refusing interim release should also have as a consequence the reversal of the Trial Chamber's decision rejecting the request for lifting restrictions on communication.<sup>25</sup>

26. The Appeals Chamber notes that the Defence brings the instant appeal under article 82(1)(b) of the Statute, which relates to appeals of "a decision granting or denying release".<sup>26</sup> The Trial Chamber's reasons for maintaining restrictions on communication during Mr Said's detention do not result in a decision granting or denying release. Thus, the Defence's challenge to that aspect of the Impugned Decision is not properly before the Appeals Chamber, and its request to lift the restrictions on communication is dismissed *in limine*.

## VII. MERITS

27. The Defence raises five grounds of appeal: the Trial Chamber committed 1) errors of law resulting from a decision based upon speculation as to facts; 2) errors of law and fact arising from the failure to define and properly apply the concept of gravity; 3) error of law in giving consideration to alleged incidents involving interference with witnesses without any connection to Mr Said; 4) error of law in relying on a report of the Registry that was not disclosed to the Defence; 5) error of law in taking into account the fact that Mr Said was in possession of confidential information identifying witnesses.

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<sup>25</sup> [Appeal Brief](#), para. 67.

<sup>26</sup> [Notice of Appeal](#), para. 8.

## A. First ground of appeal

### 1. Submissions of the Defence

28. Under the first ground of appeal, the Defence argues that the Trial Chamber assumed without any basis that Mr Said could still count on the support of former comrades to assist him in absconding. This, according to the Defence, amounts to a reversal of the burden of proof and the presumption of liberty pending trial, which is an error of law.<sup>27</sup> The Defence also argues that the Trial Chamber's erroneous assumptions unsupported by evidence constitute a failure to give reasons, which is another error of law.<sup>28</sup>

### 2. Response of the Prosecution

29. In response to the first ground of appeal, the Prosecution submits that the Trial Chamber did not create a presumption of continued detention, nor did it reverse the burden of proof. Rather, the current security situation was only one of many factors that the Trial Chamber considered in its assessment under article 58(1)(b)(i) and (ii) of the Statute.<sup>29</sup> Moreover, while the Trial Chamber did not expressly refer to all sources of evidence, the Prosecution submits that it is clear that its findings were based on all the evidence before it which, taken as a whole, reasonably supported its findings.<sup>30</sup> The Prosecution also argues that it was reasonable for the Trial Chamber to consider how easy it would be for Mr Said or his supporters to interfere with the proceedings.

30. Also under the first ground of appeal, the Prosecution argues that article 58(1)(b) of the Statute carries a "low evidentiary threshold", and that there is no bar to relying upon information in NGO reports, newspapers or other public sources.<sup>31</sup> Finally, the Prosecution submits that the Trial Chamber provided clear, comprehensive and unambiguous reasons to explain how it reached its conclusions.<sup>32</sup>

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<sup>27</sup> [Appeal Brief](#), paras 28-35.

<sup>28</sup> [Appeal Brief](#), paras 36-39.

<sup>29</sup> [Prosecution's Response](#), paras 6-7.

<sup>30</sup> [Prosecution's Response](#), paras 8-9.

<sup>31</sup> [Prosecution's Response](#), para. 11.

<sup>32</sup> [Prosecution's Response](#), paras 12-13.

### 3. *Observations of the Victims*

31. Regarding the first ground of appeal, the Victims argue that the Trial Chamber took into account several factors, including the seriousness of the charges, the potential for access to a support network through the FPRC, and the current security situation in the CAR.<sup>33</sup> The Victims recall that the Appeals Chamber has recently affirmed that “when determining whether the condition for continued detention under article 58(1)(b)(ii) of the Statute is met, the safety of witnesses must be considered”.<sup>34</sup>

### 4. *Determination by the Appeals Chamber*

32. Under the first ground of appeal, the Defence contends that the Trial Chamber relied on “theoretical and abstract risks” to continue Mr Said’s detention, which causes a reversal of the burden of proof leading to an error of law.

