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TRIAL CHAMBER VI

Before:

**Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

Victims' observations on the review of Mr Saïd's Detention

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel representing the collective interests of future applicants as well as of applicants in the proceedings and participating victims (the “Legal Representative”),¹ hereby submits her observations on the review of the detention of Mahamat Said Abdel Kani (“Mr Saïd” or the “Accused”).

2. The Legal Representative submits that Mr Saïd’s detention should be maintained as the conditions set out in article 58(1) of the Rome Statute (the “Statute”) continue to be met. There are no developments fulfilling the requirement of “*changed circumstances*” pursuant to article 60(3) of the Statute. To the contrary, in the context of the upcoming trial and the further disclosure of witness identities, Mr Saïd’s continued detention is imperative in mitigating the risks to victims and witnesses, and in ensuring the preservation of the evidence and the integrity of the proceedings.

II. PROCEDURAL BACKGROUND

3. On 3 March 2022, Trial Chamber VI (the “Chamber”) issued the “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” (the “Decision”).²

4. On 9 March 2022, the Defence filed its notice of appeal against the Decision.³

5. On 11 March 2022, the Appeals Chamber issued the “Order on the conduct of the appeal proceedings”,⁴ instructing the Defence to file its appeal brief on 21 March

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#), p. 47, lines 1-13; the “Decision on matters relating to the participation of victims during the trial”, [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; and the “Decision authorising 20 victims to participate in the proceedings”, [No. ICC-01/14-01/21-311](#), 27 May 2022.

² See the “Public redacted version of ‘Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’” (Trial Chamber VI), [No. ICC-01/14-01/21-247-Red](#), 3 March 2022 (the “Decision”).

³ See the “*Acte d’appel de la Défense relatif à la ‘Decision on the Defence Application for Interim Release of Mahamat Said 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*”, [No. ICC-01/14-01/21-252 OA3](#), 9 March 2022.

⁴ See the “Order on the conduct of the appeal proceedings” (Appeals Chamber), [No. ICC-01/14-01/21-254 OA3](#), 11 March 2022.

2022, and the Prosecution and the Legal Representative to file their responses thereon on 31 March 2022.

6. On 21 March 2022, the Defence filed its appeal brief,⁵ to which the Legal Representative and the Prosecution responded on 31 March 2022.⁶

7. On 17 May 2022, the Chamber instructed the Prosecution and the Legal Representative to submit observations on the review of Mr Saïd's detention by no later than 30 May 2022, and the Defence to respond by no later than 10 June 2022, in order to allow the Chamber to comply with its statutory duty to review the Decision every 120 days in accordance with rule 118(2) of the Rules of Procedure and Evidence.⁷

8. On 19 May 2022, the Appeals Chamber issued its "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'" (the "Judgment"),⁸ confirming the Decision.

⁵ See 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 Said 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 Said et du maintien des mesures de restrictions à ses communications*", [No. ICC-01/14-01/21-265-Conf OA3](#) and [No. ICC-01/14-01/21-265-Red OA3](#), 21 March 2022.

⁶ See the "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 Said 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 Said et du maintien des mesures de restrictions à ses communications' (ICC-01/14-01/21-265-Conf)*", [No. ICC-01/14-01/21-267](#), 31 March 2022; and the '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 Said 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 Said et du maintien des mesures de restrictions à ses communications' (ICC-02/05-01/20-265-Conf)*', [No. ICC-01/14-01/21-268-Conf](#) and [No. ICC-01/14-01/21-268-Red](#), 31 March 2022.

⁷ See the email from Trial Chamber VI to the parties and participants entitled "Submissions on review of detention", 17 May 2022 at 13:09.

⁸ See the "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'", [No. ICC-01/14-01/21-318](#), 19 May 2022 (the "Judgment").

III. SUBMISSIONS

A. Applicable law

9. Article 60(3) of the Statute provides that the Pre-Trial Chamber shall periodically review its decision on the release or continued detention of the person concerned and, following the review, amend said decision “*if it is satisfied that changed circumstances so require*”.⁹ The scope of such a periodic review is, however, of a rather limited nature and must be distinguished from the review provided for under article 60(2) of the Statute. The latter provision states that the person shall be kept in custody “[i]f the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met”.¹⁰ In contrast, the review under article 60(3) does not involve a *de novo* assessment of the requirements of article 58(1) of the Statute, but is limited to an examination of the ‘changed circumstances’ test.¹¹

10. The Appeals Chamber established that the requirement of ‘changed circumstances’ under article 60(3) of the Statute “*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*”.¹² Accordingly, the relevant Chamber must “*revert to the ruling on detention to determine whether there has been a change in the*

⁹ See article 60(3) of the Statute.

