

1 International Criminal Court  
2 Appeals Chamber  
3 Situation: Central African Republic II  
4 In the case of The Prosecutor v. Mahamat Said Abdel Kani - ICC-01/14-01/21  
5 Presiding Judge Gocha Lordkipanidze  
6 Appeals Judgment - Courtroom 2  
7 Tuesday, 23 August 2022  
8 (The hearing starts in open session at 4.31 p.m.)  
9 THE COURT USHER: [16:31:32] All rise.  
10 The International Criminal Court is now in session.  
11 Please be seated.  
12 PRESIDING JUDGE LORDKIPANIDZE: [16:32:17] Good afternoon, *bon après-midi*.  
13 Would the court officer please call the case.  
14 THE COURT OFFICER: [16:32:30] Good afternoon, Mr President. This is  
15 the second situation in Central African Republic, in the case of the Prosecutor versus  
16 Mahamat Said Abdel Kani, case number ICC-01/14-01/21.  
17 And for the record, we're in open session.  
18 PRESIDING JUDGE LORDKIPANIDZE: [16:32:49] I am Judge Lordkipanidze,  
19 presiding in this appeal arising from the case of  
20 The Prosecutor v. Mahamat Said Abdel Kani. My fellow judges in this appeal are  
21 Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza, Judge Solomy  
22 Balungi Bossa, and Judge Marc Perrin de Brichambaut.  
23 (Interpretation) Now I would like to ask the parties to introduce themselves, starting  
24 with the Defence.  
25 MS NAOURI: [16:33:33](Interpretation) Thank you, your Honour. Associate

1 counsel Mr Jacobs and Manon Lanselle and Léa Allix. And I am Jennifer Naouri,  
2 lead counsel of Mr Said.

3 MS BRADY: [16:33:54] Good afternoon, your Honour. My name is Helen Brady,  
4 I'm the senior appeals counsel for the Prosecution. And I'm here today with  
5 Mr Matteo Costi, appeals counsel, and Mr Matthew Cross, appeals counsel.  
6 Thank you.

7 MS PELLET: [16:34:11](Interpretation) Good afternoon. The victims are  
8 represented by myself, Sarah Pellet, counsel with the Office of Public Counsel for  
9 victims, and Tars Van Litsenborgh. Thank you.

10 PRESIDING JUDGE LORDKIPANIDZE: [16:34:28] Thank you very much, *merci*  
11 *beaucoup*.

12 For the record, I note that Mr Said is present in the courtroom and is represented by  
13 counsel.

14 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Said  
15 against the decision of Trial Chamber VI entitled "First review of the detention of  
16 Mr Mahamat Said Abdel Kani".

17 This is a non-authoritative summary of the Appeals Chamber's written judgment in  
18 the -- in the appeal. The latter will be notified after this hearing.

19 I will first briefly outline the procedural history of this appeal.

20 On 3 March 2022, the Trial Chamber issued its Initial Decision on Detention, pursuant  
21 to Article 60(2) of the Statute, in which it ordered the continued detention of Mr Said.

22 On 19 May 2022, the Appeals Chamber confirmed this decision.

23 On 29 June 2022, having initiated a review *proprio motu* pursuant to Article 60(3)  
24 of the Statute and Rule 118(2) of the Rules of Procedure and Evidence and after  
25 receiving submissions on the matter, the Trial Chamber issued its decision

1 determining that Mr Said would remain in detention.

2 On 5 July 2022, the Defence for Mr Said filed a Notice of Appeal against  
3 the Impugned Decision, pursuant to Article 82(1)(b) of the Statute.

4 On 14 July 2022, pursuant to the order of the Appeals Chamber, the Defence filed its  
5 appeal brief, raising four grounds of appeal against the Impugned Decision.

6 On 18 July 2022, the Legal Representatives of the Victims informed  
7 the Appeals Chamber by way of email that they did not intend to file a response to  
8 the Appeal Brief.