33. The Appeals Chamber recalls that in determining whether the conditions pursuant to article 60(2) have been met, a chamber must find that detention “appears necessary”.<sup>35</sup> In this regard, the Appeals Chamber has found that a determination shall be made concerning the *possibility*, and not the inevitability, that one of the events listed in article 58(1)(b) of the Statute will occur.<sup>36</sup> Accordingly, it is the responsibility of the relevant chamber “on the basis of the available evidence, to weigh such evidence and, on that basis, to make a prediction as to the likelihood of future events”.<sup>37</sup>

34. With respect to the risk that a suspect may abscond, the Appeals Chamber has found that this “necessarily involves an element of prediction”.<sup>38</sup> In this respect, the Appeals Chamber recalls that the existence of a support network and financial means

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<sup>33</sup> [Victims’ Observations](#), paras 25-26.

<sup>34</sup> [Victims’ Observations](#), para. 27.

<sup>35</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release](#), 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 21.

<sup>36</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release](#), 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 21.

<sup>37</sup> Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”](#), 14 July 2011, ICC-01/04-01/10-283 (OA), para. 60.

<sup>38</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”](#), 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 137.

may be relevant to determining whether there is a risk that a person may evade justice or interfere with the investigation.<sup>39</sup> Similarly, the Appeals Chamber has noted that “access to international contacts could provide the means to enable a suspect to abscond, whether or not there was evidence that the suspect would actually utilise such contacts”.<sup>40</sup>

35. Given the standard explained above, the Appeals Chamber considers that the Trial Chamber did not err. The Trial Chamber had before it evidence describing Mr Said as having a senior role in the FPRC, and it determined that Mr Said could still count on the support of former comrades in the FPRC.<sup>41</sup> The Appeals Chamber considers that the Trial Chamber could have referred to more than two items of evidence in support of this determination. However, the Appeals Chamber is not persuaded by the Defence’s position that the Impugned Decision was based on theoretical or abstract risks. The Trial Chamber considered the potential support for Mr Said together with a number of other factors before determining that there is a significant risk that Mr Said might be able to abscond if he were allowed to return to the CAR.

36. The Defence also argues that the Impugned Decision creates a presumption of continued detention for any person subject to charges before the Court, “since it will always be possible to justify detention by claiming – absent evidence – that there might be someone who might want to interfere with the proceedings or that the Accused himself – again, absent any concrete evidence – might want to”.<sup>42</sup> The Appeals Chamber finds no merit in this argument. To the contrary, the Trial Chamber found that “there is still a significant risk that Mr Said might be able to abscond if he were to be allowed to return to the CAR with or without conditions”.<sup>43</sup> The Appeals Chamber

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<sup>39</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 56, 59, 63-64.

<sup>40</sup> Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”](#), 14 July 2011, ICC-01/04-01/10-283 (OA), para. 25; *see also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”](#), 19 August 2011, ICC-01/05-01/08-1626-Red (OA 7), para. 32.

<sup>41</sup> [Impugned Decision](#), para. 27.

<sup>42</sup> [Appeal Brief](#), para. 35 (emphasis in original).

<sup>43</sup> [Impugned Decision](#), para. 30.

considers that a “significant risk” that Mr Said “might be able to abscond” may indeed justify pre-trial detention. In this regard, the 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.

37. Given the determination above that the Trial Chamber did not err in its reasons for finding that the existence of a support network contributes to a significant risk that Mr Said might abscond or otherwise interfere with the proceedings, it follows that the Trial Chamber did not fail to provide sufficient reasons. The Defence’s arguments in this regard are rejected.<sup>44</sup>

38. For the foregoing reasons, the first ground of appeal is rejected.

## **B. Second ground of appeal**

### *1. Submissions of the Defence*

39. Under the second ground of appeal, the Defence argues that the Trial Chamber erred in law in relying on this Court’s jurisprudence holding that the confirmation of charges increases the risk that the accused may abscond. The Defence refers to a number of previous decisions and one judgment of the Appeals Chamber and argues that this jurisprudence violates the presumption of liberty pending trial, which in turn violates the presumption of innocence.<sup>45</sup> Also under the second ground, the Defence argues that the Trial Chamber committed an error of fact in failing to take into account the limited number of charged incidents and the lack of seriousness in the alleged misconduct.<sup>46</sup>

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<sup>44</sup> [Appeal Brief](#), paras 38-39.