¹⁰ See article 60(2) of the Statute.

¹¹ See the “Second Decision on Bosco Ntaganda’s Interim Release” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-284](#), 17 March 2014, para. 25.

¹² See the “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’” (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 60. See also the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled ‘Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo’” (Appeals Chamber), [No. ICC-01/05-01/08-1722 OA8](#), 9 September 2011, para. 30; and “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” (Trial Chamber III), [No. ICC-01/05-01/08-743](#), 1 April 2010, para. 26.

circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute".¹³

11. The Appeals Chamber further held that in considering whether changed circumstances require a modification of a previous ruling on detention under article 60(3) of the Statute, the first consideration is "*whether the alternative risks under article 58(1)(b) of the Statute remain present so as to justify the continued detention of the person concerned. If they do not, the person must be released, with or without conditions, pursuant to article 60(3) of the Statute*".¹⁴ It added, "[o]nce this is established, there is no need for any further inquiry into other factors that may justify release. It is only if the article 58(1)(b) risks remain present to a degree which potentially justifies further detention that other factors may need to be balanced against these risks, as articulated above".¹⁵

12. According to the constant jurisprudence of the Court, change in circumstances must be demonstrated on a concrete basis,¹⁶ considering all available information, not only the arguments of the detained person.¹⁷

¹³ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), [No. ICC-01/05-01/08-1019 OA4](#), 19 November 2010, para. 52 (emphasis added). See also, *inter alia*, the "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'" (Appeals Chamber), [No. ICC-01/05-01/08-1626-Red OA7](#), 19 August 2011, para. 61.

¹⁴ See the Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification (Appeals Chamber), [No. ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9](#), 29 May 2015, para. 48.

¹⁵ *Ibid.*

¹⁶ See the "Public Redacted Version of the 'Decision on Applications for Provisional Release' of 27 June 2011" (Trial Chamber III), [No. ICC-01/05-01/08-1565-Red](#), 16 August 2011, para. 58 *citing* the "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'" (Appeals Chamber), [No. ICC-01/05-01/08-323 OA](#), 16 December 2008, para. 55. See also the "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'" (Appeals Chamber), [No. ICC-01/04-01/06-824 OA 7](#), 13 February 2007, para. 138.

¹⁷ See the "Decision on Mr Gbagbo's Detention" (Trial Chamber I), [No. ICC-02/11-01/15-846](#), 10 March 2017, para. 11.

B. There are no new circumstances that have a bearing on the conditions under article 58(1) of the Statute

13. The Legal Representative recalls that the Chamber, in concluding, in accordance with article 58(1)(b)(i) of the Statute, that there is still a significant risk that Mr Saïd might be able to abscond if he were to be allowed to return to the Central African Republic (the “CAR”),¹⁸ explicitly took into account several relevant factors, in particular: the seriousness of the charges and the fact that they have, at least partially, been confirmed;¹⁹ the possible lengthy prison sentence that may be ordered upon conviction;²⁰ Mr Saïd’s potential access to a support network through his current or former role in the *Front Populaire pour la Renaissance de la Centrafrique* (the “FPRC”);²¹ and the current situation of insecurity and instability in the CAR.²²

14. Similarly, in concluding, in accordance with article 58(1)(b)(ii) of the Statute, that the risk of potential witness interference remains high,²³ the Chamber based itself on a number of relevant factors, namely: previous security threats for witnesses;²⁴ the existing dire security situation in the CAR;²⁵ indications of support for Mr Saïd in the CAR;²⁶ and the fact that Mr Saïd is currently in possession of a lot of confidential information, including the identities of a large number of witnesses.²⁷

15. The Appeals Chamber confirmed the Chamber’s findings in its recent Judgment, explaining, *inter alia*, that the Chamber: (i) did not err in its reasons for finding that the existence of a support network contributes to a significant risk that Mr Saïd might abscond or otherwise interfere with the proceedings, and as such did not fail to provide sufficient reasons;²⁸ (ii) did not err in finding that the charges are

¹⁸ See the Decision, *supra* note 2, para. 30.

¹⁹ *Idem*, para. 26.

²⁰ *Ibid.*

²¹ *Idem*, paras. 27-28.

²² *Idem*, para. 29.

²³ *Idem*, para. 36.

²⁴ *Idem*, para. 32.

²⁵ *Idem*, para. 33.

²⁶ *Ibid.*

²⁷ *Idem*, para. 35.