9 On 21 July 2022, the Prosecution filed its response opposing the appeal.

10 I will now turn to the four grounds of appeal.

11 Under the first ground of appeal, the Defence submits that the Trial Chamber erred in  
12 law and fact in refusing to examine or respond to certain submissions of the Defence.

13 Under the second ground of appeal, the Defence submits that once the Trial Chamber  
14 determined that the Prosecution had not supplied the necessary evidence to  
15 demonstrate the need for continued detention, it should have determined that  
16 the Prosecution had failed to discharge its burden of proof and ordered Mr Said's  
17 release. In the view of the Defence, in carrying out an independent assessment,  
18 the Trial Chamber stood in the place of the Prosecution, while the Prosecution should  
19 bear the burden of demonstrating the need for continued detention.

20 Under the third ground of appeal, the Defence submits that the Trial Chamber  
21 committed an error of law and reversed the burden of proof by finding that "even  
22 though the Defence bears no probative burden [...] it does not claim that any of  
23 the information in the [17 June 2022 report of the Registry] is false or inaccurate".

24 The Defence states that it had clearly taken the view that the findings of the Registry  
25 were not substantiated by questioning the methodology used by the Registry to write

1 the report. The Defence further submits that by relying on unsubstantiated  
2 assertions, the Trial Chamber committed an error of fact that invalidates  
3 the Impugned Decision.

4 Under the fourth ground of appeal, the Defence submits that the Trial Chamber based  
5 Mr Said's continued -- Mr Said's continued detention on the general security situation  
6 in the Central African Republic, without establishing a link to Mr Said. The Defence  
7 further submits that the Trial Chamber relied on theoretical and abstract risks to  
8 continue Mr Said's detention, and that this approach gives rise to a presumption of  
9 continued detention. In the view of the Defence, this approach also reverses  
10 the burden of proof and leaves the Defence with the impossible task of proving that  
11 no risk exists.

12 I will address these grounds of appeal in turn.

13 Regarding the first ground of appeal, the Appeals Chamber recalls that in a review  
14 pursuant to Article 60(3) of the Statute, a chamber is not required to entertain  
15 submissions by a detained person that "merely repeat arguments that  
16 the Trial Chamber has already addressed in previous decisions", nor is a chamber  
17 required to enter findings on circumstances already decided upon in the ruling on  
18 detention.

19 In regard to the first Defence submission, the Appeals Chamber finds that  
20 the Trial Chamber was not required to address the relevance of the Registry Report of  
21 22 January 2022, as this report did not form the basis of the Trial Chamber's findings  
22 about changed circumstances, which is the objective of a review under Article 60(3)  
23 of the Statute. Rather, in the Impugned Decision, the Trial Chamber relied upon  
24 the new 17 June 2022 Report from the Registry for its findings about the continuing  
25 risks present on the ground in the Central African Republic.

1 The Defence submits that the Trial Chamber failed to take into account assurances  
2 given by Mr Said about his willingness to cooperate with the Court and to appear at  
3 trial. The Appeals Chamber observes that the Trial Chamber incorrectly determined  
4 that this particular issue was already ruled upon in the Said Interlocutory Appeal 3  
5 Judgment. Nevertheless, the Appeals Chamber does not accept the Defence's  
6 argument that the passage of time per se leads to the conclusion that circumstances  
7 have changed in favour of interim release. Rather, whether the passage of time has  
8 an impact on a Chamber's analysis under Article 60(3) of the Statute must be decided  
9 in the context of the specific circumstances in each case. Here, the Defence has not  
10 indicated with specificity how the passage of time leads to the conclusion that  
11 Mr Said is cooperating with the Court, nor that the Trial Chamber erred in failing to  
12 reconsider his factor.