<sup>45</sup> [Appeal Brief](#), paras 40-49, referring to, *inter alia*, Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 2 December 2009, ICC-01/05-01/08-631-Red (OA2), paras. 69-70.

<sup>46</sup> [Appeal Brief](#), paras 50-53.

## 2. *Response of the Prosecution*

40. In response to the second ground of appeal, the Prosecution submits, first, that the “seriousness” of the charges is not a term of art and need not be defined.<sup>47</sup> Second, the Prosecution submits that the Defence merely disagrees with the Court’s long-standing jurisprudence holding that the potential for a long sentence may increase a person’s motivation to abscond.<sup>48</sup> Third, the Prosecution submits that in addition to its obligation to respect the presumption of innocence, a chamber must give due regard to the protection of victims and witnesses.<sup>49</sup> Finally, the Prosecution submits that the Chamber expressly acknowledged the Prosecution’s submissions on the seriousness of the charges against Mr Said, as confirmed by the Pre-Trial Chamber.<sup>50</sup>

## 3. *Observations of the Victims*

41. Regarding the second ground of appeal, the Victims submit that the Trial Chamber relied upon a number of factors in addition to the gravity of the charges, such as the current situation of insecurity and instability in the CAR.<sup>51</sup> The Victims also point out that the Prosecution case consists of one incident with several sub-incidents and episodes of severe mistreatment.<sup>52</sup>

## 4. *Determination by the Appeals Chamber*

42. The Defence argues that the Trial Chamber committed a legal error by failing to define the seriousness of the charges. In the view of the Defence, all crimes within the Court’s jurisdiction are by definition serious, so to take into account this factor would create a presumption of detention. The Appeals Chamber recalls that similar arguments have been made by appellants in other cases.<sup>53</sup>

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<sup>47</sup> [Prosecution’s Response](#), para. 16.

<sup>48</sup> [Prosecution’s Response](#), paras 17-18.

<sup>49</sup> [Prosecution’s Response](#), para. 19.

<sup>50</sup> [Prosecution’s Response](#), paras 21-22.

<sup>51</sup> [Victims’ Observations](#), paras 32-33.

<sup>52</sup> [Victims’ Observations](#), paras 34-36.

<sup>53</sup> *See, for example*, Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”](#), 11 July 2014, ICC-01/05- 01/13-558 (OA2) (hereinafter: “*Bemba et al.* OA2 Judgment”), paras 35, 66, 67; concerning the gravity of the charges, Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*,

43. Regarding the significance of the charges, the Appeals Chamber has held that the “gravity of the crimes charged [...] [is a] factor that may increase the incentive of a person to abscond”.<sup>54</sup> In other words, “[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail”.<sup>55</sup>

44. The Appeals Chamber recalls that considering the gravity of the charges in a specific case, among other case-specific factors, does not violate the principle that the right to liberty must be respected.<sup>56</sup> Although the starting point in all cases is that the person who is subject to criminal proceedings shall enjoy the right to liberty, he or she may be deprived of that liberty as prescribed by law in a manner that is strictly necessary under the circumstances.<sup>57</sup> The Appeals Chamber has consistently held that the importance of securing a person’s attendance at trial, as set out in article 58(1)(b)(i) of the Statute, constitutes a lawful reason for pre-trial detention.<sup>58</sup> A Chamber may find

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[Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, 26 October 2012, ICC-02/11- 01/11-278-Red \(OA\) \(hereinafter: “Gbagbo OA Judgment”\), paras 34, 54; Appeals Chamber, \*The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)\*, Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the review of detention”, 17 December 2021, ICC-02/05-01/20-542-Red \(OA10\) \(hereinafter: “Abd-Al-Rahman OA10 Judgment”\), paras 32, 35.](#)

<sup>54</sup> Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, 14 July 2011, ICC-01/04-01/10-283 (OA), para. 21.

<sup>55</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 21.

<sup>56</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 54.

<sup>57</sup> Appeals Chamber, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the review of detention”, 17 December 2021, ICC-02/05-01/20-542-Red (OA 10), paras 37-38.