²⁸ See the Judgment, *supra* note 8, paras. 35 and 37.

serious in nature and would, if proved, result in a lengthy prison sentence, resulting in an incentive for Mr Saïd to abscond;²⁹ (iii) considered the general security situation together with Mr Saïd'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;³⁰ and (iv) correctly considered a number of relevant factors in finding that the conditions of article 58(1)(b)(ii) of the Statute continue to be met, such as the fact that Mr Saïd may have a strong motive to influence Prosecution witnesses, as well as the advanced stage of disclosure and the volume of confidential information in Mr Saïd's possession, including the identities of a large number of witnesses.³¹

16. The Legal Representative submits that there is not the slightest indication that a change has occurred in the circumstances underpinning the Chamber's Decision, confirmed by the Appeals Chamber, nor that there are any new circumstances requiring a modification of the Decision.

17. To the contrary, as the commencement of the trial nears, the Prosecution is continuously and increasingly disclosing information relating to witnesses.³² In the meantime, the Registry transmitted 23 victim application forms to the Chamber and the parties.³³ If anything, the fact that Mr Saïd has now had access to more information about more victims and witnesses militates *in favour* of his continued detention, rather

²⁹ *Idem*, para. 47.

³⁰ *Idem*, para. 54.

³¹ *Idem*, para. 75.

³² See, *inter alia*, the "Prosecution's Communication of the Disclosure of Evidence on 27 May 2022", [No. ICC-01/14-01/21-333](#), 30 May 2022 (dated 27 May 2022); the "Prosecution's Communication of the Disclosure of Evidence on 24 May 2022", [No. ICC-01/14-01/21-329](#), 24 May 2022; the "Prosecution's Fifth Application for Submission of Documents from the Bar Table Pursuant to Article 64(9)", [No. ICC-01/14-01/21-321-Conf](#) and [No. ICC-01/14-01/21-321-Red](#), 23 May 2022; the "Prosecution's fifth request to introduce prior recorded testimony pursuant to rule 68(2)(b)", [No. ICC-01/14-01/21-323-Conf](#) and [No. ICC-01/14-01/21-323-Red](#), 23 May 2022; the "Prosecution's Sixth Application for Submission of Documents from the Bar Table Pursuant to Article 64(9)", [No. ICC-01/14-01/21-325-Conf](#) and [No. ICC-01/14-01/21-325-Red](#), 23 May 2022; and the "Prosecution's second request to introduce prior recorded testimony pursuant to rule 68(3)", [No. ICC-01/14-01/21-326-Conf](#) and [No. ICC-01/14-01/21-326-Red](#), 23 May 2022.

³³ See the "First Registry Transmission of Group A and Group C Victim Applications for Participation in Trial Proceedings", with 23 confidential redacted annexes, [No. ICC-01/14-01/21-296](#), 6 May 2022.

than in favour of interim release. The Legal Representative therefore submits that, in the context of the upcoming trial and the disclosure of witness identities, Mr Saïd's continued detention is imperative in mitigating the risks to victims and witnesses, and in ensuring the preservation of the evidence and the integrity of the proceedings.

18. Additionally, regarding the volatile security situation in the CAR, victims continue to indicate that they are living in permanent fear,³⁴ and they all stress the need to maintain Mr Saïd in custody.

19. In conclusion, the Legal Representative submits that the Chamber's findings in its Decision remain valid. Accordingly, the alternative risks under article 58(1)(b) of the Statute remain present, thus justifying Mr Saïd's continued detention.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to maintain Mr Saïd in detention.



Sarah Pellet

Dated this 30th day of May 2022

At The Hague, The Netherlands

³⁴ See, *inter alia*, the "Victims' response to the 'Demande de la Défense se fondant sur les informations actualisées portant sur le nombre de demandes de participation de victimes déposées et anticipées dans la présente affaire visant à ce que ces demandes soient communiquées aux Parties en application du Jugement d'appel du 14 septembre 2021 (ICC-01/14-01/21-171)'" , [No. ICC-01/14-01/21-263](#), 18 March 2022, para. 19; the "Victims' observations on the 'Registry Submission on the parameters for the organisation of a judicial site visit' (ICC-01/14-01/21-241-Conf)", [No. ICC-01/14-01/21-245-Conf](#), 28 February 2022, para. 14; and the transcript of the hearing held on 12 October 2021, [No. ICC-01/14-01/21-T-004-Red2-ENG](#), p. 23, lines 20-23: "[victims] are terrorised. They live in constant fear of being arrested in the streets in Bangui or to be recognised by their torturers [...], some of whom, continue to serve within the internal security forces or within the Central African Armed Forces, while others hold high offices within the Central African administration".