13 Third, the Defence argues that the Trial Chamber erred in failing to consider  
14 the Defence's arguments about the alleged links between Mr Said and the FPRC,  
15 a political group, or between the FPRC and the proceedings at this Court.  
16 The Appeals Chamber observes that the Trial Chamber failed to recall its original  
17 findings about Mr Said's support network and his link to the FPRC from the Initial  
18 Decision on Detention under Article 60(2) of the Statute. This is not ideal, as an  
19 important part of a Chamber's assessment in a review decision under Article 60(3)  
20 of the Statute is to revert to its initial findings on detention under Article 60(2)  
21 of the Statute. However, the Appeals Chamber observes that the Chamber  
22 ultimately determined that there was no new information before the Chamber  
23 suggesting that its findings from the Initial Decision on Detention were no longer  
24 valid. The Appeals Chamber finds that the Chamber correctly considered  
25 the Defence's argument only to the extent that they relate to the issue as to whether

1 changed circumstances exist.

2 The Defence also makes several arguments about Mr Said's alleged network of  
3 support. First, the Defence points out that the Trial Chamber failed to consider that  
4 Mr Said has been in custody since January 2021, thousands of kilometres from Bangui,  
5 with no contact with anyone except his close family. The Appeals Chamber notes  
6 that this is not new information constituting "changed circumstances" in the context of  
7 Article 60(3) of the Statute, and it was not incumbent upon the Trial Chamber to  
8 consider it.

9 Second, the Defence takes issue with the Prosecution's reliance on two media reports  
10 concerning recent attacks allegedly supported by the FPRC. The Appeals Chamber  
11 notes that neither of these reports is discussed in the Impugned Decision, and that  
12 the Trial Chamber relied primarily on the 17 June 2022 Report from the Registry for  
13 its conclusion that the risk that Mr Said may abscond or interfere with  
14 the proceedings remains high. Therefore, the Appeals Chamber finds that  
15 the Defence's arguments about the Prosecution's media reports do not relate to  
16 the Impugned Decision.

17 Finally, the Defence contends that the Trial Chamber's refusal to consider several of  
18 the Defence's arguments constitutes a failure to give reasons for its conclusions in  
19 the Impugned Decision. The Appeals Chamber has determined that  
20 the Trial Chamber properly assessed whether the circumstances have changed in light  
21 of its earlier findings about Mr Said's potential support in the Central African  
22 Republic under Article 60(2) of the Statute. Therefore, the argument that  
23 the Trial Chamber erred in failing to give reasons is dismissed.

24 For the foregoing reasons, the Defence's first ground of appeal is rejected.

25 Regarding the second ground of appeal, the Appeals Chamber recalls that

1 the Trial Chamber initiated the review of detention pursuant to Article 60(3)  
2 of the Statute, in accordance with the time limit stipulated in Rule 118(2) of the Rules.  
3 In this context, the Appeals Chamber recalls that a chamber is not limited to  
4 considering the submissions of the Prosecution and any submissions of the Defence.  
5 Rather, a chamber shall also consider "any other information which has a bearing on  
6 the subject".

7 The Appeals Chamber recalls that "the onus is on the Prosecution to demonstrate that  
8 there has been no change in the circumstances justifying detention". Furthermore,  
9 the Prosecution "must bring to the attention of the Trial Chamber any other relevant  
10 information of which he [or she] is aware that relates to the question of detention or  
11 release". Nevertheless, the Appeals Chamber observes that Article 60(3)  
12 of the Statute simply requires the relevant chamber to determine whether it "is  
13 satisfied" that there are changed circumstances. It does not give either party an  
14 exclusive right to procure information demonstrating whether such circumstances  
15 exist. And nothing in the language of Article 60(3) of the Statute precludes  
16 a chamber from seeking information from the Registry *proprio motu*, as  
17 the Trial Chamber did in this case after noting that the Prosecution "should have  
18 made a greater effort to provide substantiated submissions on the matter".