<sup>58</sup> Appeals Chamber, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the review of detention”, 17 December 2021, ICC-02/05-01/20-542-Red (OA 10), para. 37, referring to, *inter alia*, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824 (OA7), para. 136; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, ICC-01/04-01/07-572 (OA4) (hereinafter: “Katanga and Ngudjolo OA4 Judgment”), para. 21; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, 16 December 2008, ICC-01/05-01/08-323 (OA), para. 55.

that, given the gravity of the charges, an accused may have greater incentive to abscond. However, detention pending trial is a temporary measure subject to periodic review.

45. Therefore, the Appeals Chamber finds that the Defence’s argument that the Trial Chamber erred in law by failing to define “seriousness”, thereby creating a “presumption of continued detention for any person accused of crimes within the jurisdiction of the Court” is unpersuasive. Moreover, the Defence’s position directly challenges appellate precedent on interim release in *The Prosecutor v. Jean-Pierre Bemba Gombo*,<sup>59</sup> and indirectly challenges the precedent in the recent judgment in *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*.<sup>60</sup> In this regard, the Appeals Chamber has explained that, although not obliged to follow its previous interpretations of principles and rules of law, the Appeals Chamber retains discretion as to whether to do so. Absent “convincing reasons”, it will not depart from its previous decisions, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions.<sup>61</sup> The Appeals Chamber finds that the Defence has not provided “convincing reasons” in this appeal.

46. Turning to the Defence’s argument that the Trial Chamber failed to explain why the charges meet the standard of “seriousness”, the Appeals Chamber notes that the charges confirmed by the Pre-Trial Chamber include charges of war crimes and crimes against humanity involving torture and unlawful detention.<sup>62</sup> Although the charges do not include murder or crimes of a sexual nature, the Appeals Chamber observes that the charges in this case, if proved, would in all likelihood result in a lengthy prison sentence. In this regard, the Appeals Chamber recalls that in *The Prosecutor v. Ahmad*

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<sup>59</sup> Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 2 December 2009, ICC-01/05-01/08-631-Red (OA2), paras 69-70.

<sup>60</sup> Appeals Chamber, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the review of detention”](#), 17 December 2021, ICC-02/05-01/20-542-Red (OA 10).

<sup>61</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”](#), 31 July 2015, ICC-02/11-01/15-172 (OA6), para. 14.

<sup>62</sup> Pre-Trial Chamber II, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), 9 December 2021, ICC-01/14-01/21-218-Red.



*Al Faqi Al Mahdi*, a conviction was entered for the war crime of directing attacks against religious and historic buildings and a prison sentence of nine years was imposed.<sup>63</sup> In the ICTY case of *The Prosecutor v. Milan Simić*, a conviction was entered for torture and inhumane treatment as a crime against humanity and a prison sentence of five years was imposed.<sup>64</sup> Like in the present case, the charges in both of these examples did not include murder or rape.

47. Therefore, the Appeals Chamber considers that the Trial Chamber did not err in finding that the charges are serious in nature and would, if proved, result in a lengthy prison sentence. It follows that the Trial Chamber was also correct in finding that as a result Mr Said may have an incentive to abscond. Even assuming that the Defence is correct that the charges against Mr Said are more limited in nature than those in other cases, this does not negate the seriousness of the charges against Mr Said.

48. The second ground of appeal is thus rejected.

### **C. Third ground of appeal**

#### *1. Submissions of the Defence*

49. Under the third ground of appeal, the Defence argues that the risk of interference with witnesses must be particular to the accused, consistent with the language of article 58(1)(b)(ii) of the Statute and as held in *The Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>65</sup>

#### *2. Response of the Prosecution*

50. In response to the third ground of appeal, the Prosecution submits that the Trial Chamber specifically addressed and rejected the Defence argument that it would be unjust to prolong Mr Said's detention solely on the basis of the precarious security

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<sup>63</sup> Appeals Chamber, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Decision on the review concerning reduction of sentence of Mr Ahmad Al Faqi Al Madi](#), 25 November 2021, ICC-01/12-01/15-434-Red3.

<sup>64</sup> ICTY, Trial Chamber II, *The Prosecutor v. Milan Simić*, [Sentencing Judgment](#), 17 October 2002, IT-95-9/2-S.

<sup>65</sup> [Appeal Brief](#), paras 54-58.

situation. The Trial Chamber found that it must weigh the magnitude of the overall potential risk of future obstruction of justice if the detained person were to be released.<sup>66</sup>

### 3. *Observations of the Victims*

51. Regarding the third ground of appeal, the Victims argue that the Trial Chamber clearly establishes a link between Mr Said and the risk of witness interference on the basis of an analysis of all relevant factors taken together.<sup>67</sup>

### 4. *Determination by the Appeals Chamber*

52. The Defence contends that the decision to extend Mr Said's detention was based on the Trial Chamber's analysis of the general security situation for Prosecution witnesses. In the view of the Defence, basing Mr Said's continued detention on this factor when no link has been established between the security situation and the accused is contrary to the language of article 58(1)(b)(ii).

53. The Appeals Chamber notes that the concern expressed by the Defence was specifically addressed in the Impugned Decision. The Trial Chamber stated that "it would be fundamentally unjust to prolong Mr Said's detention solely on the basis of the precarious security situation of witnesses inside the CAR, because he bears no responsibility for this situation or any of the reported security incidents".<sup>68</sup> After noting that the evidence presented by the Prosecution regarding security threats to witnesses in the CAR were not attributable to Mr Said, the Trial Chamber proceeded to consider "how easy it would be for the detained person, once released, to interfere with witnesses or otherwise obstruct justice".<sup>69</sup> The Chamber then considered information from the Registry before finding that there are "indications that Mr Said does still have support in the CAR and that, if he were released, he would be in a favourable position to effectively interfere with ongoing investigations or the proceedings, either personally or through third persons".<sup>70</sup>

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<sup>66</sup> [Prosecution's Response](#), paras 24-26.

<sup>67</sup> [Victims' Observations](#), para. 39.

<sup>68</sup> [Impugned Decision](#), para. 33.

<sup>69</sup> [Impugned Decision](#), para. 33.

<sup>70</sup> [Impugned Decision](#), para. 33.

54. Accordingly, the Appeals Chamber is not persuaded by the Defence's position that the Impugned Decision was based on factors unconnected to Mr Said. Rather, it is clear that the Trial Chamber considered the general security situation together with Mr Said's personal situation before finding that the risk of potential witness interference remains high, and that the conditions of article 58(1)(b)(ii) of the Statute continue to be met.<sup>71</sup>

55. The third ground of appeal is dismissed.

## **D. Fourth ground of appeal**

### *1. Submissions of the Defence*

56. Under the fourth ground of appeal, the Defence argues that the Trial Chamber's finding about the potential of witness interference was based upon an annex to a report of the Registry (hereinafter: "Registry Report Annex") that was not accessible to the Defence, which is inconsistent with an adversarial proceeding.<sup>72</sup> In any event, the Defence argues that this report is contradicted by other information, which demonstrates the importance that the Defence be in a position to contest the information contained in the report.<sup>73</sup>

### *2. Response of the Prosecutor*

57. In response to the fourth ground of appeal, the Prosecution submits that the Trial Chamber did not rely only on the *ex parte* annex, but instead it relied on all of the information available to it, including from the Prosecution and the Registry.<sup>74</sup> Moreover, the Prosecution submits that a chamber's reliance either on *ex parte* or non-disclosed evidence in reaching a decision is not per se unfair, but must be determined on a case-by-case basis.<sup>75</sup> It argues that even if the Defence did not have access to the specific information in question, it has not demonstrated that it was materially affected, as the Defence had access to material from the Prosecution and information in the

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<sup>71</sup> [Impugned Decision](#), para. 36.

<sup>72</sup> [Appeal Brief](#), para. 59.

<sup>73</sup> [Appeal Brief](#), paras 60-61.

<sup>74</sup> [Prosecution's Response](#), para. 30.

<sup>75</sup> [Prosecution's Response](#), para. 31.