19 The Appeals Chamber recalls that the security situation in the Central African  
20 Republic was considered by the Trial Chamber in the context of the Initial Decision on  
21 Detention pursuant to Article 60(2) of the Statute, and notes that the Registry is  
22 well-placed to provide an update in this regard. The Appeals Chamber further  
23 recalls that the Chamber may modify its ruling "if it is satisfied that changed  
24 circumstances so require", and that in this instance, the Trial Chamber initiated  
25 a review *proprio motu*. In these circumstances, after finding that the Prosecution

1 should have provided more substantiated submissions, the Appeals Chamber finds  
2 that it was appropriate for the Trial Chamber to carry out an independent assessment.  
3 The Appeals Chamber considers that by seeking further information from  
4 the Registry, the Trial Chamber ensured that it was sufficiently informed in rendering  
5 its determination pursuant to Article 60(3) of the Statute.  
6 Therefore, the second ground of appeal is rejected.  
7 Turning to the third ground of appeal, the Appeals Chamber has previously  
8 determined that the onus is on the Prosecution to demonstrate that there has been no  
9 change in the circumstances justifying detention. Nevertheless,  
10 the Appeals Chamber considers that where there exists a decision in favour of  
11 detention under Article 60(2) of the Statute and where the Prosecution submits that  
12 there has been no change in circumstances in a review pursuant to Article 60(3)  
13 of the Statute, it is apparent that the Defence will have a particular interest in  
14 providing information to the Chamber in order that the Chamber will have all  
15 necessary information to arrive at a fully informed decision.  
16 The Appeals Chamber is not persuaded by the Defence's argument that  
17 the Trial Chamber placed an undue burden on the Defence to disprove  
18 the information in the report. Rather, the Trial Chamber made an observation that  
19 the Defence brought a challenge to the methodology used for the report rather than to  
20 the accuracy of the information therein, and then concluded that it was not convinced  
21 by the Defence's argument on this point. The Appeals Chamber finds no error in  
22 this approach.  
23 The Defence also submits that the Trial Chamber has relied on conclusions of  
24 the Registry for which no sources were provided. While it would have been  
25 preferable for the Registry to include citations in paragraph 15 of the 17 June 2022

1 Report, the Appeals Chamber notes that in the subsequent paragraph, the Registry  
2 provided the details of an incident with citations. Furthermore,  
3 the Appeals Chamber considers that this only formed one aspect of the report.  
4 There is no indication that, but for this paragraph, the Trial Chamber would have  
5 reached a different conclusion regarding the security situation in the Central African  
6 Republic.  
7 Accordingly, the third ground of appeal is dismissed.  
8 As to the fourth ground of appeal, the Appeals Chamber recalls that in the Said  
9 Interlocutory Appeal 3 Judgment, the Appeals Chamber addressed similar arguments  
10 from the Defence and concluded that the Trial Chamber correctly determined that  
11 the risk that Mr Said himself may interfere with ongoing investigations or  
12 the proceedings was high. The Appeals Chamber also addressed the Defence's  
13 arguments that the Initial Decision on Detention under Article 60(2) of the Statute was  
14 based on theoretical or abstract risks, and that the decision amounted to a reversal of  
15 the burden of proof and a presumption of continued detention.  
16 The Appeals Chamber determined that the Trial Chamber did not err.  
17 The Appeals Chamber observes that the Defence repeats these arguments in this  
18 appeal without explaining how they relate to the Trial Chamber's assessment of  
19 changed circumstances, which was the objective of the review in the Impugned  
20 Decision under Article 60(3) of the Statute. In this regard, the Appeals Chamber  
21 expresses concern that the Defence has simply duplicated some of its arguments from  
22 the Said Interlocutory Appeal 3. The Appeals Chamber finds that such a practice is  
23 not an appropriate use of judicial time and resources.  
24 This brings us to the end of the summary of this Appeals Chamber's judgment.  
25 I would like to thank the court reporters, interpreters and other Registry staff for their

- 1 valuable assistance today in holding this hearing.
- 2 The hearing is adjourned.
- 3 THE COURT USHER: [16:57:59] All rise.
- 4 (The hearing ends in open session at 4.57 p.m.)