Registry Report.<sup>76</sup> Finally, the Prosecution submits that there is no contradiction between the *ex parte* information and the rest of the Registry Report.<sup>77</sup>

### 3. *Observations of the Victims*

58. Regarding the fourth ground of appeal, the Victims argue that there are numerous factors that justify the continued detention of Mr Said, and the non-disclosure of the Registry Report Annex in question is not reason enough to interfere with decision to detain.<sup>78</sup>

### 4. *Determination by the Appeals Chamber*

59. The Appeals Chamber recalls that a person facing allegations before this Court has a general right to disclosure of evidence under article 67 of the Statute, including adequate time and facilities for the preparation of the defence (article 67(1)(b) of the Statute) and exculpatory evidence (article 67(2) of the Statute).

60. In addition to the disclosure regime, the Statute and Rules also protect those potentially at risk as a result of the activities at the Court. A chamber must give due regard to the protection of victims and witnesses,<sup>79</sup> and all organs of the Court must take appropriate measures to protect their safety, physical and psychological well-being, dignity and privacy.<sup>80</sup> Human rights jurisprudence holds that the right to disclosure is not absolute, and withholding information may in some cases be permissible so as to preserve the fundamental rights of another person.<sup>81</sup> Indeed, not every incident of non-disclosure automatically results in an unfair trial. It would be, in every case, for the relevant chamber to assess whether the rights of the accused to a fair hearing were prejudiced on the facts.<sup>82</sup>

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<sup>76</sup> [Prosecution's Response](#), paras 33-36.

<sup>77</sup> [Prosecution's Response](#), paras 37-39.

<sup>78</sup> [Victims' Observations](#), para. 44.

<sup>79</sup> Article 64 (2) of the Statute.

<sup>80</sup> Article 68 (1) of the Statute; *see also* rule 81 (3) of the Rules of Evidence and Procedure.

<sup>81</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#), 13 May 2008, ICC-01/04-01/07-475 (OA), para. 62.

<sup>82</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#), 13 May 2008, ICC-01/04-01/07-475 (OA), para. 62.

61. Although arising from a slightly different context, the Appeals Chamber has held in this case that the fact that information may be withheld from a detained person in proceedings pertaining to restrictive measures during detention (regulation 101 of the Regulations of the Court) is not per se unfair.<sup>83</sup> Thus, any such non-disclosure is not in itself impermissible, but must be determined on a case-by-case basis. The relevant chamber must “ensure the fairness of the proceedings in compliance with articles 64(2) and 67 of the Statute [...]”.<sup>84</sup> Where a chamber relies on redacted or *ex parte* material, the detained person must be able to understand, to the extent possible, the basis for the decision from the reasons discerned from the materials *in toto* available to him or her.<sup>85</sup>

62. Here, the Defence argues that it was not in a position “to acquaint itself with the [Registry Report Annex] to be able to challenge its conclusions on an equal footing”.<sup>86</sup> However, the Appeals Chamber finds the Defence’s arguments about the prejudice caused by the non-disclosure of information in the Registry Report Annex unpersuasive. The Appeals Chamber observes that, prior to the Impugned Decision, the Prosecution made submissions on evidence accessible to the Defence that, prior to his arrest, Mr Said continued to hold a leadership position in the FPRC and continued to have access to a support network and other resources.<sup>87</sup> In the Impugned Decision, the Trial Chamber noted this argument in addition to other evidence accessible to the

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<sup>83</sup> Appeals Chamber, *The Prosecutor v. Mahamat Abdel Said Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’](#)”, 29 June 2021, ICC-01/14-01/21-111-Conf (OA), para. 69. A public redacted version was notified on 17 May 2022 (ICC-01/14-01/21-111-Red2).

<sup>84</sup> Appeals Chamber, *The Prosecutor v. Mahamat Abdel Said Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’](#)”, 29 June 2021, ICC-01/14-01/21-111-Conf (OA), para. 69. A public redacted version was notified on 17 May 2022 (ICC-01/14-01/21-111-Red2).

<sup>85</sup> Appeals Chamber, *The Prosecutor v. Mahamat Abdel Said Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’](#)”, 29 June 2021, ICC-01/14-01/21-111-Conf (OA), para. 69. A public redacted version was notified on 17 May 2022 (ICC-01/14-01/21-111-Red2).

<sup>86</sup> [Appeal Brief](#), para. 61.

<sup>87</sup> [Prosecution’s additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani](#), 4 February 2022, ICC-01/14-01/21-236-Red, paras 19-22. A confidential version was notified on the same day, ICC-01/14-01/21-236-Conf.

Defence demonstrating that some of Mr Said's former comrades still occupied senior leadership positions.<sup>88</sup>

63. The Appeals Chamber notes that the specific part of the Registry Report Annex relied upon by the Trial Chamber was not available to the Defence. Notwithstanding, the Appeals Chamber finds that the Defence had sufficient notice of the Prosecution's submissions about Mr Said's access to support and the potential for interfering with the proceedings. Thus, the Appeals Chamber is not persuaded that the Defence suffered undue prejudice in not having access to the Registry Report Annex. However, the Appeals Chamber stresses that the Trial Chamber must remain diligent as it balances, on a case-by-case basis, the rights of the detained person to be informed against the possible need to withhold information.

64. The Appeals Chamber further finds that the Defence's argument that there was a contradiction between the relevant information in the Registry Report Annex and the Report of the Registry itself is also unpersuasive. As argued by the Prosecution,<sup>89</sup> the information in the Registry Report Annex addresses only the potential threat posed. However, the report of the Registry addresses a lack of actual incidents of interference, which the Trial Chamber specifically acknowledged in the Impugned Decision.<sup>90</sup> The Appeals Chamber finds that, as a matter of logic, the two observations of the Registry are not inherently contradictory.

## 5. Conclusion

65. Thus, for these reasons, the Appeals Chamber rejects the fourth ground of appeal.

66. While agreeing with this outcome under the fourth ground of appeal, Judge Ibáñez observes that, in the Impugned Decision, the Trial Chamber cited only to the Registry Report Annex for its conclusion that there were "indications that Mr Said does still have support in the CAR and that, if he were released, he would be in a favourable position to effectively interfere with ongoing investigations or the proceedings, either personally or through third persons".<sup>91</sup> Therefore, that information appears to have been

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<sup>88</sup> [Impugned Decision](#), para. 27.

<sup>89</sup> [Prosecution's Response](#), paras 37-39.

<sup>90</sup> [Impugned Decision](#), para. 28.

<sup>91</sup> [Impugned Decision](#), para. 33.

central to the Chamber’s conclusion under article 58(1)(b)(ii) of the Statute, notwithstanding that the Chamber referred to other submissions and evidence available to the Defence in its analysis under article 58(1)(b)(i) of the Statute.

67. Moreover, Judge Ibáñez does not consider the phrase “[b]ased on all the information available to it”,<sup>92</sup> used by the Trial Chamber, to be specific enough to indicate that, in this case, the Trial Chamber relied upon other information that was duly disclosed to the Defence.

68. For the foregoing reasons, Judge Ibáñez considers that the Trial Chamber erred. In her view, the Trial Chamber must, in principle, make its assessment only after affording the Defence an opportunity to make submissions about the evidence – including information provided by the Registry – in a manner that would preserve the fairness of the proceedings. However, Judge Ibáñez notes that the risk factors in article 58(1)(b) of the Statute are not cumulative. Any of the risks listed, if present, would justify detention. Judge Ibáñez further notes that the Defence has not indicated how an error of the Trial Chamber in its finding under article 58(1)(b)(ii) of the Statute would be material to the ultimate decision to detain, given that the Trial Chamber also found grounds to detain under article 58(1)(b)(i) of the Statute. Therefore, Judge Ibáñez finds that, notwithstanding the error, it would not be appropriate to interfere with the Impugned Decision.

## **E. Fifth ground of appeal**

### *1. Submissions of the Defence*

69. Under the fifth ground of appeal, the Defence argues that the Trial Chamber committed an error of law in putting the accused in the impossible position of having to choose between two fundamental rights: the right to be informed of the charges and the right to the enjoyment of liberty pending trial.<sup>93</sup> The Defence refers to appellate jurisprudence in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, and submits that the fact that evidence has been disclosed does not necessarily lead to the conclusion that a person awaiting trial must be detained.<sup>94</sup>

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<sup>92</sup> [Impugned Decision](#), para. 34.

<sup>93</sup> [Appeal Brief](#), para. 62.

<sup>94</sup> [Appeal Brief](#), paras 63-65.

## 2. *Response of the Prosecution*

70. In response to the fifth ground of appeal, the Prosecution submits that the accused's knowledge of the Prosecution evidence is a highly relevant factor for the chamber to consider. The Prosecution further submits that, in any event, this was but one factor among many that the chamber took into account.<sup>95</sup>

## 3. *Observations of the Victims*

71. Finally, regarding the fifth ground of appeal, the Victims argue that the Defence misrepresents the Court's jurisprudence in arguing that this element constitutes a "generic and automatic basis for a Chamber to always decide to remand a detained person in detention".<sup>96</sup> The Victims argue that the fact of the disclosure of evidence may support a decision to detain as long as that finding is based on an analysis of the specific situation of that person".<sup>97</sup> Here, the Victims point out that the Trial Chamber precisely mentions that Mr Said is in possession of a lot of confidential information.<sup>98</sup>

## 4. *Determination by the Appeals Chamber*

72. The Defence submits that the jurisprudence referred to allows a chamber to rely on the general factor of disclosure to justify continued detention, without tailoring it to the case at hand, thus giving rise to a presumption of continued detention.<sup>99</sup>

73. The Appeals Chamber recalls that a person facing charges before the Court has a general right to disclosure pursuant to article 67 of the Statute. At the same time, a chamber must give due regard to the protection of victims and witnesses,<sup>100</sup> and all organs of the Court must take appropriate measures to protect their safety, physical and psychological well-being, dignity, and privacy.<sup>101</sup>

74. In making an assessment pursuant to article 58(1)(b)(ii) of the Statute, disclosure may be a factor for consideration, as disclosure enhances a detained person's

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<sup>95</sup> [Prosecution's Response](#), paras 42-43.

<sup>96</sup> [Victims' Observations](#), para. 47.

<sup>97</sup> [Victims' Observations](#), para. 48.

<sup>98</sup> [Victims' Observations](#), para. 49.

<sup>99</sup> [Appeal Brief](#), para. 64.

<sup>100</sup> Article 64(2) of the Statute.

<sup>101</sup> Article 68(1) of the Statute; *see also* rule 81(3) of the Rules of Procedure and Evidence.



knowledge of the Prosecution's investigation.<sup>102</sup> However, the Appeals Chamber has emphasised that the fact that evidence has been disclosed to an accused person does not mean that a detainee may not be released. Rather, disclosure is but one factor that a chamber may consider, amongst others, in reaching a determination as to whether continued detention appears necessary.<sup>103</sup>

75. The Appeals Chamber notes that in finding that the conditions of article 58(1)(b)(ii) of the Statute continue to be met, the Trial Chamber correctly considered a number of relevant factors. As part of this assessment, the Trial Chamber found that Mr Said may have a strong motive to influence Prosecution witnesses, and noted the advanced stage of disclosure and the volume of confidential information in Mr Said's possession, including the identities of a large number of witnesses.<sup>104</sup> The fact that the Trial Chamber considered disclosure as one factor among several does not place Mr Said in a position of choosing between the rights afforded to him under the Statute. Accordingly, the Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber committed an error of law.

## 5. *Conclusion*

76. The fifth ground of appeal is therefore dismissed.

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<sup>102</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 54.

<sup>103</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 65.

<sup>104</sup> [Impugned Decision](#), para. 35.

### VIII. APPROPRIATE RELIEF

77. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.<sup>105</sup> In the present case, it is appropriate to confirm the Impugned Decision and reject the appeal.

Done in both English and French, the English version being authoritative.



**Judge Gocha Lordkipanidze**  
Presiding



**Judge Piotr Hofmański**



**Judge Luz del Carmen Ibáñez  
Carranza**



**Judge Marc Perrin de Brichambaut**



**Judge Solomy Balungi Bossa**

Dated this 19<sup>th</sup> day of May 2022

At The Hague, The Netherlands

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<sup>105</sup> Rule 158(1) of the Rules.